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## FACILITATING OR RESTRAINING ACCESS TO GENETIC RESOURCES? PROCEDURAL DIMENSIONS IN KENYA

Evanson Chege Kamau

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## ARTICLE

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Evanson Chege Kamau\*\*

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# 1

## INTRODUCTION

The Convention on Biological Diversity (CBD) entered into force 16 years ago.<sup>1</sup> Its three specific objectives are conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits (Art. 1). The CBD gave an international formal recognition to the right of resource-rich states to regulate access to biological resources subject to national legislations (Art. 15.1) and in harmony with the aims of the Convention (Art. 3). The right to regulate access, however, was not intended as a tool to hinder access, but rather to facilitate it (Art. 15.2). Even though restrictions might at times have legitimate motivations such as the need to safeguard certain rights, measures undertaken to this effect should not run counter to the objectives of the Convention (Art. 15.2). Where access has been granted, users of genetic resources have an obligation to share benefits arising from the utilisation of such resources with the provider (Art. 15.7).

A small number of countries have developed access and benefit sharing (ABS) specific legislations. None have succeeded to effectively regulate ABS. In fact, most of them have created a contradictory effect: instead of facilitating access, they have impeded it. The implementation experience of existing legislations shows, stringency, cumbersomeness and a lack of clarity and transparency of ABS legislations, as well as access procedures, as the main reasons frustrating potential users of biological resources.

Another reason why regulatory systems have failed is because they are often designed to control natural resources assumed to have great economic potential. As a result, basic research is frequently subjected to similar requirements as commercially oriented research such as up-front payments, expensive permit fees, and/or significant commitments to training or capacity building, which are likely to frustrate the former.

Furthermore, most basic research programmes seem to face far more complex procedures when applying for permission to collect and export the material necessary for study. Long time periods required to obtain approval, high and/or multiple administrative costs and other procedural delays discourage not only some basic research programmes, but also commercial ones that are unable to meet financial expectations for benefit sharing, or lack resources to complete long, complex approval procedures. It has been realised that the initial expectations of short-term monetary gains from long-term bioprospecting projects for new drugs or improved crop plants were unrealistic. Most contribution in growth of science in the developing world has been in form of indirect benefits made by short-term basic research programmes. Apart from the mentioned challenges, there are also complications in reaching consensus on the types or forms of benefits, how they should be distributed, how to ensure they reach the pertinent beneficiaries, and how to protect traditional knowledge, among other things.

Equally detrimental to successful ABS legislations is the user countries' unwillingness to collaborate with provider countries in controlling illegal use and commercialisation of foreign biological resources and traditional knowledge by creating provisions in their national legislations. In an attempt to mitigate violations one-sidedly, provider measures end up being so stringent.<sup>2</sup>

This article focuses purely on procedural issues. It analyses the current ABS legislation focusing on the provisions of application for an access permit and assesses the impact they are likely to have on the access procedure. In other words, it attempts to answer this question: Does the Kenyan ABS law comply with the CBD requirement under Article 15.2 that contracting parties shall create conditions to facilitate access to genetic resources? It then suggests ways of simplifying the procedure for an access permit, as well as making its implementation more efficient and effective.

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1 On 5 June 1992. Kenya is a signatory of CBD as of 11 June 1992.

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2 Manuel Ruiz Muller, 'Access Regime for Andean Pact Countries: Issues and Experiences', in John Mugabe et al. eds, *Access to Genetic Resources Strategy for Sharing Benefits* 187, 198 (Washington DC, USA: IUCN Environmental Law Centre & ACTS, Kenya & World Resources Institute, 1997).

## 2 DYNAMICS OF BALANCE IN ARTICLE 15.2 CBD: THE CARROT AND THE STICK

Prior to the Convention on Biological Diversity (CBD), genetic resources were regarded as a common good.<sup>3</sup> In other words, they were believed to be an inheritance of all mankind. The CBD changed this approach by placing them under the territorial sovereignty of individual countries where they are found (Preamble; Art. 15.1). It endorsed and, for the first time, gave an international formal (legal) recognition to the sovereign right of countries possessing genetic resources to determine the rules of access and other conditions attached thereto, subject to national legislation (Art. 15.1).<sup>4</sup>

Article 15.1 was absolutely not meant to give provider States the right to deny others access to genetic resources found in their territories. It merely allows states to subject access to conditions which would serve to support the realisation of the CBD objectives, such as the fair and equitable sharing of benefits. Putting emphasis on the right to deny would be a wrong interpretation and one that is against the spirit of the CBD.<sup>5</sup> The provision granting providers the right to regulate access cannot be interpreted in isolation from the rest of the provisions of the Convention. Article 15.2 states, ‘*Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other*

*Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention*’. This provision obviously addresses providers. It could instead read, ‘*Each Provider State shall (...)*’. The suggested construction implies that providers have a right to regulate access subject to national legislations, but they also have obligations to 1) create conditions to facilitate access and 2) not to impose restrictions that are contrary to CBD objectives. It is therefore necessary to determine what conditions facilitate access, and which restrictions in access requirements would be against the CBD objectives.

Legal and scholarly work has not yet attempted to dissect these two obligations. It is especially difficult to distinguish them because the outcomes might often be the same. However, the concepts seem to differ. While the first appears to revolve around efficiency and effectivity of the access procedure and thus centre on administrative and organisational issues, the second seems to be anchored on institutional decisions based on regulations and/or laws.<sup>6</sup> An attempt to clarify this distinction will be made in the next two sections.

### 2.1 Facilitation of access

Before looking at conditions for facilitation of access, it is good to first ask what the term ‘facilitate’ means in the context of Article 15.2. To facilitate here could be interpreted to mean ‘ease’, ‘enable’ or even ‘assist’ (access). That would imply that, while designing access regimes, provider countries would be expected to put in place legislative, administrative and policy measures that ease rather than impair access. The CBD does not offer a list of conditions necessary to facilitate access. The Bonn Guidelines likewise do not elaborate this requirement. It is hard to imagine conditions that would be uniformly applicable to all or most providing States. However, since some experience does show why ABS regimes of many provider countries fail, we might get better results if we ask this question, which conditions counteract the facilitation of access?

#### 2.1.1 Countering measures

A typical example of an ABS regime, which contained almost all the negative conditions widely quoted in

3 Padmashree Gehl Sampath, *Regulating Bioprospecting: Institutions for Drug, Research, Access and Benefit Sharing* 127 (New York: United Nations University Publisher, 2005). For one part of genetic resources, there was a formal statement in the non-binding International Undertaking on Plant Genetic Resources for Food and Agriculture (1983) that plant genetic resources are a common heritage of mankind, a provision which gave rise to a *res nullus* approach at least in crop genetic resources.

4 Kerry ten Kate and Sarah Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit Sharing* 15 (London: Earthscan, 1999).

5 See also Mugabe et al., note 2 above, at 8, and see ten Kate and Laird, note 4 above, at 15f.

6 *Similar view* Niels Louwaars, pers. comms, 22 October 2008.

literature,<sup>7</sup> is the Philippines<sup>8</sup> legislation. The Executive Order No. 247 lays down a procedure, which subjects access permits applicants to a waiting period of at least five months before an approval is granted.<sup>9</sup> It allows bioprospecting only with the prior informed consent (PIC) of all the local and indigenous communities involved.<sup>10</sup> Because the communities have to be notified and consulted, a period of 60 days is set aside before which a certificate of PIC cannot be issued.<sup>11</sup> The costs for the notification are borne by the applicant.<sup>12</sup> Based on the fact that an applicant may want to conduct research in sites occupied by different communities, a certificate of PIC from each community will have to be sought by the applicant himself. Each community might have different requirements and/or impose different terms and conditions since the PIC is obtainable in accordance with the customary laws of the concerned community (Sect. 2 a). It might also not be easy to identify who represents a particular community. Due to the nature of this law, by the year 2004 only one from eight applications for commercial research was approved and only one from

seventeen for academic research.<sup>13</sup> Of those conditions, the following are easily identifiable within the Philippines' Executive Order No. 247: lengthy procedures; cumbersomeness; high costs; multiple costs; overlapping procedures; long delays; vagueness; uncertainty; no facilitation by the State (contracting party to the CBD).

### 2.1.2 Facilitating measures

Any measures undertaken to ease or eliminate these and other similar conditions would constitute facilitation conditions. Such measures may include the following nine suggestions:

- 1) Issuance of a simple written agreement to enter an area and remove samples – in place of a complex ABS agreement – where access is meant for basic research. The person requesting permission to access must, however, sign a declaration agreeing to certain conditions, which may include an obligation to deposit samples of collected materials with a designated authority, an obligation to negotiate a full benefit sharing agreement should the purpose of research and development change, or an obligation to obtain permission from the provider before passing the sample on to a third party, among other things.
- 2) Minimising transaction costs involved in reaching an agreement between providers and users.
- 3) Determination of administrative fees depending on the purpose of access. The fees could be set to decline gradually from a specific amount the more the purpose of research becomes basic.

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7 See, e.g. Jordan E. Erdos, 'Current Legislative Efforts in Brazil to Regulate Access to Genetic Resources', *Executive Report* (December 1999), available at <http://www.planeta.com/planeta/99/1199brazil.html>, Krystyna Swiderska, Elenita Dano and Olivier Dubois, 'Developing the Philippines' executive order No. 247 on access to genetic resources' (2001), available at <http://www.cbd.int/doc/case-studies/abs/cs-abs-order-ph-en.pdf>, Ruiz, note 2 above, at 195ff; Miriam Dross and Franziska Wolff eds, *New Elements of the International Regime on Access and Benefit-Sharing of Genetic Resources – the Role of Certificates of Origin* (Bonn: BfN-Skripten 127, 2005), Klaus Liebig et al. eds, 'Governing Biodiversity Access to Genetic Resources and Approaches to Obtaining Benefits from Their Use: The Case of the Philippines' (5/2002) Reports and Working Papers (German Development Institute (GDI)), Conference of the Parties (COP), 'Statement of the 10th session of the global biodiversity forum to the 4th meeting of the conference of the parties of the CBD' (May 1998, Bratislava).

8 The Philippines was the first country to adopt ABS legislation into its national law. The law of 1996 was highly criticised: Foreign researchers and entrepreneurs were expected to pay high transaction costs. There was a threat that they could move their activities to countries with less stricter laws.

9 Dross & Wolff eds, 39.

10 Department Administrative Order No. 96-20, Sect. 2 a & b.

11 Department Administrative Order No. 96-20, Sect. 3.

12 Department Administrative Order No. 96-20, Sect. 7.1.1.

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13 Jorge Medaglia Cabrera, *A Comparative Analysis on the Legislation and Practices on Access to Genetic Resources and Benefit Sharing (ABS): Critical Aspects for Implementation and Interpretation* 192 (Bonn: IUCN, 2004), and Graham Dutfield, 'Developing and Implementing National Systems for Protecting Traditional Knowledge: A Review of Experiences in Selected Countries', in *UNCTAD Expert Meeting on Systems and Experiences for Protecting Traditional Knowledge, Innovations and Practices* (2000), available at [http://r0.unctad.org/trade\\_env/docs/dutfield.pdf](http://r0.unctad.org/trade_env/docs/dutfield.pdf).



- 4) Easing application procedures by, for example, providing online services. This will enable potential users to get orientation, know the access requirements and assess the situation before they travel to the provider country.
- 5) Providing a website with links to other permit applications with the possibility of completing applications online.
- 6) Setting the shortest durations that can be adhered to between application and grant (fast track). The better acquainted granting authorities become with processing of applications, the more efficient they become. This should form a good basis for revision of timeframes.
- 7) Reducing the number of permits that an applicant may require as much as possible.
- 8) Raising the level of certainty by ensuring that all legal and administrative requirements are based in legislation and new ones do not abruptly alter or replace old ones or in any way amend existing property or intellectual property law.
- 9) Evaluating the procedure regularly, at least annually.

These and other similar measures would tremendously simplify the process.

### 2.1.3 Legitimate measures

This does not mean that any measures that seem to complicate access must be condemned outright, as this would be an unfair approach towards providers' measures. It is important to consider the legitimacy of demanding such measures. Providers, for example, have to implement Article 8(j) regarding benefit sharing by indigenous and local communities, which is a complex issue that often results in a complicated procedure. They might also want to have proof that the genetic resources to be accessed would be used in environmentally sound ways, which is a CBD requirement (Art. 15.2). Likewise, they might impose certain measures with an intention to counteract rampant cases of 'biopiracy', or ensure that users respect their obligations towards them, as

under Article 15.4-7, especially because user countries have been reluctant to undertake necessary measures. Consequently, whatever provider measures entail might be judged as being either reasonable or unreasonable depending on the circumstances. In certain cases, where the provider is able to establish that the user intends to use the 'requested' genetic resources for environmentally unsound uses, for example, denial of an access permit would obviously not amount to a violation of the CBD. In addition, to establish this fact may require a longer duration and, hence, delay might be inevitable.

## 2.2 Non-imposition of restrictions that run counter to the CBD objectives

The CBD requires that restrictions imposed in regulating access do not run counter to the objectives of the Convention. The objectives of the CBD under Article 1 have been listed above. Only restrictions that hinder the realisation of these objectives are forbidden by Article 15.2.

Determining which restrictions these are is a difficult task because neither the CBD nor the Bonn Guidelines give a clue as to what such restrictions might entail. The Bonn Guidelines quasi simply reproduced CBD's Article 15.2 wording by stating, '*Providers should strive to avoid imposition of arbitrary restrictions on access to genetic resources*', in Article (16 (c) (ii)).

Since basic research tends to be handily disadvantaged,<sup>14</sup> in spite of its irrefutable contribution to conservation and sustainable use of biodiversity,<sup>15</sup> it is easier to identify ABS provisions that are contrary to the CBD objectives when ABS regulations are applied to basic research.

Below I suggest a list of likely restrictions in regard to foreign researchers and bioprospectors. They might not be uniformly qualified as restrictions in all ABS regimes, but they might be used as a guideline in unveiling existing restrictions in such regimes. These may include:

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<sup>14</sup> Erdos, note 7 above, Swiderska, Dano and Dubois, note 7 above, and *see* Ruiz, note 2 above, at 195ff.

<sup>15</sup> Note that Article 12 (b) of the CBD places an obligation upon contracting parties to '[P]romote and encourage research which contributes to the conservation and sustainable use of biological diversity (...)'.  

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- Prohibition to enter or collect samples from certain areas unless special government interests are located therein;
- Prohibition to collect samples of a degraded species;
- Issuance of access permit on condition that a defined benefit-sharing agreement is reached forthwith;
- Issuance of permit on condition that the researcher/bioprospector will continue paying a standing fee during the course of the research;
- Issuance of access permit on condition that ensuing research will only take place in the resource State;
- Issuance of access permit on condition that the researcher/bioprospector employs some or a certain number of local collectors for the duration of collecting;
- Issuance of access permit on condition that the researcher/bioprospector collects not more than a certain amount of sample specimens;
- Issuance of access permit on condition that the researcher/bioprospector collects not less than a certain amount of sample specimens;
- Issuance of access permit on condition that the researcher will make available/reveal the results of the research before publication;<sup>16</sup> and
- Issuance of access permit on condition that the researcher/bioprospector collaborates only with local partners or scientists recommended by a national authority; in other words, an absolute prohibition to collaborate with a local partner or scientist of own choice.

The above restrictions are relative and would depend on how legitimate they are to the particular providing country. If the provider demands, prior to grant of an access permit, that an agreement is reached concerning the fate of samples collected and results achieved in case

<sup>16</sup> Monica R. Sarmiento, pers. comms, 23 October 2008.

of abandonment of activity before completion of research, for example, such a restriction would be based on a legitimate concern.<sup>17</sup> Similarly a case whereby access into a territory is denied due to the presence of a State's interests such as intelligence, military bases or plants, but there is also urgency to conserve and restore a particular species that is available only in that territory, the providing State can look for a way of facilitating access of the species either through guarded and guided collection, or supply by an appointed local parataxonomist.

No general rule of dealing with such restrictions is proposed in this article and it is hard to imagine one. As said, they must be dealt with on individual merit. The only general proposal that may be made is that national laws and regulations must be transparent. Countries may choose to have explanatory guides expounding access laws and regulations in greater details. Now, I will examine the impact the law regulating access in Kenya has on the access procedure.

## 3

### THE LAW REGULATING ACCESS

The law regulating access to genetic resources (and benefit sharing) in Kenya is *The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*.<sup>18</sup> It came into force in 2006. It is the law that concretised the Environmental Management and Co-ordination Act,<sup>19</sup> which had adopted the provisions of the CBD<sup>20</sup> on biodiversity conservation, sustainable utilisation of its components and access as well as fair and equitable sharing of the benefits arising from the utilisation of genetic resources.

<sup>17</sup> See *id.* Sarmiento imagines a situation where a researcher applies for an access permit with the understanding that ensuing research activities are to be carried out in a specific research or academic institution. In the course of the research, the researcher receives an offer for a better job elsewhere and opts to abandon his current activities.

<sup>18</sup> Will be referred to as Regulations 2006.

<sup>19</sup> The Environmental Management and Co-ordination Act No. 8 of 1999.

<sup>20</sup> In sections 50, 51, 52 and 53.

The ABS provisions of Regulations 2006 are found in parts III (sect. 9-18) and IV (sect. 19-20). Part III states clearly that any person intending to access genetic resources in Kenya must be in possession of an access permit obtainable from the NEMA. This applies to both individuals and legal corporates (organisations).

### 3.1 Procedure for access permit

The application for an access permit involves a number of procedures. First, the applicant must complete an application form as set in the first schedule of Regulations 2006. The form contains information concerning the applicants and their curriculum vitae,<sup>21</sup> the size of the project budget, as well as details about any sponsors. It also includes, among others, particulars concerning the types of genetic resources to be collected, their location and providers if already identified, known or expected uses, details of any royalties, payments and/or compensation being offered by the applicant for access to genetic resources. Second, the prior informed consent (PIC) of the relevant lead agencies and interested persons, who might be local communities or private owners of genetic resources, must be sought. The PIC should be in form of a document containing the signatures of the person(s) issuing it. Third, the applicant must have obtained permission to carry out research from the research authorising authority (RAA), in this case the National Council for Science and Technology (NCST). Fourth, an administrative fee must be paid as prescribed in the second schedule of Regulations 2006.<sup>22</sup>

The above is a simple description of the access procedure created by the access provisions of Regulations 2006, but the de facto formality looks different if a more critical examination is made. The actual starting point of the whole procedure is the research authorisation from the NCST.<sup>23</sup> An application for authorisation to conduct a research entails a number of requirements and involves several steps. An application consisting of a form duly filled with

information about the proposed project together with a detailed proposal of the project, curriculum vitae of all project participants, two passport-size photographs of the person(s) conducting the research in Kenya and a fee is made at the NCST. The applicant is required to have an affiliation with an institute in Kenya.<sup>24</sup>

The NCST convenes the responsible committee or division to examine the application depending on the area of research.<sup>25</sup> If a decision is reached to grant authorisation, the committee gets a local collaborating institution, if the applicant had none, and assists in making a memorandum of understanding (MoU) between the two.<sup>26</sup> This procedure takes approximately six weeks.<sup>27</sup> Of course there is still a hidden procedure between the Ministry of Science & Technology and the NCST as the former has the mandate to register applications, cash the fees<sup>28</sup> and issue the permits upon advice by the latter.<sup>29</sup> Therefore, there is a to and fro movement of the application between the Ministry and the Council, which consumes unnecessary time.

The issue concerning prior informed consent, especially from (relevant) lead agencies, might present numerous problems. Existing procedures of lead agencies for entry into territories and collection of resources placed under their jurisdictions are not dismantled or shortened. Therefore, it is unclear what requirements the applicant would have to meet, whether this would involve other applications, whether it would require another fee, and how long the procedure would take before the PIC is granted.

The Forests Act 2005 and the Wildlife (Conservation and Management) Act Cap 376 (WCMA) indicate clearly

21 For corporates (organisations), curriculum vitae of individuals in the project are to be attached to the form. Information about other individuals connected to the project, as well as the contact person and the position held in the organisation is also to be included.

22 The second schedule of Regulations 2006 shows the fees to be paid for access permits, their renewal and for perusal in the register of access permits.

23 The NCST is under the Ministry of Science & Technology.

24 See application for authority to conduct research in Kenya by non-Kenyans, available at [http://www.scienceandtechnology.go.ke/downloads.php?cat\\_id=3](http://www.scienceandtechnology.go.ke/downloads.php?cat_id=3).

25 Interviewee, NCST, April 2007: There are eight main divisions: Biology, industry, health, agricultural sciences, environmental & earth sciences, physical & natural sciences, information sciences & land and social sciences. Each of these divisions has twelve scientists with one chairman.

26 *Id.*

27 *Id.*

28 Stanley S. Atsali, 'International Regime on Access and Benefit-sharing (ABS): Exploring New Options for Achieving CBD-related ABS Objectives', *Paper Presented at the International Expert Workshop on Access to Genetic Resources and Benefit Sharing (Cuernavaca, Mexico, 24-27 October 2004)*, available at <http://www.canmexworkshop.com/documents/papers/II.1d.1.pdf>.

29 *Id.*

that any person intending to enter into territories placed under their jurisdictions, or collect or remove any type of biological resources, or carry out extraction for export must be in possession of a licence or permit. The WCMA restricts access to and exploitation of wildlife resources.<sup>30</sup> Any person seeking access to such resources or parts thereof must obtain a permit from the Minister for Tourism and Wildlife.<sup>31</sup> The Forests Act also stipulates that any removal of forest produce<sup>32</sup> without a licence or permit contravenes the Act (Sect. 52.1 a) and is punishable by law (Sect. 52.2, 55.1). It is also illegal to extract, remove or cause to be removed, any tree, shrub or part thereof for export from any forest area (Sect. 54.8 d). The Minister determines the circumstances in which licences/permits and other agreements are applied for, granted, varied, refused or cancelled, and the manner in which a person to whom a licence is granted may exercise a right or privilege conferred upon him by the licence (Sect. 59.2 d). He also makes rules to control the entry of persons into forests (Sect. 59.2 f) or nature reserves (Sect. 59.2 h), how long they should remain there and under which conditions they may do so (Sect. 52.1 b). Likewise, the Minister determines the amount of royalties or fees payable for any activities licensed under the Forests Act (Sect. 59.2 b). According to section 4 j, such charges are collected by the Kenya Forest Service (KFS). Before an approval for a licence/permit is granted, a period of ninety days is given to the public to make

objections, after such an intention is published in the Gazette and in at least two newspapers of national circulation (Sect. 44.3). If there are any objections, sixty more days from the time of the receipt of the objection are needed to deliberate and deliver a decision to the objector (Sect. 44.4).

### 3.2 Exemptions

Concerning entry into forests and collection, harvesting, removal or extraction of forest produce, only activities undertaken within a management plan<sup>33</sup> are exempted from a licence/permit and an Environmental Impact Assessment Report (EIAR) in respect of the proposed activity (Sect. 44.1, 2). An application by a foreign institution (researcher) to conduct a basic research aimed at improving sustainable use and management capabilities, for example, might enjoy the ease created by this provision. Advanced research aimed at commercialisation, on the other hand, would be caught by the provision.

In order to give preference to basic research, the law must make a distinction between access conditions and procedure for basic research and commercial bioprospecting. Regulations 2006 do not make such a distinction.

Regulations 2006 do not have different procedures or conditions for different purposes of access. Unless regulations of lead agencies make exemptions similar to those of the Forests Act, any applicant seeking PIC of various lead agencies is required to repeatedly perform a similar procedure. In addition, some procedures are quasi duplicated as some jurisdictions; for example, fisheries, wildlife and forestry resources often intertwine. It is also to be expected that some conditions would vary from one lead agency to another, thus increasing uncertainty. If legislations of lead agencies with overlapping jurisdictions do not develop a united approach of regulating access, such a situation is likely to produce a disguised hindrance to access, as Regulations 2006 have not succeeded to unify the procedure.

Seeking for PIC from local communities in Kenya might be complicated by the fact that there are a few organised and issue-sensitised communities; for example, those

30 John Mugabe and James Otieno-Odek, 'National Access Regimes: Capacity Building and Policy Reforms', in John Mugabe et al. eds, note 5 above, at 98.

31 See *id.* The WCMA is not clear concerning regulation of access to flora (in parks and reserves). Provisions to this effect can only be hypothetically derived from sections 13 and 16, which forbid a variety of other activities against both fauna and flora without authorisation, and empowers the minister to make entry regulations, as well as establish the fees to be paid for such entry. Now a draft bill, the Wildlife (Conservation and Management) Bill 2007, which incorporates research and bioprospecting concerns, has been developed and is pending in Parliament for approval. If it is adopted, the law will establish a clear requirement for (basic) researchers and bioprospectors to seek for an access permit and pay the required fee before any activities are conducted. Bioprospectors would still have to possess prior informed consent, material transfer and benefit sharing agreements from stakeholders whose interests are involved before a permit can be issued by the wildlife department. A copy of the bill is available at <http://www.fankenya.org/downloads/wildlife-conservation&managementbil2007.pdf>.

32 According to section 2 of the Act, 'forest produce' includes bark, creepers, fibres, fruit, grass, gum, honey, leaves, limestone, plants, rubber, sap, seeds, spices, wax, etc.

33 Section 2 defines a 'management plan' as a systematic programme showing all activities to be undertaken in a forest or part thereof during a period of at least five years, and includes conservation, utilisation, silvicultural operations and infrastructural development.

living around Mukogodo forest are organised by a council of elders known as ILMAMUSI (standing for four group ranches: Iingwesi, Makurian, Mukogodo and Sieku), and those living around Kakamega forest are organised by an organisation called Kakamega Environmental Education Programme (KEEP). In circumstances where none can be identified, it will be difficult to trace the true representation of a local community. It could also imply that one might have easy access to PIC which is not representative and that might be challenged later by the legitimate local community.

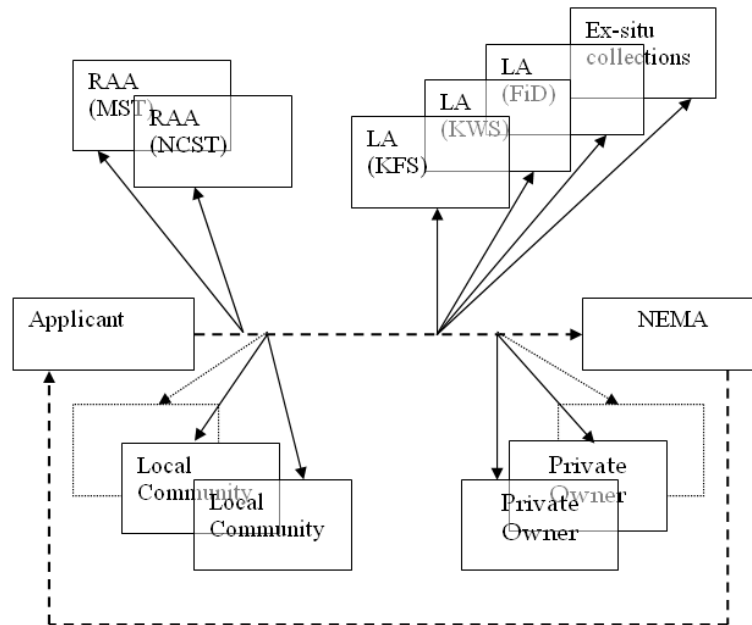
It is only after all the requirements above have been met that an application for an access permit is acceptable to the NEMA, in spite of the numerous hurdles. Upon receipt of the application, the Authority shall, nonetheless, publish a notice in the Gazette and at least one newspaper with nationwide circulation, or in any

other appropriate way (Reg. 2006, sect. 10). This is meant to give the public an opportunity to bring representations or objections (Reg. 2006, sect. 11). It takes sixty days from receipt of an application to the time the Authority decides to grant or refuse the permit (Sect. 13).

## 4 IMPACT ON ACCESS

In order to clearly understand which affects the Regulations produce, it is useful to use an illustrative diagram (Diagram 1 below) of the current access procedure.

Diagram 1: Illustration of current access procedure



RAA: Research Authorising Authority; MST: Ministry of Science & Technology; NCST: National Council of Science & Technology; LA: Lead Agency; KFS: Kenya Forest Service; KWS: Kenya Wildlife Service; FiD: Fisheries Department; NEMA: National Environmental Management Authority

Source: Kamau & Winter, 2009

The applicant has to seek all the clearances, licences and permits, even from government institutions, before applying for the access permit at the NEMA. Drawing an example of a procedure that would be relatively short from Diagram 1 above, if the applicant succeeds to get a research clearance from the NCST/MST within two months, PIC from KFS within 90 days and access permit from the Authority within 60 days, the duration of the process would amount to seven months. It is also very expensive as there are different fees to be paid, as well as other likely expenses to be incurred by the applicant. If an applicant succeeds in obtaining research authorisation and access permit with the first attempt, he would have paid USD 100-500 at NCST/MST and USD 260-650 at NEMA as administrative fees. But this still does not include the fee(s) of the lead agency(ies) under whose jurisdiction the resources are to be found and without whose PIC NEMA cannot issue an access permit. Assuming the applicant needs a permit from only one lead agency with a fees estimate to that of NCST/MST or NEMA, the applicant will have paid a total of USD 460-1,650 or USD 620-1,810.

This is the shortest access procedure one can imagine from Regulations 2006 yet it is still longer than that of

the Philippines Executive Order 247, and certainly more expensive. If the applicant requires PIC from more lead agencies or ex-situ collections and may be one or two local communities, the procedure becomes extremely complicated and expensive. It should also be kept in mind that an applicant has no assurance that the application will succeed at all (Sect. 11), and if it does, after how many attempts.

If the applicant succeeds, the validity of the permit after such a great effort lasts only one year (Sect. 14.1). The renewal provision (Sect. 14.2) does not mitigate the situation, but creates more uncertainty. First, by stating that ‘an access permit may be renewed’, it gives the impression it may not. Second, it allows for new terms and conditions to be imposed, which might force the researcher/bioprospector to give up a project that had already been started. Third, the second renewal also lasts for only one year. Fourth, a new fee for renewal has to be paid.

The table below illustrates in a condensed form the negative characteristics (for access) identified in Regulations 2006 and the negative impacts they are likely to produce.

**Table 1:** Characteristics identified in and impacts created by Regulations 2006

Identified (Negative) Characteristics		Possible Negative Impacts						
		Delay	Expensive	Complicated	Cumbersome	Uncertainty	Ambiguity	High transactional costs
1.	Long procedure	✓					✓	✓
2.	Multiple permits	✓	✓	✓	✓	✓	✓	✓
3.	Multiple PICs	✓	✓	✓	✓	✓	✓	✓
4.	Multiple fees		✓			✓		✓
5.	Other likely fees		✓			✓	✓	✓
6.	Overlapping procedures	✓	✓	✓	✓	✓	✓	✓
7.	Short validity of permits	✓					✓	✓

Source: Kamau & Winter, 2009

The procedure is very cumbersome, complicated, taxing, time-consuming and expensive. It also creates (legal) uncertainty and depicts a certain level of ambiguity. According to experience made by other (forerunner) countries, such a procedure would most likely discourage researchers. Likewise, it is not capable of enticing potential bioprospectors.

In light of the outcome of the analysis above, it is justifiable to conclude that Regulations 2006 do not facilitate but rather impair access to genetic resources. They hence do not comply with Article 15.2 of the CBD and need to be revised. To that effect, the Brazilian initiative is exemplary.

The Brazilian MP 2.186-16 instituted a procedure similar to that of the Executive Order No. 247 for the PIC of local/indigenous communities. Faced with challenges identical to those of the Philippines in implementation, the CGEN (Council for the Management of Genetic Resources) draft law is now trying to make a number of amendments. If adopted, the procedure for PIC of traditional knowledge commonly owned by various communities will be shorter.<sup>34</sup> An applicant will need only one certificate of PIC from one of the communities concerned. Benefits from the utilisation of the knowledge will go to a common fund (*‘Podem ser feitos contratos com CTA com uma unica comunidade, mesmo que outras detenham o mesmo conhecimento. Demais comunidades receberiam recompensas via Fundo’*). Also, the draft law proposes to do away with the requirement that foreign institutions get a local collaborating institution before a licence to carry out research is granted (*‘Instituições estrangeiras podem pesquisar os RG sem intermediação de pessoas jurídicas brasileiras’*).

Such adjustments could help ease the access procedure, but they require a lot of prior ground work. To simplify the PIC procedure, for example, a database of existing local/indigenous communities, form of organisation, representation, their knowledge and its use needs to be created. The communities must be consulted, sensitised and involved. How the fund will function and be made effective must also be well regulated. On the other hand, reversal of the requirement that foreign institutions establish collaboration arrangements with (a) local institution(s) prior to grant of permit might require a

study to establish which effects that would have on technology transfer. Some scholars see it as being contrary to the objective of creating an opportunity for knowledge transfer.<sup>35</sup> This is just indicative of the hard task involved in making a fairly suitable ABS regime.

## 5 SIMPLIFYING THE ACCESS PROCEDURE – SOME PROPOSALS

The current access procedure needs to be simplified and eased. It is proposed the procedure be integrated. Other measures would also help to make the procedure more attractive and effective.

### 5.1 Procedural integration

The so-called procedural integration is a useful guide in shortening the current bureaucracy. The idea behind this principle is to concentrate as many administrative tasks as possible under one agency.<sup>36</sup> That does not mean the agency has to perform all the tasks by itself, but it is responsible, for example, to see to it that an application filed with it goes through the prescribed procedure; thus, the applicant is not required to take the application to all necessary agencies, or chase them. This is the case, for instance, for the building permit procedure in Germany under the principle of the *‘Einheit der Verwaltung’*—in other words, the unity of administration (unofficial translation).

<sup>35</sup> See Ten Kate and Laird, note 4 above, at 15.

<sup>36</sup> Werner Thieme, *Einführung in die Verwaltungslehre* 69f (Köln: Heymann, 1st ed. 1995), Hellmut Wollmann, ‘Co-ordination in intergovernmental setting’, in G. Peters and J. Pierre eds, *Handbook of Public Administration* (London: Sage, 2003), Hellmut Wollmann, ‘Gebietsreform’, in R. Voigt and R. Walkenhaus eds, *Handwörterbuch zur Verwaltungsreform* (Wiesbaden: VS Verlag, 2006), Hellmut Wollmann, ‘Funktionalreform’, in R. Voigt and R. Walkenhaus eds, *Handwörterbuch zur Verwaltungsreform* (Wiesbaden: VS Verlag, 2006b), Gunnar F. Schuppert, *Die Einheit der Verwaltung als Rechtsproblem* 757ff (Die Öffentliche Verwaltung (DÖV), 1987), and Jörg Bogumil, ‘Verwaltungsreform (Stichwort)’, in R. Voigt and R. Walkenhaus eds, *Handwörterbuch zur Verwaltungsreform* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2006).

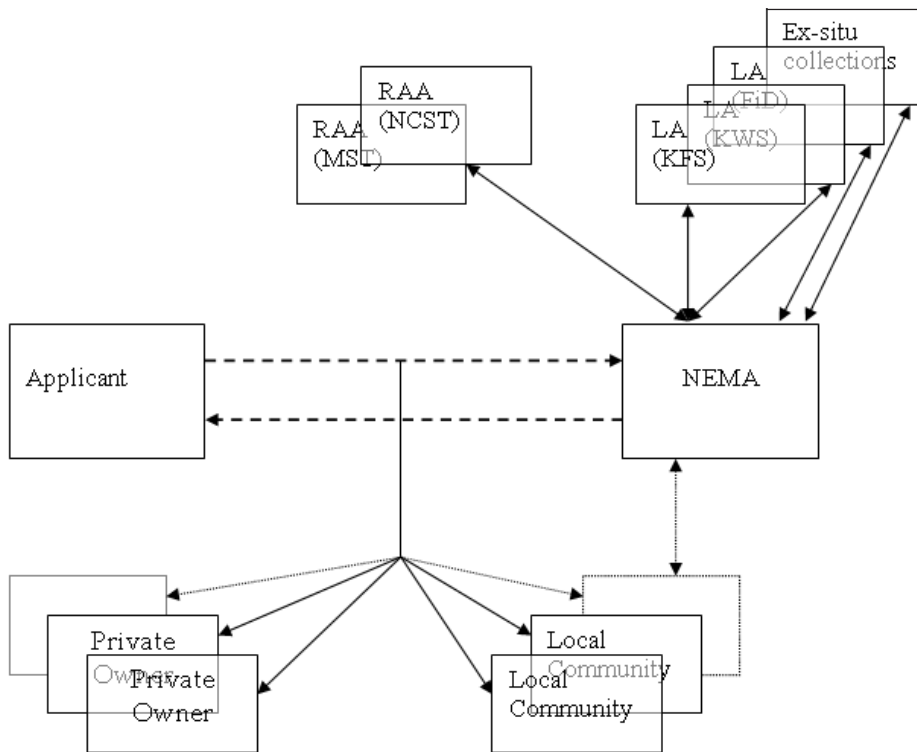
<sup>34</sup> Kleba and Kishi, pers. comms.



Taking our previous example, an applicant who requires only the PIC of relevant lead agencies will only need to submit the application to the final Authority, NEMA. The latter would then seek clearance from the NCST/MST, PIC from pertinent lead agencies, as well as their comments, and perform other institutional formalities. The applicant will only have to seek the PIC of local communities and private owners, but it is also possible that NEMA steps in to assist in negotiations between

an applicant and local communities (see illustrative diagram 2 below). PIC of local communities with shared interests may also be integrated into one PIC. After examining and processing the documents, NEMA finally communicates the decision to the applicant.

**Diagram 2:** Illustration of a simplified access procedure



Source: Own illustration

There do appear to be legal grounds for NEMA to act in this capacity. The provisions of the EMCA empower NEMA to carry out the general supervision and co-ordination of all matters relating to the environment, and make it the principal instrument of the government in the implementation of all policies relating to the environment (sect. 9.1). They also charge it with power to co-ordinate environmental management activities of lead agencies so as to ensure, among other things, the



proper management and rational utilisation of environmental resources (sect. 9.2 a).<sup>37</sup>

There are surely identifiable immediate benefits of an integrated procedure for the provider. Some of the requirements and procedures of NEMA and lead agencies are similar and meant to achieve the same goal. A public notice, for example, does not need to be made severally (by different lead agencies) for a single application. NEMA could ideally do this, thus saving on time and costs. This approach could also achieve harmonisation of conflicting formalities. There is, for example, a conflict as far as duration granted for licences and permits is concerned. The NCST, for instance, gives a permit for three years whereas NEMA gives it for one year, subject to renewal. A lead agency may apply a different approach altogether thus creating a confusing situation for the applicant, as well as the general process. There are also gaps, which create opportunities for violation. In the past, researchers/bioprospectors have been known to proceed with research activities after receiving PIC from the lead agencies instead of going back to complete the application procedure for an access permit at the NCST.<sup>38</sup> Sometimes their activities are reported to the NCST very late.<sup>39</sup> Such occurrences take place because collaboration among the stakeholders is poor.<sup>40</sup>

In summary, unity of administration could help the access procedure achieve the following benefits, among others, both for providers and users of genetic resources: reduce the costs for the applicant; save time for the applicant; reduce costs for the institutions; increase transparency in allocation of tasks and accountability thereof; improve coordination of policies and tasks;<sup>41</sup> reduce corruption; reduce conflicting formalities and approaches.

## 5.2 Auxiliary measures

Save procedural integration, a distinction should be made between research projects depending on their purposes. Based on such differentiation, certain applications could be exempted from specific (access) formalities. The

present procedure subjects all projects involving collection of genetic resources, even for conservation purposes, to the same procedure. Such a process is likely to hinder most carriers of non-commercial projects, which are instrumental in domestic scientific and technological progress.<sup>42</sup> There is, of course, a danger that some genetic resources of great commercial value might escape through academic/basic research and be commercialised later.<sup>43</sup> Therefore, the separation must be done cautiously in order to ensure both scientific growth and sharing of benefits derived from the use of genetic resources.

Monitoring of research activities during collection of biological resources and control at export (exit) points need to be intensified. A cumbersome application procedure will amount to nothing if monitoring and control are not properly organised and appropriated. That involves sensitisation and capacity building of the local communities, game and forest wardens,<sup>44</sup> customs personnel and in an extreme case, the police, especially traffic police.

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42 See Mugabe et al. eds, note 5 above, at 24.

43 *Id* at 22 and 24. The case of Genencor featured by John Mbaria in the East African (Nairobi) of 23 August 2004 is a perfect example. An online copy of the article is available at <http://www.grain.org/bio-ipr/?id=409>. A researcher from the department of microbiology and immunology at the University of Leicester in the UK conducted research in Kenya accompanied by a group of scientists and a worker of a biotechnology company known as Genencor International Inc. The scientists collected samples of extremophiles, tiny organisms that are able to survive and thrive in extreme environmental conditions, from some alkaline lakes of East Africa located on the bed of the Great Rift Valley – Bogoria, Magadi, Nakuru, Elementaita and Solai in Kenya, and Natron in Tanzania – in 1998. There is no indication that the scientists had sought a permit to carry out research from the Ministry of Education or the Kenya Wildlife Service, which has the mandate to vet proposals for permits by researchers working in protected areas. Nonetheless, they went ahead to publish their results in the Extremophile Journal of the UK in 1998. The samples collected were bought by the Genencor worker, who made an enzyme discovery that was later sold to Procter & Gamble by Genencor. The enzyme is used in the manufacture of Tide Bleach Detergent and ‘stonewashing’ material.

44 A recent case of attempted illegal export of live reptiles from Kenya to Japan, which was foiled by a successful interception of the consignment at Mombasa airport by KWS agents, shows that control at exit points can considerably augment monitoring efforts. See full story at <http://www.nation.co.ke/News/-/1056/461512/-/tk7ksd/-/index.html>.

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37 An electronic copy of the Act is available online at [http://www.reconcile-ea.org/wkelc/env\\_mgt\\_act.pdf](http://www.reconcile-ea.org/wkelc/env_mgt_act.pdf).

38 Interviewee, NCST, April 2007.

39 *Id*.

40 *Id*.

41 See Wollmann, note 36 above, at 84.

## 6 CONCLUSION

The practical implementation of the CBD provisions on ABS within national (and/or regional) spheres has not been an easy task for most countries. Save the shortage or lack of needed capacity, the peculiarity of the interests involved has made the legislating exercise very complicated and exhausting. Due to, on the one hand, encroaching, and on the other, contradicting laws/rights, and the failure of the CBD to commit the effort of user countries in the realisation of measures of provider countries, the latter is often prompted to rely on stringent laws so as to counter biopiracy and illegal post-export usage of acquired biological resources, as well as traditional knowledge, and ensure compliance. Unfortunately, this approach seems to hurt the provider countries more frequently than the user countries.

Kenya's ABS legislation entered into force recently. Its provisions seem to be a conscious or unconscious adoption of the stringent approach applied by forerunner provider countries. Although no practical case of its impact on either basic or commercial bioprospecting projects exists, it is easy to predict that the procedure created by its provisions for application of an access permit will most likely repel potential projects. The procedure is too long and has the tendency of becoming very cumbersome, exhausting and expensive depending on the scope of the applicant's interests. It also creates a feeling of uncertainty for future activities of newly initiated projects.

In its current state, Kenyan ABS legislation creates hurdles to access rather than facilitating it. Its practical application would most likely be in conflict with Article 15.2 of the CBD and hence against CBD's objectives. Consequently, it needs to be revised to make it more proactive (rather than reactive) and workable and thereby conform to the CBD ABS provisions.

Some bioprospecting projects play a vital role in research and development. Creating hurdles for them would be self-created injustice to the country apart from running counter to the objectives of the CBD. That does not imply the legislation should be loose enough to allow irregularities and illegal utilisation of genetic resources

and traditional knowledge. Nonetheless, a long, exhausting and/or expensive procedure does not necessarily produce compliance. There are loopholes which if sealed could produce positive results that stringent laws are not capable of achieving. Instead of granting provisional licences of access,<sup>45</sup> for example, it is better to shorten the application procedure. There are also conflicting and contradicting mandates, duplicated procedures and costs, which should be eliminated by unifying (harmonising) the process. This will simplify it and render it more attractive for applicants. Compliance should be sought at the research and export levels through monitoring and control, as well as effective sanctions. My own conclusion is that using what I would call a 'funnel approach' (in other words, easing the application phase to attract potential researchers/bioprospectors, and then narrowing the chances of violation in the bioprospecting and export phases) would deliver better results than the current approach. This could be intensified by trying to engage, at the application level, not only the applicants, but also the foreign companies, institutions and governments they represent as post-export partners in follow-up procedures.

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45 The NCST may secure a provisional permit from the Office of the President, or more often from the Ministry of Science and Technology, on behalf of the Office of the President, pending issuance of the final permit. Provisional permit holders are allowed to commence their research activities before their applications are reviewed as long as they have secured intrusion and collection permits from the relevant lead agencies. Once a provisional permit has been given, the application is forwarded to NSCT for review. NCST gives the final approval. Provisional permits raise a question on the possibility of creating a loophole where collecting and exporting genetic resources could occur under a provisional permit that was not going to be given final approval. Under the current ABS regulatory regime, it could also mean that a bioprospector has the possibility of dodging the procedure it sets by skipping the application at NEMA. This, likewise, is an indication of the grave disharmony that exists within the general ABS regime.

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