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INSTITUTE OF DIPLOMACY AND
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From International Policy to Domestic Practice: Challenges in implementing the
Convention on Biological Diversity (CBD) in Kenya //

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DECLARATION

I, CHEGE ANNE hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed..........

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Table of Contents

DECLARATION	ii
ACKNOWLEDGEMENTS	v
DEDICATION	vii
ABSTRACT	viii
ACRONYMS / ABBREVIATIONS	x
CHAPTER ONE	1
INTRODUCTION	1
1.1 The Context.....	1
1.2 Why the Convention on Biological Diversity.....	6
1.3 Background to the problem.....	7
1.4 Statement of the Problem.....	11
1.5 Theoretical Framework.....	13
1.6 Literature Review	16
1.7 Objectives of the Research	24
1.8 Hypotheses.....	24
1.9 Broad Argument Structure.....	24
1.10 Research questions sought to be answered.....	25
1.11 Methodology.....	27
1.12 Chapter Breakdown	28
CHAPTER TWO	30
CONVENTION ON BIOLOGICAL DIVERSITY AND ITS DOMESTICATION IN KENYA 30	
2.1 Introduction.....	30
2.2 Background to the Convention on Biological Diversity (CBD).....	31
2.3 The Nature of the Convention on Biological Diversity.....	32
2.4 Rights of Contracting Parties.....	36
2.5 Obligations of Contracting Parties.....	39
2.6 Concept of domestication of Treaty Law	42
2.7 Domestication of the CBD in Kenya.....	45
2.8 Kenya's Framework Environmental Law.....	52
2.9 National Authority responsible for implementation of the CBD in Kenya.....	53
CHAPTER THREE	56
CHALLENGES IN IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY IN KENYA	56
3.1 Introduction.....	56

3.2 Lack of a clear coordination mechanism	57
3.3 Limited funding	68
3.4 Lack of a coherent domestication policy	71
3.5 Inadequate Political will for conservation	73
3.6 Inadequate capacity.....	76
3.7 Inaccessibility to data and environmental information.....	78
CHAPTER FOUR.....	80
CONCLUSIONS AND RECOMMENDATIONS	80
Areas for further research	90
BIBLIOGRAPHY.....	91
LIST OF STATUTES.....	94

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DEDICATION

This research is dedicated to the future generation, for whom, the present generation must sustainably manage biological diversity.

ABSTRACT

...male and female, he created them. God blessed them and said to them,rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground. ... God saw all that he had made, and it was very good.

Genesis 1; The Holy Bible, New International Version

Concern for the well being of the environment is a phenomenon whose history is as old as the history of man himself, and efforts to conserve and preserve various aspects of the environment have been undertaken at various stages of human development. These efforts have crystallized into a body of norms, principles, and regulations, embodied in international environmental conventions to govern the use of our natural resources. States that agree to be bound by these norms, principles and regulations, agree to do fulfill their obligations to ensure that the objectives of these conventions are met. However, the loss of our natural resources is increasing, and this sharply marks a gap between commitment and implementation.

This research project examines the reasons behind this gap in Kenya in relation to the Convention on Biological Diversity, and how practitioners would close it. Using information drawn from policy experts, and implementers in the country, the study explores the constraints that contribute to this gap and suggests possible solutions. While these constraints are not germane to the CBD, the findings from this case study can be used to give useful pointers to other regimes since the analytical framework adopted is broad enough to permit linkages.

The study concludes that policy formulation should take into account lessons from past related policies. Kenya needs to draw up a compliance action plan to address the issues of inadequate funds, low capacity, lack of coordination mechanisms for implementation of the CBD, and awareness, so that these constraints do not appear like a *'cut and paste'* exercise in every national reporting for the CBD. Until these issues are taken seriously, a gulf will always exist between what the country aims to do and what it actually achieves.

ACRONYMS / ABBREVIATIONS

ACTS	African Centre for Technology Studies
CBD	Convention on Biological Diversity
CHM	Clearing House Mechanism
CoP	Conference of the Parties
DEPI	Division of Environmental Policy Implementation
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act (1999)
FD	Forest Department
GEF	Global Environment Facility
GOK	Government of Kenya
GTI	Global Taxonomy Initiative
IMCE	Inter-Ministerial Committee on the Environment
IUCN	World Conservation Union
KEFRI	Kenya Forestry Research Institute
KIPI	Kenya Industrial Property Institute
KWS	Kenya Wildlife Service
MEA	Multilateral Environment Agreement
NBSAP	National Biodiversity Strategy and Action Plan
NCST	National Council for Science and Technology
NEAP	National Environment Action Plan
NEMA	National Environment Management Authority
NES	National Environment Secretariat

NMK	National Museums of Kenya
ODA	Official Development Assistance
PADELIA	Partnership for the Development of Environmental Law & Institutions in Africa
PPCSCA	Permanent Presidential Commission on Soil Conservation and Afforestation
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNFCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNDP	United Nations Development Programme

CHAPTER ONE

INTRODUCTION

1.1 The Context

Concern has steadily grown about the need to conserve species and natural habitats in the face of rapidly developing threats of all kinds. These are concerns about a loss of potential benefits for both present and future generations, and also a concern with the intrinsic value of biological diversity, which humanity may use, but which it has no moral right to destroy, as well as with its fundamental role in maintaining the life-sustaining systems of the biosphere.¹ These concerns have led states and the international community in general to have, at the very least, an interest in the conservation of species and the habitats in which they live. Widespread disquiet at environmental degradation has crystallized in the form of a consensus to establish rules of international law intended to achieve a better balance between sovereign rights over natural resources, and the need to use them sustainably.

The above consensus has been formalized over the years to establish international environmental regimes. This collective will to conserve the environment has led to various international conventions starting with the 1972 UN Conference on Human Environment to the much broader and integrative Convention on Biological Diversity (CBD) that was adopted in Nairobi on May 22 1992 and opened for signatures in Rio de Janeiro at the United Nations Conference on Environment and Development (UNCED) in June 1992.

¹ De Klemm C. & Shine C., *Biological Diversity and the Law; Legal Mechanisms for Conserving Species and Ecosystems*, Gland, IUCN Publications Services Unit, 1993, p. 3

The 1972 UN Conference on Human Environment otherwise known as the Stockholm Conference was the first major international conference, held under the Auspices of the UN. It was designed to deal with questions surrounding the management and protection of the environment and its relationship with humans. The Conference adopted the Stockholm Declaration containing principles designed to encourage the preservation and enhancement of the human environment. In addition, the Conference recommended the establishment of an enabling institutional arrangement, which resulted in the UN General Assembly's establishment of the United Nations Environment Programme (UNEP).

The twentieth anniversary of UNEP was marked with the UN Conference on Environment and Development (UNCED), which took place in Rio de Janeiro in July 1992. The objective of UNCED was to formulate appropriate mechanisms to address the practical crisis facing humanity in protecting the environment while still guaranteeing a minimum level of development. The output of this Conference was the Rio Declaration on Environment and Development, and adoption of the Convention on Biological Diversity (CBD), Forest Principles and the UN Framework Convention on Climate Change (UNFCCC).

These regimes are founded upon general principles, and relates to the requirement for states to cooperate in dealing with environmental conservation issues.² The International environmental regimes signify a collective will to address environmental problems, and are a blend of hard law

² Principle 24 of the Stockholm Declaration of 1972 noted that 'international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit', while Principle 7 of the Rio Declaration of 1992 emphasized that 'states shall cooperate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth's ecosystem'.

in the form of customary rules and treaties, and soft law, comprising conference resolutions and declarations. They are concluded globally by states, and the parties to these agreements have an obligation to abide by them.

States generally comply with their international obligations, invoking a principle of international law that treaties must be observed.³ Despite this principle, compliance⁴ with and enforcement of international law is widely recognized as one of the principle challenges facing states in pursuit of sustainable development. The interest in environmental enforcement – broadly defined as the range of actions that governments and others may take to encourage and compel compliance with environmental requirements – stems from a desire to ensure that environmental requirements, expressed in policies, laws and permits, lead to real improvements in environmental quality. For the purposes of this research, compliance is taken to refer to the position a state is in with regard to its obligations under an international regime.

Implementing International environmental regimes in Africa has both benefits and burdens. On the benefits side, the principles embedded in these agreements today carry some of the most enlightened ideas for the sustainable utilization of environmental resources, and consequently, offer the best approach to the conservation of Africa's biodiversity. Besides, some of the global environmental agreements have provided a framework for technological and financial assistance to developing countries involved in environmental protection, such as the Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA) of the CBD, and the Global

³ That principle has been codified in the 1969 Vienna Convention on the Law of Treaties, Art 26, entitled *pacta sunt servanda*, which provides that every treaty in force is binding upon the parties to it and must be carried out by them in good faith.

⁴ Compliance is an actor's behaviour that conforms to a treaty's explicit rules

Environment Facility (GEF) for financial assistance.⁵ Compliance with international environment regimes and their prompt domestication determines the extent to which the country benefits from the international regimes.

The biodiversity-related agreements also carry obligations for state parties. Party states, through national environmental law translate the principles in these International environmental regimes into action at national level. In keeping with these agreements, national governments are encouraged to develop national legislation and related institutions to address environmental management issues. The most common way for a state to demonstrate compliance with international legal obligations is by the enactment of legislation.⁶ The International environmental regimes that are specific on enacting legislation for implementation, commit state-parties to various reporting requirements, asking for submission of regular reports to the Conference of the Parties on what they have done to enforce the MEA. The Conference of the Parties (CoP)⁷ to the CBD requires parties to keep the implementation of the Convention under review.

Compliance with International environmental regimes involves a three-step process for most states. First, the state signs the Convention, often at the ministerial level, agreeing to its contents in principle. Secondly, the national government then ratifies that state's commitment to participating in that convention's activities, and lastly, the convention activities enter into force when a specified number of states sign and ratify their involvement.

⁵ UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa *Handbook on the Implementation of Conventions Related to Biological Diversity in Africa*, 1999, p.1

⁶ UNEP, *UNEP Environmental Law Training Manual*, Nairobi, UNEP, 1997, p. 243

⁷ The CoP is the decision making body of the Convention which reviews the implementation of the Convention according to Article 23 of the CBD.

However, compliance with and enforcement of International environmental regimes has been widely recognized as one of the principle challenges facing state-parties in the pursuit of sustainable development in the twenty-first century. Ordinarily, the factors that move states to adhere to treaties vary with circumstances.⁸ States often prefer to agree only on non-binding guidelines or principles which they view as targets rather than firm obligations and which they are usually free to implement (or not) at whatever pace they see fit.⁹

Kenya's socio-economic backbone is its natural resources such as agricultural produce, forest products, minerals and wildlife. The Kenyan Poverty Reduction Strategy Paper for the period 2001-2004 states that approximately 80% of Kenya's population earns its livelihood from land and natural resource based production systems. Conservation, sustainable utilization and management of the environment and natural resources, especially land, water and forests, therefore forms an integral part of national planning and poverty reduction efforts.¹⁰

To ensure development therefore, Kenya relies heavily on its natural resources, and this awareness led the country to ratify the CBD in 1994, accepting to be bound by international obligations to ensure national conservation measures are established. The CBD is a framework instrument, which does not create hard legal obligations for state parties. This would ideally make it easier for state parties to abide by the principles set out, but with the current biodiversity loss in Kenya, we need to identify why the Convention has not been effective.

⁸ UNEP-ACTS, *The Making of a Framework Environmental Law in Kenya*, ACTS Press, Nairobi, 2001 p84

⁹ Hurrel A. & B. Kingsbury, *The International Politics of the Environment; An Introduction*, in Hurrel A. & B. Kingsbury (ed), *The International Politics of the Environment*, oxford University Press, New York, 1992 p.22

¹⁰ Republic of Kenya, Ministry of Finance and Planning, *Poverty Reduction Strategy Paper for the Period 2001-2004*, Nairobi, 2004. pp 43-44

This study therefore seeks to explore the experience in Kenya of adhering to its international environmental obligations, looking specifically at factors that have hindered the effective implementation of the CBD.

1.2 Why the Convention on Biological Diversity

The determination of the specific convention to be covered and the extent of coverage has been done judiciously. The CBD is the only comprehensive Convention that addresses all aspects of conservation of biological diversity. These include conservation of species and their ecosystems, equitable sharing of benefits arising out of the utilization of genetic resources, access to and transfer of technology relevant to conservation and use of genetic resources, and mechanisms to provide funds to developing countries to assist in conservation of biodiversity.

Early treaties include conservation measures for certain species or certain types of natural habitat or protected areas, resulting in gaps in coverage in both cases. In addition, regional conservation conventions are limited to certain parts of the world, leaving many regional unprotected by such treaties. Although the earlier conventions address specific questions of biodiversity conservation, these are piecemeal in nature and do not adequately meet the needs of conserving biodiversity worldwide.¹¹

¹¹ The existing conventions covered only internationally important natural sites (World Heritage Convention). The specific threat of trade in endangered species (CITES), a specific ecosystem type (Ramsar Convention), and a group of migratory species (CMS).

1.3 Background to the problem

Since the 1970s, international environmental regimes were developed quickly; mainly duplicating each other in several respects, including personnel and institutions at national level that would backup implementation, follow up, reporting and coordination. Until the adoption of the CBD, the sectoral and regional nature of international instruments for the protection of species and ecosystems resulted in considerable gaps in coverage in both cases. In consequence, the priority of the new Convention was to extend the scope of conservation obligations to a much larger range of situations than those presently covered by the body of international conservation law in force, including global instruments.¹²

However, with the continuing degradation of the environment, it then became apparent that coherent implementation was lacking. Convention Secretariats and UNEP moved to promote adherence of countries to bring Multilateral Environmental Agreements (MEAs) to force. They also showed concerns on compliance, and other instruments have, or are taking steps to move into compliance and enforcement.

The need to address the enforcement gap had been recognized at the Rio Earth Summit (1992) in Agenda 21¹³, Chapter 8, which specifically directs that States develop their compliance and enforcement capacity. The Capacity Development Initiative of UNDP and the Global

¹² De Klemm C. & Shine C., *supra note 1*, p. 17

¹³ Agenda 21 is a comprehensive programme of action to be implemented into the twenty-first century by Governments, development agencies, UN Organisations and independent sector groups in every area where human activity affects the environment.

Environmental Facility concludes that there is a need to strengthen domestic capacity to enforce laws and policies to implement global environmental conventions.

During the World Summit on Sustainable Development, held in Johannesburg in 2002, the need to strengthen environmental enforcement and compliance was a dominant theme. There was recognition that past environmental lawmaking had not sufficiently arrested environmental degradation and that enforcement and compliance ought to become a priority in the coming decades.

Kenya is committed to environmental protection, and has thus ratified numerous international and regional environmental conventions of direct relevance to Kenya. Kenya became a party to the CBD by ratifying it in 1994. This was a commitment by the government to fulfill the obligations specified in the different articles of the Convention. The fact that large numbers of international environmental agreements have been reached and numerous environmental regimes created is important and encouraging. But this does not in itself answer whether Kenya is abiding by them in order to achieve the intended outcomes. A great deal of effort has been invested in getting written agreements, but far too little attention has been paid to guaranteeing that real environmental improvements are made. Very few agreements have actually led to major reforms within each country that would guarantee implementation of these environmental treaties.¹⁴

¹⁴ Susskind L. & C. Ozawa, *Negotiating More Effective International Environmental Agreements*, in Hurrell A. & B. Kingsbury (ed), *supra note 9*, p.143

Despite mounting efforts since Rio, Kenya has been losing some of its biodiversity through over-exploitation and conversion of various ecosystems into other land uses. The country's great diversity of biological resources provides food, fuel, medicine, wood, shelter and income. However, these environmental resources are increasingly under pressure from unsustainable use, resulting in their depletion and general environmental degradation.¹⁵ For instance, between 1995 and 2000, the whole of the indigenous forest in the Imenti Forest Reserve on the slopes of Mt. Kenya was illegally converted into cropland. Designated as a forest reserve since 1932, under which no clearance activities were permitted, forest policies clearly failed to provide adequate protection.¹⁶

According to data from the Department of Resource Survey and Remote Sensing (DRSRS), there are marked changes in wildlife populations between the 1970s and the 1990s. Table 1.0 illustrates that despite Kenya having made a commitment by ratifying the CBD, the country is experiencing massive losses in her wildlife populations.

¹⁵ Republic of Kenya, National Environment Management Authority, *State of Environment Report 2003*, Nairobi, 2004 pp5-6

¹⁶ United Nations Environment Programme, *Global Environment Outlook 3; Past, present and future perspectives*, London, Earthscan Publications Limited, 2002 p 99

Table 1.0 Changes in wildlife populations, 1970s-1990s

Wildlife	1970s	1990s	Change	
			No.	%
Buffalo	35,453	30,187	-5,266	-15
Eland	25,775	19,123	-6,652	-26
Elephant	39,108	14,923	-24,185	-62
Giraffe	62,255	50,080	-12,175	-20
Impala	116,177	67,934	-48,243	-42
Oryx	53,653	25,824	-27,829	-52
Waterbuck	12,309	5,260	-7,049	-57
Gazelle Thomsons	87,086	31,259	-55,827	-64

Source: DRSRS Data

The problem is further compounded by limited functioning mechanisms for monitoring and regulating the impacts of land use patterns.¹⁷ Even where national mechanisms exist, their implementation is often hampered by lack of funds, and the high revenues from tourism-even though this is based on conservation- tend to be absorbed by other government activities rather than being invested in further conservation.¹⁸

Kenya's Poverty Reduction and Strategy Paper, 2001-2004 stats that the unsustainable rate of depletion of the natural resource base in Kenya, especially forests, means that the country's

¹⁷ Ministry of Environment and Natural Resources, Republic of Kenya, *National Assessment Report for the World Summit on Sustainable Development (Rio+10)*, Nairobi, 2002, p 31

¹⁸ United Nations Environment Programme, *Africa Environment Outlook; Past, Present and future perspectives*, England, Earthprint Limited, 2002, p 69

capacity to cope with adverse climatic conditions such as drought and flooding has been significantly reduced. The Strategy Paper amplifies that weak environmental management has resulted in severe land degradation and desertification and must be addressed in order to check the adverse impact on poverty.¹⁹

To ensure effective implementation, the constraints that affect the country in fulfilling her obligations arising from the CBD should be addressed adequately, otherwise, Kenya will continue ratifying more regimes and without making any difference to the environment and this will inevitably undermine the country's prospects for sustainable development and poverty eradication. UNEP Guidelines on Compliance with Multilateral Environmental Agreements²⁰ states in Part 4 that the competent body of a multilateral agreement may, where authorized to do so, regularly review the overall implementation of the obligations of that agreement and examine specific difficulties of compliance. It is therefore against this backdrop and the fact that Kenya records biodiversity loss to date, that this research study seeks to examine the constraints that hinder implementation of the CBD.

1.4 Statement of the Problem

A continuous improvement approach depends upon learning. Lessons become key input to policy, and effective lessons must include real facts, both positive and negative, with way forward on how the negative aspects can be improved to make a difference. The fact that Kenya's environment continues to deteriorate in spite of such a substantial body of policies, laws

¹⁹ Republic of Kenya, supra note 14, p 44

²⁰ United Nations Environment Programme, *Guidelines on Compliance with and Enforcement of Multilateral Environment Agreements*, 2002

and regulations may be an indicator of a low level of implementation and, particularly, of enforcement.²¹

The problem can be further interpreted to mean that either there is no enactment of national legislation or if there is, major constraints stand in the way. These constraints appear in numerous government papers, National Reports to the Conference of the Parties, and are repeated during each reporting period. This appears now to be a 'cut and paste' exercise, but no substantive actions seem to have been taken to overcome them. It is therefore important that the factors that hinder effective implementation of the CBD be examined and solutions proposed; otherwise, Kenya will continue signing more and more international regimes, without making any difference to the situation that was set out to be improved. While it is important that Kenya should ratify and accede to environmental conventions to safeguard her biodiversity, the country should at the same time be guided by the conviction that it will be able to implement her obligations.

This study will adopt a case study approach, and focus on the circumstances affecting implementation of the CBD in Kenya. The objective is not to provide a detailed analysis of the implementation status, but rather to explore the forces that work to complicate the process of national compliance with international obligations, and suggest reforms required to meet the challenges. This study will not pretend to have conclusive answers to each or all of the constraints. However, it seeks to provide a platform for discussing them by making suggestions based on the findings from the authorities responsible for implementation.

²¹ United Nations Environment Programme, *supra* note 19, p. 375

1.5 Theoretical Framework

The study of why states behave as they do is central to the discipline of international relations. At the broadest level, questions of compliance are questions about behavioral motivations. Theories about compliance provide accounts of why states comply with or do not comply with international obligations. These theories are useful lenses for viewing and understanding compliance-related behaviour and the reasons behind that behaviour. They thus suggest different approaches that states use to comply with laws designed to further environmental conservation and sustainable development.

Normative-driven theories of state behaviour²² stress the role of socialization, the social construction of state interests (and preferences), and the internalization of norms within states²³. Normative theories focus on influences on states that affect their compliance with international regimes. Normative theories of domestic compliance follow the logic of appropriateness²⁴, viewing states as good faith actors that want to obey the law but cannot. Under the banner of norm-driven theories are the *Managerialists*, developed by Abram and Antonia Chayes. They

²² Normative driven theories encompass a range of perspectives. One is the legitimacy theory which maintains that compliance is secured to whatever degree by the perception of a rule as legitimate by those to whom it is addressed. Managerialism is another perspective which will be focus of this study. Thirdly, there is the transnational legal process, which posits that states obey international rules when they internalize the norms and incorporate them into their own value systems. This perception disaggregates the state, highlighting the role of non state actors in domestication. For mote information see Franck Thomas M., *Legitimacy in the International System*, Journal of International Law, 705,706, 1998, and Koh Hongju Harold, *Why Do Nations Obey International Law*, 106 Yale Law Journal, 2599, 1997

²³ Raustiala K., *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 387 (2000), in Zaelke D, et al, *Making Law Work: Environmental Compliance & Sustainable Development* Vol 1, London, Cameron May Ltd, 2005, p 73

²⁴ March J. & J. Olsen, *The Institutional Dynamics of International Political Orders*, International Organisations, 943, 1998, where James March and Olsen divide the basic logic of human action into the 'logic of consequences' and the 'logic of appropriateness'. The 'logic of appropriateness' views actions as based on identities, obligations and conceptions of appropriate action. The 'logic of consequences' views actors as choosing rationally among alternatives based on their calculations of expected consequences.

have developed a prominent theory of compliance with international commitments that is largely norm-driven, and argue that instances of non-compliance are often inadvertent, stemming from lack of capacity or resources, ambiguous commitments and provisions, and time lags between commitment and performance.²⁵

Starting from the assumption of state compliance as the norm, *Managerialists* argue that noncompliance is typically non-volitional; the result of a lack of administrative or financial capacity, ambiguity in treaty terms, or unforeseen changes in conditions. As a result, punitive measures will not effectively induce compliance; rather, the best response is to assist the deviant state, through the provision of information, technical and financial assistance to reach compliance. This process is cooperative and aims at improving performance. This study aims at providing suggestions to improve on performance of Kenya on her international obligations.

Increased awareness, complexity and severity of transboundary environmental problems have led to increased international cooperation. Principle 7 of the Rio Declaration during the UNCED in 1992, emphasized that 'states shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem'. International environmental regimes require states to cooperate in dealing with environmental issues, especially those of transboundary nature.²⁶ International regimes promote cooperation in the international system, since each state is expected to play by the same rules.²⁷ Regimes coordinate behaviour of

²⁵ Chayes A. & A. H. Chayes, *On Compliance*, International Organisation, (1993), as quoted in Zaelke D, D. Kaniaru, & E. Kruzikova, *supra* note 23, pp 57-58

²⁶ Shaw M. N., *International Law*, Cambridge, Cambridge University Press, 1997, p. 600

²⁷ Krasner, S. D., *International Regimes*, Ithaca, Cornell University Press, 1983

individual states, and make cooperation possible even within an international system which has no absolute authority.

John Ruggie introduced the concept of international regimes into the international politics literature in 1975, and defined a regime as 'a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments which have been accepted by a group of states.'²⁸

The concept of international regime is defined in terms of four distinct components, which are, principles, norms, rules, and decision-making procedures. They all contain injunctions about behaviour; they prescribe certain actions and proscribe others. They imply obligations even though these obligations are not enforceable through a hierarchical legal system. The demand for international regimes arises from tasks thrust upon states and non-state actors when they have to cope with interdependence and the problems and conflicts that arise from it.²⁹

The study is also be guided by a theory of domestication of international law, especially with respect to the process by which the CBD has been translated into national law. Commonwealth countries require that rules of international law be transformed into municipal or national law before they can have any effect within the domestic jurisdiction. They are thus transformed by the use of the appropriate constitutional machinery such as an Act of Parliament. This doctrine grew from the procedure whereby international agreements are rendered operative in municipal

²⁸ Keohane R. O., Cooperation and International Regimes, in Little R. & M. Smith, (ed), *Perspectives on World Politics*, Routledge, London, 1991 p.108

²⁹ List M. & Rittberger V., *Regime Theory and International Environmental Management*, in Hurrell A. & B. Kingsbury, supra note 9, p. 86

law by the device of ratification by the sovereign and the idea has developed from this that any rule of international law must be transformed, or specifically adopted, to be valid within the internal legal order.³⁰

This is an expression of the dualist position. Dualism theory asserts that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule the other. This is because of the different legal structures employed on the one hand by the state, and on the other hand as between states. Kenya is a dualist country, and the study outlines the process of operationalising her international obligations within domestic legislation.

1.6 Literature Review

Much has been written about International environmental regimes, their implementation, and factors that hinder their effective implementation. This section reviews literature on the implementation of the Convention in Kenya, and environmental compliance and implementation strategies.

Vicente Sánchez and Calestous Juma mention implementation of international environmental regimes in general and the CBD in particular in their book; *Biodiplomacy; Genetic Resources and International Relations*³¹. This book puts the world living resources at the centre stage in international relations. It looks at the CBD, and how it has helped establish a new regime for governing and utilization and conservation of genetic resources. The book gives a detailed

³⁰ Shaw M. N., *supra note 25*, p. 105

³¹ Sánchez V. & C. Juma (eds), *Biodiplomacy; Genetic Resources and International Relations*, Nairobi, ACTS Press, 1994

analysis of the main features of the Convention, and outlines various ways of how the Convention can be implemented.

The book argues that the machinery for compliance with the Convention should ideally be built into the constitutional framework of the state parties so as to make it part of routine governmental obligation. It proceeds to give some critical elements that should go into domestic legislation. Model legislation which reflects the spirit of the Convention should first guide itself through a preamble, consisting principles regarding commitment and purpose, objectives of biodiversity conservation, underlining the dangers of biodiversity loss, and reaffirming the desirability of incorporating the principles of the Convention into domestic law.

The body of the statute should comprise six parts, namely the preliminary section, a section on biodiversity research, a section on in situ conservation, a section on ex situ conservation, a section on administration of the legislation, and a section on general matters, which include the relationship between this particular statute and others, and penalties on certain kinds of conducts.

Sánchez and Juma concede that this is however not exhaustive, but it proposes some direction for the kind of domestic legislation that may enable a state party to systematically pursue the goals prescribed. They continue by highlighting various problems that state parties would face in implementing the Convention, among them the poverty issue which might hinder research, lack of finances for implementing conservation programmes, and overexploitation of resources to meet basic needs of the people and for the governments to maintain their machinery of governance.

The Handbook on the Implementation of Conventions Related to Biological Diversity in Africa³² provides a reference point for biodiversity conservation programmes in Africa. The book is formulated around the main biodiversity conventions of relevance to Africa. The Handbook considers that the existing international biodiversity law-meritorious as it may be- has to be lodged within the sovereign legal machinery of state parties, in order to have an effective application. The principles must be domesticated and made part of the constitutional processes in the individual countries if they are to be assured of implementation.

The Making of a Framework Environmental Law in Kenya³³ constitutes a background to the framework law to ascertain the pressure points which require legal intervention. The book basically describes the development of Kenya's framework environmental law, while analyzing the existing policy and legal regime, bringing out the weaknesses in the legal and institutional arrangements, including Kenya's practice in environmental treaty law, in order to lay a basis for advancing proposals for a suitable draft framework law. The book highlights that there are no constitutional provisions for parliament's participation in the treaty-making process in Kenya. It goes on to propose that a constitutional provision be introduced requiring the executive branch to present to parliament, within a given time frame from the date of adoption, any treaty which is of interest to Kenya, together with a recommendation and an explanatory note, for debate. Such a debate would increase parliamentary and public awareness of the treaties, and this influence the adoption of the implementing legislation, and the authorization of funds for the implementation of the treaties. The authors query as to why some treaties in Kenya have been accepted and

³² UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa, *supra* note 5

³³ UNEP, *supra* note 8

others left out, and suggest that an enquiry be conducted to determine the factors affecting the acceptance of treaties in Kenya.

Ecopolity Series on Environmental Law and Political Change in Kenya³⁴ focuses on the interplay between environmental conservation and sustainable development in Kenya. It starts by describing the nature of environmental law in Kenya, and proceeds to look at the constitution's capacity to deal with environmental problems. It further looks at the likely implications of the present political and constitutional changes for environmental law in Kenya

The Ecopolity Series on Environmental Law and the Constitutional Order³⁵ focuses on the question posed by the gravity of the environmental crisis that we are in. It questions the domain of political arrangements and of the constitutional order which exists to validate and regulate these arrangements. It brings out the interplay between the constitution and the environment, arguing that environmental law has to be accorded a high place in the political and constitutional arrangements of any state.

The Kenya National Assessment Report for the World Summit on Sustainable Development (Rio+10)³⁶, prepared by the Ministry of Environment and Natural Resources in Kenya focuses on the main achievements, constraints, and challenges encountered at the national level in the implementation of Agenda 21. The review shows that although significant progress has been

³⁴ Ojwang J. B. (1992), *Environmental Law and Political Change in Kenya*, Ecopolity Series No. 1, Nairobi, ACTS Press

³⁵ Ojwang J. B. (1993), *Environmental Law and the Constitutional Order*, Ecopolity Series No. 3, Nairobi, ACTS Press

³⁶ Ministry of Environment and Natural Resources, Republic of Kenya, *National Assessment Report for the World Summit on Sustainable Development (Rio+10)*, Nairobi, 2002

made towards implementation UNCED outcomes, there still remain some gaps, constraints and challenges that need to be addressed. This Report mentions some of the key challenges, which include inadequate financial resources, rising levels of poverty and inadequate human capacity among others.

The African Preparatory Conference for the World Summit on Sustainable Development (WSSD) was held in Nairobi, on 15-18 October 2001. The World Summit on Sustainable Development was an assessment of progress on sustainable development in Africa since Rio (1992). The report to this conference³⁷ was prepared by the expanded joint secretariat in cooperation with sub-regional organisations for the preparation of WSSD. The preparatory process includes the assessment and review of progress made in the implementation of Agenda 21, the major accomplishments and lessons learnt, the main constraints, new challenges and opportunities and proposals on ways of strengthening the institutional framework. Chapter four of the report lists the constraints and challenges that are of global nature and those specific to Africa. The report merely lists these constraints, which include the debt burden in Africa, poverty, governance, conflicts and civil unrest, population pressures. The report does not go into specifics of each country in Africa.

UNEP's Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements were completed in 2001.³⁸ These are broad guidelines, which are advisory in nature, consisting of non-binding, flexible considerations that may be implemented by governments to enhance their compliance with and enforcement of environmental conventions.

³⁷ Report on the African Preparatory Conference for the World Summit on Sustainable Development (WSSD), 15-18 October 2001

³⁸ www.unep.org/depe/compliance-and-enforcement

These guidelines were adopted by the Seventh Special Session of the Governing Council of UNEP in February 2002.

Though the terms compliance and enforcement are often used loosely and interchangeably, as far as the UNEP guidelines are concerned, compliance refers to the situation in which a state is, with regard to its obligations under an MEA, i.e. whether it is in compliance or not. Enforcement refers to a set of actions, i.e. adopting laws and regulations, monitoring outcomes, etc including various enabling activities and steps, which a state may take within its national territory to ensure implementation of an MEA. In other words, compliance is used in an international context, and enforcement in a national one.³⁹ The Guidelines place particular emphasis on capacity strengthening and technology transfer as essential elements of improving the implementation of international environmental law.

The Quagmire of Biodiversity Conservation in Kenya is a Masters Research project by Justry P. Lumumba Nyaberi.⁴⁰ The objectives of this research are to assess the state of environmental law and policy in Kenya, to analyse the legal framework and the mechanisms for the protection and sustainable use of biodiversity, to look at the limitations of Kenya's legal framework and suggest appropriate changes for better conservation methods, and to forecast future prospects for biodiversity conservation and protection. One of the findings of this research is that despite the efforts that Kenya has put in place in ratifying numerous environmental agreements, management of the environment has not been effective, and this study seeks to find out why. He

³⁹ Kaniaru D. *UNEP Governing Council Adopts Guidelines on Compliance with, and Enforcement of Multilateral Environmental Agreements*, in International Network for Environmental Compliance and Enforcement, 6th International Conference on Environmental Compliance and Enforcement, April 15-19 2002, San Jose, p47

⁴⁰ Nyaberi L. J. P., *A Masters Project on The Quagmire of Biodiversity Conservation in Kenya*, University of Nairobi, (unpublished) December 1995

departs from the premise that there is no legal obligation on the citizens or the state to conserve the environment, and that the citizens do not have a constitutional right to a balanced ecosystem.

The study concentrates on the provisions of the CBD that touch on technology, biotechnology, and intellectual property. It explores in depth the relevance of technology, including indigenous knowledge to conservation of biodiversity, but does not necessarily showcase how Kenya implements these provisions of the CBD and the challenges therein. While the study concedes that international environmental regimes cannot effectively achieve the set objectives unless operational steps are undertaken and effected at municipal level, the writer does not venture into challenges that Kenya faces while implementing at least the provisions that have been operationalised nationally. The study does not attempt to systematize how the CBD has been integrated into relevant sectoral and cross-sectoral plans and programmes. The writer however mentions at some point that some countries like Kenya do not incorporate any conventions in its municipal law, since it does not accord international law any superiority over municipal law. This means that any international instrument in Kenya should be transformed through relevant legislation before it can take effect.

On domestication of a convention, the writer only mentions the process from signature, ratification, succession, adhesion, acceptance, approval and confirmation. The Convention specifies that the contracting party shall in accordance with its particular conditions and capabilities develop national strategies, plans or programmes. For any provision of international law to have a force of law in Kenya, it must be passed by parliament, through a local legislation,

reflecting the core principles of the convention. This is aimed at making the convention to receive local implementation and enforcement.

Kenya's Poverty Reduction Strategy Paper for the period 2001-2004 outlines how the country will promote economic growth and reduce poverty levels. Implementation of the strategy is outlined in sector objectives. Without any mention of environmental conventions, conservation of the environment is a sub-sector within the Agriculture and Rural Development Sector which is the top ranked national priority. Issues of concern within this sub-sector are listed as poor environmental awareness and information dissemination, lack of sustainable use and management of forests, lack of pollution control and waste management programmes in urban areas, poor integration of environmental consideration in land use planning, low level of environmental data collection, and lack of enforcement of environmental laws. The Strategy Paper however, does not elucidate how, in achieving the objectives of the sector, these problems can be overcome.

From the foregoing literature, it is apparent that not much has been written in the focus area of the proposed study. Most of the literature concerns itself with guidelines for compliance and enforcement, Kenya's initiatives in the implementation of the CBD, but none has attempted to look critically at the constraints that hinder Kenya into full and effective implementation of the CBD. This study therefore aims to fill this gap.

1.7 Objectives of the Research

The study will address the following objectives in its analysis;

1. The process of domesticating international provisions into Kenya's national law
2. Constraints affecting implementation of CBD in Kenya and possible solutions to overcome these constraints

1.8 Hypotheses

This study will seek to verify the following hypotheses.

1. A formal process of domesticating international obligations in Kenya would lead to greater awareness and effective implementation of the CBD.
2. A framework that addresses challenges and proposes solutions to the implementation of the CBD would increase the performance of Kenya under her international obligations.

1.9 Broad Argument Structure

Kenya's economy and the livelihoods of her people are dependent on the natural resources such as water, land, air, plants and animals. These natural resources, as enumerated in the 2003 State of Environment Report for Kenya depends largely on natural resources for economic growth and sustainable development. Kenya thus translated Agenda 21 into a National Environment and Action Plan to integrate environment concerns into the national planning and development process. Despite mounting efforts since Rio, Kenya has been losing some of its rich biodiversity through over-exploitation and conversion of various ecosystems into other land uses.

Kenya is a dualist country, and provisions of CBD do not automatically become incorporated into national legislation. Kenya has to transform them through necessary legal mechanisms for them to have any force in national law. Kenya has transformed some of the provisions, and others are yet to be enacted within the domestic legislation. For the intended impacts of the Convention to be felt by the people, it is important that all provisions are enacted into domestic legislation and the process be made formal, with clear mandates given to the relevant institutions.

The challenges that face the implementation of the CBD are not necessarily CBD – specific. The choice of the Convention in this research has already been provided, and the focus on the challenges of implementing this particular Convention is broad enough to be applicable to other conventions.

1.10 Research questions sought to be answered

The central research question addressed in this study is what constraints exist that hinder effective implementation of the CBD in Kenya, and what can be done to overcome them? From this main research question, the study derived some specific questions that guide the present research.

It is these questions that form the content for primary data. These questions are discussed in form of focused interviews with officers working in policy development and especially the implementation of the CBD from UNEP, IUCN, Forest Department, Kenya Wildlife Service,

National Environment Management Authority, National Museums of Kenya, Ministry of Environment and Natural Resources, and Ministry of Foreign Affairs. In particular, the following research questions are used to generate data to inform the study:

1. Kenya is a dualist country and therefore transforms provisions of international conventions before they can have any effect nationally. What is the process taken to ensure that the provisions of the CBD are transformed?
2. Why did Kenya ratify the CBD?
 - a) To what extent is the public aware of the benefits of the CBD to the country?
 - b) Who is the national focal point for the CBD and how are they appointed?
 - c) What are their responsibilities?
3. What role does your institution/agency play in implementing provisions of the Convention?
 - a) Which other institutions are implementing the provisions of the CBD in Kenya?
 - b) Who has the mandate to coordinate activities of the various players in the implementation of the CBD?
 - c) How is collaboration assured among the various players?
4. What obstacles does your institution/agency encounter while implementing provisions of CBD?
 - a) Have these obstacles been addressed before?

b) What is being done/can be done to overcome these challenges?

1.11 Methodology

Chapter one and two describe the nature of the research problem, explores the Convention itself, and provides the background against which the empirical part of the study will be illuminated.

This part draws its sources from secondary data materials, which will come from library research, internet searches, journals and reports from organizations and government institutions currently implementing parts of the CBD. These include but not limited to UNEP, UNDP, IUCN, KWS, National Museums of Kenya, and National Environment Management Authority.

This consists of published works, journals, annual reports from relevant institutions, and Internet searches.

Primary data is derived from focused semi-structured interviews with lead agencies implementing the CBD. The semi structured interviews and discussions also combine some predetermined questions with more open ended discussions. Interviews with the Attorney General's Chambers will be designed to generate information on the process of domestication of Kenya's international obligations and the AG's role in the ratification process. It is hoped that this will be the departure point from which the constraints can be explored.

Given the time allocated for the research, the study focuses on one Convention, and therefore, only those actors that control relevant implementation provisions and who possess relevant information and expertise for the implementation of the CBD in Kenya. These include officials in the Ministry of Foreign Affairs, Ministry of Environment and Natural Resources, National

Environment Management Authority (NEMA), which came into being with the adoption of the EMCA in 2001, IUCN⁴¹, UNEP, UNDP, National Museums of Kenya, Forest Department, and Kenya Wildlife Service. Information on domestication of treaties in Kenya is provided by Senior State Counsels in the Attorney General's Chambers.

1.12 Chapter Breakdown

1. INTRODUCTION

Chapter one introduces the problem area, gives a background and states the paradigms within which the study is conducted. This chapter also includes the statement of the problem, the objectives of the study, hypotheses, methodology of data collection and research questions to be answered.

2. CONVENTION ON BIOLOGICAL DIVERSITY AND THE DOMESTICATION PROCESS IN KENYA

Chapter two gives an overview of the CBD and documents the process followed in the domestication of the Convention. This chapter looks at the objectives of the Convention, the rights and obligations of Contracting parties to the Convention. It further examines the process of transforming these rules of the Convention into national law in Kenya, and introduces the very recent Framework Environmental Law in Kenya.

⁴¹ The IUCN was formerly known as the International Union for the Conservation of Nature and Natural Resources. It is now commonly known as the World Conservation Union, although the original abbreviation of IUCN is used. IN this study, IUCN is the more frequent term.

3. CHALLENGES IN IMPLEMENTATION OF THE CONVENTION ON BIOLOGICAL DIVERSITY IN KENYA

Chapter three illuminates the challenges that impede the country into effective implementation of the Convention. The chapter also notes the various lead agencies who are undertaking various programmes that explicitly or implicitly relate to the Articles within the CBD. The study cannot purport to study all the challenges but focuses on the major challenges that cut across the key players in the implementation process.

4. CONCLUSION AND RECOMMENDATIONS

Chapter four concludes the study by giving the main theoretical and empirical conclusions, and suggests ways in which the constraints studied can be adequately addressed. The chapter also suggests possible areas for future research.

CHAPTER TWO

CONVENTION ON BIOLOGICAL DIVERSITY AND ITS DOMESTICATION IN KENYA

2.1 Introduction

The acceleration of the destruction of biological diversity led to a growing recognition that the world community should take concerted efforts to ensure the conservation of species and ecosystems. Prior to the adoption of the CBD, there were other international instruments for the protection of species and ecosystems, but they had considerable gaps in coverage. Therefore, it was felt that the new Convention would extend the scope of conservation obligations to a much larger range of situations than those presently covered by the body of international conservation law in force.

The purpose of this chapter is two fold. Firstly the chapter introduces the Convention, looking at its history, nature and responsibility it confers to the Contracting parties. Secondly, the chapter looks at various ways that countries agree to be bound by provisions of international treaties. It specifically examines how Kenya domesticates international treaties. The chapter further introduces the Framework Environmental Law in Kenya, as reflected in the enacted Environmental Management and Coordination Act (1999).

2.2 Background to the Convention on Biological Diversity (CBD)

In 1968, the United Nations General Assembly proposed the convocation of a world conference on the human environment to be held in Stockholm in 1972. The Stockholm Conference was thus convened in June 1972. This Conference served as a catalyst for several environmental initiatives. It resulted in the Stockholm Declaration on the Human Environment, containing 26 normative environmental principles, a 109-point Environmental Action Plan, and a Resolution recommending institutional and financial implementation by the United Nations. The result of these recommendations was the creation of the United Nations Environment Programme (UNEP), established by UN General Assembly Resolution and based in Nairobi.

The Stockholm Conference drew attention to the global problems of environment deterioration and methods to prevent or remedy it. A follow-up to the Stockholm Conference was held in 1982 in Nairobi, which spurred the UN to set up the World Commission on Environment and Development, chaired by Gro Harlem Brundtland, then Prime Minister of Norway. Its 1987 Report "*Our Common Future*" placed the concept of sustainable development¹ into the realm of international environmental law. At the suggestion of the Commission, preparations began for the Rio Summit, officially the United Nations Conference on Environment and Development (UNCED), thus marking the end of the era of emphasis on the "human environment" and the beginning of the era of emphasis on "environment and development."

The UNCED conference, held 20 years after the Stockholm Conference, was held in Rio de Janeiro in June 1992. Also known as the Rio Summit, the conference had as one of its aims

¹ The Brundtland Report defined the concept of sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. This is found in the World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press p. 87

promotion of the further development of international environmental law, and more specifically, to examine the feasibility of elaborating general rights and obligations of states in the field of environment.² In this way Rio produced five main documents: the Rio Declaration on Environment and Development, the Statement on Forest Principles, the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and Agenda 21.³

2.3 The Nature of the Convention on Biological Diversity

Until the adoption of the CBD, the sectoral and regional nature of international instruments for the protection of species and ecosystems resulted in considerable gaps in coverage in both cases. In consequence, the priority of the new Convention was to extend the scope of conservation obligations to a much larger range of situations than those presently covered by the body of international conservation law in force, including global instruments.

The concept of a World Convention was put forward not to replace these existing conventions, but rather to establish general obligations for the preservation of biological diversity and to provide a coherent framework for action in the future. The idea was initially launched by the IUCN at its 15th General Assembly in Christchurch in 1981, which instructed the Secretariat of the Union to carry out a preliminary study of the matter.⁴

² Sands P. *Greening International Law*, Earthscan Publications Ltd. London, (1993)

³ United Nations Environment Programme, *UNEP Environmental Law Training Manual*, UNEP, 1997 pp 29-31

⁴ De Klemm C. & Shine C. , *Biological Diversity and the Law; Legal Mechanisms for Conserving Species and Ecosystems*, Gland, IUCN Publications Services Unit, 1993, p. 17

The final text of the CBD was adopted on 22 May 1992, and the Convention entered into force in 29 December 1993.⁵ The CBD, together with the other major outcome of the Rio Summit, the UNFCCC, constitute the most ambitious initiative to-date by the international community in the sphere of environmental management and sustainable development.⁶

The main objectives of the CBD are to conserve biological diversity, to promote the sustainable use of its components, and to encourage equitable sharing of the benefits arising from the utilisation of genetic resources (Art 1). The Convention contains 42 articles and permits no reservations.

The Convention is the first global comprehensive agreement to address all aspects of biological diversity.⁷ The Preamble to the Convention recognizes that biological diversity is disappearing fast and that it should be conserved for both ecocentric and anthropocentric reasons. The ecocentric reasons involve understanding that biological diversity has an intrinsic value and this implies that it must be protected for its own sake. The Preamble also states that it should be preserved for the continuation of evolution and the maintenance of the life-supporting systems of the biosphere.⁸ This is the why the Preamble affirms that the conservation of biological diversity is a '*common concern of humankind*' to underline the significance of the human interest in general without undermining the rights of states over their natural resources. This is interpreted to mean that although state parties have sovereign rights over their biological resources under

⁵ United Nations Environment Programme, *supra note 3*, p. 54

⁶ UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa, *Handbook on the Implementation of Conventions Related to Biological Diversity in Africa*, UNEP, 1999, p.18

⁷ The Convention defines 'biological diversity' to include the variability among living organisms from all sources including, among other things, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. (Art 2)

⁸ De Klemm C. & Shine C. , *supra note 4*, p.19

international law, they also have the responsibility for conserving their biological diversity and for using their biological resources in a sustainable manner. Article 3 reaffirms this principle of national sovereignty over natural resources.⁹

The Convention translates its guiding objectives of conservation, sustainable use and equitable sharing of benefits into binding commitments in its substantive provisions contained in Articles 6 to 20. These articles contain key provisions on, among others; measures for the conservation of biological diversity, both *in situ*¹⁰ and *ex situ*¹¹, incentives for the conservation and sustainable use of biological diversity, research and training, public awareness and education, assessing the impacts of projects upon biological diversity, regulating access to genetic resources, access to and transfer of technology and the provisions of financial resources.

The Convention recognizes the importance of indigenous and local communities in the conservation and sustainable use of biodiversity. The Preamble of the Convention recognizes the close and traditional dependence of many indigenous and local communities on biological resources and the desirability that these communities receive benefits when techniques and knowledge from their traditional practices become more widely used. This is also stressed in Article 8 (j) which calls for the respect, preservation and maintenance of the knowledge, practices and innovations of these communities, and the equitable sharing of benefits arising from their utilization.

⁹ In the period leading to the Rio Earth Summit (1992) there were attempts to characterize biodiversity as the 'common heritage of mankind', but these attempts did not succeed. Had they succeeded, these attempts would have qualified national sovereignty over natural resources and implies some kind of collective national ownership of these resources.

¹⁰ *In-situ* conservation means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings

¹¹ *Ex-situ* conservation means the conservation of components of biological diversity outside their natural habitats

Article 21 establishes a mechanism for the provision of financial resources to developing countries for the purposes of the Convention. In Article 20 developed countries undertake to provide 'new and additional financial resources to enable developing country parties to meet the agreed full incremental costs' of implementing the obligations of the Convention. To this end, Article 39 appointed the Global Environment Facility (GEF) on an interim basis to operate the financial mechanism of the Convention, and the GEF continues to fulfill this function.

In addition to its substantive provisions, the Convention establishes institutional arrangements, which provide a mechanism for the further development of, and for monitoring the implementation of the Convention through meetings, work programmes, reviews and negotiations. Three institutions are established by the Convention; the Conference of the Parties (COP), the Subsidiary Body on Scientific Technical and Technological Advice (SBSTTA) and the Secretariat. The Convention also establishes a financial mechanism for the provision of financial resources to developing country Parties and provides for the establishment of a Clearing House Mechanism (CHM) for scientific and technical cooperation.¹²

The governing body of the Convention is the COP¹³, and its key function is to keep under review the implementation of the Convention and to steer its development. The COP also adopts the budget, considers national reports, and considers and adopts protocols. The SBSTTA¹⁴ is an inter-governmental scientific advisory body, which provides the COP with advice and recommendations on scientific, technical and technological aspects of the implementation of the Convention. Article 24 establishes a Secretariat whose principal functions are to prepare for and

¹² Secretariat of the Convention on Biological Diversity, *supra note 6*, p. xviii

¹³ Established under Article 23

¹⁴ Article 25

service meetings of the COP and other subsidiary bodies of the Convention and to coordinate with other relevant international bodies.

Given the nature of the issues that the Convention seeks to address, the Convention is heavily dependent for its effectiveness on the actions of Parties and other institutions. Article 34 gives procedures for ratification, acceptance and approval. The Convention is open for ratification or approval by states and regional economic integration organizations.

2.4 Rights of Contracting Parties

The Convention is founded upon certain fundamental principles of general consensus among states. These principles constitute the rights the state has under the Convention and are instrumental in the acceptance of the Convention by state parties. Article 3 acknowledges the sovereign right of states to exploit their own resources pursuant to their own environmental policies. This is in line with the internationally accepted principle that states are sovereign and have sovereign rights over their own biological resources.¹⁵

The Preamble states that states have a right to conserve their biological resources. This is a conservation principle, which is in line with the realization and concern of the Convention that *'biological diversity is being significantly reduced by certain human activities'*. This ties in with the principle affirmed in the Preamble to the Convention that conservation of biological diversity is a common concern for humankind. This right to conserve implies the development of

¹⁵ United Nations General Assembly (UNGA), Resolution 1803 of 12 December 1962 on permanent sovereignty over natural resources;

strategies to mitigate the effects of human activities to ensure that they are not a threat to biological resources. This principle goes hand in hand with the principle of sustainable use of resources. Article 2 of the Convention states this principle thus;

'sustainable use means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.'

Another significant right mentioned in the Preamble is the right to economic and social development of developing countries. Development will inevitably be assured by the exploitation of biological resources, so long as this is done in a sustainable manner. States can therefore make use of their natural resources to meet the food, health and other needs of their populations, but this should be done with due diligence to ensure that this does not lead to loss of these resources.¹⁶

The state parties therefore enjoy the right to develop using their own natural resources, but this right should not be exercised without the considerations of sustainable use and the conservation principles. This ties in with one of the objectives of the Convention, that of equitable sharing of the benefits arising out of the utilization of genetic resources. This right to an equitable share follows on logically from the principle of sovereignty over natural resources and is a fair counterpart to the obligation to conserve biological diversity.¹⁷

¹⁶ UNGA Resolution 3201 of May 1974 on the Declaration on the New International Economic Order, which provides in part that:

'Each State is entitled to exercise effective control over its natural resources and their exploitation with means suitable to their own situation including the right to nationalization or transfer of ownership to its nationals. This right being an expression of the full permanent sovereignty of the state.'

¹⁷ De Klemm C. & Shine C. , *supra* note 4, pp19-20

Access to genetic resources is now a matter which may be regulated by national legislation (Article 15.1). Sovereign States have always had the right, of course, although they seldom exercised it, but this is the first time that it had been affirmed by a treaty. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing the resource, unless that Party decides otherwise (Article 15.5). In consequence, the collection of genetic material would now be subject to a permit, and the conditions of access would have to be mutually agreed. This implies that access permits would be accompanied by contracts stipulating conditions for access, which would normally include a fee.

The Convention also recognizes that state parties have the right to take precautionary measures against any threat to their biological resources whether coming from within or without. The Preamble of the Convention states that;

‘...it is vital to anticipate, prevent, and attack the causes of significant reduction of loss of biological diversity at source’

It recognizes that information and knowledge regarding biological diversity is generally lacking and that it is therefore urgent to develop scientific, technical and institutional capacities to provide the basic understanding upon which to plan and implement appropriate measures. In the meantime, lack of scientific certainty shall not be used as a reason for postponing conservation measures, consistent with the precautionary principle.¹⁸

¹⁸ De Klemm C. & Shine C. *supra* note 4, p.19

2.5 Obligations of Contracting Parties

Rights do not exist without being followed by obligations. The Convention stipulates a number of obligations for state parties. It is these obligations that bind states and make them responsible and accountable under international law. When a state becomes a party to an international regime, it henceforth assumes obligations, which, by fulfilling them, it promotes the realization of the goals of the regime.

While Article 3 recognizes the sovereign right of states to exploit their own natural resources, this comes hand in hand with the duty to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

States are under an obligation to cooperate with each other in mitigating transboundary environmental risks. Article 5 of the Convention states that;

'Each contracting party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.'

State parties are also charged with the responsibility of the formulation and implementation of strategies, plans or programmes for the conservation and sustainable use of biodiversity and to integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies (Article 6). The state thus has an obligation to

ensure conservation of its biological resources is integrated into relevant programme areas of national development.

According to Article 7, state parties must identify the components of biodiversity important for its conservation and sustainable use, monitor such components where so identified, and identify processes and categories of activities which are likely to have significant adverse impacts on biodiversity. Identification and monitoring activities are to be undertaken for the purposes of Articles 8 to 10. Article 8 calls on Contracting Parties to institute measures for in-situ conservation, and in particular the establishment of a system of protected areas to facilitate conservation of species within these areas while protecting their habitats. Article 9 calls on Contracting Parties to establish and maintain facilities for ex-situ conservation of species in the country of origin of genetic resources, and adopt measures for their rehabilitation and reintroduction into their natural habitats. Article 10 states that processes and categories of activities which may be destructive of biological diversity must be regulated and managed. It states in part that;

'Each Contracting party shall, as far as possible and as appropriate adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity..'

Under Article 14, Contracting Parties have the obligation to prepare environmental assessments of proposed projects that are likely to have significant adverse effects on biological diversity, with a view to avoiding or minimizing such impacts, and also to ensure that the environmental consequences of their programmes and policies which are likely to have such impacts are duly taken into consideration.¹⁹

¹⁹ Article 14 on Impact Assessment and minimizing adverse impacts

All state parties have a duty to provide financial resources needed to implement the Convention.

In particular, it is provided in Article 20 (1) that;

'Each Contracting party undertakes to provide, in accordance with its capabilities, financial support and incentives in respect of those national activities which are intended to achieve the objectives of this Convention, in accordance with its national plans, priorities and programmes.'

This Article introduces specific obligation to developed countries to support the developing countries in fulfilling the obligations of the Convention. Paragraph (2) of this Article calls on the developed countries to:

...provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention ...

This obligation gives the developed countries the responsibility of ensuring implementation of the Convention by the developing countries. The Article further states in paragraph (4) that;

'The extent to which developing country parties will effectively implement their commitments under this Convention will depend on the effective implementation by developing country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties.'

For purposes of reviewing the implementation of the Convention, each Contracting Party to the Convention has an obligation under Article 26 to present to the Conference of the Parties (CoP) reports on measures it has taken to implement the provisions of the Convention and in addition, to include in the reports the effectiveness of these measures in meeting the objectives of the Convention. The CoP is the governing body of the Convention and meets every two years to

consider national reports, adopt the budget of the Secretariat, and adopt any protocols to the Convention.

It is observed that none of the conservation obligations set out in the Convention are absolute. Instead, they are all qualified by the phrase, "as far as possible and as appropriate". This wording makes allowance for the difficulties faced by most countries in fulfilling the performance obligations laid down by the Convention. On the other hand, this systematic qualification of the obligations weakens them considerably, as it becomes a matter of judgment as to whether conservation is possible and appropriate in the face of other pressing needs. It reduces the Convention to a statement of good intentions for conservation of our natural resources.

2.6 Concept of domestication of Treaty Law

As there is no central organization to which states can turn and no world government in which implementation powers are vested, the implementation of international environmental law prescriptions is largely found operative through the instrumentalities of municipal or national law. State parties to international environmental law instruments have to enact municipal law to give effect to and enforce international environmental law provisions. This is the process of domestication.

The term domestication is used in relation to international conventions or provisions. It means incorporation of the provisions of the convention, or the main ones into the national legal system

– to facilitate its regular application through the ordinary motions of the established constitutional machinery. As these provisions then form part of the ordinary law of the land, there will be a constitutional duty to apply it through the executive organ, and it will be subject to enforcement through the regular judicial process.²⁰ This is the international dimension of demonstrating compliance with obligations of a convention. The national dimension refers to actions taken by individuals or other bodies or legal persons to comply with domestic legislation.

Compliance with International environmental regimes involves a three-step process for most states. First, the state signs the Convention, often at the ministerial level, agreeing to its contents in principle. This signature does not impose a legal obligation on the signing state to ratify the convention at a later stage. Secondly, the national government then ratifies that state's commitment to participating in that convention's activities. The idea of ratification developed because it was thought reasonable that, after a convention had been signed, countries should have a further opportunity to consider the often complex and important issues involved before finally being legally bound by them. For most states, ratification consists of passing a bill through Parliament.

Thirdly, the convention activities enter into force when a specified number of states sign and ratify their involvement. The number of states needed to trigger entry into force is established during the negotiation process and varies from convention to convention. Once a Convention has entered into force, state-parties can then begin to negotiate specific control actions, breaking the principles or articles in a convention into more specific and achievable actions. All this is

²⁰ UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa, *supra* note 6, p. 78

done voluntarily by state-parties, invoking the principle of international law that all treaties must be observed.

The constitutions of many states provide for the adoption of rules of international law by incorporating (in the case of customary law) them into municipal law so long as they are not inconsistent with statutory law or judicial decisions of the highest organs in the land. This is the view taken by proponents of the monist theory, who hold that international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure.²¹

With respect to treaty law, many state constitutions provide for their transformation into municipal law through legislative action. This is the dualist position that purports that international law does not form part of the municipal law of a state unless it is transformed to give it legal effect within a particular state.

There is a general duty into bringing municipal law into conformity with international law obligations. A state, which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.

²¹ Shaw M. N., *International Law*, Cambridge, Cambridge University Press, 1997, p. 105

2.7 Domestication of the CBD in Kenya

Kenya signed the CBD on 11.06.1992 and ratified it on 26.07.1994. A prominent feature of Kenya's environmental legislation is its diffuse nature with provisions being contained in about 77 statutes. Most of the statutes are sectoral either by the natural resources such as fisheries, water, forestry and wildlife, or by the functional sectors such as public health, agriculture, factories, mining, or chiefs' authority.

Although the current Constitution of Kenya does not have direct environmental protection provisions, it has been argued that Section 71 of the Constitution, which deals with the right to life, encompasses the right to a clean and healthy environment, as this right can only be meaningful if enjoyed within a conducive environment.²² Nevertheless, a case is being made that during the Constitutional Review Process currently taking place in Kenya, the right of individuals to enjoy a clean and healthy environment be incorporated in the Constitution. This would elevate environmental issues to a constitutional level. Besides the legal hierarchical superiority, such constitutional entrenchment would give the desired visibility to environmental matters and thereby assist in the enhancement of the level of public awareness about the critical importance of such matters.

The East African Countries, forming part of the British Commonwealth lean towards dualism. Thus, application of an international treaty in Kenya would commence in the municipal legal regime on the transformation of such treaties into national legislation. In Kenya the authority to

²² Advocates of the inclusion of the right of the individual to enjoy a sound and healthy environment in the Constitution have argued that a healthy environment is as vital as health, or life itself. In fact, being alive, a right protected under the Kenyan Constitution may frequently depend on the health of the environment itself.

sign treaties vests with the Minister of Foreign Affairs. Kenya is formally governed by Acts of Parliament, statutes, which derive their force from the Constitution²³. Although the Draft Constitution²⁴ mandates the state to domesticate international and bilateral agreements and treaties relating to the protection of the environment, there is no documentation which provides for this process.²⁵

There is no ratification act as such, but the process is regulated through the administrative process of government circulars and regulations. After an agreement is signed, the parent Ministry prepares a Cabinet Memorandum. The Cabinet Memorandum contains information on the purpose of the treaty, benefits to Kenya, financial implications of implementing the provisions of the treaty, and the institutions that are responsible to implement the treaty. This is then submitted by the Minister responsible together with the Attorney General's Chambers and the Ministry of Foreign Affairs to the Cabinet. The Cabinet Memorandum is then tabled before the Cabinet for discussion and approval as to whether the country should ratify the agreement.

Upon Cabinet approval for ratification of the agreement, the international process for ratification then comes into play. It should be noted however, that there is no constitutional provision for Parliament's participation in the treaty-making process in Kenya. The decision on whether or not to ratify remains at Cabinet level.

²³ UNEP-ACTS, *The Making of a Framework Environmental Law in Kenya*, Nairobi, ACTS Press, 2001, p.25

²⁴ Constitution of Kenya Review Commission, *The Draft Constitution of Kenya 2004*, Chapter 8

²⁵ Information obtained by the researcher from the Attorney General's Office and Ministry of Foreign Affairs, 2nd - 3rd August 2005

In Kenya, there are no constitutional provisions for parliament's participation in the treaty-making process. This means that there is no room for debate of any regime that has been ratified, and thus no public awareness on the purposes of the treaty, and this has implications on allocation of funds for implementation and ultimately, compliance with the treaty. This also has implications on the appointment of the focal institution or Ministry for the Convention. In the case of the CBD, this has largely been an administrative process, and the responsibility previously rested with the National Environment Secretariat (NES).

The Government of Kenya founded NES in 1974 as the lead environment agency to coordinate and oversee environmental activities in the country. Later on, in 1994, NES founded the Inter Ministerial Committee on Environment (IMCE), a multi-sectoral and multi-disciplinary team with membership from the government, private sector and NGOs. The IMCE had a Biodiversity sub-committee which was responsible for the implementation of the CBD. It is significant to note that NES was within the Office of the President rather than within its line Ministry. The IMCE was important to enable NES liaise with relevant national institutions working on conservation issues. However, NES and IMCE operated in the absence of a national environmental legislation. Thus, the two had no enforcement mandates and their responsibilities on environmental management in the country ended with coordination.²⁶

In accordance with Article 6 of the CBD, Kenya has instituted measures for conservation and sustainable use by developing the National Biodiversity Strategy and Action Plan (NBSAP). The overall objective of the NBSAP is to address the national and international undertakings

²⁶ Ministry of Environment & Natural Resources, *A Summary of the Kenya National Biodiversity Strategy and Action Plan*, Nairobi, National Environment Secretariat, 2000, p.1

elaborated in Article 6 of the Convention. It is a national framework of action for the implementation of the Convention to ensure that the present rate of biodiversity loss is reversed and that present levels of biological resources are maintained at sustainable levels for posterity.²⁷

The core of Kenya's implementation of Article 8 of the CBD on in-situ conservation can be found in the Wildlife Conservation and Management Act, 1989, which established the Kenya Wildlife Service (KWS). This Act covers all issues related to protected areas, terrestrial and marine, and the conservation and management of wildlife in general.

The main legislative provisions for in-situ conservation are found in the Forests Act for flora, and the Wildlife Act for fauna. The Forest Act empowers the Minister to create forests on unalienated government lands. Access to the forests and the utilization of the forest resources is regulated by license in the interests of conservation. Section 6 (2) of the Act further empowers the Minister to declare forest areas or any part thereof to be a nature reserve "for purposes of preserving the natural amenities thereof and the flora and fauna therein."

The Wildlife Act empowers the Minister to declare any area of land to be a wildlife conservation area. Conservation areas may be national reserves (section 18) or local sanctuaries (section 19). The declaration of an area to be a conservation area is intended to protect the wild animals in their natural habitat.

For ex-situ conservation, there is no legal framework in Kenya for the control, coordination or conservation of genetic resources which have been removed from their natural habitats. Despite

²⁷ *supra* note 26, p. 2

this, however, there are various initiatives carried out by institutions for the ex-situ conservation of components of biological diversity. The National Museums of Kenya (NMK) has several activities in this regard. NMK has a limited storage of seed germplasm, which allows for replication. NMK also houses the National Botanic Garden, which is able to assist in propagation and reintroduction activities where necessary.

Article 52 of the Environment Management and Coordination Act (EMCA)²⁸ provides for the effective implementation of Article 9 of the CBD. In particular, Article 52 of EMCA calls on NEMA to prescribe measures for the conservation of ex situ biological resources, and to provide guidelines for the establishment of germplasm banks, botanical gardens, and animal orphanages.

Within the ambit of the NBSAP, Kenya has developed a potentially effective structure to ensure the sustainable use of biodiversity, in accordance with Article 10 of the CBD. These policies are supported by EMCA, but their effectiveness is yet to be established, since in the first place the Action Plan has not been approved by Parliament. Customary use of biodiversity is however used selectively. The government's initiatives in the agricultural sector tend to focus more on the introduction of improved varieties and new levels of technology with the aim of increasing yields. Cooperation between the public and private sectors is encouraged in Article 37 (c) of the EMCA, which provides for the inclusion of four representatives of the business community to the National Environmental Action Plan Committee.

Article 11 of the Convention calls for the adoption of incentive measures for conservation and sustainable use of components of biological diversity. Positive incentive measures have not been

²⁸ Republic of Kenya, *The Environmental Management and Coordination Act*, 1999, No. 8 of 1999, Nairobi

well developed in Kenya. The Forest Department and Kenya Forest Research Institute (KEFRI) undertakes some activities such as the provision of free tree seedlings and extension services, but these tend to be within the mandates of the agencies concerned rather than statutorily required. What exists are negative incentive measures addressing EIAs, that are generally seen to be of a prohibitive nature. Additionally, Part XIII of the EMCA provides for severe statutory penalties for environmental offences.

Article 12 of the Convention calls for Contracting Parties to establish and maintain programmes for scientific and technical education and training in appropriate measures for the conservation of biodiversity. However, most of the initiatives in education and training are based upon individual practices and policies of institutions because no national legislative provisions exist. For instance, the Kenya Industrial Property Institute (KIPI) has a mandate to advise upon and encourage activities involving technology transfer under the Industrial Property Act 1989.

In accordance with Article 14 of the CBD, Kenya has gained a wealth of experience in conducting Environmental Impact Assessments (EIA). This is so especially with the entry into force of the EMCA, which provides for an effective framework of carrying out EIAs. Given the fact that there is considerable expertise, especially in agencies such as KWS, IUCN, and that the financial costs of the EIA are borne by those proposing activities, it is expected that provisions of this Article should not be difficult to implement.

Kenya has no comprehensive approach to facilitate access to genetic resources are required under Article 15 of the CBD. EMCA gave the responsibility for access and benefit sharing to

NEMA. However, this does not preclude other agencies like the Plant Genetic Resources Working Group to implement a large scale access and benefit sharing project in collaboration with the Royal Botanic Gardens at Kew, United Kingdom.

The Government's support for technology transfer is found in the mandates of most lead agencies and also in the provisions of Science and Technology Act, which established the National Council on Science and Technology (NCST), and those of the Industrial Property Act, establishing the Kenya Industrial and Property Institute (KIPI).

Most lead agencies have historically depended to a large degree on external donor support, however, some of them in the recent past have made moves to establish partnerships locally with private companies. EMCA makes specific provisions of financial support of the operations of NEMA. Article 20 (3) specifies that the Authority will be financially enabled through the Parliament;

There shall be made to the Authority out of monies provided by Parliament for that purpose, grants towards the expenditure incurred by the Authority in the exercise of its powers or the performance of its functions under the Act.

Most of the lead agencies support education and awareness programmes in Kenya, playing host to academic and private sector researchers and initiatives. The national media also tries to provide extensive coverage of environmental issues, and in the recent past, awareness has been generated during the process of conducting EIAs. The NBSAP mentions the promotion of public awareness on biodiversity issues countrywide, but does not elaborate on how this would be carried out.

Kenya has considerable experience in conducting EIAs, but until the entry into force of the EMCA, this was done in a fairly ad hoc basis. The Act, in Part VI establishes an effective framework for EIAs by requiring that the National Authority must register any individuals that may carry out such assessments in Kenya. The Act is elaborate on the procedures for conducting EIAs,²⁹ but does not touch on the issue of liability and redress, including compensation and restoration as required under Article 14 of the Convention.

2.8 Kenya's Framework Environmental Law

In 1999, the Kenyan Parliament passed an environmental law known as the Environmental Management and Coordination Act (EMCA), which is Kenya's principal legislation on matters of the environment. Once adopted by parliament in December 1999, it received Presidential Assent on 6th January 2000 and came into force on 14th January 2000.³⁰ Its overall objective is to provide an appropriate legal and institutional framework for the management of the environment and to meet the requirements of sustainable use of natural resources.³¹

As earlier provided, prior to its enactment in 1999, there was no overall framework environmental legislation. Kenya's approach to environmental legislation and administration was highly sectoral and legislation with environmental management components had been formulated largely in line with natural resource sectors as aforementioned. EMCA was developed as a framework law, and this means that the Act is thus far, the only single piece of

²⁹ Republic of Kenya, *supra note 28*, Part VI on Environmental Impact Assessment

³⁰ Institute for Law and Environmental Governance, *Community Guide to Environmental Management in Kenya*, Nairobi, 2003, pg 19

³¹ Republic of Kenya, *supra note 28*

legislation that contains to date the most comprehensive system of environmental management in Kenya.

The Act is based on the recognition that improved legal and administrative co-ordination of the diverse sectoral initiatives is necessary in order to improve national capacity for the management of the environment, and accepts the fundamental principle that the environment constitutes the foundation of our national, economic, social, cultural and spiritual advancement. Part V of EMCA provides legal tools for sustainable management of the environment. It covers the protection and management of wetlands, hilly and mountainous areas, forest, environmentally significant areas, the ozone layer and the coastal zone. It further provides for the conservation of energy and biological diversity, access to genetic resources and environmental incentives. To fulfill its mandate, EMCA established several institutions to assist with this mandate. Among the institutions established³² include the National Environment Management Authority (NEMA).

2.9 National Authority responsible for implementation of the CBD in Kenya

Being a comprehensive framework agreement, the CBD provisions are implemented by a wide range of institutions. EMCA established various institutions, among which is the National Environment Management Authority with a mandate to coordinate all activities related to the conservation and sustainable use of Kenya's natural resources.

³² Institutions established by EMCA include the National Environment Council, NEMA, Technical Advisory Committees which dissolve after their specific duties, Director General, Public Complaints Committee, Provincial Environment Committees, District Environment Committees, Standards and Enforcement Review Committee, National Environment Tribunal, and the National Environment Action Plan Committee.

National Environment Management Authority (NEMA)

NEMA is the institution with the legal authority to exercise general supervision and co-ordination over all matters relating to the environment, and is the principal instrument of the Government charged with the implementation of all policies relating to the environment. NEMA's functions, which determine its scope of activities, are more particularly set out in Section 9 (2) of the Act. They include co-ordinating the various environmental management activities being undertaken by the lead agencies and promoting the integration of environmental consideration into development policies, plans, programs and projects.

Among the functions the Authority has, the function of coordination is the most fundamental.

The Authority is mandated to;

Coordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes, and projects with a view to ensuring the proper management and rational utilization to environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.³³

In particular NEMA is mandated to;

- i) undertake, in co-operation with relevant lead agencies, programs intended to enhance environmental education and public awareness about the need for sound environmental management,
- ii) publish and disseminate manuals, codes or guidelines relating to environmental management, prepare and issue an annual report on the state of the environment in Kenya,

³³ Republic of Kenya, *supra* note 28

- iii) advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment;
- iv) advising the Government on regional and international environmental conventions, treaties and agreements to which Kenya is a party,
- v) mobilizing and monitoring the use of financial and human resources for environmental management;
- vi) rendering advice and technical support where possible to entities engaged in national resources management and environmental protection so as to enable them to carry out their responsibilities satisfactorily.

As such it is very clear that apart from coordinating all aspects of biodiversity conservation in the country, part of NEMA's role is to ensure that the public receives adequate information on aspects of environmental management in Kenya.

CHAPTER THREE

CHALLENGES IN IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY IN KENYA

3.1 Introduction

The previous chapter discussed how countries nationalize their international obligations, and looked at the process taken to domesticate the CBD in Kenya. From the foregoing, the picture emerging is one of a country committed to adhering to the terms of the Convention; looking at the various initiatives that the country has put in place. However, with the increase in loss of the country's biodiversity, one ends up with a gap between commitment and actual implementation.

This chapter illuminates the factors that create this gap. The chapter discusses some of the key institutions that are implementing various provisions of the Convention, and from discussion with officials from these institutions, identifies some of the major challenges that hinder the effective implementation of their obligations. Some of the challenges identified include inadequate funding, unclear and overlapping mandates, lack of coordination, low capacity for conservation technologies and inaccessibility to data and environmental information. These challenges are examined individually.

3.2 Lack of a clear coordination mechanism

As discussed in Chapter two, the Convention is a broad framework agreement of provisions for conservation of biodiversity. Due to the broad nature of the Convention, it is inevitable that many institutions are involved in implementing its broad provisions, whether directly or indirectly. The picture that emerges therefore is one where most of these institutions undertake similar activities, and with the absence of a coherent coordinating mechanism, efforts are most often duplicated. Further, this leads to inter-agency competition for scarce financial resources. As an example of the current practice as far as implementation of conservation principles of the CBD are concerned, the following gives an example of some of the lead institutions carrying out conservation activities in Kenya.

National Environment Management Authority

The previous chapter introduced NEMA, which is the coordination body of all environment conservation activities in the country. The objective of NEMA is to exercise general supervision and coordination over all matters relating to the environment and be the principal government instrument in the implementation of all policies relating to the environment. It is also specifically mandated to undertake programmes intended to enhance environmental education and public awareness about the need for sound environmental management as well as for enlisting public support.¹ The Director General is the chief executive of NEMA and is responsible for day-to-day management of the affairs of the Authority.

¹ Institute for law and Environmental Governance, *Community Guide to Environmental Management in Kenya*, Nairobi, 2004, p 28-29

In relation to international conventions, the Authority has the responsibility to;

Advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be and

Advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party

This is a daunting task for the Authority, given the broad structure of the CBD, which does not lend it possible to have one implementing body. This therefore means that there are numerous institutions/agencies implementing some provisions of the Convention, directly or indirectly. The mandates of these institutions are not derived from the EMCA; rather, the institutions are governed by their own statutes.

Permanent Mission of Kenya to UNEP

The Permanent Mission of Kenya to the UNEP figures in the CBD Secretariat's files as the primary focal point for the Convention in Kenya. Their role is a representational one, dating back to the history of the Stockholm Convention, where they played an ambassadorial role. The Mission performs diplomatic roles and acts as a link between the government and other diplomatic missions on issues related to environmental conservation, thereby providing an international link. In particular, the Mission also serves as a conduit between NEMA and the Secretariat of the CBD in Montreal for information related to the CBD.

Kenya Wildlife Service (KWS)

The core of Kenya's implementation of Article 8 of the CBD can be found in the provisions of the Wildlife Conservation and Management Amendment Act 1989. It is this Act that established the KWS and contains its mandate. KWS is the major body whose mandate is the conservation and management of wildlife and Kenya's National Park System. Other goals include infrastructure development, community wildlife conservation programs; capacity building; and the development of a policy framework for the management of protected areas² in Kenya. These goals are in conformity with Article 8 and 9 of the CBD on In-situ and Ex-situ conservation measures respectively.

Most of Kenya's wildlife exists outside of its National Parks, and KWS has been catalytic in setting up a wide range of community and private initiatives to set up ecotourism enterprises on their land. In *Ngwesi* for instance, a 16,500 acre group ranch in the northern area of Kenya opened a small lodge in 1996, and has been attracting income which benefits the communities who live around it. The Mara Conservancy in the Trans Mara area of Kenya is an initiative aimed at ensuring that the local community actually receives the proceeds from tourism activities carried out in their area.³

Other conservation measures that KWS is involved in include the reintroduction of species in areas from which they had formerly been eradicated, and management of wildlife-livestock interactions. For example, giraffes were successfully reintroduced from Kenya into Kidepo Valley National Park in Uganda.

² both terrestrial and marine protected areas

³ United Nations Environment Programme, *Africa Environment Outlook; Past, Present and future perspectives*, London, Earthprint Limited, 2002 pp. 71-72

interactions. For example, giraffes were successfully reintroduced from Kenya into Kidepo Valley National Park in Uganda.

Kenya's protected area estate covers 8% of its land and includes a range of designations (national parks; national reserves; national local sanctuaries; community-based protected areas; and private owned areas). These protected areas face many challenges including encroachment due to increasing human populations, linked to increasing poverty, as well as a range of institutional capacity constraints.

The current emphasis in Kenya is to effectively link protected areas in Kenya with lands outside the protected area estate, particularly through more collaborative approaches with local communities. A particular focus is to develop a shared vision that wildlife is an important natural resource, crucial for sustainable development and poverty alleviation among local communities. A range of strategies for community-based management of wildlife are currently being implemented, often based around the empowerment of local communities. A number of conservation and institutional development projects are also being implemented, where possible on a sustainable financing basis.

Forest Department

The Forest Department (FD) is another agency that manages a system of protected areas that are critical for *in-situ* conservation purposes. FD activities include in collaboration with KWS, an extension service for on-farm forestry, and supporting the cultivation of indigenous tree species.

National Council for Science and Technology

Kenya's involvement in the development of the Cartagena Protocol was led by the National Council for Science and Technology (NCST), and it operates as the lead agency for the Protocol. The Cartagena Protocol on Biosafety is a supplementary agreement to the CBD, which was adopted in 2000 to address the potential risks posed by cross border trade and accidental releases of living genetically modified organisms. NCST plays host to the National Biosafety Committee which is inter-ministerial and cross-sectoral, and aimed at ensuring effective planning with regard to modern biotechnologies .⁴

National Museums of Kenya (NMK)

The NMK is a quasi-government institution established by the National Museums Act (Cap 216) of the Laws of Kenya. NMK is a multi-disciplinary institution whose mission is to collect, preserve, study, document and present Kenya's past and present cultural and national heritage. The objectives are to enhance knowledge, appreciation, respect and sustainable utilization of these resources for the benefit of Kenya and the world, for now and posterity. NMK houses a Centre for Biodiversity as well as the East Africa Natural History Society, and the Kenya Research Centre for Indigenous Knowledge.

⁴ Biotechnology is increasingly used for the genetic improvement of crops but concerns have been raised about potential risks to biodiversity. The organisms produced are referred to as genetically modified organisms (GMOs) or living modified organisms (LMOs). It is in response to this concern that the Cartagena Protocol was negotiated.

The NMK implements the Programme of work for the Global Taxonomy Initiative (GTI), as decided by the Conference of Parties in their sixth meeting.⁵ This entails classification at species, ecosystem and genetic levels. The GTI addresses lack of information on the identity of components of biological diversity and the need to identify, monitor and assess biological diversity in line with Article 7 of the Convention.⁶ The NMK houses the East African Herbarium and has instituted some programmes like the Important Bird Areas, Invertebrate Department, and Pollinator Initiative for implementation of the GTI Programme. However, they decry the inadequacy of taxonomic expertise.⁷

In line with Article 8 of the Convention on In-situ Conservation measures, NMK undertakes inventories on rare, threatened and endemic plant genetic resources. In addition, the Herbarium section of the NMK, together with the Seed Centre of the Kenya Forestry Research Institute collects and conserves forestry genetic resources in the National Genebank. The National Genebank was established in 1983 and is responsible for ex-situ conservation of crop plant germplasm in line with Article 9 of the Convention.⁸

International Union for the Conservation of Nature – IUCN

IUCN was established in 1948, and is a Union of States, government agencies and a diverse range of non-governmental organizations, working in a unique world partnership spread over

⁵ Decision VI/8 of CoP to CBD in Secretariat of the CBD, *Handbook of the Convention on Biological Diversity*, Montreal, 2003 pp 700-703

⁶ Article 7 is on Identification and Monitoring of components of biological diversity important for its conservation and sustainable use, and organize and maintain data derived thereof.

⁷ Centre for Biodiversity, National Museums of Kenya, *Report on Implementation of Programme of Work for the Global Taxonomy Initiative*, April 2005

⁸ Republic of Kenya, Ministry of Environment Conservation, *First National Report to the Conference of the Parties of the CBD*, March 1998

140 countries. As a Union, IUCN seeks to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable. IUCN operates through a 'triple helix'; its three strands are the secretariat, the membership and commissions.⁹

The objectives of IUCN's work on biodiversity¹⁰ are three-fold. First, the Union aims to ensure the conservation, sustainable use and equitable sharing of the benefits derived from the use of biological resources, through the implementation of the Convention on Biological Diversity (CBD); second, the Union aims to promote synergies between various international agreements; and third, the Union works to ensure the integration of biodiversity into key agreements and processes.

IUCN, having developed the draft for the Convention is keen on supporting its implementation at regional and national levels. The Union has helped many countries prepare National Conservation Strategies, and demonstrates the application of its knowledge through the filed projects it supervises across the world. IUCN provides technical and policy advice to the Contracting Parties to the CBD, drawing on its technical programmes, regional and country offices, and its commissions, in consultation with its membership.

IUCN, through its Species Survival Commission (SSC), produces a publication of threatened and endangered species worldwide. This is the IUCN's Red List of Threatened Species which

⁹ The Commissions of IUCN include the Commission on Ecosystem Management, Commission on Education and Communication, Commission on Environmental Law, Commission on Environmental, Economic and Social Policy, Species Survival Commission, and the World Commission on Protected Areas.

¹⁰ www.iucn.org

provides the most authoritative global assessment of the status of plants and animals, and is used by scientists, policy makers, NGOs, and researchers worldwide.¹¹

United Nations Environmental Programme (UNEP)

The United Nations Conference on Human Environment, held in June 1972 was the event that turned the environment into a major issue at the international level. It is during this conference that UNEP was created, as the ‘environmental conscience of the UN system’.¹² UNEP’s mission is;

‘To provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations.’

To work towards this mission, UNEP plays a catalytic role in the development of international environmental law, advises governments on the formulation and implementation of environmental programmes, and provides advice on international cooperation in the field of the environment. With regard to implementation of international conventions, UNEP has a Division of Environmental Policy Implementation (DEPI), which is responsible for the implementation of environmental policy in order to foster sustainable development at global, regional and national levels.

¹¹ IUCN – The World Conservation Union, *An Assessment of Progress 2002*, Gland and Cambridge, 2003, p16

¹² United Nations Environment Programme, *Global Environment Outlook 3; Past, present and future perspectives*, London, Earthscan Publications Limited, 2002 p 4

The DEPI is also UNEP's focal division for capacity building, which characterizes most of UNEP's work. In cooperation with international and national partners, DEPI adopts an integrated approach in providing technical assistance, advisory services, and strengthening the environmental management capacity of developing countries and countries with economies in transition. The activities of the Division are needs driven; based on global regional and national priorities, but include capacity building initiatives, and a branch for the implementation of environmental law.

The Implementation of Environmental Law Branch comprises two units:

- Compliance with and Enforcement of Environmental Law, including Multilateral Environmental Agreements (MEAs);
- Partnership for the Development of Environmental Law and Institutions in Africa (PADELIA)¹³.

The Compliance and Enforcement Unit is dedicated to supporting the implementation and enforcement of environmental laws, including Multilateral Environmental Agreements (MEAs). The unit promotes compliance with and enforcement of MEAs at the national, regional, and global levels through the development and application of a range of tools. These include, for example, guidelines on compliance, legislation, institutional approaches, and cooperation. The unit also develops and strengthens the capacities of officials and institutions in the national and regional implementation of MEAs.

¹³ PADELIA is a 10-year old Programme, successor to UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa

With respect to the PADELIA programme, the Unit seeks to assist African governments in building capacities for the development, strengthening, implementation and harmonization of environmental legislation as well as related institutions for sustainable development and poverty reduction.

From the foregoing, there are numerous actors carrying out activities for biodiversity conservation, which is not a bad thing at all. However, they are so scattered and their activities so divergent that, according to sources from NEMA, monitoring of their activities in relation to the implementation of the CBD becomes extremely difficult. For instance, the existence of numerous actors cannot enable NEMA to give an inventory of how much funding goes to support biodiversity activities. This in turn complicates the process of fundraising, since one cannot tell which species require more management emphasis and more financial support and so on.

In addition, the First National Report to the Conference of Parties to the CBD in 1998 noted that although there are more than 77 statutes that relate to the conservation and management of biodiversity in Kenya, these laws are not adequately enforced due to among other reasons, absence of legal provisions to specify standards of performance.

One of NEMA's main objectives is to coordinate all environmental activities being undertaken by the lead agencies in the country. The coordination function means that NEMA cannot implement projects, and has to rely on the lead agencies implementing various sections of the CBD to gather information on what is being done. Some of the lead agencies we have studied

above have developed expertise in their broad areas of work. However, the extent to which they are implementing specific Articles of the Convention lies within the extent to which they are mandated by their own internal statutes. There is therefore no mechanism for these institutions to forward for instance their research findings to a central coordination body. The fact that NEMA has the legal right to request for information on what is going on regarding a particular Article of the Convention does not ensure that these institutions cooperate to provide this information if their statutes do not necessarily require them to.

The fact that implementation of the CBD necessitates a multiplicity of actors also gives rise to the problem of duplication of activities and unnecessary bureaucracy. For instance, the study has shown that the focal point for the CBD is the Permanent Mission of Kenya to UNEP. As the focal point, the Mission is responsible for administering all environmental conventions in Kenya, including the CBD. NEMA, on the other hand is responsible for coordinating all environmental conservation activities in the country. To illustrate this problem further, the National Reports to the CoP are prepared within the auspices of NEMA, and forwarded to the Mission to UNEP for onward transmission to the CBD Secretariat. Should there be any queries, the CBD Secretariat writes to the Mission, which then forwards this to NEMA. In order to give any clarifications, NEMA writes back again to the Mission for transmission to the Secretariat. This bureaucracy introduces unnecessary delays in information dissemination.

3.3 Limited funding

Various financial mechanisms were suggested during the negotiations for the Convention. The proposal originally put forward by IUCN, that conservation actions should be financed through levies on the commercial applications of wild products, which would be paid into an international conservation fund established under the Convention, was not retained.¹⁴ It was therefore concluded that any financial mechanism would have to be exclusively based on compulsory or voluntary contributions by Contracting Parties. However, this immediately raised concern as to whether such contributions could ever be sufficient to meet global conservation requirements under the Convention.

In parallel, it was recognized that substantial financial means would need to be transferred to developing countries for implementation of the Convention, if it was to have any chance of being effective. Many of the countries which are the richest in biological diversity are also amongst the poorest in the world. As a result, they would be completely unable to meet their obligations under the Convention without such transfers.

The Convention therefore establishes a legal interrelation between the conservation obligations of developing countries and the obligation on the part of developed state Parties to provide the former with new and additional financial resources. In particular, Article 20, (2) of the Convention states;

'The developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention and to benefit from its provisions ...'

¹⁴ De Klemm C. & Shine C. , *Biological Diversity and the Law; Legal Mechanisms for Conserving Species and Ecosystems*, Gland, IUCN Publications Services Unit, 1993, p 23

The Article further states that;

*'.....The implementation of these commitments shall take into account the need for adequacy, predictability and timely flow of funds and the importance of burden-sharing among the contributing countries included in the list.'*¹⁵

This Article places a burden to the developed country Parties and holds them responsible in a sense for the extent to which the developing country Parties implement their commitments under the Convention.

At the time of negotiation of the Convention, the delegates took cognizance of the fact that these Articles would need to be internalized back home especially with respect to the developed country Parties new responsibilities of provision of funds. In this respect, interim arrangements were made, and covered under Article 39. A global financial mechanism for the conservation of biological diversity, the Global Environment Facility (GEF) was chosen. The GEF was chosen to be the institutional structure for provision of financial resources to developing country Parties on an interim basis for the period between the entry into force and the first meeting of the Conference of the Parties, or until another institutional structure is chosen. GEF had been in existence for a year, having been established in 1991 as an experimental partnership involving UNEP, UNDP and the World Bank to generate ecological dividends from local and regional development by providing grants and low-interest loans to developing nations and economies in transition.¹⁶

¹⁵ This is a list of developed country Parties and other Parties which voluntarily assume the obligations of developed country Parties, established during the first meeting of the Conference of the Parties to the Convention

¹⁶ United Nations Environment Programme, *supra note 12*, p 17

Transfer of funds for the purposes of implementing the Convention in Kenya has been, and still remains a major challenge. This refers to funding from within and from without. In Rio, some developed countries affirmed their commitment to reaching the target of 0.7% of gross national product for Official Development Assistance (ODA) annually.¹⁷ Only Denmark, the Netherlands, Norway and Sweden achieved that goal. Although Kenya does not have a comprehensive report illustrating the diminishing amounts of ODA for purposes of meeting CBD obligations, numerous reports from lead agencies have highlighted this as a primary concern.

NEMA has repeatedly cited reduced funding from the government as a point of weakness in the implementation of its mandate. Funding to the Authority has reduced considerably. Sources from the Authority that did not wish to be quoted confirm that the Authority, which was created by Parliament in 1999, had a budget provision of Ksh 900 million from the central government. But after its inception, it received Ksh 403 million during the fiscal year 2003-2004. This reduced to Ksh 293 million in 2004-2005 fiscal year, and slid further down to Ksh 273 million in 2005-2006 fiscal year.

The First National Report to the Conference of the Parties to the CBD mentions limited funding as an obstacle. So far, the Government of Kenya budgetary allocation for the implementation of national strategies and action plans is far below what would be required for the implementation of the CBD. Some of the money for the activities has come from multilateral donors like GEF, UNEP among others, but the government's contribution was minimal.¹⁸

¹⁷ UNEP, *supra* note 16, p 17

¹⁸ Ministry of Environmental Conservation, *supra* note 8

The Second National Report to the CoP of the CBD also highlights limited financial resources as an impediment to the implementation of the provisions. The problem of limited financial resources resounds throughout the report. This implies that Kenya is quite handicapped in meeting its obligations under the Convention, and there is a need to find both short term and long term solutions to this problem.

3.4 Lack of a coherent domestication policy

The text of the CBD defines the norms, rules and procedures that Parties have agreed to support. Implementation under the CBD is largely a domestic matter, and the main provisions firstly should be incorporated into the national legal system to facilitate regular application through the ordinary motions of the established constitutional machinery. What we find in Kenya is that in the first instance, the current constitution does not incorporate environmental conservation concerns, leave alone the provisions of environmental conventions. This leads to the conclusion that such provisions do not form part of the ordinary law of the land, and consequently, there is no constitutional duty to apply them and thus not subject to enforcement through the regular judicial process.

Discussions with officials at the Attorney General's Chambers revealed that there is no legislative roadmap for the domestication of international conventions in Kenya. Chapter two has discussed how Kenya ratifies treaties and what emerges is that there is no enabling institutional structure for the ratification process. Domestication of the principles of the Convention is left to the discretion of environmental agencies in the country. This in turn leads

to ad hoc implementation of the Articles contained in the CBD and other obligations that are never fulfilled.

Attempts to incorporate the provisions of the Convention in Kenya can be seen through the development of the NBSAP and the NEAP. This is in accordance with Article 6 of the Convention, which gives each Contracting Party a mandate to;

'Develop national strategies, plans, or programmes for the conservation and sustainable use of biological diversity or adopt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned....'

Although Kenya has completed the National Biodiversity Strategy and Action Plan (NBSAP), the study discovered that the NBSAP document remains to be approved by Parliament, and most importantly, that the development of the NBSAP document appears to have been a desk study. The preparation of the NBSAP document, according to former NES senior official, was done by a consultant without any consultations with lead environmental agencies. Perhaps this reflects the level of government commitment to the Convention in the country. In some way, the process used to develop the NBSAP document was in contravention of Article 13 (a) on Public Education and Awareness. In part, this Article states the importance of promoting and encouraging understanding of the importance of, and measures required for the conservation of biological diversity.

However, the EMCA introduced the framework legislation on the environment in Kenya. It is hoped that through Part IV of the EMCA, (Environmental Planning), Article 6 of the CBD will be domesticated in the country. In this Part, a National Environment Action Plan Committee is

established, with a mandate to prepare, after every five years, a national environment action plan for consideration and adoption by the national assembly. This is a process that NEMA has reported is currently ongoing. However, it is interesting to note that even though the NEAP Committee is a fairly inclusive body including a wide range of government ministries, institutions, private sector, research institutions, as well as NGOs, this section does not lay emphasis on involvement of the public in the development of the NEAP, even though according to section 38 (1), the NEAP shall;

“be binding on all persons and all government departments, agencies, state corporations or other organs of Government upon adoption by the National Assembly.”

3.5 Inadequate Political will for conservation

Since independence in 1963, Kenya has over the years consistently stressed the need to live in harmony with the environment by not exerting excessive pressures on our natural resources. The Sessional Paper No. 10 of 1965 on *Africa Socialism and its Application to Planning in Kenya* noted that;

“...outmoded farming techniques may result in erosion; the cutting of wind breaks and the burning of vegetation may turn fertile acres into desert; and the destruction of forests may eliminate important water supplies; practices tending to harm rather than conserve our physical environment...”

Through this Sessional Paper, the Government of Kenya recognized the need to conserve natural resources for future generations and further, that the concern with the quality of the environment

must be placed on equal footing with the need to exploit natural resources for natural development.¹⁹

During the preparation towards the June 1972 UN Conference on the Human Environment, the government established a secretariat in the Ministry of Natural Resources to prepare country papers. Thus, the National Environment Secretariat (NES) was established, which played a pivotal role in the discussions to establish the UNEP headquarters in Nairobi. The 1979-1983 Development Plan made a move towards integrating environmental concerns into sectoral planning and management, which was to be in vogue in the post-Rio era. During this period, the government undertook institutional measures to ensure conservation goals in the Development Plan were met. Such measures include the establishment of the Inter-Ministerial Committee on the Environment (IMCE), the Permanent Presidential Commission on Soil Conservation and Afforestation (PPCSCA) and offices of the District Environment Officers for each administrative district. Both 1984-1988 and the 1989-1993 Development Plans stressed the government's concern with environmental protection, and included an environmental component in different resource sectors.²⁰

History from independence shows a clear policy commitment by the government over the conservation of our biological resources. However, the current continuing rate of biodiversity loss suggests otherwise. Concern regarding this commitment is further driven by the recent remarks by some cabinet ministers that NEMA is a major stumbling bloc to investors, courtesy of its stringent rules which lead to delays and additional costs for investors. Although this may

¹⁹ UNEP-ACTS, *The Making of a Framework Environmental Law in Kenya*, Nairobi, ACTS Press, 2001 pp 17-19

²⁰ UNEP-ACTS, *supra* note 19, pp. 20-21

be a legitimate concern for investors, priority for conservation should be taken into consideration too. It is interesting to recall that NEMA derives its powers from EMCA 1999 which the Cabinet passed.

The study further revealed that conservation of our natural resources remains a commitment on paper, and it has been relegated to the margins of our national development priorities. In accordance with Article 6 of the Convention, attempts have been made to integrate the conservation and sustainable use of biodiversity into Kenya's national development agendas. A case in point is the inclusion of conservation concerns within the Poverty Reduction Strategy Paper (PRSP)²¹ and the Economic Recovery Strategy.²¹ However, these still remain in paper with no specific action plans to implement the twin goals of conservation and development. Chapter one showed how conservation of the environment within the PRSP is documented in a couple of paragraphs as a sub sector within the Agriculture and Rural Development Sector.

Illegal allocations of forest land and forest excisions are in contravention of the obligations of the CBD. An analysis of forest land to date reveals that the country had 3% of the total territorial landmass under closed canopy gazetted forests in the 1970's and 1980s. This has progressively reduced to about 1.7%²² to date despite Kenya having ratified the CBD and committed to fulfill its obligations. We can all recall that some forest excisions received full backing of the Cabinet ministers for example the 2001 declaration to excise 167,000 acres of forest land.

²¹ Ministry of Finance and Planning, Republic of Kenya, *Poverty Reduction Strategy Paper for the Period 2001-2004*, Nairobi, 2001

²² Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 pp151-155

In addition, this diminishing political will can be felt through the Economic Recovery Strategy Paper, which touches on conservation priorities in just less than half a page, while the rest touches on how the country will achieve national development. This is coupled with the fact that economic measures for valuing biodiversity are not developed or well understood by our policy makers. The Consultative Donor Meeting that took place early this year in Nairobi reveal from the agenda that, in the discussions on how to promote economic development in Kenya with more support from the developed countries, no attention was given to the very natural resources that provide the raw materials, critical in achieving this economic development, and reducing poverty levels in the country.

The challenges of political will to comply with international environmental obligations can also be linked to the problem of lack of awareness of the benefits of biodiversity conservation.

3.6 Inadequate capacity

The main thrust of the obligations of Article 12 of the CBD is provision of scientific and technical education and training in measures for conservation and sustainable use of biological diversity. All the public universities in Kenya offer some training courses of relevance to conservation of biological diversity. However, discussions with key informants revealed that the current training is not demand driven, and is so generalized such that it does not address specific environmental needs. In short, the training appears to be de-linked with practice. This is also

illustrated in NEMA's State of the Environment Report²³ which states that teachers take a theoretical approach to teaching instead of problem-solving approach.

There is little research or follow-up to determine the effectiveness of officials within lead agencies who have undergone specific training. In most cases, government officials, after attending professional development courses, get promoted without fully implementing the skills learned on the job, or training others. In most cases, they join international NGOs due to the economic incentives they provide.

Information technology has become a powerful tool for information dissemination. However, discussions at the Attorney General's Chambers revealed the lack of information and communication technology training that would enable legal and conservation experts to communicate and share best practices internationally. Insufficient capacity in areas such as data collection, archiving, analysis and retrieval was echoed throughout the discussions.

Most of the institutions visited noted the low level of technical capacity to translate some of the provisions of the CBD into action nationally. In addition, it was found that there were no deliberate attempts to link practice to policy, even though evidence has it that activities to meet the objectives of the Convention are on going. This is reflected in the Second National Report to the CoP where it states the problems in compiling the report thus;

".....Some of the respondents did not at the beginning relate their activities to implementation of the CBD. However after several meetings they were able to recognize the relevance of their activities to the CBD."

²³ National Environment Management Authority, *State of Environment Report 2003*, Kenya, Nairobi, 2004, pp 134-135

3.7 Inaccessibility to data and environmental information

Coupled with the challenge of lack of ICT knowledge, there is no website either within the Ministry of Foreign Affairs, at the Attorney General's or the Ministry of Environment which can provide a one-stop shop for all the environmental conventions, international, regional and bilateral, that Kenya had ratified to date. In addition, information regarding who is doing what in relation to the various articles of the CBD is very difficult to find. This complicates the coordination and reporting process, and further complicates measures for conservation and sustainable use of our biological diversity. Currently, NEMA is trying to put a database together for all international, regional and bilateral environmental agreements that Kenya is party to.

Kenya's First National Report to the CoP notes that adequate data on geographic distribution of most species is not available. It further notes that the Country Biodiversity Study done in 1992 recorded species numbers that were slightly higher than average numbers recorded in world lists. This does not reflect the true biodiversity, but there are not conclusive figures produced yet.

The State of Environment Report 2003²⁴ acknowledges that existing data on environmental issues is spread over many organizations in the public and private sector, international and regional organizations. The data collection and harmonization process is inadequate due to the widely scattered sources without an established data/information collection infrastructure. In some cases, there are restrictions on data access and use, while in others, the data provided is of

²⁴ National Environment Management Authority, *supra* note 23, pp.130-133

questionable quality. Lack of quality, timely data or information usually leads to poor planning, and subsequently poor monitoring and evaluation.

This chapter has illuminated the challenges that Kenya's lead environmental management agencies are faced with, while implementing the various provisions of the CBD. The chapter has disclosed the gulf between Kenya's commitment to halt biodiversity loss by ratifying the CBD, and the fact that biodiversity loss in the country is increasing. The chapter has demonstrated the reasons for this gulf, which leave no doubt that solutions should be found in order to bridge it and effectively achieve the objectives of the CBD, and in particular achieve the millennium development goal of combating poverty by sustainably managing Kenya's natural resources. The following chapter proposes possible solutions for addressing these challenges.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

This concluding chapter presents the theoretical and empirical conclusions of the research study. The theoretical findings are based on the perspective that mostly informed the study, that of the *Managerialists*, which is derived from normative theories of compliance as seen in chapter one. The empirical findings lead to the possible solutions suggested by our key informants. Based on the research findings, the study gives recommendations and suggests areas for further research.

Based on the results of the study, it is clear that the government has shown commitment in ensuring the conservation and sustainable use of our natural resources. The study has revealed in chapter three the pivotal role that the Kenyan government played prior to the 1972 Stockholm Conference, leading to the establishment of UNEP headquarters in Kenya, and also the role during the preparations of the UN Conference on Environment and Development. Chapter three has also mentioned Kenya's commitment for conservation and therefore, the integration of conservation goals within sectoral plans for national development. A gulf however, has emerged between this commitment and the actual practice of fulfilling the obligations of the CBD, what with the rising rate of biodiversity loss in the country. It is therefore clear that several factors combine to hinder effective implementation of the CBD.

It is evident from the challenges that have been illuminated that norms alone do not necessarily lead to outcomes. The text of CBD defines the norms, rules and procedures that parties have

agreed to support. However, even though the Convention identifies clear norms, procedures and rules are vague.¹ Krasner² asserts that norms are behavioural guidelines, which rules operationalise and procedures implement. One cannot therefore divorce the existence of a regime from its implementation. Implementation has to occur for a regime to be effective, and since implementation under the CBD is largely a domestic matter, mechanisms for inducing implementation ought to be designed mostly through carrots rather than forcing implementation through coercion. Normative theories therefore not only focus on the internalization of norms within states, but also lay emphasis on the influences that affect a state's compliance with its international obligations. The *Managerialists*, within the ambit of normative theories focus on positive incentives (carrots) for inducing compliance with international regimes, by emphasizing solutions to the challenges of implementation.

A regime embodies practices and evolves through a process. In this way, this research study, by seeking to address the challenges that affect the implementation process of CBD obligations, contributes its findings to the learning curve that would inform rule making. It recommends that environmental rule setting should take into account lessons learnt while putting into practice the norms and procedures prescribed.

In line with the ideals of *Managerialists*, UNEP has established guidelines for enhancing compliance with multilateral environment agreements to assist governments and secretariats of the multilateral agreements, regional organizations, non-governmental organizations, private sector, and other relevant stakeholders in enhancing and supporting compliance with these

¹ Le Prestre P. G., *Studying the Effectiveness of CBD*, in Le Prestre P. G. (ed) *Governing Global Biodiversity; The Evolution and Implementation of the CBD*, Hampshire, Ashgate Publishing Limited, 2002 p.58

² Krasner S. D., *International Regimes*, Ithaca, Cornell University Press, 1983

agreements. The guidelines are intended to facilitate consideration of compliance issues at the design and negotiation stages and also after the entry into force of the conventions.³ On national implementation, the Guidelines stress on the importance of identifying any compliance problems and developing a compliance plan stating how it may deal with these problems. In particular, the Guidelines state that;

"...if a state, once it becomes a party to a specific multilateral environmental agreement, subsequently identifies compliance problem, it may consider developing a compliance plan consistent with that agreement's obligations and inform the concerned secretariat accordingly. The plan may address compliance with different types of obligations in the agreement and measures for ensuring compliance"

These Guidelines work on the premise that Parties to a Convention have the good will while ratifying the Convention, but certain impediments hinder them from realizing the full benefits of the Convention through the implementation of the its provisions. NEMA should make use of these guidelines, and where necessary, suggest any changes, since the guidelines are just the beginning of a process of ensuring effective implementation of multilateral environment agreements.

As was noted in chapter three, implementation of the Convention in Kenya has been impeded by inadequate commitment and support to implement the Convention. To demonstrate this commitment, the study concludes that the Ministry of Environment should deliberately appoint the national focal point for the Convention, outlining their responsibilities and gazette them. In addition, the government, through the Ministry of Environment should specifically outline the focal point's enabling financial resources.

³ United Nations Environment Programme, *Guidelines on Compliance with and Enforcement of Multilateral Environment Agreements*, UNEP, 2002

As was noted in chapter three, Kenya does not have a formal legal process for ratifying treaties. This subsequently means that obligations of the CBD were not tabled and debated in any forum to create awareness, review the provisions against the existing national environmental policies and adopt legal measures for implementing the Convention. In this case, there were no deliberate attempts to internalize the provisions of the CBD within the frameworks of existing policies. In hindsight, the provisions of the CBD should have been debated in Parliament before ratification. This would have enabled Parliament to cover the subject matter of the Convention rather than just make simple references to it. In addition, such debate would have enhanced awareness of the treaty to the public, and subsequently enhance chances of efficacy of implementation. For future international treaties, it is recommended, and currently, there is a proposal in the Constitutional debate that the Executive should submit the text to Parliament within six months after the treaty is adopted, for debate before recommending ratification.

Based on the results of the study, the lack of awareness on what the Convention is and what it purports to achieve is perhaps the most critical problem that hinders effective implementation of the Convention in Kenya. In fact, all the other problems appear to be subordinate to the lack of awareness that biodiversity forms the very basis of life on earth. Natural resource base provides products and services that create and maintain the well being of both people and nature. Although everyone's livelihood depends in some way or another upon biodiversity, it is especially important to those whose livelihoods are dependent upon locally available natural resources. The fourth goal of the 2010 Strategic Plan for the CBD⁴ lays emphasis on a better

⁴ The Strategic Plan was developed in 2002, during the World Summit for Sustainable Development (WSSD) with a purpose of guiding the further implementation of the CBD at the national, regional and global levels. During the

understanding of the importance of biodiversity and of the Convention, which would lead to a broader engagement across society in implementation. A greater challenge lies within NEMA to implement a public awareness strategy and promote public participation in support of the Convention.

However, having a general understanding of the importance of Kenya's biological diversity is not enough. It must also be appreciated that biodiversity has intrinsic values and also values in maintaining life on earth. Biodiversity is the life insurance of life itself. The diversity within species is the insurance for the species survival in difficult times, the variability among living and non-living things is the guarantee for ecosystem functioning and services, and the variation of functional ecosystems is the life insurance for sustainable development. This should be a fundamental understanding of any approach to the long-term conservation and use of biodiversity. Public awareness therefore ought to be made explicit in government policies relating to biodiversity conservation, in line with Article 13 on Public Education and Awareness.

Capacity building is an integral part of formulating and implementing long lasting strategies for conservation. As noted in chapter three, capacity gaps in Kenya include ignorance of the state of biodiversity, of specific provisions of the CBD and lack of scientific and financial expertise. For NEMA to ensure coordinated implementation at the national level, it has to first establish the capacity needs within the entities engaged in natural resource management in the country. In

WSSD, Contracting Parties committed themselves to a more effective and coherent implementation of the three objectives of the Convention, to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of life on earth. See Decision VI/26 in Secretariat of the CBD, *Handbook of the Convention on Biological Diversity (updated to include outcomes of the sixth meeting of the Conference of the Parties)*, Montreal, CBD Secretariat, 2003 pp. 883-887

addition, lead agencies should establish partnerships with research institutions so that theoretical approaches are linked with practical solutions.

Regarding the challenge of establishing a coherent and appropriate coordination structure, the key informants suggested that NEMA should first bring together all relevant stakeholders to discuss their specific mandates, those mandates that directly relate to the Convention, and establish a collaborative framework to be adopted by the key entities. To consolidate gains of cooperative actions, there is a need to review the conservation policies of these entities in line with the developed collaborative framework. This would enable NEMA to carry out its coordination responsibilities. This will equally be the first step towards solving the problem of overlapping mandates, which lead to unfulfilled obligations and increases competition for the limited financial resources.

NEMA is mandated to undertake, in cooperation with relevant lead agencies, programmes intended to enhance environmental education and public awareness about the need for sound management of biological diversity. The extent to which this cooperation can be achieved and maintained depends on the awareness and consensus built around the need to develop synergies for conservation and sustainable use of our natural resources, since the goals, scientific linkages, and institutional frameworks of most of the environmental conservation conventions are intertwined. In 2003, NEMA and the Secretariat of the UN Convention to Combat Desertification organized a workshop to improve the knowledge of participants on the national policies and initiatives adopted to implement some of the international environmental

conventions⁵ and identify areas of synergies and linkages in the implementation of these conventions. During this workshop, participants recommended the establishment of a Conventions Office in NEMA to host all convention focal points and the development of joint work programmes for the conventions so as to coordinate implementation, harmonise policies, and establish a common strategy for awareness creation. It is these recommendations that NEMA could put into actionable items in order to effectively achieve the coordination mandate.

The potential risks of GMOs to biodiversity are the subject of ongoing research. Genetically modified organism (GMO) technology could play an important role in increasing agricultural products such as disease or drought resistant crops. However, this is an issue that is highly contestable especially with the release of GMOs that are encoded with a terminator gene. Such GMOs ensure that the seed produced is non-viable, thereby requiring farmers to purchase another batch of seed the following season instead of retaining some of the seed for planting the following year. This underlines the importance and urgency of public awareness, not only in GMOs, but also in all aspects of biological diversity in Kenya to ensure a well informed and balanced decision-making process. The national media has stepped up efforts to regularly communicate conservation activities in the country, and this is a tool that NEMA and the National Council for Science and Technology should use.

The legal and policy framework for the management of the environment has improved, with the passing of EMCA and the creation of enabling institutions. What remains to be seen is the debate and subsequent approval by Parliament, of the National Biodiversity Strategy and Action

⁵ The Conventions that formed the core of the discussions were the UN Convention to Combat Desertification (UNCCD), UN Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, Ramsar Convention on wetlands, and the Rio Forest Principles.

Plan, with specific measures to be taken to operationalize the plan. Thus, the NEAP Committee, in line with their mandate from EMCA, should embrace dialogue with key stakeholders in the development of a national environment action plan, and a debate within the National Assembly that incorporates views from the public rather than undertake a desk study.

NEMA will not function unless resources go into maintaining a strong Authority, staffed by a creative, respected professional secretariat. In addition, there is need to integrate the activities of other conservation agencies, and civil society so that activities taking place should not be unrelated to what the CBD was originally meant to achieve. Not to get rid of the diversity, but to add to it some logical framework so as to realize the benefits that CBD carries along. The need for mechanisms to enable other implementing institutions to collaborate with NEMA cannot be overstated. No wheel works, after all, unless the hub, spokes, and rim function as a well-designed whole.

The study revealed that most of the development partners approached by most of the conservation organisations are the traditional donors, in addition to the GEF. Even though the Convention gives developed countries the responsibility for providing additional funding to the developing countries to implement the Convention, developing countries like Kenya should find new ways of attracting funds internally. Fundraising efforts therefore ought to embrace the private sector by establishing long lasting partnerships at different levels in all relevant sectors. In this way, donor dependency would be minimised, and potential for destructive activities would be mitigated by the awareness created for biodiversity conservation and equal access through such partnerships. In addition, suggestions were made to make use of the Constituency

Development Funds (CDF), which are funds given to every constituency in Kenya for national development projects. From the CDF, communities should lay emphasis on a certain percentage to implement conservation and sustainable use projects within their constituencies. This also lays emphasis on the government to establish clear mechanisms to incorporate the communities in implementing the Convention.

Article 15(7) of the Convention requires that the results of research and development, as well as the benefits arising from the commercial and other utilisation of genetic resources, must be shared in a fair and equitable way with the Contracting Party providing such resources, again on mutually agreed terms. This implies, in particular, to the results and benefits arising from biotechnologies based upon genetic resources (Article 19(2)). These requirements would require access contracts with conditions for access. This in turn would rely heavily on the negotiation skills for both the Party providing the genetic material and the one receiving it. It is imperative therefore that Kenya considers having diplomatic training for experts involved in such negotiations, and also to involve legal experts who would enable them to conclude contracts that would be beneficial to them. The Attorney General's Chambers is full of State Counsels who are willing to be involved, so long as they are not only informed at the last stages of contract signature.

The Millennium Declaration is an attempt to provide a navigational map for the future, and such advances have been driven mainly by a series of civil society initiatives, which have nourished and enriched discussions throughout the years, calling upon governments to put into practice the different obligations and suggesting diverse mechanisms for how to do so. The need to involve

the civil society in the processes leading to the adoption and ratification of conventions is paramount and should be explored.

Prior to the meetings of the Conference of the Parties to the CBD, NEMA should take an active role in bringing together all the implementing agencies, representatives of the civil society and private sector to establish roles and responsibilities. Each constituent should present to NEMA a brief on their activities *vis-a-vis* the Convention, upon which NEMA would use to prepare a composite brief and map out a clear negotiation plan with clear roles for the selected country delegation. The first condition of this plan should be that the agenda of the Kenyan delegation must truly reflect national priorities. Real needs of Kenyans must be carried along and articulated during the CoP.

Based on the findings, the study gives priority to the establishment of a Conventions Desk, within NEMA, which would lay the foundation of an implementation framework of environmental conventions in general and the CBD in particular. This framework would constitute the actions to be taken to address the challenges that have been considered in this study and which impede the effective implementation of the CBD in Kenya. The study also recommends that the implementation framework, as far as possible, provide for normative, institutional and procedural mechanisms to ensure its operation. In this way, the country would be able to meet the objectives of the 2010 Biodiversity Strategy of significantly reducing the rate of biodiversity loss, and give life and relevance of conservation in sustainable development.

Areas for further research

Although various challenges have been illuminated and solutions suggested, the study may not have given sufficient detail to all the factors affecting implementation of the CBD in Kenya due to time constraints. The study has broken certain grounds, which warrant more in-depth analysis. The most interesting finding that requires further research is the relationship between positive incentives and rate of domestic implementation of international conventions.

More research is needed to establish lasting linkages between learning institutions and the lead agencies implementing various provisions of multilateral environmental agreements to improve synergies between theory and practice. Another area that could be further explored is the establishment of innovative sources of financing within the country to enable Kenya fulfill the international obligations within the CBD. It would be interesting to explore how these sources would be established and maintained in Kenya.

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