

ABS IN KENYA

Overview of legal requirements, procedures and relevant authorities

ABS in national legal and policy framework

Several laws and rules in Kenya address ABS-related issues, including:

- Constitution of Kenya (2010) establishes that natural resources and the benefits derived from them belong to the Government and people of Kenya
- Environment Management and Co-ordination Act (adopted in 1999 and amended in 2015) provides for the establishment of ABS measures
- Environmental Management and Co-ordination (conservation of biological diversity and resources, access to genetic resources and benefit sharing) Regulations (2006) establish ABS requirements
- Wildlife Conservation and Management Act (2013) includes permitting requirements and procedures for different activities involving wild and native animals, plants, microorganisms or parts thereof, including bioprospecting, on public and private lands
- Protection of Traditional Knowledge and Cultural Expressions Act (2016) establishes ABS requirements with respect to traditional knowledge associated with genetic resources
- Science Technology and Innovation Act (2013) regulates scientific research and development in Kenya.
- Forest Conservation and Management Act (2016) includes provisions on trade in timber and non-timber products



Introduction

Kenya is a mega-biodiverse country and recognises the significance of its wealth of biological resources to national well-being and economic prosperity. The importance of conserving and sustainably using its resources while ensuring the sharing of benefits from their use, as a way to contribute social, cultural and economic wellbeing has also been acknowledged.

Kenya is a Party to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Resulting Benefits (Nagoya Protocol) since 12 October 2014. A number of national laws and regulations with provisions linked to access and benefit sharing (ABS) are in place. Yet work is still ongoing towards putting these rules in practice and ensuring a coordinated approach to ABS implementation. This note provides an overview of ABS rules and practices in Kenya, particularly as may be relevant to companies working with specialty ingredients for food, beverages, cosmetics, fragrance and flavours and natural pharmaceuticals.

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Scope of ABS requirements

The scope of ABS requirements in Kenya is established in the 2006 ABS regulations but should be considered in the context of the broader legal framework and the way authorities interpret and put these requirements into practice.

Under the 2016 regulations, ABS requirements cover access to genetic resources, derived products and intangible components for purposes of research, bioprospecting, conservation, industrial application or commercial use. That is, ABS rules in Kenya have a broad scope and may apply to a range of activities linked to ingredients from biodiversity.

What resources are covered?

- ✓ «Genetic resources», which can be considered to include plants, animals, microorganisms, other biological resources and parts thereof.
- ✓ «Derived products» are not defined in the Kenyan ABS Regulations. The term is understood to include but go beyond «derivatives» as defined by the Nagoya Protocol. That is, it would cover «naturally occurring compounds» such as butters, oils and natural molecules and also compounds that are modified such as purified or modified plant extracts.
- ✓ All types of species are covered, whether native or introduced, cultivated or wild, collected *in situ* or in *ex situ* conditions - though some ABS-related rules, such as provisions in the 2013 Wildlife Act, may have a more restrictive scope.
- ✓ Intangible components cover traditional knowledge as well as any information related to genetic resources, which could include digital sequence information.



What activities are covered?

ABS regulations cover a range of activities, including research, bioprospecting, conservation, industrial application, and commercial use. Though these terms are not defined, the scope of activities covered by ABS requirements would seem quite broad. However, other legal and guidance documents suggest a narrower focus, namely activities that involve research and development. For example, in accordance with the 2016 ABS regulations, a research permit from the National Commission for Science, Technology & Innovation (NACOSTI) is a pre-requisite to an ABS permit (see section on access requirements).

How is research and development understood? Under the 2013 Science Technology and Innovation Act, any person intending to undertake research in science and technology in Kenya, or accessing, handling any material or technology coming from the country, requires a research permit. NEMA, in its guidance on ABS, defines research as covering activities undertaken to increase scientific and technical knowledge and devise new applications for such knowledge. The term would thus include applied research, including bioprospecting and other collection of information related to sectors such as agriculture and medical, physical or biological sciences and leading to new devices, products or processes.

Is there broader application of ABS principles?

It is important to note that ABS principles, including prior informed consent and fair and equitable benefit sharing, may also be relevant and put into practice in other types of activities. The Kenyan legal framework, namely the 2013 Wildlife Act and the 2016 Forestry Act, regulate activities such as bioprospecting, trade in non-timber products, wildlife exploitation, and game farming. Rules for these activities refer to concepts such as prior informed consent and benefit sharing, which are considered by authorities in the relevant permitting processes.

Access requirements

Access to biological resources in Kenya involves a number of different permits and procedures, which are not only related to ABS. Depending on the activities, companies may be required to secure a research permit, an export permit, a phytosanitary certificate and a material or information transfer agreement. This section focuses on three ABS-specific requirements: prior informed consent (PIC), mutually agreed terms (MAT), and an ABS permit.

Prior informed consent (PIC)

Prior informed consent (PIC) is the authorisation required from the provider of genetic resources (see box) for the proposed access and utilisation activities. In practice, PIC is granted through a document signed both by providers and users, following a process of consultation. The PIC document includes information on the user of genetic resources, local partners, genetic resources to be accessed, permitted uses, details of collection and potential environmental and socio-economic impacts of access and utilisation of genetic resources, and benefit sharing arrangements. These points are further developed in the mutually agreed terms (MAT).



Who is the provider?

The provider is the person or entity with rights and responsibilities over the genetic resources and associated traditional knowledge, as determined by the Kenyan legal framework.

Depending on the area where the genetic resources are accessed, providers may include:

- National government institutions in charge of wildlife, forest or marine protected areas where resources are accessed (e.g. Kenya Wildlife Service)
- Indigenous peoples or local communities with rights over land where resources are accessed
- County government authorities in charge of game, forest, land and marine reserves where resources are accessed
- Individuals or legal entities with ownership of private land where resources are accessed

Often, there are overlapping rights over genetic resources, which may require PIC to be secured jointly from national government agencies, county governments and local communities involved. For example, if wild plants are collected from a private game park, PIC would be required from the owner, as well as from the Kenya Wildlife Service (KWS). Indeed, KWS has been actively involved in most ABS cases in Kenya. Local communities and county governments are also often engaged.

Mutually agreed terms (MAT)

Mutually agreed terms (MAT) address the conditions and modalities of access and utilisation of genetic resources and fair and equitable benefit sharing. It also sets out the obligations of users and providers. It is negotiated in the presence of all relevant stakeholders, including government agencies, to ensure fair and equitable benefit sharing.

Topics generally addressed by the MAT in Kenya include:

- Use of material: The user discloses known or potential uses of the resources.
- Change of use: The user must renegotiate PIC and MAT and obtain another access permit in case of change of use of the resources.
- Third party transfer: The user cannot transfer genetic resources or parts thereof to third parties without the consent of the provider.
- The user must report in writing on a regular basis to the competent authority and the provider.
- Intellectual property rights: The user must obtain prior agreement from the provider before applying for any intellectual property rights in relation to the resources.



The MAT also include benefit sharing arrangements, covering both monetary and non-monetary benefits, as agreed between the provider, user and relevant competent authorities (see below).

Access permit

Access to genetic resources in Kenya requires an application to the National Environmental Management Authority (NEMA) for an access permit. The application form to be filled out is contained in the 2006 ABS Regulations and includes information such as:

- Applicant identification and contact details
- Project description, including budget, resources to be accessed and proposed utilisation
- Details of benefits to be shared under the MAT

The application form must also be accompanied by a number of documents, including copy of the PIC, MAT, research permit, research proposal, and proof of payment of application fee. Finally, foreigners intending to carry out research in Kenya must be affiliated with a Kenyan public research institution and present a memorandum of understanding.

If requested by the applicant, NEMA may consider and treat some information relating to the application and proposed access and utilisation activities as confidential.

ABS application process

1 Supporting documents and permits



Prior informed consent (PIC) Providers and users sign PIC after consultation

Mutually agreed terms (MAT) Obligations, conditions and methods of access and utilisation are agreed

Research permit A research permit issued by the National Commission for Science, Technology and Innovation (NACOSTI) is required for the ABS application process

Other permits and documents Material transfer agreements, export permits, phytosanitary certificates or other documents may be required, depending on the planned activities

2 ABS application process

Coordinated by National Environmental Management Authority (NEMA)



This is time foreseen by regulations for the ABS application process

Application

Formal review

ABS technical committee

3 ABS permit issued



NEMA issues the provider an ABS permit

Benefit sharing requirements

Benefit sharing arrangements are discussed and agreed upon between providers and users in the consultation process leading to PIC and outlined in the MAT.

There are no pre-established parameters for benefit sharing. However, the 2006 ABS Regulations provide a list of potential monetary and non-monetary benefits. They also specify that the holder of an access permit must facilitate the involvement of Kenyan citizens and institutions in the execution of the activities under the permit.

Monetary benefits may include, for example, access fees, milestone payments, research funding, investment in equipment and facilities, or joint ownership of intellectual property rights. Non-monetary benefits may include, for example, sharing of research results, cooperation on research and development programmes, participation in product development, training and capacity building, scholarships and exchange programmes.





Contacts

ABS national focal point

Dr. Chris Kiptoo
Ministry of Environment and Forestry
psoffice@environment.go.ke
psofficeenviron@gmail.com

Competent national authority

National Environmental Management
Authority (NEMA)
dgnema@nema.go.ke

Other important contacts

Kenya Wildlife Service (KWS)
Director General
director@kws.go.ke

National Commission for Science,
Technology and Innovation (NACOSTI)
customercare@nacosti.go.ke
info@nacosti.go.ke

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UNION FOR ETHICAL BIOTRADE

De Ruijterkade 6, 1013 AA, Amsterdam, The Netherlands | Telephone: +31 20 22 34567 | Email: info@uebt.org

Representation in Porto Alegre, Brazil | Ghaziabad, India | Antananarivo, Madagascar | Hanoi, Vietnam

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