

## **BIODIVERSITY ISSUES**

**A) Sui generis system for the protection of plant varieties  
and the protection of traditional knowledge of  
indigenous communities**

**Experience in Costa Rica**

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## **Introduction**

Regarding the subject of “sui generis system for the protection of plant varieties and the protection of traditional knowledge of indigenous communities”, it is necessary to take in consideration that the Biological Diversity Agreement specifically establishes in relation to the preservation *in situ*, in article 8), j), that as far as it concerns and as it may proceed, each contracting party “according to its national legislation, will respect, preserve and maintain, the innovations and practices of indigenous and local communities that entail traditional life styles which are pertinent for the preservation and sustainable use of biological diversity and will promote its broadest application, with the approval and participation of those who possess said knowledge, innovations and practices, and will encourage that benefits derived from the use of that knowledge, innovations and practices be shared fairly.”

The Costa Rican Government recognizes the contribution of indigenous and local communities to the development of plant varieties along ancient traditions. The knowledge of biological resources of these communities affects the development of products in agriculture, medicine and industry. Likewise, these communities have an important role worldwide as agents in the preservation of genetic materials.

It is important to emphasize on the fact that at the present time Costa Rica does not have a specific law for plant varieties. By the middle of last year, a law project was presented at the Congress; however, its discussion will not start until the next few months. Parallel to the discussion of this project, the convenience or not of the country's adhesion to the UPOV system will be analyzed, considering that none of the international commitments, including the WTO's obligations, demand the adhesion to this system.

Nevertheless, Costa Rica's Biodiversity Law establishes a series of aspects regarding the protection of traditional knowledge of indigenous and local communities (including the development of new plant varieties) which is necessary to detail.

## **National experience**

First of all, article 62 of the Biodiversity Law establishes that the “Comisión Nacional de Gestión para la Biodiversidad” (CONAGEBIO) is the one entitled to determine the general rules for the access to genetic and biochemical elements and for the protection of biodiversity intellectual rights, to which the administration and interested third parties have to submit.

The access rules' regulation has not entered into force yet, however, article 63 of the Biodiversity Law establishes a series of basic requirements, like the prevention that has to be made by the Technical Office of CONAGEBIO to interested third parties

who, with the application of the different kind of access to biodiversity elements, must enclose the consent previously given by the owner of the land where the activity will be developed, by the indigenous community authority when the activity is being developed on their territories, or by the Conservation Area Director. Likewise, the terms for the technology transfer and fair distribution of benefits agreed on the licenses, agreements and concessions have to be established, when such terms exist, as well as the kind of protection for the associated knowledge that may be demanded by the representatives of the place where the access is materialized.

- Sustainable management of environment

Article 1 of the Biodiversity Law states that the purpose of this law is to preserve biodiversity and the sustainable use of resources, as well as to distribute fairly the consequent benefits and expenses.

Among the principles that rule Costarican legislation in biodiversity subjects we can name the one of “intra and intergenerational equity” which determines that the State and private citizens will try to make sure that biodiversity elements are used in a sustainable way, so that the possibilities and opportunities of its use and benefits be guaranteed in a fair way for all society sectors and to satisfy the needs of future generations.

- Definition of traditional knowledge

Article 82 of the Biodiversity Law establishes that the State recognizes and protects under the common name of sui generis communitary intellectual rights, the knowledge, practices and innovations of indigenous people and local communities, related to the use of biodiversity elements and associated knowledge. This right exists because of the sole existence of the cultural practice or the knowledge related to genetic and biochemical resources.

Costa Rica has not yet fulfilled the participatory process to determine the nature and extent of the sui generis communitary intellectual rights (for further information, see section “”). This process must be accomplished with the participation of the Commission’s Technical Office, the Indigenous Board and the Farmers’ Board.

Once this participatory process is accomplished, it will proceed to make an inventory of the specific sui generis communitary intellectual rights which communities request to protect, and it will be kept open the possibility that in the future other rights with same characteristics may be registered or recognized. The recognition of those rights at the Registry of the Commission’s Technical Office is voluntary and free; it has to be made by duty or at request of concerned, without submitting to any formality.

The existence of such recognition in the Registry will force the Technical Office to deny any consult related to the recognition of intellectual rights of the same

element or knowledge. Such denial, as long as it is duly founded, might be made, even when the sui generis right is not officially registered.

- Rules on exploitation of such knowledge

In Costa Rica, access to genetic and biochemical resources requires necessarily a permit granted by the Technical Office of CONAGEBIO. The access permit will be established for a maximum period of three years, which can be extended if the Commission's Technical Office considers it adequate. Said permits have a series of characteristics, such as the following:

- a) They are granted to an investigator or investigation center,
- b) They are personal and not transferable,
- c) They are restricted to the authorized genetic and biochemical elements and
- d) They can only be used on the area or territory that is specifically mentioned in them.

Before the Technical Office grants an access permit to genetic or biochemical resources, it must determine if the application refers to a local or indigenous traditional knowledge, because that would mean its denial. Independently from the examination made by the Technical Office, it is important to mention that costarican law recognizes the right of local communities and indigenous people to oppose to the access to their resources and associated knowledge, based on cultural, spiritual, social, economic or any other reasons, as established on article 66.

- Identification of right-holders

Article 85 of the Biodiversity Law foresees that it will be on the participatory process that will be held by the Commission, the Commission's Technical Office, the National Indigenous Board and the National Farmers Board where it will be determined the way in which the sui generis community intellectual right will be used, who will be its holder and who will be their beneficiaries. The identification of sui generis community rights holders process still has to be defined in Costa Rica.

- Benefits from concessions or receipt of royalties and the channeling of such funds to the benefit of local communities

Concerning the concession of benefits and the ways to make them reach local or indigenous communities, the Commission's Technical Office is the entity entitled to authorize the agreements and contracts subscribed between private citizens, nationals or foreigners, or between them and the institutions registered for that purpose, in the event they contemplate access to the use of genetic and biochemical elements of costarican biodiversity.

Article 76 of the Biodiversity Law establishes that in the corresponding resolution which grants access to genetic and biochemical resources, the Technical Office will establish the obligation for the interested person to deposit up to ten per cent (10%) of the research budget and up to fifty per cent (50%) of the collected royalties, on behalf of the Preservation Areas National System, the indigenous territory or the private provider owner of the elements that have to be accessed. Likewise, the Technical Office will determine the amount that interested parties will have to pay on each case for procedure expenses, as well as any other benefit or technology transfer which represents a part of the previously informed consent.

- Periodic renewal or permanent rights

Local and indigenous sui generis communitary rights are permanent rights which are legally recognized in Costa Rica because of the sole existence of the cultural practice or the knowledge related to biochemical and genetic resources; previous declaration, direct recognition or official registration are not required; therefore, certain practices that in the future might acquire such category may be included.

- Data base, registers or other methods to be made obligatory or optional

In Costa Rica every research or bioprospecting program about genetic or biochemical biodiversity material that seeks to be held on national territory requires a previous access permit granted by the Technical Office of CONAGEBIO. The procedure to have access to genetic and biochemical resources in Costa Rica is obligatory, according to article 69 and following articles of the Biodiversity Law.

- Differentiation between access rights for commercial or scientific purposes

Article 71 of the Biodiversity Law establishes that the access permits will stipulate the origin certificate, the possibility or prohibition to extract or export samples or its duplication and deposit; the periodical reports, the verification and control, the publicity and property of the results, as well as any other condition that, given the rules of science and applicable techniques, is necessary according to the Commission's Technical Office's opinion.

In the case of access permits for scientific or non commercial purposes, the Law establishes that the aforementioned requirements will be determined in a different way for researches without commercial purposes, whenever it is convincingly demonstrated that there is no profit interest.

For example, the legislation determines that public universities and other duly registered institutions may periodically subscribe model agreements with the Commission to carry through the access permits and the operation reports; however, in these cases, the legal representatives of the universities or institutions

that make use of this benefit will have criminal and civil responsibility for the use of the benefit.