POLICY BRIEF

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Implementing Namibia's Access to Biological and Genetic Resources and Associated Traditional Knowledge Act

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Voices for BioJustice
Working towards the equitable and sustainable use of biodiversity

INTRODUCTION

In May 2014, Namibia became the 35th country to ratify the Nagoya Protocol. The Ministry of Environment, Forestry and Tourism is the Namibian government's responsible entity for the implementation of the Protocol. While the development of legislation has been a protracted process, in June 2017 the *Access to Biological and Genetic Resources and Associated Traditional Knowledge Act No. 2 of 2017* was passed by Parliament.

Until such time as the implementing regulations are promulgated and the Office established, the Interim Bio-Prospecting Committee (IBPC) facilitates administration of the Act. The IBPC is situated in the Ministry of Environment, Forestry and Tourism and has representatives from seven government ministries, research institutes, regional and local government. Together with the Directorate of Environmental Affairs, the IBPC coordinates ABS activities while research permits are authorised by the National Commission on Research, Science and Technology in accordance with the *Research, Science and Technology Act No. 23 of 2004* with input from the Ministry of Environment, Forestry and Tourism.

KEY ISSUES

- **Namibia's legal and policy framework within which ABS is situated is fragmented, has overlapping institutional mandates, and a lack of clarity** on permitting procedures.
- The existence of **multiple definitions of group rights in communal areas could result in conflicts of interest** and the misallocation of benefits.
- There is a **lack of clarity** amongst stakeholders about the understanding of **biotrade versus bioprospecting** and applications of ABS.
- **Overregulation may hinder existing systems for sustainable management and equitable benefit sharing** from biotrade and inhibit local valorisation of biological and genetic resources.

Namibia has an extensive community based natural resource management (CBNRM) programme that devolves utilisation rights over wildlife and plants to communal conservancies and community forests for economic benefit. Biotrade is an important sector of the economy, especially amongst rural communities who trade several species in international markets. While the Act covers both biological and genetic resources, without the regulations it remains uncertain as to whether biotrade will be excluded from the scope of the national regulations. In June 2018, a Final Consultative Workshop to review the draft ABS regulations was facilitated by the Ministry of Environment, Forestry and Tourism. This, and previous experiences gained from the implementation of CBNRM and biotrade in Namibia, have enabled the identification of existing issues in the regulatory framework and potential pitfalls in the implementation of ABS. This brief examines these issues in light of the forthcoming regulations and offers recommendations for implementation of ABS in Namibia.

The Access to Biological and Genetic Resources and Associated Traditional Knowledge Act sets out to

- Regulate access to biological and genetic resources and associated traditional knowledge.
- Protect the rights of local communities over such resources and traditional knowledge.
- Provide for fair and equitable benefit sharing.
- Establish administrative structures and processes for the implementation and enforcement of such principles.

The Act applies to biological and genetic resources found in both *in situ* or *ex situ* conditions in Namibia, their derivatives and products. It designates the Office of Biological and Genetic Resources and Associated Traditional Knowledge in the Ministry of Environment, Forestry and Tourism to administer the Act and, provides for Access Permits, Prior Informed Consent, Benefit Sharing and Material Transfer Agreements.

CBNRM and ABS

The *Nature Conservation Amendment Act No. 5 of 1996* enables any group of persons living on communal land to register as a conservancy, thereby providing for an economically based system of sustainable management and utilisation of wildlife in communal areas, while the *Forest Act No. 12 of 2001* confers the rights to manage and use forest produce and other natural resources of the forest. These laws enable registered conservancies and community forests to sustainably utilise wildlife and plant resources and benefit from their commercialisation.

Under the *Access to Biological and Genetic Resources and Associated Traditional Knowledge Act No 2. of 2017*, "local communities" include natural resource management organisations such as conservancies and community forests.

KEY IMPLEMENTATION ISSUES

1 Fragmented legislation, overlapping mandates and lack of integration between Ministries for management of indigenous resources

Policy and legislation for the management of indigenous animal and plant resources in Namibia has not been simultaneously developed and remains unintegrated. This is in part due to the Directorate of Forestry being housed in the Ministry of Agriculture, Water and Land Reform from 2005 to 2020. The Directorate has now been re-housed by the Ministry of Environment, Forestry and Tourism, but the implementation of CBNRM by two separate Ministries has resulted in different trajectories. Community forests have been implemented on a smaller scale and are institutionally weaker than communal conservancies. However, the legislation offers community forests exclusive use of resources, while these rights are not afforded to conservancies. The lack of integration of policy and legislation has resulted in difficulty streamlining management processes for wildlife and plant resources.

Permitting procedures remain unclear and unharmonised between Ministries, with uncertainty regarding which permits are required from which institution. Permits for collecting research samples are authorised by the National Commission on Research, Science and Technology under the *Research, Science and Technology Act No. 23 of 2004*. Additional permits from the Ministry of Environment, Forestry and Tourism may be required for protected or specially protected species. Export permits are authorised by the Ministry of Environment, Forestry and Tourism or the Ministry of Agriculture, Water and Land Reform, and a phytosanitary certificate from the latter is also required for any plant material transported out of the country. Multiple permitting procedures through multiple institutions can lead to confusion, delays, and create barriers to research.

A community forest awareness meeting in Sanitatas Conservancy in the Kunene Region, Namibia. *Credit: Jessica Lavelle*

The *Inland Fisheries Act No. 1 of 2003* under the Ministry of Fisheries and Marine Resources provides for the establishment of fish protection areas, used to recognise community-based committees for the protection, management and utilisation of fish from local rivers. However, the regulation used to establish such committees is not well aligned with the powers in the Act, raising questions of legality of the committees to manage those fish resources.

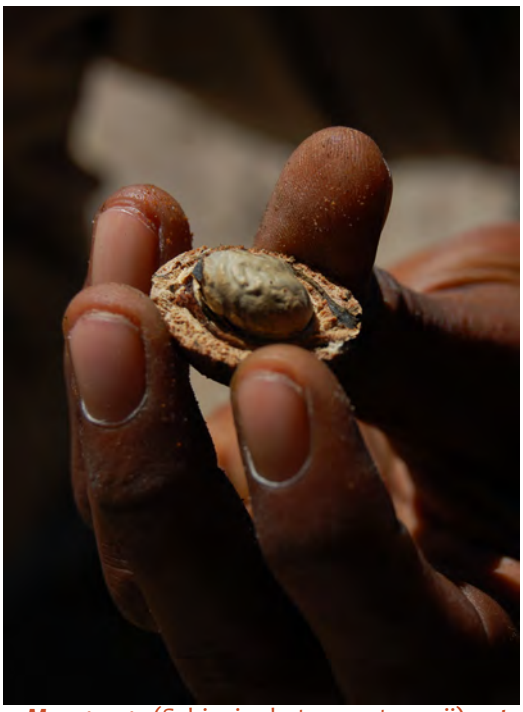
2 Multiple definitions of group rights in communal areas

The ABS Act defines "local communities" as living or having rights or interests in a distinct geographical area with a leadership structure or with rights in relation to or stewardship over its natural resources, genetic resources and associated traditional knowledge and technologies, governed partially or completely by its own customs, traditions or laws. However, the Act does not define membership or describe the spatial boundaries of the area. Other statutes provide definitions that could be used to determine the custodians of biological and genetic resources and associated traditional knowledge under ABS.

The *Traditional Authorities Act No. 25 of 2000* in defining a traditional community describes jurisdiction in terms of its members inhabiting a common communal area but does not provide for establishing spatial boundaries, and members may include those who reside outside the common communal area or who have assimilated the culture and traditions of that traditional community and been accepted by them.

Conservancies and community forests have legally defined "group" memberships and spatial boundaries. Their rights apply to wildlife or forest resources within their boundaries and which have been approved by the relevant Ministries.

The *Communal Land Reform Act No. 5 of 2002* provides for customary and leasehold rights over a spatially defined area. Land rights are designed for "individuals" (or families) or legal entities but such a right might be used to strengthen the exclusionary rights of a local community over "outsiders" if the local community could hold rights as a group. The Ministry of Agriculture, Water and Land Reform has been exploring ways to use the existing legislation to recognise and register claims or grant new rights to traditional community groups or structures which are not legal entities.



Mongongo (Schinziophyton rautanenii) ***nuts are a valuable food source and the kernels produce an oil which is used traditionally as a body rub and in the cosmetics industry.***
Credit: Jessica Lavelle

In assessing custodianship and benefit sharing, there could be conflicts of interest where multiple groups co-exist. For example, in the Kavango and Zambezi Regions, traditional authorities are the historical traditional leaders and land administrators with their powers both socially embedded and reinforced by legislation. Irrespective of the management rights afforded to conservancies and community forests, traditional authorities maintain power in decision-making processes and often demand benefits from conservancy and community forest enterprises. These demands are rarely challenged for fear of retribution due to the cultural and political power of the traditional authorities. While conservancy and community forests are legally required to have mechanisms for accountability, including benefit-distribution plans and annually reviewed budgets, traditional authorities have no such processes for accountability to their communities. However, conservancies and community forests may not be immune to unscrupulous benefit-sharing agreements and/or corruption.

In areas where multiple ethnic communities co-exist, marginalised communities that do not recognise traditional authorities may be challenged by more powerful communities with endorsed traditional

authorities. In communal areas that are not registered as conservancies or community forests, risks of community exploitation are far greater. This necessitates alternative community based organisations such as cooperatives or trusts, in addition to strengthening land tenure of local community groups under the *Communal Land Reform Act No. 5 of 2002*.

3 Lack of clarity about ABS amongst stakeholders

In June 2018, the Ministry of Environment, Forestry and Tourism facilitated a consultative workshop to review the draft regulations of the Act. The workshop revealed wide differences among participants on their knowledge of ABS, their expectations of the regulations, and their role in implementation. Participants' knowledge ranged from those with detailed understanding of the Act and draft regulations, to those who were unfamiliar with the legislation and did not know the difference between bioprospecting and biotrade. There were also discrepancies regarding whether biotrade should be excluded from the scope of the regulations. Expectations were divided on the regulations needing to be detailed and prescriptive (i.e. providing "certainty") versus flexible and adaptable (i.e. providing "practicality").

Awareness training was undertaken in some locations in North Central and Zambezi Regions, Bwabwata and Namib-Naukluft National Parks, and Keetmanshoop. These events indicated that discrepancies in literacy may hinder understanding of the legislation.

4 Over-regulation may hinder existing systems of biotrade and benefit sharing and inhibit local valorisation of biological and genetic resources

Experiences elsewhere suggest that biotrade activities should only be regulated under particular circumstances where volumes are large and where overexploitation is a concern. Further, that the regulation of biotrade commercialisation activities should require measures that are significantly different to bioprospecting.

The leaves, twigs and branches of the mopane tree are used traditionally while the seeds are harvested in the Kunene Region, Namibia for extraction of an essential oil used in the cosmetics industry. *Credit: Jessica Lavelle*

In Namibia, many households depend on the income generated from biotrade and multiple systems exist for the sustainable management of resources and benefit sharing. For example, in the Kunene Region, products are traded through the Kunene Conservancies Indigenous Natural Products Trust, a legal entity owned by conservancies that enters into trade agreements with industry partners. The use of the conservancy institutional framework ensures sustainable management of the use of resources and equitable benefit sharing through direct payment to harvesters for raw materials. The Opuwo Processing Facility, owned by the Trust, processes the raw materials and produces essential oils. A percentage profit share is divided based on the value of all raw material collectively harvested by each participating conservancy. The Eudafano Women's Cooperative in Oshana Region produces marula oil for international markets and has 26 associations and 2 500 members. Raw materials are processed into oils at Eudafano Women's Marula Manufacturing in Ondangwa, owned by the cooperative, which has enabled increased income to members.

Over-regulation of resources through ABS can marginalise poor communities. Therefore, in developing policy and associated regulations, caution must be exercised by governments. The imposition of additional fees and levies at a national level will most likely diminish benefits to communities as costs to small businesses and exporters increase. An alternative scenario is an increase in industry sourcing materials from unregulated informal markets and/or corruption to avoid fees and burdensome bureaucracy. In the case of South Africa, additional permitting and increased transaction costs have deterred business and research interest. Lastly, regulations seeking to protect local communities from exploitation may inadvertently hinder the documentation, protection and revitalisation of traditional knowledge and value-addition by local institutions through prohibitive research and development permit procedures. In developing policy and associated regulations, it is necessary to interrogate whose interests will be served.

RECOMMENDATIONS

1. Relevant policies and laws for indigenous plants, wildlife and fish should be harmonised by the Ministry of Environment, Forestry and Toursim; Ministry of Agriculture, Water and Land Reform; and Ministry of Fisheries and Marine Resources.

2. Permitting procedures should be streamlined between the National Commission on Research, Science and Technology and relevant Ministries, and widely communicated with clear guidelines.

3. Institutional complexity at the local level requires careful consideration in defining rights holders in a benefit-sharing agreement. Regulations should avoid over-prescription in this regard.

4. With the publication of the regulations, the Ministry of Environment, Forestry and Tourism, Directorate of Environmental Affairs, and National Commission on Research, Science and Technology should create awareness and disseminate information to improve understanding of ABS and clarify distinctions between biotrade and bioprospecting.

5. To mitigate limited government resources, awareness campaigns should be developed in partnership with, for example, NGOs working in communal areas, to target different stakeholders considering their different roles, literacy levels and languages.

6. Applied research on ABS should be promoted with the knowledge and experience gained shared through publications, peer-to-peer exchange visits and presentations, and used to inform future amendments.

7. Caution must be exercised by governments when developing policy and associated regulations to avoid inappropriate laws and over-regulation. Given the success and importance of existing biotrade to rural households, these systems should be used as examples in the implementation of ABS and should not be subject to unnecessary regulation.

CONCLUSION

Access and benefit-sharing policy and legislation can be a powerful tool to prevent the historical exploitation of local communities and traditional knowledge. However, notions of "local communities" and "traditional knowledge" are fraught with complexity that must not be underestimated.

Policy and legislation in itself will not protect the rightful owners of traditional knowledge or ensure equitable benefits. And overregulation can prevent any benefits at all. Policy should seek to guide, not prescribe, processes, with rigour applied in implementation specific to the local context including existing institutions, respect for local needs and regulatory clarity.

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