Why Access and Benefit Sharing Policy and Legal Frameworks are Important for Africa

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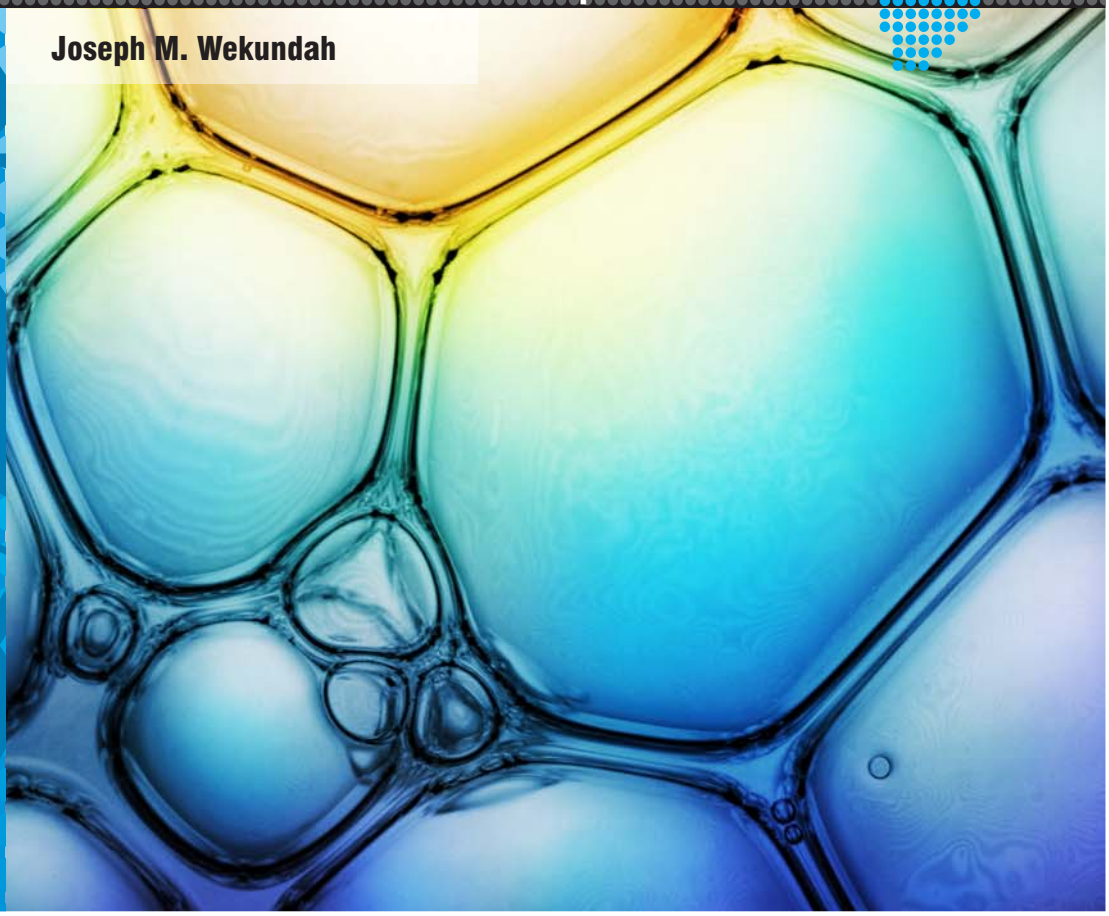

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Table of Contents

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List of Acronyms

ABS	Access and Benefit Sharing
ATPS	African Technology Policy Studies Network
BTA	Biotechnology Trust Africa
CBD	Convention on Biological Diversity
CBO	Community Based Organizations
GDP	Gross Domestic Products
IP	Intellectual Property
IK	Indigenous Knowledge
IPR	Intellectual Property Rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
TK	Traditional Knowledge
WHO	World Health Organization

Introduction

Based on the Intellectual Property (IP) Programme Desk Study it was noted that there were limited policy and legal frameworks for Access and Benefit Sharing (ABS). Although most countries relied on Environmental Management Acts for dealing with Access of genetic resources and its conservation, there were limited efforts towards setting up clear policies and legal frameworks for dealing with Access and Benefit Sharing. It is only Kenya and Uganda who have regulations under the Environmental Management and Coordination Acts, however, the actual implementation of the regulations, is far from perfect.

Developing countries, especially in Africa are rich in biodiversity and yet out of the eight target countries for the IP programme, only Kenya and Uganda have established regimes though the regimes and their implementation are weak.

This policy paper attempts to provide a background to ABS, limitation to develop policy and legal frameworks, opportunities available through International Treaties and Conventions, what ABS is, whether ABS regimes are important, why local mechanisms for governing ABS are weak, how the mechanisms can be improved, and the way forward.

Background

Prior to the commencement of the Convention on Biological Diversity (CBD) in 1992, access to genetic resources and associated traditional knowledge was free for all mankind. Genetic resources and Traditional Knowledge (TK) were often taken from communities and countries by organizations and individuals who monopolized the benefits. But commercialization of genetic resources and associated TK has existed for hundreds of years. In the 18th Century, European colonial explorers traveled to different parts of the world seeking exotic plants. They brought back decorative flowers, medicinal herbs and new types of food. These expeditions were a one way transfer of knowledge with biological explorers taking knowledge from local communities. There was little or no exchange of knowledge and no offer of compensation for such communities.

During the later part of the 1900s a few countries developed legal provisions for ABS. However, benefits were narrowly defined as tangible benefits (royalties) and benefit sharing was largely carried out at the government level. Benefits did not reach traditional owners of the genetic resources and associated TK. Communities and countries of origin were often not informed about the use of their genetic resources and associated TK, limiting their bargaining power and preventing them from sharing in benefits of their own resources.

On the above basis, there was growing concern over the monopolization of benefits and this forced genetic-resource providers to restrict access to genetic resources and associated TK, and the negotiation of an international regime to regulate access and benefit sharing - the Convention on Biological Diversity (CBD). The CBD integrates the objectives of conservation, sustainable use, and benefit sharing. It balances the rights of resource-providing countries to share in benefits with the rights of technology-rich countries to access biodiversity resources in biodiversity rich countries. The CBD recognizes the importance of the knowledge, practices and innovations of indigenous and local communities (Article 8(j)) and makes provision for prior informed consent to be obtained by any public or private enterprise seeking access to biodiversity resources (Article 15). The CBD is supported by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) which commenced in 2001. Today, genetic resources are no longer considered the common heritage of mankind and cannot be treated as freely accessible commodities.

What are the Limitations for the Implementation of ABS Regimes in Africa?

A number of countries, as providers of genetic resources, have taken legislative measures to implement Article 15 of the CBD. Currently, 29 countries have national legislations. The national legislations address a range of issues which include: the granting of prior informed consent by competent national authorities; mutually agreed terms and benefit sharing arrangements in access agreements; and Intellectual Property Rights (IPR). Due to the legislation, a number of countries who use the genetic resources have put in place measures to support

compliance with prior informed consent of countries of origin of the genetic resources and on mutually agreed terms e.g. countries such as Sweden and Denmark insists that access and benefit sharing requirements must be met as a pre-requisite for public funding of research and development projects.

Most national frameworks also require an access agreement; setting out mutually agreed terms for access and benefit sharing. Generally, access agreements have to be approved by a competent national authority. However, the contract is to be negotiated between indigenous and local communities or any relevant stakeholder and the applicant.

Most of the measures require that standard clauses are incorporated in the contract e.g. geographical area where the genetic resources are to be accessed, the quantity to be accessed, and the purpose of the access and duration of the contract. Other measures consider IPR in the context of benefit sharing through the sharing of royalties (Costa Rica imposes 50%). A limited number of countries such as Brazil, India, Denmark, Norway, Egypt and Costa Rica, include specific requirements for the disclosure of origin of genetic resources and TK in the IPR applications.

The developments of national measures have proven difficult for a number of developing countries especially in Africa due to lack of national capacity. Other issues arise in the implementation of national and regional regimes on ABS; and the solutions will be dependant on effective implications of national legislative regimes, but also for the achievement of the objectives of the CBD in the field. The limitations for ABS regimes include: monitoring of compliance; enforcement problems; intellectual property rights; lack of and disparities in National legal regimes.

(i) Monitoring of compliance

The problem here is at two levels. Although a number of legislative regimes have established mechanisms for monitoring, inspections, and verification; experience has demonstrated limited resource capacity of the Governments to monitor all bio-prospecting activities within their national jurisdiction.

The second issue is whereby the genetic resources have left the country and they only rely on reports imposed on users in order to track compliance with the terms

and conditions of access. It is in this context that the idea of International certificate of origin/source is considered. It ensures transparency and traceability and provides guarantee that legal requirements in the country of origin have been fulfilled.

(ii) Enforcement problem

Difficulties arise, with respect to enforcement, in cases of non-compliance with legislative requirements in countries of origin or with contractual obligations. The capacity of countries of origin to enforce their legal requirements will largely depend on mechanisms for access to justice and the availability of administrative and judicial remedies in foreign jurisdiction.

(iii) Intellectual Property Rights

IPRs have been at the center of incidents of unauthorized access to and unlawful appropriation of genetic resources and related TK. A number of pioneering countries now require the disclosure of country of origin and/or evidence of prior informed consent and mutually agreed terms in application for IPRs. Some of these requirements are contained in national patent law regimes, especially in India and Egypt. Disclosure requirements would support ABS arrangements move effectively in those cases where they are part of both national patent laws and the International IPR regimes.

(iv) Lack of and disparities in National legal Regimes

Uneven development of ABS frameworks among countries party to the CBD creates problems of implementation at two levels. Firstly, countries in the same bio-geographic region, with deficiencies in their legislation; one or more countries are likely to undermine the ABS objectives of other countries where the genetic resources are trans-boundary. Harmonization of legislative requirements within such regions is therefore a pre-requisite for effective national implementation. Secondly, countries with users of genetic resources under their jurisdictions will need to take appropriate legislative measures in order to support ABS regimes of provider countries. Such measures could include disclosure requirements in patent applications; access to justice, and administrative and judicial remedies in cases of breach of legislative or contractual obligations.

What Opportunities & Support is Available for ABS Regimes Through International Treaties Conventions, etc.?

Article 15 of CBD provides a framework for national governments to implement ABS mechanisms to regulate and protect Traditional Knowledge and genetic resources in order to facilitate access and ensure the fair and equitable sharing of benefits. It re-affirms the sovereign rights of states over their natural resources. It is the cornerstone of the work on access and benefit sharing. As a consequence, the authority to determine access to genetic resources rests with the national Governments and is subject to national legislation. It also establishes a number of general principles and obligations relating to access to genetic resources and benefit sharing. The principles are:

> Parties have an obligation to create conditions to facilitate access to genetic resources and shall not impose restrictions that run counter to the objectives of the CBD.
> Access, where granted, shall be on mutually agreed terms.
> Access to genetic resources shall be subject to the prior informed consent of the contracting party providing such resources.
> Scientific research on genetic resources provided by other contracting parties shall be undertaken with the full participation of such parties and where possible in the territory of such parties.
> Parties have an obligation to take legislative, administrative or policy measures to ensure that fair and equitable sharing of the results of research and development and the benefits from the commercial and other utilization of genetic resources with the contracting party providing such resources.
> Such benefit sharing shall be on mutually agreed terms.

Secondly, Article 8(j) addresses the maintenance and promotion of traditional bio-diversity related knowledge, innovations and practices. This issue is closely related to access and benefit sharing and as such must be an integral part of any international regime on ABS. Under Article 8(j) parties to the CBD undertook to:

> Respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.
> Promote their wider application with approval and involvement of the holders of such knowledge, innovations and practices.
> Encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Like CBD, the International Treaty on Plant Genetic Resources for Food and Agriculture recognize the Sovereign right of countries to regulate access to their genetic resources and associated TK.

Lastly, the Bonn Guidelines on ABS which were negotiated in 2001 and adopted in May 2002. These are the only instruments on ABS developed under CBD for implementation. The guidelines were intended to:

> Provide governments and stakeholders with a transparent framework to facilitate access to genetic resources and ensure fair and equitable sharing of benefits.
> Provide guidance to parties in the development of access and benefit sharing regimes.
> Inform the practices and approaches of stakeholders in ABS arrangements.
> Provide stakeholders' capacity building to guarantee effective negotiations and implementation of ABS arrangements.
> Promote the adequate and effective transfer of appropriate technology to parties providing genetic resources.

What is Access & Benefit Sharing?

In this context, genetic resources refer to plants, animals and micro-organisms; and access to genetic resources is the process of acquiring a particular genetic resource from one country to the other. Specifically, access means obtaining, possessing and using genetic resources, conserved, whether they are derived products and, where applicable, intangible components for purposes of research, bio-prospecting, conservation, industrial applications or commercial use. Before, the genetic resources were free to all mankind, in which, they could be collected at will from the country of origin to the user country. Currently, the

access is regulated, thanks to the CBD. However, the definition of Benefit Sharing has been debated for long despite its prominence in law, medical ethics and political philosophy. The straight forward linguistic definition for benefit sharing is the action of giving a portion of advantages/profits to others. Advantages/profits was chosen deliberately to capture the notion that benefit sharing relates to monetary and non-monetary benefits. However, to capture the International legal context, the following modification of linguistic definition seems more appropriate: Benefit sharing is the action of giving a portion of advantages/profits derived from the use of genetic resources or traditional knowledge to resource providers.

In addition to the international guidelines, national laws, regional associations have formulated model laws. For example, the African Union has developed a model law to regulate access and benefit sharing for genetic resources and has its own definition: Benefit sharing is the sharing of whatever accrues from the use of biological resources, community knowledge, technologies, innovations or practices. This definition is an improvement on some of the national definitions of some countries. However, it fails in one important respect. It does not specify that two parties have to participate in a legal benefit sharing process. With who are the benefits, of whatever accrues from the use of biological resources, to be shared? This question remains unanswered in two ways. Firstly, we could demand for benefits even if we were not in any way connected with the used resource. Secondly, the definition seems to imply that all users of resources warrant benefit sharing. However, the use of biological resource in the definition is much broader than genetic resource. These definitions provide good templates for national Governments to come up with their own definitions when developing a contractual agreement with the users of genetic resources.

Are ABS Regimes Important for Economic Development?

Genetic resources whether from plants, animals or micro-organisms, may be used for various purposes, whether for basic research or commercialization of products. Users of genetic resources may include research institutes; Universities and Private Companies operating in various sectors, such as pharmaceuticals, cosmetics, agriculture, horticulture and biotechnology.

Benefits derived from genetic resources may include: the result of research and development carried out on the genetic resources, the transfer of technologies which make use of those resources, participation in biological research activities, or monetary benefits arising from the commercialization of products based on the genetic resources. Examples of monetary benefits could be the sharing of profits from commercial products or royalties arising from patented products based on genetic resources.

Plants that provide valuable economic value include medicinal plants or traditional medicine. The World Health Organization (WHO) estimates that 80% of the world population depends on traditional medicine. The world's trade in medicine plants in the late 1980s was about US$500 million annually. In 1990, medicinal plants earned US$ 43 billion globally. In 1996 Europe alone imported 26,500 tons of medicinal plants from Africa. It is however, not clear whether the proceeds from those plants were shared with the owners of the knowledge. The only good example here is the case of the San Tribe from South Africa who sold their rights of ownership of the hoodia plant to a British Company for about US$ 20 million. Whether this was the right way to go or have an agreement for continuously sharing profits from its profits is something to consider for the future.

Other medicinal plants such as the devils claw (used as analgesic anti-inflammatory drug) is often exported for US$ 2 million on annual basis by Namibia but the issue of the communities is not mentioned. Similarly, prunus africana is cut and exported to Europe for boosting immunity and for the cure of prostate cancer. In 1994, Germany spent US$150 million on importing prunus africana. Worldwide trade in prunus products fetches an estimated US$ 220 million. In Kenya, the export of this plant is by individuals however, the people who have nurtured it are ignored.

Trade in Biopiracy indicates clearly the need for proper policy and legal framework for Access and Benefit Sharing e.g. industrial enzymes from microbes used for fading jeans are worth US$ 600 million annually and the communities around Lake Bogoria are not able to access any profits since microbes were stolen due to lack of clear policies and legal frameworks. Similarly, diabetes drug processed by microbes from Lake Ruiru is worth Euro 278 million. The communities around the lake are hardly aware of what has transpired.

The wildlife and their conservation are under the Kenya Wildlife Services in Kenya and similar arrangements are there in Tanzania. For a long time, benefits accruing from Tourism were taken by the Government but due to the principal of benefit sharing, communities around game parks are now considered for benefits through the revenue that is generated.

Based on the above, a case study in Tanzania will illustrate the benefit and sharing regimes for wildlife conservation. The Tanzania wildlife policy that was developed through participatory approach and approved by the government in 1998 advocated the participation of local communities not only in the conservation of wildlife resources but also in the sharing of benefits accrued. With regard to benefit sharing, the policy adopts relative distribution of revenue and benefits to stakeholders whose relevant roles are considered in different categories of land, the effort invested in conservation of the resources, and the institutional and management costs.

The vision of the wildlife sector was: to promote the conservation of biological diversity; administer, regulate and develop wildlife resources; involve all stakeholders in the conservation of wildlife and sustainable utilization, as well as in fair and equitable sharing of benefits; promote sustainable utilization of wildlife resources; raise the contribution of the wildlife sector in the country's Gross Domestic Product (GDP) from 2% to 5% in the next 20 years; and contribute to poverty alleviation and improvement of the quality of life of the people of Tanzania.

On this basis, studies were carried out by experts on the proposed mechanisms for benefit, revenue and cost sharing systems involving local communities, district councils and the central Government. The study proposed a revenue sharing arrangement among the main stakeholders. The following table shows the revenue sharing arrangements proposed by the study.

Revenue to local communities was through Community Based Organizations (CBOs), formed for this purpose under the countries laws. The study proposed the dividing of the wildlife reserves into several wildlife management areas to capture local communities around them. The benefits in this case are in form of revenue and employment to the stakeholders.

Table 1: Proposed Revenue Sharing Arrangements

Opportunities	Local communities	District Councils	Central Government
(a) Tourist hunting			
• Hunting block fees	100%	0%	0%
• Conservation fees	100%	0%	0%
• Game fees	60%	10%	30%
(b) Resident hunting			
• Game fees	100%	0%	0%
(c) Tourism	**70%**	**10%**	**20%**
(d) Bee keeping	**70%**	**10%**	**20%**

This looks like a good arrangement however; it needs a comprehensive policy and legal framework for proper coordination and implementation, whether this is implemented as a document; it needs verification from the Tanzanian Government.

Why Local Mechanisms for Governing ABS is Weak

Out of the eight countries, Kenya is one of the countries with regulation on Access and Benefit Sharing. The regulations under the Environmental Management and Coordination Act of 1999 were passed as a legal notice No. 160 of 2006. The regulations cover aspects related to: Conservation of Biological Diversity (Environmental Impact Assessment License, conservation of threatened species, inventory of biological diversity, monitoring of status and protection of environmentally significant areas); Access to plant genetic resources (Access permit, notification of application, determination of application, form of access permit, communication of decision validity and renewal of access permit, terms and conditions of an access permit, suspension, cancellation, etc. of access permit, Register of access permits and Material Transfer Agreement); and Benefit Sharing (application of part, and benefit sharing). The coverage as indicated is narrow and is not clear on fair and equitable sharing of Benefits.

During the brainstorming workshop held at Panafric Hotel in April 2007, the participants raised the following issues on the Kenyan ABS regulations: the definition of genetic resources was missing and it could imply that one would need a permit to go for fruit shopping; secondly, the definition of prior informed consent was missing. The regulation does not cover approved research activities intended for educational purposes within recognized Kenyan academic and research institutions. But just in case the research is collaborative with foreign institutions, how does the regulation ensure that researchers involved do not take genetic resources out of the country on behalf of their collaborators; and finally, it appeared as if no ground work was done to prevent movement of genetic resources through various entry points; there was no mention of this in the regulation.

It was however acknowledged by the presenter from National Environmental Management Authority that the coordination of stakeholders is difficult since each stakeholder would like to see economic value to their institutions. Furthermore, lack of participation of the stakeholders in the formulation of the policies was evident. The regulations furthermore exempt local communities in the exchange of their genetic resources; however, there is no mention of benefit sharing with stakeholders, especially the communities. This therefore aims at generating resources for the Authority or the Government and should not even be referred to as Access and Benefit Sharing regime.

The Kenya Regulations rules are for research on plants alone and this might be related to the mandate of National Environmental Management Authority whereas the Kenya Wildlife Services is focused on wild animals and this leaves out medicinal plants and related TK, other animals and micro-organisms. As a result, medicinal plants and micro-organisms that can generate revenue for the Government and Communities are not addressed by the regulations. This might also be linked to the non-protection of TK. The plants (germplasm) for research could come up with patented products and yet the regulations do not indicate the sharing of royalties. This only applies to plants other than genetic resources for food and agriculture as those are exempted. It also appears as if there is no link to the IPR laws, and yet IPR regime is supposed to strengthen ABS in this era of biotechnology. In some countries, prior informed consent and mutually agreed terms on access and benefit sharing are included in the IPR applications.

It is therefore evident that pieces of legislation exist on ABS for plants as indicated above, revenue sharing for wildlife conservation and none for medicine plants and micro-organisms. This requires an analysis of the regulations with an aim to strengthen them to ensure strong coordination which at the moment is lacking.

How to Strengthen Policies & Legal Frameworks for ABS in Target Countries

Regulations concerning access to genetic resources and the sharing of benefits associated with their use are of vital interest to the International community. However, what kind of regime is most appropriate for different categories of genetic resources and for their different uses? In developing effective regulatory regimes, it is important that practical considerations on how different types of genetic resources are conserved and used are considered.

International Treaty on Plant Genetic Resources for Food and Agriculture highlights the importance of building an access and benefit sharing regime on an appreciation of the historical development and use of a particular category of genetic resources. Plant genetic resources for food and agriculture have been spread widely around the world for thousands of years and countries are interdependent upon them for food security. In this regard, and in general, they differ; for example the wild endemic species used for medicinal purposes.

In a similar manner, it is critically important to also consider the unique factors concerning the historical development and patterns of exchange and use of farm animal genetic resources. Various fora on the state of the world animal genetic resources can provide information of how farm animal genetic resources can be taken into consideration in processes to develop national regulatory regimes concerning access to genetic resources and benefit sharing.

Furthermore efforts are underway in a number of regions to develop policies about the most appropriate access and benefit sharing regimes to serve as the foundation of exchange for the materials.

The first step towards developing ABS laws is the development of a national strategy for the conservation of the national biological diversity. The strategy should help to define clearly the policy goal for access to genetic resources in the following terms: Ensure that the social and economic benefits of the use of genetic material and products derived from biological diversity accrue to the state. To achieve this government should hold a national inquiry into access to genetic resources. This involves comprehensive public consultations including those with indigenous communities, environmental initiatives, industry, etc. During this policy development, the government should consult widely; including the Bonn Guidelines adopted in May 2002. Based on consultations, a common framework to implement the Bonn Guidelines should be reached. It helps to come up with a nationally consistent approach for access to and utilization of genetic and biochemical resources. The purpose of the Bonn Convention is to ensure consistency of approach and legal clarity and certainty across the government jurisdiction. The policy will guide the development of the legal frameworks.

Depending on the different governments, the ABS regulations could be part of Environmental Management Coordination Act as it is in Kenya and Uganda or they could be under a new Act that can govern the Access and Benefit Sharing.

There are six objectives on access and benefits sharing that are consistent with both the CBD and Bonn Guidelines. These are: (i) promoting the conservation of biological resources, including the ecologically sustainable use of those biological resources; (ii) ensuring the equitable sharing of the benefits arising from the use of biological resources; (iii) recognizing the special knowledge held by indigenous people on biological resources; (iv) establishing an access regime designed to provide certainty and minimize administrative costs for people seeking access to biological resources; (v) seeking to ensure that the socio economic and environmental benefits arising from the use of biological resources accrue to the nation and (vi) contributing to a nationally consistent approach to access biological resources. Objectives (i) and (ii) reflect the 3 objectives in Article 1 of CBD, while (iii) foreshadows the responsibility to indigenous and local communities under Articles 8(j) and 10(c) and objectives (iv) and (v) address article 15 of CBD.

The Kenyan ABS had only three objectives: Conservation of biological diversity;

access to genetic resources; and benefit sharing. This appears narrow and whether or not they address the implementation of the CBD as per the international obligations is in doubt.

The established ABS system should foster research and development on genetic resources to produce economic outcomes that value biodiversity and contribute to its conservation. The system should be clear and practical with low transactions costs and high levels of transparency. It is intended to encourage research and development; and protect the interests of indigenous and none indigenous providers and users.

Anyone wishing to access local biological resources for purposes of research and development on its genetic or biochemical make up taken from lands or waters administered by the Government must apply for a permit from the competent National Authority. If access sought is for commercial purposes, the competent authority will approve the permit for commercial purpose if the collection causes no environmental harm and the applicant has entered into a benefit sharing agreement. Access to non-commercial purposes does not require a benefit sharing agreement only satisfaction that no environmental harm is done and that the permission for the collection has been given. Finally if an applicant wishes to obtain genetic resources from indigenous owned land or use any associated TK, then the applicant must go to the indigenous community and negotiate a benefit sharing agreement with them. The competent authority is only obliged to be satisfied that the conditions for prior informed consent and mutually agreed terms in a benefit sharing agreement with indigenous people have been met. The communities under such conditions should be registered as CBOs or Associations. All permits are entered into a public register and are free for viewing with or without costs. It creates a fully transparent system of virtual certificates of origin and legal provenance.

Therefore to strengthen policies and legal framework for ABS, each state needs to focus more on sustainable use of its biodiversity and conservation, clear benefit sharing agreements with all stakeholders, economic and social development using a systematic process that fits with international obligations but for the benefit of the people of the individual country.

What is the Way Forward for African Countries in Strengthening Policies & Legal Framework?

Given that local communities have contributed to the nurturing of genetic resources especially for food and agriculture for many years without due recognition for compensation or benefit sharing, it is time African countries through the CBD to strengthen their policies and legal frameworks to ensure that the national genetic resources are conserved and sustainably used for economic development and poverty alleviation of their people.

The African states should borrow a leaf from the countries in South America, Far East and come up with an Access and Benefit Sharing system that is geared towards economic benefits from the biological biodiversity. African Governments need focus on consultations and assessment of the existing provisions to be able to amend or develop Acts or legal notices to ensure that the countries benefit from the rich biodiversity available. The CBD has provided for the conservation and sustainable use of biodiversity and equitable sharing of benefits arising from the biological resources. It has further provided Bonn guidelines which are still being improved to assist in the implementation of the international obligation.

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