

**ACCESS TO GENETIC RESOURCES AND BENEFITS SHARING : MAIN  
ASPECTS OF SOME LEGAL FRAMEWORKS**

*Prepared for presentation at the Open Meeting of the Global Environmental Change Research Community  
Montreal, Canada, 16-18 October, 2003.*

*Marcelo Dias Varella, Ph.D.*  
[Marcelo.Varella@laposte.net](mailto:Marcelo.Varella@laposte.net)

## TABLE OF CONTENTS

|     |  |    |
|-----|--|----|
| 1.  | Introduction.....  | 3  |
| 2.  | Background and characteristics of legislation for access and benefit sharing.....                                | 4  |
| 2.1 | International agreements.....  | 4  |
| a)  | UNESCO.....  | 4  |
| b)  | UN safeguards for indigenous people’s knowledge.....   | 5  |
| c)  | FAO farmers' rights and the International Treaty on Plant Genetic Resources.....                                 | 5  |
| d)  | International Labour Organization.....   | 6  |
| 2.2 | National policies.....   | 7  |
| a)  | Centralization and decentralization.....   | 7  |
| b)  | The involvement of local communities.....  | 8  |
| c)  | Benefits sharing.....  | 9  |
| d)  | Participation of persons, private enterprises, or landowners.....  | 10 |
| e)  | Control of access.....   | 11 |
| f)  | Collective rights.....   | 11 |
| g)  | Considerations regarding the capacity of the countries to enforce national law: the control of the contract..... | 12 |
| 3.  | Final Considerations.....  | 13 |
|     | Bibliography.....  | 16 |
|     | Regulations, Regulations Drafts and Draft Guidelines.....  | 16 |
|     | Texts.....   | 16 |
|     | Countries or States with national or local projects of law.....  | 17 |
|     | Countries or States with national or local regulations:.....   | 17 |
|     | Regions with international norms.....  | 17 |
|     | Relevant Guidelines prepared by countries or regional organizations.....   | 17 |
|     | Relevant Guidelines prepared by international organizations.....   | 18 |
|     | Relevant Guidelines from national institutions.....  | 18 |
|     | Relevant Guidelines established for NGOs.....  | 19 |
|     | Guidelines established by indigenous and local community organizations.....                                      | 19 |
|     | Relevant Guidelines elaborated by professional societies.....  | 20 |
|     | Relevant Guidelines elaborated by the private sector.....  | 20 |

## **ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING: MAIN ASPECTS OF SOME LEGAL FRAMEWORKS**

### **1. Introduction**

1. This article summarizes some of the proposed guidelines, national legislation and international agreements that deal with issues related legal frameworks for access and benefit sharing. It is structured as a descriptive presentation of the facets of those frameworks that have been widely discussed within the context of the Convention on Biological Diversity (CBD).

2. Access and benefit sharing has been a key feature of the CBD since its signing in 1992. Within the context of access and benefit sharing, prior informed consent as a condition of access to biological resources has been an important concern for many CBD signatories. Before 1992, however, some initial frameworks were already in place. These included such norms (often non-binding) as those established by negotiations on Folklore at the United Nations Educational, Scientific and Cultural Organization (UNESCO); the indigenous people's rights at the United Nations (UN); the farmers' rights at the Food and Agriculture Organisation (FAO); and also some clauses in the International Union for the Protection of New Varieties of Plants (UPOV) conventions. These texts, by contributing to the evolution of the debate, have provided the foundation of the system currently under development within the CBD.

3. Since 1992, a number of new national initiatives have been adopted by developing country governments, local communities, public and private institutions, as well as by individuals. These made the legal dispositions in the Convention on Biological Diversity more concrete. Notable among government initiatives are: some legal initiatives and infra-legal norms that regulate access to genetic resources, and the creation of institutional entities to promote the regularization of access. Examples of law include three Brazilian laws, one at the federal level, and two at the state level. Examples of institutions include Instituto Nacional de Biodiversidad (INBio) in Costa Rica and Bioamazônia in Brazil.

4. Public and private institutions participate in the specification and implementation of contracts regulating access to genetic resources. These contracts can be formed in partnership with governments, institutions or local communities in the country where the biological resources are located. The International Cooperative Biodiversity Group (ICGB) – an initiative of the United States<sup>1</sup> – provides examples of the types of contracts that can be formed with governments, and even with national institutions. The contracts signed between Merck and Inbio<sup>2</sup> or between Novartis and Bioamazônia provide examples of the latter. Examples of contracts with local communities are exemplified by the agreements between Shaman Pharmaceuticals and the indigenous group Quechua (in Peru), and between Body Shop and the Kayapos (in Brazil).

---

<sup>1</sup> The contract is implemented by the National Institutes of Health (NIH), the National Science Foundation and the United States Development Agency, and covers several multilateral contracts each involving public and private institutions.

<sup>2</sup> The trans-national corporation Merck, and the National Institute of Biodiversity of Costa Rica.

5. Some recent developments have put several international frameworks in place. In April 2002, the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Bonn ABS Guidelines) were adopted at the sixth Conference of the Parties to the CBD. In November 2001, the International Treaty on Plant Genetic Resources for Food and Agriculture was approved by the United Nations Food and Agriculture Organization (FAO).

6. In this document, we look at some frameworks concerning access to genetic resources<sup>3</sup>. To begin, we look at related international norms, followed by a consideration of national regulations. We focus on government initiatives, providing a typological study of some legal initiatives, laws and other norms in force. Given that general aspects of different norms and legal proposals are similar in different countries, we look at the common characteristics of these norms instead of examining each one separately. The characteristics are those most commonly discussed within the CBD. As a practical issue, we indicate the legal instruments contained in each characteristic. A bibliography lists those that are explicitly dealt with in this document, as well as others as a matter of record.

## **2. Background and characteristics of legislation for access and benefit sharing**

7. Negotiations at the international level regarding the protection of access to genetic resources have drawn on the results of a number of earlier developments that provided an intellectual as well as analytical backdrop. Notable were those relating to the protection of folklore, the protection of traditional knowledge, the work of indigenous groups and the traditional rights of farmers regarding their own seed. These discussions clearly focused on the local level and, in particular, the rights of local communities and indigenous peoples. The elevation of discussions from the local to the national level in the Convention on Biological Diversity was therefore a major change. Prior to the CBD, the main concern had been to respect the consent of the local community and indigenous groups and to share profits with them. After 1992, the protection of national interests generally took priority over local interests. This change in emphasis, however, has not been uniform and varies across, and sometimes within, geographical regions.

### **2.1 International agreements**

#### **a) UNESCO**

8. UNESCO has hosted a number of major discussions regarding the protection of folklore. This issue is central to the discussion regarding the protection of genetic resources in that a significant proportion of such resources form an integral part of the traditional knowledge of indigenous tribal groups. A view held by some participants in those discussions is that biological resources exist in a *social context* in which indigenous people and local communities are involved in their conservation. Within that view, local populations are seen as important stakeholders because they are familiar with the environment that surrounds them as well as being knowledgeable regarding the biochemical properties of the resources being utilised.

9. The result of this work undertaken by UNESCO suggested that if a plant that is part of the local environment of an indigenous people is harvested, they should be recognised as stakeholders in the monetary and non-monetary benefits accruing from the products manufactured from such plants.

---

<sup>3</sup> The laws, projects of law and guidelines were selected to provide different examples on access and benefits sharing. This study does not provide an exhaustive list of all norms and guidelines in existence.

10. It has now been several decades since UNESCO introduced standards regarding the protection of folklore. These standards have been used as a basis for discussions concerning the protection of traditional culture and indigenous people. The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>4</sup>, for example, provided for the protection of collections of art as well as specimens of flora and fauna. Some consideration has also been given to extending the sovereignty of countries to cover cultural resources in the same way as natural resources.

11. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage considers man-made works and everything in the natural world which has ethnological or anthropological value to be cultural heritage. Natural heritage is also considered to encompass animal and plant species that are valuable from a scientific standpoint and for the conservation of biodiversity.

12. The Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted in 1989, also provides for a definition of popular culture which encompasses traditional knowledge and would protect such knowledge in a manner comparable to that which applies to intellectual property. The Recommendation would prohibit the use traditional knowledge without the permission of the communities which developed such knowledge. It would also require acknowledgement of its origin. Licences and payments would be required to a community for the use of its folklore – which would amount to a form of compensation for the use of genetic resources that are part of the knowledge-base of indigenous groups. This knowledge-base would also include information on how to use such resources; for example, the way in which plants or animals can be preserved.

*b) UN safeguards for indigenous people's knowledge*

13. The work of the Working Group on Indigenous Populations at the UN in the 1980's, and in particular that of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, has played a major role in moving the access and benefits sharing discussions forward. The Group viewed traditional knowledge as a permanent, inter-generational right to be administered by indigenous people themselves.

*c) FAO farmers' rights and the International Treaty on Plant Genetic Resources*

14. FAO Conference Resolution 5/89 provides for the protection of traditional knowledge, particularly knowledge relating to agriculture. The Farmers' Rights were defined<sup>5</sup> as rights arising from the past, present and future contributions of farmers who have conserved, improved and made available the genetic resources of plants, particularly those which were grown in their original source. This right was held to belong to the international community, a guarantee for present and future generations of farmers.

15. A "Farmers' Privilege" had earlier been created that, among other characteristics, was to entitle farmers to benefit from sales of seed by major enterprises. A non-mandatory levy was suggested that would be introduced on seed sales so as to create a fund for nature conservation. This fund was to be

---

<sup>4</sup>. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property - 17 Nov 1970.

<sup>5</sup>. The original text reads as follows: "Rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources particularly those in the centres of origin/diversity. Those rights are vested in the International community, as trustees for present and future generations of farmers, and supporting the continuation of their contributions as well as the attainment of overall purposes of the International Undertaking."

managed by the FAO. Although the fund only produced meagre revenues, the term Farmer's Privilege continued in the drafting of subsequent intellectual property standards applicable to plant varieties. Most recent agreements have restricted this right – a notable example being the 1991 UPOV Convention. Several national standards<sup>6</sup> provide for specific mechanisms that guarantee farmers' rights to produce their own seed and to trade such seed with other farmers in accordance with traditional practices.

16. In November 2001, the International Treaty on Plant Genetic Resources for Food and Agriculture was approved at the FAO meeting. The Treaty was established as a revision of the 1983 International Undertaking on Plant Genetic Resources for Food and Agriculture – in order to harmonise with the CBD – and was adopted as a legally binding agreement. The Treaty provided a framework to ensure access to plant genetic resources for food and agriculture and also provided the agricultural sector with a multilateral tool to promote cooperation and synergy with other sectors. The Treaty establishes mechanisms for transfer of technology, capacity building and sharing of monetary benefits derived from the commercialization of intellectual property rights. This new instrument can be useful mainly for access of *ex situ* collections, of plant genetic resources for food and agriculture held in trust by the International Agricultural Research Centres (IARCS) of the Consultative Group on International Agricultural Research (CGIAR).

d) *International Labour Organization*

17. Some discussions were also held under the auspices of the International Labour Organization with regard to the protection of traditional knowledge. Convention 169 (1989) was the most relevant of the texts to have been adopted within that body. It aimed to guarantee the right of indigenous populations to be consulted over the use of their traditional knowledge. The same applied to the implementation of any project affecting indigenous people: where the Convention accorded such peoples the right to participate in the planning of projects and to the profits from such projects<sup>7</sup>.

18. These mechanisms would have had significant impacts on access to genetic resources, but lack of signatories and regulations has limited their effectiveness<sup>8</sup>. Instead, the main effects of the mechanisms have been to maintain international attention on traditional knowledge, biological diversity and development.

---

<sup>6</sup>. European legislation (Council Regulation 8.465) and Brazilian legislation (Law 9.465/95, Art. 10), for example.

<sup>7</sup>. As seen in the following definitions given in the Convention:

A. Definition of folklore.

For purposes of this Recommendation: Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

F. Protection of traditional and modern culture: In so far as folklore constitutes manifestations of intellectual creativity whether it be individual or collective, it deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests.

<sup>8</sup>. By July 2000, only Argentina, Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, the Netherlands and Peru had signed the Convention.

## 2.2 *National policies*

### a) *Centralization and decentralization*

19. Latin American countries have moved toward centralizing control of access to genetic resource at the government level. African countries, on the other hand, have moved in the opposite direction of decentralizing the decision-making power, giving more choice to local communities. When decision-making power is centralized at some level of government, management frameworks often include the creation of a national commission (or committee) to analyse access demands on a case-by-case basis.

20. This commission can include exclusively government representatives, or it can include others such as indigenous communities and civil society. The Brazilian Provisionary Measure 2.052/2000 (MP 2.052) – a federal norm in force – is an example of a commission exclusively comprised of government representatives. Senate initiative 306/95 (PLS 306/95) in Brazil is an example of a mixed commission, composed of representatives from the federal government, state government, the Federal District, the scientific community, traditional or local peoples, indigenous peoples, non governmental organizations and private enterprises. Half of the members come from the government, the other half from non-public institutions. Law 388/97 of the state of Amapa and Law 1.235 of Acre both in Brazil, and Costa Rica’s law also involve the creation of a mixed commission.

21. In these cases, all demands for access to genetic resources must be revised by the commission. The commission can make suggestions and impose conditions to approve access contracts or to permit bio-prospecting activity. The commission must also consult local communities, but in general the local community is only *consulted*, and it does not have the right to prohibit activities, if the commission has voted differently, with exception of the Federal law<sup>9</sup> and the law 388/97 of Amapa, where the local community decision must be respected.

22. In the Andean Pact, Decision 391 secures partial rights for local communities, but the final decision is left to the national authority<sup>10</sup>, which will evaluate and perhaps participate in the contract. It is, therefore, consistent with the pattern in Latin America of centralizing decision-making. However, due to a lack of domestic legislation implementing Decision 391, it is not yet in force in all states.

23. The Organization of African Unity (OAU) also intends to establish a national coordination committee, composed of government representatives, scientific and professional organizations, non-governmental organizations and local communities. This commission would not, however, replace the importance of consent by local communities, nor the degree of participation of local communities in contracts. Similar trends are identified in the Madagascar initiative, which states that each competent Ministry can only give authorization for access after having received consent from the local community (HERMITTE, 2000).<sup>11</sup>

24. The Swiss draft guidelines recommend that a “competent national authority” help communities in: finding opportunities and negotiating a contract; solve future problems, as well as assist them in solving differences arising between the different stakeholders; and, creating mechanisms to solve controversies. This latter function of helping communities to solve problems is only found in Swiss Guidelines. In

---

<sup>9</sup> Both laws can address the subject, once there is common competence between the Union and States, without hierarchy.

<sup>10</sup> See articles 7, 17 to 31.

<sup>11</sup> The Ministry of Agriculture is responsible for plant varieties, domesticated animals and the environment. The Ministry of Water and Forests for wild resources. The Ministry of Culture for artistic and artisan works.

Australia, a related law does not mention a National Committee, but the Commonwealth public inquiry process suggests that the Ministry of Environment must participate<sup>12</sup>.

25. The centralization of decision-making power in national commissions, as well as the government's ability to permit or negate access to genetic resources, are the result of negotiations regarding national sovereignty over biological resources carried out at the CBD. The dominant position argues that these resources belong to nations and not to local communities or indigenous peoples. While recognising that local communities have the right to participate in benefits sharing or, in some situations, to give their opinion on the utilization of these resources, this position considers local people to be one *part* of the national population. As such, they are not considered as an independent group with decision-making power above that of the national interests (as reflected in government decisions).

*b) The involvement of local communities*

26. Many legal initiatives contain clauses that include consultation with local communities. Since cultural differences across communities preclude standardised forms of decision-making structures, laws must be flexible in how they engage those communities. Thus, most national legal frameworks do not spell out specific protocols to verify local community decision making processes. Law 388/97 of Amapa (which concentrates decision-making power at the commission level) authorizes the commissions to fix consultation instruments for each community. However, a written report of consultation must be provided that demonstrates community consent.

27. The Swiss draft guidelines require the participation of stakeholders with prior informed consent, as do the Australian law and the UK draft guidelines. The Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing (Botanic Gardens) suggests a written undertaking be included in any contract to specify that genetic resources were acquired, and are being supplied, with the permission of local communities. In the UK draft guidelines, parties should obtain and record the prior informed consent of other stakeholders, as appropriate, for access to and use of the genetic resources concerned (and associated knowledge).

28. MP 2.052, in Brazil, respects the right of indigenous communities to refuse access to genetic resources within their lands and/or access to traditional knowledge. However, the same legal norm authorizes the national commission to ignore this right if access to biological resources is considered relevant to the public interest<sup>13</sup>. Since the norm does not conceptualise public interest, it effectively allows the national commission to nullify the right.

29. The African project (OAU) and Madagascar initiative, both of which are less centralized, grant more decision-making power to local communities, allowing them to make decisions in accordance with local tradition. Authorization by the community must be in written form and can be acknowledged by the responsible national authority, or by the local community itself in accordance with national regulation. The communities have the right to refuse access, and even have the right to annul or restrict their consent.

30. The access and benefit sharing law of Costa Rica gives local communities the right to refuse access demands. This is called the "right to objection". Objection can be based on a variety of reasons,

---

<sup>12</sup> See also Decision V/16, COP 5.

<sup>13</sup> Public interest means that the private property is generally respected, but the government (representing the public interest) can establish some administrative limitations to the property. The state's interest to intervene in the property right can be based on the preservation of the environment or the biological diversity, for example.

related to cultural, social, spiritual, or economic issues. A similar right is elaborated in a Colombian initiative.

c) *Benefits sharing*

31. Benefits sharing can be realized in different ways: direct monetary payment, technology transfer, construction of infrastructure for the local community, research into local maladies, equipment, participation in monetary benefits associated with intellectual property rights, taxonomic, biochemical, ecological, horticultural and other information and data, through research results, publications and educational materials, access to collections and databases, benefits in kind, such as augmentation of national collections in the country of origin and support of community development activities training in science, *in situ* and *ex situ* conservation and management, information technology and management and administration of access and benefit-sharing, among other benefits.

32. The OAU initiative does not include a provision for determining mechanisms for benefit sharing. However, contracts are centred on the notion of payment in the form of monetary resources, establishing the participation of local communities in benefits sharing.

33. The Swiss and Botanic Gardens guidelines and the Brazilian legal initiative state that international institutions shall facilitate research in cooperation with national research institutions. MP 2.052 in Brazil states that the contract for access to genetic resources must contain a clause regarding technology transfer. Some examples include: cooperative scientific research and technological development; capacity building; information exchange; consolidation of scientific research infrastructure; partnership in the economic exploitation of processes and products derived from genetic resources; and joint ventures for the creation of technological foundations. This initiative also includes a treatment of intellectual property rights and free licensing for the utilization of patented processes and products.

34. Monetary benefits can come from different sources: royalties sharing, percentage participation in process and products sales, and anticipatory payments, as well as the payment of fixed money attached to the success and continuity of biological resource use. The payment of royalties can be undertaken during the life of the patent, as in the Merck-INBio contract, or only during the first years of the trade period, as in the Novartis-Bioamazônia contract.

35. Proportional payment is another common element in access contracts. This kind of payment does not exclude the pre-payment, since both can be elements of a single contract. Payments that are proportional will, of course, change in accordance with changes in the product, its value, or its sales. Some contracts provide for variable payment as a function of the material quality of the biological resources supplied. The ICBG contract in Nigeria<sup>14</sup> obliges research institutions to pay 1 to 2% of their sales to communities for raw biological material, 3 to 5% for plant extracts, and 5 to 7% for chemical material.

36. Costa Rican law requires that part of the resources obtained be invested in the conservation of the region from which the genetic resources originate. The interested party must concede up to 10% of the resources destined to research and up to 50% of any possible additional benefits to the protection of the region. The denomination of exact monetary value is fixed by the commission that evaluates the contract

---

<sup>14</sup> ICBG drug development and conservation of biodiversity in Africa. The partners are Walter Reed Army Institute of Research, Smithsonian Institution, the Bioresources Development and Conservation Programme, Pace University of New York, the University of Utah, the University of Minnesota, the University of Jos and the International Centre for Ethnomedicine and Drug Development in Nigeria, and the University of Dschang, Cameroon.

proposition. The Colombian initiative also states that the national government can access, without restriction, all information produced through the research of biological resources. This is one way to promote technology transfer as well as to encourage the sharing of control.

37. The initiative of the Organization of African Unity (OAU) states that 50% of all benefits must be designated to local communities and indigenous peoples. That initiative provides for *equal* participation by those concerned. Most, if not all, initiatives and laws make reference to *equitable* benefits sharing, but leave unclear exactly what “equity” means. Moreover, beneficiaries might include the government, local communities, indigenous peoples, owners of biological collections, landowners and even research institutions. Such a large and varied group makes either equal or equitable sharing a difficult goal.

*d) Participation of persons, private enterprises, or landowners*

38. Access to genetic resources can also take place on private property. As such, landowner participation can be an important aspect in benefit sharing. The OAU initiative requires authorization by landowners, but is silent on their participation in contracts. In situations that explicitly detail participation by landowners, there are two possibilities: either integrate the landowner into juridical relations or exclude him/her. In the first situation, the landowner participates in the contract and gains the right to receive part of the benefits. PL 4.751, under consideration by the Brazilian congress, envisages the active participation of landowners. Law 388/97, of Amapa, and PLS 306/95, assign the issue of landowner participation, as well as the participation of owners of genetic resources collections, to another contract that can be attached or made an accessory to the main contract.

39. The distinction between these clauses is contained within the contract composition. PL 4.751 provides for a multilateral contract, with the participation of government, indigenous peoples, landowners, proprietors of biological collections, and the solicitor (enterprise or research institute). The initiative states that the contract should be an agreement between: 1) the national government, landowner or the indigenous peoples’ representative, and the national institute for indigenous protection or the local community representative; and 2) the national institution authorized for access to genetic resources and the institution destined to receive these resources.

40. Law 388/97 of Amapa, law 1.235 of Acre, as well as PLS 306/95 in Brazil provide for more than one contract. The main contract is between the state, the solicitor and the owner of traditional knowledge (indigenous peoples or local community) and another contract, an accessory contract, between the solicitor and the landowner or the proprietor of the genetic resources collection.

41. In Australia, the situation is much more complex. Traditional civil law is used to determine whether the landowner is a party to the contract. Only the legal owner of the resource is entitled to be party to a contract. This has similarities to the Brazilian initiative above (PL 4.751). However, the participation of landowners in a specific contract of access to genetic resources is left implicit since there is no specific clause addressing this (VOUMARD, 2000).

42. When the contract excludes a provision for the landowner, it is implied that genetic resources are the patrimony of the state. This is the case in Madagascar. As a consequence, questions may arise concerning the legal ramifications of the act, which can be interpreted as an administrative restriction or, in some circumstances, as an expropriation by the state of immaterial property. However, expropriation of immaterial things is not a recognized phenomenon. Restricting the rights of a landowner to genetic resources implies a restriction not on the plant itself but on an immaterial aspect of the plant. Indeed, genetic research is not aimed towards the discovery of plants in themselves, but rather towards the immaterial contribution to be gained from plant’s genetic resources. This is, nonetheless, an important

point that engenders considerable discussion. Some frameworks consider biodiversity to be public property, meaning that there could be a restriction of property rights. However, this can also be interpreted to mean that the state has an interest in the preservation of biodiversity – the landowner or indigenous population could still have the right to contract freely or under the authorisation of a national authority.

43. In Brazil, different treatments among PLS 306/95 (Senate), PL 4.751 (House of Representatives) and MP 2.052 (in force, by the Executive) illustrate this conceptual conflict. PLS 306/95 treats genetic patrimony as a public interest, while MP 2.052 and PL 4.571 treat it as state patrimony. The end result is a complex legal situation that, for each circumstance, requires detail analysis and discussion.

*e) Control of access*

44. The participation of a national institution is an important step towards guaranteeing that the contract will be realized as set forth. In its interaction with a foreign institution, the national institution can play any one of three different roles: as the main institution, as co-responsible for the activities, or as a subordinate institution, under the foreign partner.

45. Brazil's PL 4.751 (in the House of Representatives) and MP 2.052 (in force) are two examples where the national institution is necessarily the main party in the contractual relation. It is required to be responsible for the coordination of work, as well as for collection and bio-prospecting activities. PLS 306 (Senate) also specifies that a national institution must be present during the realization of work, but permits coordination to be undertaken by the foreign institution.

46. The Colombian law proposal requires that interested foreign parties must include an equal number of nationals and foreigners on the research team. These researchers are chosen by the national institution that will also be part of the contract.

47. The OAU, Madagascar initiative, and Costa Rican law do not include clauses related to control of access. Moreover, the majority of developing countries do not possess scientific infrastructures, such as universities or research centres that are capable of engaging with international research institutions. Imposing requirements in circumstances where capacity does not exist would potentially create important barriers to the acquisition of technology and other important resources.

*f) Collective rights*

48. Indigenous populations often request the creation of collective intellectual property rights to protect their traditional knowledge. In the present international legal framework, collective rights are not possible due to the characteristics of such rights: collective (not individual and exclusive) and traditional knowledge (not new, but ancestral) are difficult to operationalize. The present international legal framework requires the identification of a specific legal entity: an individual, a firm, etc. The right cannot be given to a vaguely defined community, or given to multigenerational entities. Nor can such a right be used to protect an object that is not novel and cannot be industrialized.

49. Concerning plant varieties, similar controversies are apparent: the plants conserved by indigenous people are neither homogenous nor invariable. In fact, it is precisely this plant diversity and the preservation of this diversity that are the main barriers to protection under the present legal system. The protection of new plant varieties (under UPOV conventions) requires an examination of homogeneity, stability and distinctness (in relation to plants already known in nature or protected). In the case of plants conserved by indigenous groups, such requirements are difficult to satisfy.

50. Collectives rights may have to use models that are different from those already presented. Some legal propositions have already been made, but no legal norm has been implemented. The most debated proposition is the creation of a national register of traditional knowledge or of plants. Those engaged in the conservation of cultural and/or biological diversity would be recorded in a national register. The option to catalogue a plant, or piece of knowledge, would then belong to everyone involved in its conservation, registered or not (original right, declared by government, not constituted by him), and could be conceded to the local community, or tribe, in a generic manner.

51. The community would then be the owner of a modality of intellectual property rights. All community members would have the right to exploit such knowledge, in accordance with their traditions. The knowledge would have to be considered imprescriptible and unseizable. There would be no monopoly over the knowledge or over the life of organisms.

52. The Costa Rican law establishes a kind of community right. This proposal states that an inventory of existent knowledge will be carried out for each community, and that it will be protected. Though idealistic (the cost of such a complete inventory makes it unrealistic) the legal system has demonstrated flexibility and an openness to adapt to difficult issues. A problem that is left unresolved, however, is the situation where two distinct groups hold the knowledge at the same time – dual ownership is not permitted. From an anthropological point of view, it is completely possible that two different groups utilize a plant in the same way or use the same methods to conserve a natural space.

53. The Colombian initiative also defines a type of collective multigenerational right, to be detailed in future regulations, and the proposed Madagascar law defines community rights as being non-tradable and imprescriptible.

g) *Considerations regarding the capacity of the countries to enforce national law: the control of the contract*

54. The control of the contract can be realized by either the government, the community or other institutions. In general, the community does not possess the capacity to effectively control the contract. Most communities have neither sufficient resources to pay attorney fees nor to engage enterprises at foreign tribunals. One suggested alternative has been for communities to receive government assistance in the implementation and enforcement of contractual clauses. This is the case of the ICBG Nigeria contract, where Howard University was contracted to assure royalty payments.

55. In Brazil, the situation is different since indigenous communities are not considered a population with “absolute capability” to act. They do not have the right to enter into process in court, or to sign a contract. They require government assistance in all civil acts. This results from norms dating back to the beginning of the 20th century that were conceived to protect indigenous communities. The verification of compliance with contractual clauses in a concrete situation is left to the public prosecutor. The public prosecutor is an independent institution with constitutional competence as *custos legis*. The Federal Constitution, as well as law 388/97 of Amapa, call for effective participation by indigenous peoples, and provide for the *parquet* to initiate cases in defence of indigenous peoples.

56. Some laws and guidelines, such as the Swiss and UK draft guidelines, do not have rules on how to control and/or to enforce legal and contract provisions. But they suggest that a national authority should assist the communities – not necessarily implying that they will control the contract during its execution. A case-by-case analysis is to be made by the national authority, with an important consideration being the local capacity to control the contract. The Swiss guidelines as well as some other legal initiatives suggest that the research must be realized *in loco*. In that case, the capacity to control is increased.

### 3. Final Considerations

57. These legal proposals and norms are part of the building of the general CBD framework on access and benefit sharing. Those that have been implemented thus far appear consistent with existing international agreements; for example, the World Trade Organization, and the World Intellectual Property Organization.

58. Though some have called for stronger control of access, it is also necessary to create conditions that are conducive to bio-prospecting and research/development. A model that has met with some success has been the establishment of national and international institutions. The creation of programs such as the National Biodiversity Institute in Costa Rica and the Molecular Ecology Program for Sustainable Use of Biodiversity in Brazil, are examples.

59. The following table (next page) illustrates the wide variety of legal initiatives and their characteristics. The first column names the legal initiatives or the norm in force. The remaining columns outline their characteristics. The "decision making power" identifies which level of decision, local or national, dominates. The "local communities' participation" identifies laws that make some reference to this category. "Reciprocal fulfilment of contract obligations" refers to the presence of examples of obligations on the contract. "Benefit sharing" is viewed according to the participation of the different stakeholders. "Persons, private enterprises" is in reference to main or accessory contracts that mention their presence. Finally, the last column identifies who has "contract control".

|                                    | <b>Decision Making Power</b> | <b>Local Communities</b>  | <b>Reciprocal fulfilment of contract obligations</b>      | <b>Benefit sharing</b>  | <b>Persons, Private Enterprises</b>  | <b>Contract Control</b>  |
|------------------------------------|------------------------------|---------------------------|---|---|--------------------------------------|--|
| <b>Swiss Guidelines</b>            | Mixed : local and national   | Participate               | Different examples cited                                  | All actors involved, but they are not specified   | No reference                         | Not specified  |
| <b>Australian Law</b>              | Mixed : local and national   | Decide                    | No data<br>There are different examples in the Guidelines | Government, indigenous peoples, private and national institutions, and individuals                    | They can participate in the contract | Not specified  |
| <b>MP 2052 Brazil</b>              | Centralized                  | Do not decide             | Different examples cited                                  | Government, local communities, indigenous peoples, private and national institutions, and individuals | They can participate in the contract | Controlled by government and by a participating national institute |
| <b>PLS 306/95 Brazil</b>           | Centralized                  | Decide                    | <b>No data</b>  | Government, local communities national and foreign institutions                                       | They can participate in the contract | Controlled by government and by a participating national institute |
| <b>Law initiative 4.751 Brazil</b> | Centralized                  | Decided by the government | Different Examples  | Government, local communities, national and foreign institutions                                      | They can participate in the contract | National institution coordinates                                   |

|                                     |  |        |                          |  |   |  |
|-------------------------------------|--|--------|--------------------------|--|---|--|
| <b>Law 388/97<br/>Amapá, Brazil</b> | Centralized  | Decide | No data                  | Government, local communities, national and foreign institutions | They can participate in the contract          | Controlled by the government and participating national institution  |
| <b>Law 1235/97<br/>Acre Brazil</b>  | Centralized  | Decide | No reference             | Government, local communities, national and foreign institutions | They can participate in the contract          | Controlled by government and by a participating national institution |
| <b>Costa Rican law</b>              | Centralized  | Decide | No reference             | Government, local communities, national and foreign institutions | No prevision of participation in the contract | Government controls  |
| <b>Colombian Law initiative</b>     | Mixed : local and national                           | Decide | No reference             | Government, local communities, national and foreign institutions | They can participate in the contract          | Controlled by government and by a participating national institute   |
| <b>Madagascar Law initiative</b>    | Mixed : local and national                           | Decide | No reference             | Government, local communities, national and foreign institutions | No prevision of participation in the contract | Government controls  |
| <b>OUA Law initiative</b>           | Mixed, but each country can make different decisions | Decide | No reference             | Government, local communities, national and foreign institutions | No prevision of participation in the contract | Government controls  |
| <b>UK draft Guidelines</b>          | Mixed: local and national                            | Decide | Different examples cited | National and international institution, but it is not specified  | No prevision of participation in the contract | Not specified  |

## Bibliography

### Regulations, Regulations Drafts and Draft Guidelines

Australia – Environment Protection and Bio-Diversity Conservation Act 1999, section 301

Provisionary Measure n 2.052, Brazil

Project of Law from the Senate 306/95 Brazil

Project of Law 4.751, National Congress Brazil

Law 388/97, State of Amapá, Brazil

Law 1235/97, State of Acre, Brazil

Costa Rican law

Colombian Law initiative

Madagascar Law initiative

OUA Law initiative

Draft Guidelines on access and benefit sharing regarding the utilisation of genetic resources, Switzerland

### Texts

Hermitte, Marie-Angèle (2000)

Commentaires au Projet de Loi de la Biodiversité de Madagascar. Mimeo, restricted circulation.

Varella, Marcelo Dias (1996)

*Propriedade intelectual de setores emergentes*. São Paulo : Atlas

Varella, Marcelo Dias (1998).

*Viabilização de mecanismos de troca : biodiversidade v. desenvolvimento*, [www.ccj.ufsc.br](http://www.ccj.ufsc.br),

Voumard, John (2000).

*Commonwealth public enquiry. Access to biological resources in Commonwealth areas*. Canberra: Commonwealth of Australia

**Countries or States with national or local projects of law**

- a) Brazil – Project of Law of Senate 306/95
- b) Brazil - Law initiative 4.751
- c) Brazil – Draft Project of Law from Sao Paulo
- d) Colombia
- e) Costa Rica
- f) Organization for African Unity
- g) Madagascar

**Countries or States with national or local regulations:**

- a) Australia – Environment Protection and Bio-Diversity Conservation Act 1999, section 301
- b) Brazil – MP 2.052 and revisions
- c) Amapá (Brazil) - Law 388/97
- d) Acre (Brazil) - Law 1235/97
- e) Philippines – Executive order no. 247
- f) India – Bill no. 93 of 2000

**Regions with international norms**

- a) Decision 391, Andean Pact

**Relevant Guidelines prepared by countries or regional organizations**

- a) Swiss draft guidelines on access and benefit sharing regarding the utilization of genetic resources
- b) Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing
- c) Draft Framework Agreement on Access to Genetic and Biological Resources (Association of South East Asian Nations-ASEAN)
- d) UK Draft Common Policy Guidelines on principles on access to genetic resources and benefit-sharing

**Relevant Guidelines prepared by international organizations**

- a) Ramsar Convention on Wetlands - Guidelines for establishing and strengthening local communities and indigenous people's participation in the management of wetlands
- b) World Heritage Convention - Operational Guidelines for the Implementation of the World Heritage Convention
- c) Commission on Human Rights WGIP - Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People
- d) UNESCO/ICSU Draft Declaration on Science and the Use of Scientific Knowledge, and the Science Agenda - Framework for Action (1998)
- e) World Bank - Operational Directive 4.20: Indigenous Peoples
- f) FAO International Code of Conduct for Plant Germplasm Collecting and Transfer
- g) WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985)

**Relevant Guidelines from national institutions**

- a) Guidelines for Equitable Partnerships in New Natural Products Development: Recommendations for a Code of Practice (Conclusions of the Workshop on Drug Development, Biological Diversity and Economic Growth, National Cancer Institute of the US National Institutes of Health, Bethesda, Maryland, 1991)
- b) NCI Policy on Benefit-Sharing - Letter of Intent (1990); Letter of Collection (1992); and the Memorandum of Understanding (1995) (National Cancer Institute of the US National Institutes of Health)
- c) Guidelines for Research Applicants (Australian Institute for Aboriginal and Torres Strait Islander Studies, Canberra, Australia, 1998)
- d) Guidelines for Ethical Research in Indigenous Studies (Australia, May 2000)
- e) Previous Possessions, New Obligations: Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples (Museums Australia, Canberra, 1993) (Strategy)
- f) Previous Possessions, New Obligations: Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples (Museums Australia, Canberra, 1993) (Policy)
- g) Working with Indigenous knowledge: A Guide for Researchers (Louise Grenier for the International Development Research Centre - IDRC, Ottawa, Canada, 1998)
- h) Research licensing process for research projects in Nunavut Region, Northwest Territories, Canada (Nunavummi Qaujisaqtulirijikku / Nunavut Research Institute, Iqaluit, Canada)
- i) Ethical Guidelines for Indigenous Research (National Health and Medical Research Council-NHMRC, Canberra, Australia)

- j) Heads of Agreement (Strathclyde Institute for Drug Research, UK)
- k) Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit-Sharing (Royal Botanic Gardens, Kew, and UK Department for International Development)) (Common Policy Guidelines)

**Relevant Guidelines established for NGOs**

- a) WWF-WCPA/IUCN Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas Equitable Research Relationships in Practice: Guidelines for the Development of Agreements Between Communities and Researchers
- b) Indigenous Peoples and Conservation: WWF Statement of Principles (World Wide Fund for Nature, Gland, Switzerland, 1996)
- c) Research Principles for Community-Controlled Research with the Tapirisat Inuit of Canada (Inuit Tapirisat of Canada, Ottawa, Canada)

**Guidelines established by indigenous and local community organizations**

- a) Research Principles for Community-Controlled Research with the Tapirisat Inuit of Canada (Inuit Tapirisat of Canada, Ottawa, Canada).
- b) Guidelines for the Conduct of Participatory Community Research to Document Traditional Ecological Knowledge for the Purpose of Environmental Assessment and Environmental Management (Dene Cultural Institute, Hay River, Northwest Territories, Canada, 1991)
- c) Guidelines for the Protection of Cultural Diversity: Resolution of Rome (Tulalip Tribes, Sami Parliament and Cobase - Cooperativa Tecnico Scientifica di Base, Rome, 1998).
- d) Interim Protocols for Aboriginal Participation in Management of the Wet Tropics World Heritage Area (Queensland, Australia) (Bama Wabu Aboriginal Corporation and the Wet Tropics Management Authority, Cairns, Australia, 1998)
- e) Interim Protocols for Aboriginal Participation in Management of the Wet Tropics World Heritage Area (Queensland, Australia) (Bama Wabu Aboriginal Corporation and the Wet Tropics Management Authority, Cairns, Australia, 1998) (Interim Protocols)
- f) Draft Statement of Principles Regarding Biophysical Research in the Aboriginal Lands, Islands and Waters of Cape York Peninsula (Balkanu Cape York Development Corporation Pty Ltd, Cairns, Australia)
- g) Inuit Resource Conservation Strategy (Inuit Circumpolar Conference, Ottawa, Canada)
- h) Traditional Knowledge Research Guidelines: A Guide for Researchers in the Yukon (The Council of Yukon First Nations, Whitehorse, Canada, 2000)
- i) Guidelines for Respecting Cultural Knowledge (Assembly of Alaska Native Educators, Anchorage, Alaska, 1 February, 2000)

**Relevant Guidelines elaborated by professional societies**

- a) Covenant on Intellectual, Cultural and Scientific Resources: A Basic Code of Ethics and Conduct for Equitable Partnerships Between Responsible Corporations, Scientists or Institutions, and Indigenous Peoples. (Global Coalition for Biocultural Diversity)
- b) Code of Ethics and Standards of Practice (International Society of Ethnobiology 1998).
- c) Professional Ethics in Economic Botany: A Preliminary Draft of Guidelines (Society for Economic Botany).
- d) Code of Ethics for Foreign Collectors of Biological Samples (Botany 2000 Herbarium Curation Workshop, Perth, Western Australia, October 1990. Modified April 1992)
- e) Suggested Ethical Guidelines for Accessing and Exploring Biodiversity (Anil K Gupta – based on Pew Conservation Scholars' Initiative to Develop Ethical Guidelines to Access Biological Diversity)
- f) Rules and Procedures when collecting, recording, and documenting IK (International Institute of Rural Reconstruction Guidelines, International Institute of Rural Reconstruction - IIRR, 1996)

**Relevant Guidelines elaborated by the private sector**

- a) Code of Practice (International Federation for Alternative Trade - IFAT Conference, New Windsor, Maryland, USA, May 1995).
- b) Discovering New Medicines from Nature: Policy for the Acquisition of Natural Product Source Materials (Glaxo Wellcome, UK, 1992).
- c) Acquisition of Natural Resources for the Development of New Pharmaceuticals (Novo Nordisk Health Care Discovery, 1995)
- d) Policy for the Acquisition of Natural Product Source Materials (Xenova Discovery Ltd, 1998).
- e) Statement of principles (Bristol-Myers Squibb, 1995) (Indigenous Rights and Bioprospecting)
- f) Agreement of Principles (Shaman Pharmaceuticals)