

# Genetic Resources, Traditional Knowledge and International Law



**I**n this paper, we examine the extent to which international laws oblige plant genetic resources (PGR) managers in national (government) programs to obtain the prior informed consent (PIC) of indigenous peoples and local communities before accessing, using or exchanging plant genetic resources in food and agriculture (PGRFA) and related knowledge associated with them. To this end, both existing international instruments and those that are currently under development/negotiation are examined.

Here are some existing agreements and related norm setting developments.

## The Convention on Biological Diversity (CBD)

The international agreement with the highest profile that addresses this issue is the Convention on Biological Diversity (CBD). Article 8(j) of the CBD requires that signatories "shall, as far as possible and as appropriate" and "subject to [their] national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices". Article 10(c) commits contracting parties, "as far as possible, and as appropriate ... [to] protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with the conservation or sustainable use requirements".

### Some Progress on CBD

Both of these articles are relatively vague: they do not actually spell out what states can or should do to fulfill their obligations. Part of the reason for this is that parties negotiating the CBD did not agree on just how far signatories should be obliged to go to protect traditional knowledge.



- In the period leading up to 1992 when the CBD was finalized, the whole idea of protecting traditional knowledge was still relatively new: no one had any fixed ideas about how it should be done. Partly as a consequence of this ambiguity, the Conference of the Parties to the CBD (COP-CBD) established two Ad Hoc Open Ended Intersessional Working Groups to investigate, among other things, means by which member states could "as appropriate" and "subject to their own legislation" protect traditional knowledge.
- In May 1998, the Fourth COP-CBD created the Ad Hoc Open Ended Intersessional Working Group on the Implementation of Article 8(j) to provide advice to the Parties regarding the "development of legal and other appropriate forms of protection of the knowledge ... of indigenous and local communities". In May 2000, the Fifth Conference of the Parties extended the mandate of this working group and directed it to take steps towards the development of parameters for such legal systems.
- The Working Group's mandate was renewed by the Sixth Conference of the Parties in April 2002. In truth, this group's rate of progress has been relatively slow. That said, it must be appreciated that the 8(j) Working Group's mandate is extraordinarily broad, attempting to work through largely uncharted territory. Furthermore, its very existence is an important stage in the potential evolution of a better-defined international norm regarding the protection of traditional knowledge.

**Update:**

Mandate of the working group has been extended at the 6th Conference of Parties last April 2002 but workplan is still under deliberation.



- In October 2001, the Ad Hoc Open Ended Working Group on Access and Benefit Sharing created the draft "Bonn Guidelines" for state parties developing national legislation to regulate access to genetic resources and benefit sharing. A variation of these guidelines was adopted by the COP VI in April 2002 through Decision VI/24. Though they will not be binding, they still have a great deal of potential to influence how countries develop their access laws. Among other things, the Bonn Guidelines recommend that "[r]especting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws." This is significant because the CBD does not explicitly state that it is necessary to get the PIC of constituent communities.



It has been argued that the requirement to obtain such consent is implicit in the text of the Convention; nonetheless, it is not an explicit requirement. Consequently, it could be argued that the Bonn Guidelines go one step further than the CBD in this regard. Or put another way, that they offer an interpretation of the CBD that clarifies an outstanding ambiguity.

Furthermore, COP VI recommended that state parties should include in their national laws requirements for parties to provide the origin of genetic resources and traditional knowledge that they used when developing innovations over which they seek IP rights (Decisions VI/10 and VI/24).

## Obligations for National PGRFA Program

### Managers

How much does all of this add up to by way of obligations for national PGRFA program managers? There are two potentially different answers to this question: one is legal and the other is political/moral.

#### Legal

The preliminary legal issue for national genetic resources program managers to consider is whether or not the country in which program activities are taking place has ratified the CBD. If not, the Convention does not apply, and national genetic resources program managers do not need to consider the CBD when thinking about their obligations to indigenous and local communities.

If the country concerned has ratified the CBD, the national genetic resource program managers must consider a few related issues.

- First, they must realize that as agents or representatives of the national government, they are bound by the standards established by the CBD, even if the country concerned has not created laws to implement the CBD.
- Second, if the country has implemented legislation, they should look to those laws for guidance as to how they should conduct their operations. However, they are not necessarily able to rely entirely on national laws in this respect; it is always possible that national implementing legislation may not implement all of the standards established in the CBD. In such cases, the national program manager must consider voluntarily

complying with higher standards of conduct than what is required by the national law in order to make sure they are in compliance with the Convention.

Unfortunately for national program managers, these are very difficult judgements to make. They are complicated by the facts, set out above, that:

- the CBD does not explicitly state that national implementing laws must require access-seeking parties to obtain PIC from indigenous and local communities or traditional knowledge holders; and
- the implementing guidelines developed by the CBD Working Group on Access and Benefit Sharing -- which do include such a requirement -- are not legally binding. Consequently, national governments have a great deal of latitude to interpret and implement the CBD in different ways.

For example, the Philippines national access law -- Executive Order No. 247 -- requires access-seeking parties to obtain PIC from traditional communities whereas the Andean Pact's regional agreement on access law - Dec No. 391 -- is not so clear. While it says that member states "recognize and value the rights and decision-making capacity of indigenous, afro-american and local communities," it does make any explicit provision for including those peoples in considerations of access proposals. In fact, the Decision states that access agreements will be between the competent national authority (a body appointed by the government) and the access-seeking parties. In this context, it is not at all clear how local peoples get included in the PIC-related processes. One possible explanation is that, as a regional agreement, it is necessary to allow countries space to define how they will involve their communities. Nonetheless, this leaves open the possibility that those communities will not be included in the same way as they would be in the Philippines. Despite this possible difference, both laws cite the CBD in their preamble statements as justification and support for their content and implementation.



Strictly legally speaking, with such precedents before them, national genetic resources program managers will not be certain, from a legal point of view, whether or not they must obtain PIC from indigenous and local communities in the course of their program activities. As stated above, it has been argued that the CBD requires the PIC of communities, but there is no universal consensus on this point.

### Political/Moral

While the CBD may not include many concrete legal obligations, it has given rise to an unprecedented level of political sensitivity to genetic resources related issues. In the court of public opinion, there is no defence for parties accused of taking and using genetic resources associated with indigenous communities without their permission. Charges of "biopiracy" are not tempered by technical legal explanations that the activity in question took place in a country that:

- has not yet signed or ratified the CBD; or
- determined that the CBD did not require them to require access- seeking parties to obtain the PIC of indigenous and local communities.

As far as the general public is concerned, the CBD creates standards of conduct applicable to everyone, everywhere in the world. The reputations of programs and institutions can be lost overnight through allegations of violating the spirit of the CBD.

Complicating this situation once again is the fact that the CBD is so vague in terms of what actually can and should be done to advance its objectives. One party's interpretations of CBD- compliant behavior may be another's definition of "biopiracy".

In light of the highly charged political environment, national genetic resources project managers are best off ignoring legal technicalities that might reduce their obligations, and instead, conducting themselves as though particularly rigorous interpretations of the CBD had been implemented into domestic law.



Politically and morally speaking, it is advisable for the national genetic resources program managers to be extremely diligent in making sure they obtain PIC from indigenous and local community representatives before obtaining, exchanging and using genetic resources and related information associated with those communities.



Other existing international instruments support the protection of traditional knowledge, though they do not mention it explicitly.

## Other International Agreements

Other international agreements, although they do not mention indigenous and local knowledge explicitly, certainly support the notion that countries are under a growing obligation to introduce policies to deal with indigenous and local knowledge. For example,

the international Convention on Social and Cultural Rights (ICESR) includes the right to development and diffusion of science and culture. It further obliges signatories to provide measures for the enjoyment of the cultural heritage of indigenous peoples.

The International Labor Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) states that member states should promote “the full realization of social, economic and cultural rights [of indigenous and tribal peoples] with respect to their social and cultural identity, their customs and traditions, and their institutions.” While neither of these instruments creates an explicit obligation for nation states to implement means of vesting exclusive forms of protection rights in traditional knowledge holders, it could be argued that they support that kind of legislative measure.

## Emerging Developments: Possible Agreements, Amendments and Declarations

### International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or International Seed Treaty)

The International Treaty was adopted by the Food and Agriculture Organization (FAO) General Assembly in November, 2001. It will come into force 90 days after the fortieth country ratifies it. Article 9 of the International Treaty states that:

"In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:

- protection of traditional knowledge relevant to plant genetic resources for food and agriculture; and
- the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture..."

In this case, the entire principle of Farmers' Rights is explicitly made subject to national legislation. As a consequence, legally speaking, national genetic resources program managers can simply look to the legislation of the country in which the relevant program activities are taking place to determine what his or her responsibilities are.

Despite the limiting legal effect of making farmers' rights subject to national laws, there is little doubt that the inclusion of these provisions in the International Treaty will underscore the political pressure that already exists by virtue of the CBD (and less so, the CCD) to obtain PIC when acquiring, exchanging and using genetic resources and related knowledge associated with indigenous peoples and local communities.

## Draft Declaration on the Rights of Indigenous Peoples

Article 19 of the Draft Declaration on the Rights of Indigenous Peoples states that indigenous peoples "are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop, and protect their sciences, technologies and cultural



manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts."

## The Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore

Among other things, the Intergovernmental Committee (IC) will develop recommendations for non-binding model intellectual property clauses to be included in contractual agreements governing exchanges of PGRFA between various public and private institutions and national gene banks. It will also look at other kinds of exchanges, e.g., the supply of a wild plant with medicinal uses from an indigenous community to foreign research institutes.

The IC is also examining means by which traditional knowledge (TK) could be included in patent offices' searches for prior art. For the time being, the IC is considering working towards recommending a number of TK-related journals that should be included in such searches. In preparation for the next meeting, the Secretariat will assemble a list of TK-related journals, and make an initial effort at establishing which of them would be most important to include.

While some state members of the IC definitely would like to work towards the creation of an international binding agreement regarding the protection of traditional knowledge, enough other countries are against the idea that it is unlikely that an intergovernmental negotiating committee will be struck to create such an agreement any time soon.



## World Trade Organization (WTO/TRIPS)

Article 27(3)(b) of the TRIPS agreement requires all WTO members to offer intellectual property protection for plant varieties in the form of patents or "effective *sui generis* protection." There is no mention in the TRIPS agreement regarding traditional knowledge. However, there is a review of article 27(3)(b) (which was scheduled to begin in 1999) and a review of progress member states are making in implementing the TRIPS agreement (which was scheduled to begin in 2000) wherein it may be possible to introduce amendments regarding protecting traditional knowledge.



Many developing countries have been attempting to interject consideration of traditional knowledge protection in the context of these reviews. Their efforts coincided with, and consequently got included in, the decision to launch a new comprehensive round of trade negotiations under the aegis of the WTO. To this end, article 19 of the Doha Ministerial Declaration instructs the TRIPS Council to examine: "the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore," in the context of its review of article 27.3(b) and the review of the implementation of the TRIPS Agreement.

Meanwhile, it seems unlikely that the WTO member states will arrive at the consensus necessary to alter the TRIPS agreement to oblige members to provide some form of intellectual property protection for indigenous and local knowledge (including, presumably, farmers' varieties that satisfied the new *sui generis* criteria for protection). Until such time, there is nothing explicit in the TRIPS agreement that obliges PGR managers to obtain PIC from indigenous communities if collecting or exchanging those communities' plant varieties.

## Conclusion

In recent years there has been a proliferation of international fora considering different aspects of the protection of indigenous peoples' and local communities' technologies and knowledge. There is a growing trend towards the recognition/creation of rights of control in those communities over genetic resources with which they are associated, and related knowledge. For the time being, the international law has not gone so far as to set minimum standards for the creation and enforcement of *sui generis* indigenous people's rights for communities over their technologies and associated knowledge. Nor is it explicitly stated in any currently binding international legal instrument that it is necessary to obtain

the PIC of indigenous peoples and local communities before collecting, using or exchanging those resources and knowledge.

It could certainly be argued that the international law is definitely moving in that direction; nonetheless, it is not undisputably there yet. Meanwhile, however, given the political climate, we would argue that it is incumbent upon all national genetic resources program managers to exceed their strict legal obligations and live up to higher standards of behavior in terms of obtaining the PIC of indigenous peoples and local communities when accessing, exchanging and using genetic resources and related information with which these groups are associated.

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