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Namibia's Access to Biological and Genetic Resources and Associated Traditional Knowledge Act and the Protection of Local Communities

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Introduction

Namibia ratified the **Convention on Biological Diversity**[1] on 16 May 1997, and acceded to the **Nagoya Protocol**,[2] a complementary agreement to the Convention, on 15 May 2014. The Nagoya Protocol addresses the issue of fair and equitable sharing of benefits arising from the utilisation of genetic resources, and the associated issues of genetic resources in the hands of local communities and the traditional knowledge associated with genetic resources. When accessing such resources, Contracting Parties are held to ensure free, prior and informed consent by the local community concerned, and fair and equitable benefit-sharing mechanisms. Namibia's **Access to Biological and Genetic Resources and Associated Traditional Knowledge Act, 2017**[3] (the "ABS Act") provides for implementing the Nagoya Protocol in this country.[4]

1. Scope and Objectives

The Act applies to biological and genetic resources as found in or outside of their natural habitat, the derivatives of such resources, associated traditional knowledge, and benefits arising from their use, including commercial use (ABS Act, sec. 3). In line with the Nagoya Protocol, its central objective is to provide for the conservation, evaluation and sustainable use of biological and genetic resources and associated traditional knowledge (ABS Act, sec. 2).

A distinction between the Nagoya Protocol and the Act is that the Protocol refers to "indigenous and local communities" whereas the Act does not mention the word "indigenous". Instead, it defines "local community" as:

> "*a group living or having rights or interests in a distinct geographical area within Namibia 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*" (ABS Act, sec. 1).

However, the Act does not set out what constitutes the borders of an area or what makes a person a community member or a rights holder. For local communities to instrumentalise legal provisions and rely on them for protection of their rights, it is important that the legal provisions address such rights very specifically. Otherwise, community members can be hindered in seeking to actually enforce the law that is meant to protect them. This was the case in *Tsumib and Others v Government of the Republic of Namibia and Others*,[5] involving the Hai||om people, an indigenous community, a rights-bearing entity under international law and one of the marginalised local communities in Namibia, who faced difficulty in requesting the High Court to allow them to bring a group action.

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1 The Convention on Biological Diversity entered into force on 29 December 1993.

2 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (aka "Nagoya Protocol on Access and Benefit-sharing (ABS)"), adopted on 29 October 2010 in Nagoya, Japan, entered into force on 12 October 2014.

3 The Access to Biological and Genetic Resources and Associated Traditional Knowledge, 2017 (Act No. 2 of 2017), promulgated by Government Notice No. 160 on 27 June 2017 (*Government Gazette No. 6343)*, was brought into force on 1 November 2021 by GN 236/2021 (*GG 7673*).

4 Natural Justice, "Namibia Passes their National Bill on ABS and Traditional Knowledge", 11 July 2017.

5 *Tsumib and Others v Government of the Republic of Namibia and Others* (SA 53 of 2019) [2022] NASC 6 (16 March 2022).

The High Court held, and the Supreme Court later confirmed, that under Namibian law they must either be represented by the Hai||om Traditional Authority, so recognised under the Traditional Authorities Act, or form an association in terms of common law. However, the Hai||om community have been criticising their Traditional Authority for being too closely related to the government against which the claim was brought while not representing the community's interest. Therefore, referring to their Traditional Authority as a vehicle for litigation would have defeated the purpose of the lawsuit.[6] As for the alternative of forming an association, the legal stance of an association would be equally as unsure as that of individuals. In the end, the lack of a legal definition of what a member of a local community member is, has hindered the Hai||om people's effort to enforce their rights before the Courts. The same dilemma may arise for any traditional community based on the definition in the ABS Act, if community members are not in agreement with the approach of their Traditional Authority or do not feel represented by their Traditional Authority.

In addition, in terms of the definition by area, in areas where several local communities coexist or there is, for example, a Traditional Authority as well as a Community Forest and/or Conservancy, determining the ownership of rights and access to benefits could provoke conflict. This is especially harmful in areas where marginalised communities live under Traditional Authorities that they do not recognise.[7]

2. Rights conferred by the ABS Act

The Act divides the rights to biological and genetic resources and associated traditional knowledge between the State and local communities. With regard to biological and genetic resources, subject to access rights, right holders have: the right to collectively share the arising benefits (ABS Act, sec. 12(a)); the right to protect their biological and genetic resources and associated traditional knowledge as traditional custodians and users (ABS Act, sec. 12(b)); and the inalienable right to use their biological and genetic resources and associated traditional knowledge in the course of sustaining their livelihood systems, conservation and sustainable use of biological diversity (ABS Act, sec. 12(c)). Apart from these rights, any right regarding the access to, collection of and exercise of control over any biological or genetic resource vests in the State (ABS Act, sec. 1).

On the one hand, allocating the rights to biological and genetic resources to the government is a necessary step to allow its effective control over them. On the other hand, overregulation can further marginalise local communities by restricting their own trade with the resources, since the regulations also apply to their commercial use, and additionally, it can promote corruption and the formation of illegal markets, which prevent the accumulation of benefits for local communities.[8]

As regards traditional knowledge, rights relating to such knowledge vest in the local community that holds and applies the knowledge for the sustainable conservation of the genetic resource (ABS Act, sec. 2). The State must recognise and protect the community intellectual property rights as they are set out under the norms, practices and customary law of the community concerned,

6 Dieckmann, U. (2020), "From colonial land dispossession to the Etosha and Mangetti West land claim: Hai||om struggles in independent Namibia", in W. Odendaal and W. Werner (eds), *"Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia*, Legal Assistance Centre, Windhoek, 2020, p. 102.

7 Hazam, J. and Lavelle, J. (2020), "Implementing Namibia's Access to Biological and Genetic Resources and Associated Traditional Knowledge Act", *Voices for BioJustice*, Policy Brief, p. 3.

8 Ibid.

whether such law is written or not. Items of traditional knowledge must be identified, interpreted and ascertained in accordance with customary practices and law, whether such law is written or not. Non-registration of any traditional knowledge does not render it unprotected as community intellectual property rights (ABS Act, sec. 13).

Herein lies the core of the problem regarding the definition of the term "local community". Who actually owns traditional knowledge? Who is "*the particular local community which holds and applies such knowledge for the sustainable conservation of the genetic resource*" (ABS Act, sec. 2)? Traditional knowledge can be held by various community members, across several communities, or by just one of several communities in one area. Some communities regard their knowledge as spiritual and hence impossible to be owned by an individual.[9] Without an exact definition of what a local community is and who its members are, marginalised groups and individuals effectively remain unprotected, as shown in the *Tsumib* case cited herein. In the case of two communities occupying the same area, as well as when an area has a Traditional Authority and a Community Forest or Conservancy, not all members of a community might be or feel represented by these authorities and their decisions. At the same time, the removal of a chief when the local community is disagreeing with their leadership is challenging. A chief, it seems, is appointed for a lifetime, but can be removed under section 8(1) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000) and "*in accordance with the customary law of that community*". However, section 3(3)(c) of the same Act holds that the Traditional Authorities can make customary law, thus giving them the power to set out the requirements for their own removal. Furthermore, it has been questioned in various instances whether Traditional Authorities are best suited to represent their own communities. The San communities have held for years that in their customary law, a hierarchical position such as a Traditional Authority is not provided for because they rely on a more egalitarian system with a group of leaders.[10] In Uis, the Daures Daman Traditional Authority has been accused of selling letters of consent for mining activities to the Chinese mining company Xingfeng in exchange for food and chairs. They allegedly did so without consulting community members or understanding the negative social and environmental consequences of their actions.[11]

Even if a rights holder is identified, section 13 of the ABS Act only protects traditional knowledge within Namibia. To protect it from exploitation on an international level while collecting benefits, a patent is required. In many cases, such patents have already been registered by international companies in Western countries. The blame for this can be placed mainly on the lack or absence of investigation, prior to patenting, of whether the discovery by the Western entity is in fact part of the traditional knowledge of a foreign local community. A prime example is the Hoodia plant that is native to Namibia, South Africa and Botswana, used traditionally by the San to suppress hunger and provide energy on long journeys. After the San shared this knowledge, it was published, hence the South African Council for Scientific and Industrial Research (CSIR) in 1998 obtained a patent for Hoodia's presumed appetite-suppressing quality. Due to a lack of own research funds, a licence was granted to the UK company Phytopharm and the US company Pfizer for the development of the active ingredient in the Hoodia plant, namely p57, to be used as a pharmaceutical drug for dieting.[12] This exploitation of the traditional knowledge was widely publicised, but the patenting

[9] Andrzejewski, A. (2010), "Traditional Knowledge and Patent Protection: Conflicting Views on International Patent Standards", *Potchefstroom Electronic Law Journal (PELJ), 13(4)*, pp. 94-125.

[10] Dieckmann, U. (2020), op. cit.

[11] *New Era Live*, "Chief denies selling mining rights for hamburgers", 30 March 2023.

[12] World Intellectual Property Organization (WIPO) (n.d.), "Leveraging Economic Growth through Benefit Sharing".

was deemed irreversible, since fighting the patent in court would mean disclosing the knowledge to the public and thereby rendering it worthless. Instead, the CSIR entered into a benefit-sharing agreement with the South African San Council, stating that the communities will receive 8% of all milestone payments received by the CSIR from the licensee, and 6% of any royalties paid to the CSIR from sales of the final product. However, this agreement has highlighted the risks that come with the conclusion of such agreements. On the one hand, due to reported side effects from taking/applying some products, and difficulties in calculating export numbers, the San communities have received fewer payments and lesser amounts than expected. On the other hand, the agreement barely sets out any non-monetary benefits. Finally, some voices in San communities have opposed the commercialisation of Hoodia altogether, due to their belief that the plant's power is linked to its natural habitat.[13] Who should be protected?

To effectively protect traditional knowledge as well as collect arising benefits, local communities would have to patent traditional knowledge themselves before someone beats them to it. However, this process is hindered by several issues. Firstly, a patent requires an element of novelty at the time of invention. With traditional knowledge that has been around for ages, it can be hard to pinpoint the moment of innovation. Secondly, the knowledge has to be prepared for a patent to be granted. For a plant that has pain-reducing effects, for example, the exact active ingredient has to be isolated, and such research requires resources and funding that are not readily available in Namibia. Where local scientists are able to conduct the research, when they publicise their findings they risk exposing the knowledge to exploitation, as it is hard to control who accesses and uses the published material. Furthermore, the problem of resources is not limited to the aspect of research; it also applies to registering the patent as well as employing the knowledge in a commercial way to maximise the community's profit. Finally, the question of ownership comes up again, in that a patent has to be registered in the name of an individual or an entity.[14]

Another way to protect traditional knowledge as well as biological and genetic resources is to register a geographical indication (GI), but this option is not currently included in the ABS Act. The GI allows for protecting a product that has a specific geographical origin and possesses a quality or a reputation that is due to that origin, by creating standards that must be upheld in order to market a product as the said product. However, although the GI prevents companies from filing for patents or trademarks in regard to the product, it does not entail benefit-sharing. After several issues with patent and trademark filings, the GI is the option that South Africa chose for its Rooibos plant. While local communities do not directly benefit from sales of Rooibos through international companies, they also cannot be prevented from commercialising it themselves.[15] However, Namibia does not have a GI framework at present.

The third right of local communities established in the Act is the right to collectively share the benefits arising from the access to their biological and genetic resources as well as the use of their traditional knowledge (ABS Act, sec. 12(a)). Monetary benefits include, for example, access fees, payment of royalties, research funding and joint ownership of relevant intellectual property rights. Non-monetary benefits include, for example, sharing of research and development results, participation in product development, and admittance to ex situ facilities of biological and genetic

[13] UNESCO Intangible Cultural Heritage (ICH), "Case Study 18: The commercialization of traditional knowledge about an appetite suppressant in South Africa and Namibia".

[14] Andrzejewski, A. (2010), op. cit.

[15] WIPO (n.d.), "Disputing a Name, Developing a Geographical Indication".

resources and to databases by participating institutions and employment (ABS Act, sec. 10). This amplifies the necessity for a precise definition of who holds the rights to resources and knowledge, as it is directly linked to the receival of benefits. The ABS Act also does not provide for a specific mechanism to control equitable sharing of benefits. Furthermore, it is questionable how much monetary benefits would actually serve local communities. In the case of the Hoodia plant, even though the profits received were less than expected, the San struggled to put them to use effectively due to a lack of organisational structures. San community members have voiced a preference to live practising their culture in harmony with nature rather than participate in a monetary system for survival. Instead, non-monetary assistance such as capacity-building would be required to provide a breeding ground for the utilisation of future profits.[16]

3. Access

Prior to carrying out any research, commercialisation, export or other uses requiring access to biological and genetic resources in Namibia, an access permit in the prescribed form and manner is needed. For export, an additional export permit issued by the Ministry is required (ABS Act, sec. 8).

Additionally, access to biological or genetic resources and traditional knowledge, and thus the relating permit, is subject to written prior informed consent of the concerned right holders (ABS Act, sec. 9). Before approaching right holders for obtaining free, prior and informed consent, the Biological and Genetic Resources and Associated Traditional Knowledge Office must be notified. In order to obtain consent, the user is required to provide a full explanation of how the biological or genetic resource and the traditional knowledge is to be acquired and used. The concerned right holder may refuse access. However, the Minister of Environment, Forestry and Tourism ("the Minister"), when required in terms of the provisions of the Nagoya Protocol, may with reasons and in compliance with Article 18[17] of the Namibian Constitution, reverse the decision.

The principle of free, prior and informed consent is established in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Recognising the rights of indigenous people to the lands, territories and resources which they have traditionally owned, occupied or used, the UNDRIP holds that any decision regarding these lands, territories and resources requires free, prior and informed consent by the rights holders. This entails consultation and meaningful participation in all aspects of the project, from initial assessment and planning to monitoring and closure; without any form of coercion; before any authorisation is granted; and with full and accurate disclosure of information about the proposed developments in accessible and understandable form.[18]

While it is commendable that the principle is cited in the ABS Act, the effect of this is significantly diluted by the blurred borders of the term "local community". Without a clear specification of who is responsible for giving consent, i.e. who is the rights holder, the term is reduced to a mere empty shell. Local community members will not be able to veto a decision of the Traditional Authority

[16] UNESCO ICH, "Case Study 18", op. cit.

[17] Article 18 of the Namibian Constitution, addresses Administrative Justice and states that, *"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a Competent Court or Tribunal."*

[18] Legal Assistance Centre: "Free, Prior and Informed Consent: What is it and how does it apply to the protection of Namibia's indigenous peoples' rights over their land and natural resources?", p. 3.

and establish the need for their consent in court due to a lack of grounds. There is no procedure set out for how individual community members can influence the decision-making process and have it reviewed. In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others,*[19] the South African High Court underlined that during consultations that are meant to uphold the principle of free, prior and informed consent, all community members, not just the leaders or Traditional Authorities, must be included in the process (para. 92). In Namibia, the repeated complaints about the mining activities of Reconnaissance Africa where community members were not being consulted at all, or were being kept from attending consultation meetings because of COVID-19 regulations, are an example of the exclusion faced by local communities where an effective procedure is not prescribed by the law.[20]

4. Legal recourse

In connection with the provisions regarding the participation in the decision-making process, the ABS Act also provides an avenue for legal recourse against decisions made under the Act, such as the issuance of a permit. The appeal of a decision of the head of the Biological and Genetic Resources and Associated Traditional Knowledge Office is to be brought to the Minister (ABS Act, sec. 18(1)). The appeal of a decision of the Minister made in terms of the ABS Act is to be brought to the High Court within the prescribed period (ABS Act, sec. 19(1)).

In light of the above-mentioned weaknesses of the provisions ensuring the participation of local community members, challenging a decision after it has been made might become their only resort. This scenario is likely, as it could be observed in recent years in regard to mining licences and the required Environmental Clearance Certificates required for them, which are granted on the basis of a decision-making process similar to that pertaining to access permits under the ABS Act.

Due to the similarities in the structure of the law, case law relating to mining activities is also suitable for highlighting challenges that local communities face when relying on legal recourse in relation to the ABS Act.

Just like under the Environmental Management Act, 2007,[21] which constitutes the requirements of an Environmental Clearance Certificate for mining activities, an appeal made to the Minister under the ABS Act does not suspend the operation or execution of the decision pending the decision of the Minister, unless the Minister, on the application of a party, directs otherwise. In *Ncumcara Community Forest Management Committee and Others v Environmental Commissioner and Others*,[22] the drilling operations for mining were already underway when local community members found out about them and registered an appeal with the Minister concerning the issuance of the Environmental Clearance Certificate. Operations were allowed to continue while the Minister was deliberating.

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19 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk) (1 September 2022).

20 Frack Free Namibia, "Frack Free Namibia: Advocating for the Most Marginalized as Government Welcomes Canadian Oil and Gas Exploration in the Kavango Regions", 28 October 2022; and *Ncumcara Community Forest Management Association v Environmental Commissioner* (HCMD-CIV-MOT-GEN 289 of 2022) [2022] NAHCMD 380 (29 July 2022).

21 Environmental Management Act, 2007 (Act No. 7 of 2007) (*GG 3966*), enforced on 6 February 2012 by GN 28/2012 (*GG 4878*).

22 *Ncumcara Community Forest Management Association v Environmental Commissioner*, op. cit.

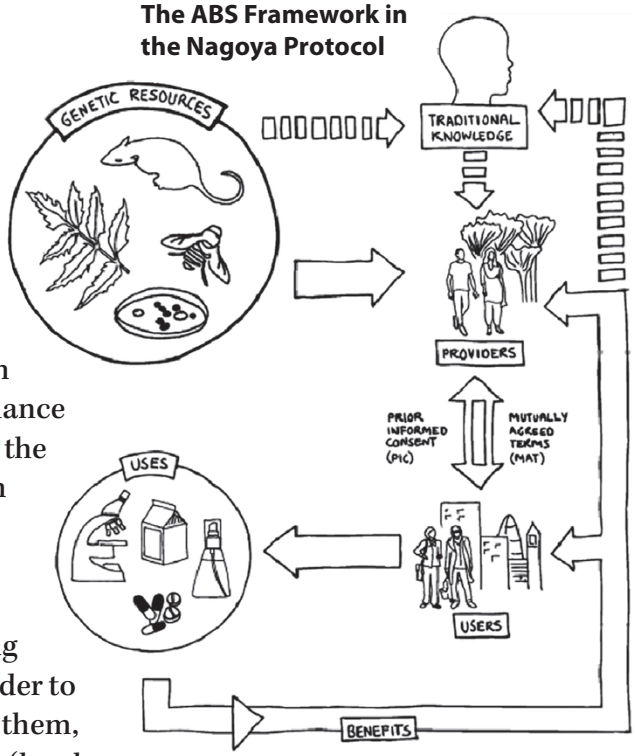
After five days without intervention, the affected Community Forest Management Committees applied to the Court for an urgent interim interdict. However, the Court found that it did not have jurisdiction in the narrower sense, since section 50 of the Environmental Management Act reserves for the Minister the right to decide on the appeal. The Court considered intervention to be possible only if the Minister refused to make any decision or had already come to one (para. 74). This meant effectively leaving the local community defenceless, as due to the quick progression of the drilling operations, time would have been of the essence to protect their land. Since the process of accessing biological and genetic resources and traditional knowledge can be concluded just as fast, if not faster, the same issue arises in regard to the ABS Act.

Furthermore, in *Ncumcara Community Forest Management Committee and Others v Environmental Commissioner and Others*, the Court also questioned whether Community Forest Management Boards have *locus standi*, since they are not legal entities (para. 35). Due to the high costs of legal proceedings and the required coordination, filings by individual community members are a more difficult undertaking. In addition, local community members would have to argue that it was in fact their individual free, prior and informed consent that constitutes the requirement set out in section 9 of the ABS Act. As already explained in this paper, this is unsure based on the Act.

5. Conclusion

While the ABS Act is a step in the right direction in the protection Namibia's local communities and their natural and biological resources and traditional knowledge, it fails to provide them with effective measures and procedures that will ensure the implementation of their rights. In many respects it seems that the reality of life of members of marginalised communities has not been sufficiently considered. An immediate step to enhance the law would be to determine, in conjunction with the affected communities, a comprehensive definition of the term "local community", since a large share of the problematic issues is connected to the lack of clarity of what this term entails. However, these issues also hint at a deeper underlying issue, being the exclusion of minorities from governance. In order to create legal provisions that protect and empower them, members of local communities need a seat at the (legal drafting) table in Namibia.

The ABS Framework in the Nagoya Protocol



Source: *Introduction to Access and Benefit-Sharing* (factsheet), Secretariat of the Convention on Biological Diversity, 2010.

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