

OAU Draft Legislation On Access To Biological Resources and Community Rights (1999)

Whereas, the State together with the civil society exercises sovereign and inalienable rights over the biological resources existing in the national territory,

Whereas, it is necessary to protect and encourage cultural diversity, valuing the knowledge, innovations and practices of the local communities with respect to the conservation, management and use of biological resources,

Whereas, it is the duty of the State and its citizens to regulate access to biological resources as well as [related/associated] [the use of] community knowledge and technologies,

Whereas, the State recognizes the necessity of providing adequate mechanisms which guarantee a just, equitable and effective participation of its citizens in the protection of their collective and individual rights and in making decisions which affect the biological and intellectual resources as well as the activities and benefits derived from their utilization,

Whereas, there is the need to promote and support the traditional and indigenous technologies that are important in the conservation and sustainable use of biological resources and to complement them by modern technologies,

Whereas, there is the need to implement the relevant provisions of the Convention on Biological Diversity, in particular Article 15 on access to genetic resources and Article 8(j) on the preservation and maintenance of knowledge, innovations and practices of indigenous and local communities,
Now, therefore, it is hereby legislated as follows:

Article 1

Definitions

[to be provided later]

Article 2

Objectives

The objectives of this legislation shall be to

- a. ensure the conservation and sustainable use of biological resources and [related] [the protection of community] knowledge and technologies in order to maintain and improve their diversity as a means of sustaining the life support and health care system of the country,
- b. protect and support the rights of local communities over biological resources and their knowledge, innovations and practices with respect to

the conservation and use of biological resources;

- c. provide an appropriate system of access to biological resources and [related] knowledge and technologies based upon mutually agreed terms and subject to the prior informed consent of the State and the concerned local communities;
- d. promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of biological resources and [related] knowledge and technologies as well as ensuring the participation and agreement of concerned communities in making decisions as regards the distribution of benefits which may derive from such use;
- e. promote and encourage the building of national scientific and technological capacity relevant to the conservation and sustainable utilization of biological resources;
- f. provide appropriate institutional mechanisms for the effective implementation and enforcement of community rights and conditions of access to biological resources.

Article 3

Scope

1. This legislation applies to biological resources and [related] knowledge and technologies as well as their derivatives existing in the national jurisdiction of the country both in situ and ex-situ.
2. This legislation shall not apply to the traditional use and exchange of biological resources as well as [related] knowledge and technologies carried out by and between local communities based upon their customary practices.

Article 4

Access to Biological Resources and [related] Community knowledge and Technologies

1. Research and development on biological resources shall be carried out within the country, unless found impossible to do so. When there are competitive requests for access to biological resources, priority shall be given to the collector who undertakes to conduct the research and development within the country.
2. Access to biological resources shall be based upon mutually agreed terms and subject to the prior informed consent of the State as well as the concerned local communities, and to the requirements and conditions set out below:
 - a. The Collector shall request the competent national authority for access to biological resources by application in writing that contains information, inter-alia:

- i. the identification of the applicant and the documents which testify to his legal capacity to contract;
- ii) detailed and specific information about the resources to which access is sought, including its present and potential uses, its sustainability and the risks which may arise from access;
- iii) whether any collection of the biological resource endangers any component of biological diversity;
- iv) the purpose for which access to the resource is requested including, where appropriate, the type and extent of commercial use expected to be derived from the resource;
- v) description of the manner and extent of intended involvement of the country in the necessary research and development of the biological resource concerned;
- vi) the identification or request for the assignment of the national scientific counterpart institution which will participate in the research and be in charge of monitoring the process;
- vii) the precise sites where the resource is located as well as the places where the proposed research and development activities will be carried out. In the case of ex-situ genetic resources, information about the ex-situ center of conservation shall be included;
- viii) an indication of the primary destination of the resource and its probable subsequent destination;
- ix) an indication of the benefits, whether economic, technical, biotechnological, scientific, environmental, social or otherwise, that may derive to the country and the concerned local communities and proposed mechanisms or arrangements for benefit sharing;
- x) description of the knowledge, innovation or practice associated with the resource, if any,
- xi) presentation of an environmental impact assessment where this is required;
- xii) any other information deemed relevant by the competent authority.

b. Once the application is complete, the competent national authority shall place it in a public registry for a period of ___ months which may be consulted by any person.

c. Upon determination that the application has fulfilled all the necessary requirements of the present legislation and subsequent regulations issued for its effective implementation, the competent national authority shall approve the granting of access to the material requested with or without conditions.

2. The competent national authority shall grant permission after the signing of an agreement with the collector. The agreement shall contain as a minimum requisite:

- a. a limit on the sizes of the samples that the collector may obtain and/or export;
- b. guarantee of a deposit of duplicates of all specimens collected with a duly designated governmental entity;
- c. a commitment by the collector to inform the competent authority and,

where appropriate, the concerned local community of all findings from the research and development on the resource, if a commercial use is derived from such activity;

- d. a commitment by the collector not to transfer the resources to any third party without the authorization of the competent national authority;
- e. provision for the payment of [royalties] [a fixed sum of money] to the national government or local communities, in case commercial use is derived from the biological resources taken. Where appropriate and applicable, other forms of additional benefits may be negotiated;
- f. submission of a regular status report of research and development on the resources concerned and where [appropriate] [specimen of biological resources are to be collected in large quantities], on the ecological state of the area to the competent national authority; and
- g. commitment to abide by the relevant rules of the country particularly those regarding sanitary control, biosafety and the protection of the environmental as well as the cultural practices, traditional values and customs of the local communities.

3. No import or export of any biological resources shall be allowed to and from the country unless the competent national authority confirms that a prior informed consent has been obtained from the country of origin.

4. The competent national authority may unilaterally withdraw its consent and terminate the agreement and/or further use of the biological resources concerned whenever it has become apparent that the collector has violated any of the mutually agreed terms, or the overriding public interest so demands.

5. The competent national authority shall ensure that a guarantee has been obtained from the State in whose jurisdiction the collector operates regarding the latter's compliance with the mutually agreed terms and conditions of access to the biological resources.

6. Any claims upon biological resources obtained or used in violation of the provisions of this legislation or mutually agreed terms and conditions shall not be recognized and the certificate of intellectual property or similar certificates and licences upon such resources or products and processes resulting from access shall not be considered valid.

7. The competent national authority may, when it deems it necessary, establish restrictions to or prohibitions on those activities which are directly or indirectly related to access to or introduction of biological resources, particularly in cases of:

- a. endangered taxa;
- b. endemism or rarity;
- c. adverse effects upon human health or upon the quality of life or the cultural values of the local communities;
- d. environmental impacts which are undesirable or difficult to control;
- e. danger of genetic erosion or loss of ecosystems, their resource or their components, because of undue or uncontrolled collection of germplasm;
- f. non-compliance with rules on bio-safety or food security; and

g. use of resources for purposes contrary to national interest and to relevant international agreements entered into by the country.

Article 5

Community Rights

1. The State shall recognize and protect the rights of the local communities to collectively benefit from their knowledge, innovations and practices acquired through generations (past, present and future) and to receive compensation for the conservation of biological resources in accordance with the provisions of this legislation and subsequent regulations
2. The local communities shall at all times and in perpetuity be the lawful and sole custodians [as well as generators] of the relevant knowledge, innovations and practices.
3. No such knowledge, innovations or practices shall be sold, assigned, transferred or dealt with in any manner without the prior informed consent of the local communities concerned.
4. The State shall ensure that at least__ percentum of benefits obtained from any commercial use of biological resources are paid to the concerned local communities.
5. Subject to the above paragraphs of this Article, the State shall take regulatory measures to establish and implement a system of collective/community [intellectual] [achievements] rights through a process of consultation with and participation of the local communities. Such measures shall include:
 - a. the identification of the types of collective [intellectual] [achievements] rights that are recognized in each case;
 - b. the identification and definition of the requirement and procedure necessary for the recognition of the collective [intellectual] [achievements] rights and the title to same;
 - c. definition of a system of collective registration and specific rights and obligations that arise from the entitlement;
 - d. criteria and mechanisms for the standardization of procedure; and
 - e. licenses for the exploitation and commercialization of the protected species, varieties or lineages.
6. The State shall identify, in consultation with local communities , technical institutions to assist them to identify and characterize their innovations.
7. The State shall ensure that local communities have the right not to allow the collection of biological resources and access to thier traditional technologies, knowledge, innovations and practices, as well as to demand restrictions upon such activities when it is proved that such activities threaten the integrity of their natural or cultural patrimony.

Article 6

Institutional Arrangements

1. A national inter-sectoral coordination body at the highest level, composed of relevant representatives from the public sector, scientific and professional organizations, NGOs and representatives of local communities, shall be created as a regulatory body to ensure the proper implementation and enforcement of the provisions of this legislation.
2. A technical secretariat (advisory body) which shall equally be inter-sectoral and composed of representatives of the public sector, research institutes and centres, the academic sector, authorities of community organizations and NGOs shall be created to support the work of the national inter-sectoral coordination body .
3. The national inter-sectoral coordination body shall have, inter-alia, the following functions:
 - a. ensure that the minimum conditions for agreements with collectors is strictly observed and complied with;
 - b. ensure that the rights of local communities wherein the collection of or research on biological resources are being conducted are protected, including verifying that the requirement of prior informed consent by the local communities are complied with;
 - c. study and recommend policies and laws on the sustainable use of biological resources including new laws on intellectual property rights and community rights over their knowledge, innovations and practices [relevant to the conservation and sustainable use of biological resources];
 - d. recommend policies and mechanisms for coordination between the entities competent in matters of biodiversity and bio-safety;
 - e. establish, together with relevant sectoral agencies, local communities, scientific and non-governmental organizations, lists of genetic resources threatened by extinction and deterioration, and of the places threatened by serious loss of biological diversity;
 - f. issue and update every ___ years, a report on threats to the national biodiversity and about the potential impacts of its deterioration upon sustainable development;
 - g. establish a mechanism to enable the identification and dissemination of information regarding threats to biological and genetic diversity; and
 - h. perform such other functions as may be necessary to implement this legislation.

Article 7

Establishment of a National Information System

There shall be established a National Information System with regard to biological resources which include the following aspects:

- a. the creation of facilities required to maintain an up-to-date system of

information about the research and development activities on the biological resources of the country, and
b. measures towards the repatriation of information on the country's traditional knowledge and technologies [related with biological diversity].

Article 8

Funding

The funds required to undertake activities towards implementing the provisions of this legislation shall be obtained through [budgetary allocation] [the establishment of a national trust fund] for which resources may include:

- a. allocation of state budget;
- b. a portion of the benefits shared by appropriate and concerned sectoral departments;
- c. incomes and fees imposed on access agreements; and
- d. any other source of funds to be identified.

Article 9

Appeals

Decisions on approval, disapproval or cancellation of agreements regarding access to biological resources may be appealed through appropriate administrative channels. Recourse to the courts shall be allowed after exhaustion of all administrative remedies.

Article 10

Sanctions and Penalties

1. Without prejudice to the exercise of civil and penal actions which may arise from violations of the provisions of this legislation and subsequent regulations, sanctions and penalties to be provided may include:
 - a. written warning;
 - b. fines;
 - c. automatic cancellation/revocation of the permission for access;
 - d. confiscation of collected biological and genetic specimens and equipment;
 - e. perpetual ban from access to biological resources in the country.
2. The violation committed shall be publicized in the national and international media and shall be reported by the competent national authority to the secretariats of relevant international agreements and regional bodies.