Costa Rica's Biodiversity Law: Sharing the Process[1]

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Journal of International Wildlife Law & Policy, Volume 2, No. 2 (1999) pp. 259-265

Keywords:

Costa Rica; Convention on Biological Diversity; biodiversity; intellectual property

Editor's note: The Biodiversity Law of Costa Rica (both the original in Spanish and an English translation) is available on the Journal's web site: www.jiwlp.com.

Abstract

This article assesses the prospects for Costa Rica's new Biodiversity Law. We believe that this analysis could also provide a valuable case study of national implementation of the Convention on Biological Diversity (CBD). The article is not intended to be a primer on the CBD, nor will it defend its precepts. The authors believe that each nation must formulate a legal framework to regulate biodiversity that reflects their unique national circumstances.

1. Background

Costa Rica's Biodiversity Law, approved on 23 April 1998,[4] is the culmination of a long process to develop a legal framework that will result in a more equitable distribution of benefits deriving from the commercial exploitation of biodiversity resources.

It is important to note that six contracts with transnational companies for biodiversity prospecting had already been signed in Costa Rica when the first draft Biodiversity Law was

[1] An earlier version of this article was prepared for the Workshop on Biodiversity Conservation and Intellectual Property Regime, New Delhi, India, 29-31 January 1999.

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[4] Biodiversity Law, The Legislative Assembly of the Republic of Costa Rica (1998).

presented in June of 1996. Yet, at the time there was no legal framework to regulate such activities.

Over the past twenty years, Costa Rica had enacted laws to regulate the use of individual natural resources, such as the Law for Wildlife Conservation (1992), the Forest Law (1996), the Constitutive Law for the National Parks Service (1972), and the Organic Law on the Environment (1995). But a legal gap existed in the regulation of genetic and biochemical resources, as well as in access to and the fair distribution of their benefits. The Convention on Biological Diversity was ratified by Costa Rica in 1994.

Prior to the drafting of the Biodiversity Law, the administrative framework for the use of biodiversity resources was restricted to an Advisory Council to the Minister of the Environment and Energy, known as COABIO, made up of specialists in distinct aspects of biodiversity, and the National Biodiversity Institute (INBio), a civil non-profit association, which is a counterpart to private enterprises interested developing commercial applications of chemical compounds, genes, proteins, micro-organisms and other products of biodiversity.

2. Legislative History

The proponent of the initiative to develop a national biodiversity law in Costa Rica was Luis Martínez Ramírez, ex-congressman and former president of the Environmental Commission of the Legislative Assembly. He requested the technical support of the World Conservation Union's Regional Office for Mesoamerica (IUCN-ORMA), located in Costa Rica, in the drafting of the Biodiversity Law. The objective of this legal initiative was to ensure compliance with one of the mandates of the Convention on Biological Diversity, challenging its signatories to legislate on the themes covered by the Convention.

IUCN-ORMA responded positively to the request and charged the Wildlife Thematic Area with responsibility for the project. Prior to the development of the draft law, its philosophical framework was defined jointly with the Environmental Commission of the Legislative Assembly. This definition established the following guiding principles:

- equal access to and distribution of benefits from the use of biodiversity components;
- respect for human rights, principally for those groups that are marginalized due to cultural or economic conditions;
- sustainable use of biodiversity resources that may contribute to development options for future generations;
- democratic guarantees of greater participation of all citizens in decision making, within an environment of peace.

With this conceptual base a consultation process was initiated with groups selected according to certain characteristics: indigenous peoples, closeness to protected areas, small farmers, legal experts, scientists, civil servants and representatives from the commercial sector. The objective of this consultation was to assist in the formulation of the basic content of the draft law.

With this input, preparation of the draft law commenced. The objective was to draft a law capable of implementing all aspects of the Convention on Biological Diversity in an integrated

manner, while contemplating the possibility developing distinct regulations for more specific themes such as biosecurity, biotechnology, access and intellectual property in the future. The draft law, released on 18 June 1996, was extensively distributed to the public to solicit input, including 300 copies to individuals and institutions. It was also made available on Internet.

A revised Draft Law was drafted and sent to the Environmental Commission in December 1996. However, the discussion process was bogged down due to the polarisation positions on the draft legislation.

The proposal for a reconciliation forum by Jorge Mora, Rector of the National University, was accepted by the Environmental Commission. The latter delegated the task of drawing up the draft law to a Special Mixed Sub-commission, made up of representatives of the National Indigenous Forum, the Costa Rican Federation for Environmental Conservation (FECON), the National Small Farmers Forum, the University of Costa Rica and the National University, the Union of Chambers for Private Business, the National Biodiversity Institute (INBio), the Advisory Council to the Minister of the Environment and Energy (COABIO), and the National Liberation (PLN) and Christian Socialist Unity (PUSC) parties.

The objective of the Sub-commission was to draft a revised version of the law within a period of five months. Debate arose, among other things, about the role of the State as guardian of biodiversity, the concepts of public and private ownership, the administrative organisation, biosecurity and access to genetic and biochemical components, the protection of associated knowledge and the intellectual rights of the community.

The Sub-commission submitted the revised text in November 1997, and five months later, on 23 April 23 1998, during the last days of the Figueres Olsen administration, the Draft Biodiversity Law was approved by a conditional majority vote in the legislative assembly. It was subsequently signed and converted into Law of the Republic No. 7788 on 6 May 1998.

3. Contents of the Law

3.1 Article 7: Definitions

Biodiversity

The term "biodiversity" is defined in the law as variability of living organisms from any source, existing within terrestrial, aerial, marine or aquatic ecosystems or in other ecological complexes. It includes the diversity within each species, as well as between species and the ecosystems of which they are part.[5]

For the purpose of this law, the term biodiversity is understood to include intangible components, including individual or collective knowledge, innovation and traditional practice of real or potential value associated with biochemical and genetic resources, whether protected or not by intellectual property systems or *sui generis* registry systems.[6]

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[5] *Id.* at art. 7(2).
[6] *Id.*

Bioprospecting

"Bioprospecting" is defined under the law as the systematic search for, and classification of research for commercial application of new sources of chemical compounds, genes, proteins, micro-organisms and other products of current or potential economic use that are found in biodiversity.[7]

Genetic resources

"Genetic resources" include any material derived from plants, animals, fungi or micro-organisms that contain functional units of heredity.[8]

Knowledge

"Knowledge" is defined as a dynamic product generated by society over time and by different mechanisms, including that which is produced by traditional means or generated by scientific practice.[9]

Previous informed consent (PIC)

"Prior informed consent" is the procedure by which the State, private owners or local and indigenous communities, having been previously supplied with all requested information, agree to permit access to biological resources or to the intangible component associated with them, under mutually agreed conditions.[10]

3.2 The first draft law

The first draft of the Biodiversity Law, presented for consideration in June 1996, sought to establish a National System for Biodiversity Management, comprised of representatives from four sectors: the State, small farmers, scientific/academic and indigenous groups. Each sector would have designated a representative to serve on the National Biodiversity Commission (CONABI).

Under the first draft, it was contemplated that the Commission would be attached to the Presidency and co-ordinated by one of the vice presidents. The draft law also provided for the establishment of a National Technical Secretariat to carry out its measures, with the Secretariat's judgments to be binding. The Secretariat would have included advisory councils on biosecurity, biotechnology, sustainable use, intellectual property and indigenous matters. It would also have established a national biodiversity network for the systematisation and dissemination of information, as well as personnel training.

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[7] *Id.* at art. 7(3).
[8] *Id.* at art. 7(14).
[9] *Id.* at art. 7(6).
[10] *Id.* at art. 7(9).

This system was premised on the assumption that each sector would organise internally and name a representative who would serve as the link between that sector and the national body.

3.3 The revision process

A series of comments and proposals for changes to the law started to arrive at the office of the proposing congressperson after presentation of the Draft Law. Thus in December 1996 a Substitutive Draft Law, enriched with the contributions from different national institutions, was presented to the Environmental Commission.

The administrative provisions of the first draft law were changed in several ways:

- The Biodiversity Conservation System would be made up of the National System for Biodiversity Management, and by the National System of Conservation Areas (SINAC);
- SINAC, which was functioning de facto, would be accorded stronger legal authority, acknowledging the fact that protected areas were a fundamentally important instrument for *in situ* biodiversity conservation;
- The National System for Biodiversity Management sought to establish a national commission and a technical secretariat. It also supported a proposal for the regionalisation and de-concentration of the regional and local councils;
- The draft law contemplated placing the CONABI under the Ministry of Environment and Energy, acknowledging the Ministry's leading role on biodiversity issues;
- Two more sectors were incorporated into the production sector, in recognition of its importance in the use of biodiversity resources, and non-governmental organizations;
- It was contemplated that there would be a gradual transfer (over five years) of operative functions from the Technical Secretariat on Biodiversity to the Conservation Areas;
- No changes were made to the advisory councils or the National Biodiversity Network.

3.4 The second revision process

A Special Mixed Sub-Commission was appointed in July 1997 to formulate a Draft Consensual Law. In November of 1997, the Draft Law was submitted, and with slight modifications, was passed on 23 April 1998.

This incarnation of the legislation maintained the Ministry of Environment and Energy as coordinator of the National Commission for Biodiversity Management and the National System of Conservation areas, the functions of which were maintained much as they were in the first version and include programming, advisory and implementation functions. The main difference was that the new draft drew representatives only from the institutional sector.

The National Commission for Biodiversity Management is comprised of eleven representatives from the following agencies and organizations:

- Environment and Energy, which presides over the Commission

- Agriculture and Livestock
- Health
- Overseas Trade
- The Costa Rican Institute for Fisheries and Aquaculture, the body charged with overseeing marine resources
- The Executive Director of the National System of Conservation Areas
- Representatives of:

    - The Association of the National Small Farmers' Board
    - The Association of the National Indigenous Board
    - The Costa Rican Federation for Environmental Conservation
    - The Costa Rican Union of Chambers of Private Industry
    - The National Council of Rectors.[11]

This Commission, known as CONAGEBIO, includes an Office for Technical Support, comprised of an Executive Director and personnel provided for under the regulation. The Commission has responsibility for the processing, co-ordination and granting of permits. It may also establish ad hoc Expert Committees.[12]

3.4.1 Access to genetic and biochemical components and protection of associated knowledge

CONAGEBIO is responsible for proposing policies concerning access to genetic components and biochemicals of *in situ* and *ex situ* biodiversity. It also acts as a mandatory consultative body for applications for intellectual property rights in the context of biodiversity resources.[13]

3.4.1.1 Basic requirements for access

The basic requirements for access are:

1) Prior informed consent of representatives of the situs where access is to take place, these being the regional councils of the Conservation Areas, farm owners or indigenous authorities, when this situs within their territory.

2) Approval of the prior informed consent by the Commission's Technical Office.

3) The terms of technology transfers and the fair distribution of benefits, agreed to in the permits, agreements and concessions, as well as the type of protection of associated knowledge called for by the representatives of the place where access takes place.

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[11] *Id.* at art. 15.
[12] *Id.* at art. 16.
[13] *Id.* at art. 14.

4) The definition of the means by which such activities will contribute towards the conservation of species and ecosystems.

5) Designation of an in-country legal representative, in cases where individuals or corporate residents reside outside the country.[14]

3.4.1.2 Right to cultural objection

The new law recognises the right of local communities and indigenous peoples to oppose access to their resources and associated knowledge for cultural, spiritual, social, economic or other reasons.[15]

3.4.1.3 Access permit for research or biodiversity prospecting

Any research programme or biodiversity prospecting on genetic or biochemical material from biodiversity to be conducted in Costa Rican territory requires an access permit. For duly registered *ex situ* collections, a procedure is established for the authorisation of permits.[16]

Such permits are granted to a researcher or research centre, are personal and not transferable, are limited to the material containing the authorised genetic or biochemical components and can only be used in the area or territory that is clearly indicated in the permit.[17] Access permits for research or biodiversity prospecting do not grant or delegate rights, and only allow for the carrying out of such activities on previously established biodiversity components. The permits must clearly stipulate: the certificate of origin, the possibility of or prohibition on extracting or exporting samples or, in its absence, the duplication or deposition of materials; periodic reports, monitoring and control, publicity and ownership of rights, as well as any other condition which, given the applicable scientific and technical rules, are necessary according to the Commission's Technical Office. The requirements are to be determined in a different way for non-profit projects; however, there must be reliable verification of the fact that there are no profit motives.[18]

Each request should be addressed to the Technical Office and comply with the following requirements:

1) Complete name and identification of the interested party. If it is not the interested party making the application, full details of their representative should be indicated as well as the authorisation under which he/she is operating;
2) Complete name and identification of the responsible professional or researcher;
3) Exact location of the place and the objects to be subjected to research, with an indication of the owner, the administrator or holder of the real estate;

[14] *Id.* at art. 63.
[15] *Id.* at art. 66.
[16] *Id.* at art. 69.
[17] *Id.* at art. 70.
[18] *Id.* at art. 71.

4) Descriptive summary of the scope of the research and possible environmental impacts;
5) Objectives;
6) A representation that the previous declaration has been made under oath;
7) Place for notifications to be made within the perimeter of the residence of the Commission's Technical Office.[19]

The request should be accompanied by the prior informed consent (PIC), authorised by the appropriate body, as provided for under Article 65.[20]

3.4.2 Voluntary register of individuals or corporate entities involved in biodiversity prospecting

Individuals or corporate entities who wish to carry out biodiversity prospecting should register with the Commission. Registration, however, does not provide rights to carry out activities specific to biodiversity prospecting.[21]

3.4.3 Authorisation for agreements and contracts

The Commission's Technical Office will authorise agreements and contracts signed between individuals, nationals or overseas interests, or such individuals or entities and institutions registered for this purpose, if access to the use of genetic and biochemical components of Costa Rican biodiversity are contemplated. Their processing and approval are subject to the provisions in Articles 69, 70 and 71 of the Law.

Public universities and other duly registered centres can periodically establish framework agreements with the Commission for the processing of access permits and operational reports. In these cases, the legal representatives of the universities or institutions that benefit from this provision will be criminally and civilly responsible for their uses.[22]

3.4.4 Concession

When the Technical Office authorises the permanent use of genetic material or biochemical extracts for commercial ends, the interested party is required to obtain a concession for their extraction; and for which the General Norms established by the Commission are applied.

3.4.5 General rules for access

In addition to the specified requirements described in this article, the new law also requires parties interested in obtaining a concession to deposit up to ten percent of the research budget and up to fifty percent of the bonuses that it collects for disbursement to the National System of Conservation Areas, or the indigenous territory or private owner providing access to the

[19] *Id.* at art. 72.
[20] *Id.* at art. 72.
[21] *Id.* at art. 73.
[22] *Id.* at art. 74.

components. The Technical Office also may determine the amount to be paid by interested parties for administrative costs and other benefits or technology transfers that form part of the prior informed consent.[23]

3.4.6 Forms of and limits to protection

The new law provides for State protection of intellectual and industrial property rights through patents, trade secrets, plant breeders' rights, *sui generis* community intellectual rights, copyrights and farmers' rights. The rights, however, do not apply to the following:

1) Deoxyribonucleic acid sequences per se;
2) Plants and animals;
3) Micro-organisms that have not been genetically modified;
4) Essentially biological processes for the production of plants and animals;
5) Natural processes and cycles;
6) Inventions that are essentially derived from knowledge associated with publicly- owned traditional or cultural biological practices;
7) Inventions which, which if commercially exploited in a monopolistic manner, could affect agricultural or fishing processes or products that are considered essential for the sustenance and health of the country's inhabitants.[24]

3.4.7 Binding prior consultation

Both the National Seed Office and the Registers of Intellectual and Industrial Property are required to consult with the Commission's Technical Office before granting protection for intellectual or industrial property involving biodiversity components. Those seeking protection must always provide the certificate of origin issued by the Technical Office of the Commission and the proof of prior informed consent. Justified opposition by the Technical Office will prevent registration of the patent or protection of the innovation.[25]

3.4.8 Licences

Individuals benefiting from the protection of intellectual or industrial property rights related to biodiversity will cede a legal license to the State that will allow the use of such rights in cases of declared national emergency. Under such circumstances, the State will not be required to pay compensation to the holder of the interest.[26]

3.4.9 *Sui generis* community intellectual rights

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[23] *Id.* at art. 76.
[24] *Id.* at art. 78.
[25] *Id.* at art. 80.
[26] *Id.* at art. 81.

The State expressly recognises and protects, under the rubric of *sui generis* community intellectual rights, knowledge, practices and innovations of indigenous peoples and local communities related to the use of biodiversity components and associated knowledge. This right exists and is legally recognised by the simple existence of the cultural practice or knowledge related to genetic and biochemical resources; it requires no previous declaration, express recognition or official registration, and thus may include practices that might acquire such status in the future.[27] The recognition implies that none of the forms of protection of intellectual and industrial rights regulated in this section of the law, special laws, or international law will affect such historical practices.[28]

Within the eighteen months of the law's entry into force, the Commission's Technical Office, in conjunction with the Indigenous Peoples Board and the Small Farmers Board, will solicit the input of indigenous and small farmer communities to determine the nature and scope of *sui generis* community intellectual rights.[29]

3.4.9.1 Determination and registry of *sui generis* community intellectual rights

The new law provides for the creation of an inventory of *sui generis* community intellectual rights that communities ask to be protected, with the understanding that others of a similar nature may be registered and recognised in the future. The existence of such recognition in the Register will oblige the Commission's Technical Office to reject applications for intellectual or industrial rights over such components or knowledge, even when the *sui generis* right is not officially registered.[30]

3.5 The most polemical issues and how they were resolved:

CRITICISM	**CONCILIATION**
•Too many obstacles for access.	The new law clarifies that it is a question of access to genetic and biochemical resources and that biological resources are not included. Access conditions are simplified.
•University autonomy is violated concerning scientific research.	The new law does not affect university autonomy as far as teaching and research in the field of biodiversity is concerned, except

[27] *Id.* at art. 82.
[28] *Id.*
[29] *Id.* at art. 83.
[30] *Id.* at art. 84.

	when research has commercial applications.
•Issue of protected areas not included.	A chapter was included for the legal establishment of the National System of Conservation Areas (SINAC)
•Indigenous and small farmer groups are not organised, thus, the State must serve in a coordinating role	Representation of the Indigenous Board and the Small Farmers Board are provided for within the National Commission for Biodiversity Management (CONAGEBIO), directed by the Ministry of the Environment and Energy.
•Human genetic material is included within the law.	Access to human biochemical and genetic material is excluded from the ambit of the law.

4. Current situation and follow-up: National Incidence Network

The National Small Farmers' Board, the National Indigenous Board, the Costa Rican Federation for Environmental Conservation and the National University's CAMBIOS programme have established the National Incidence Network to maximize enforcement of the Biodiversity Law and strengthen the participation of civil society. More specifically, the Network will pursue the following objectives:

- Ensure the direct participation of farmers, indigenous populations, academia and the environmental movement in the implementation of the law;
- Strengthen civil society through the National Commission for Biodiversity Management (CONAGEBIO), the body that was created to formulate national policy for the conservation, sustainable use and restoration of biodiversity. CONAGEBIO will propose policies relating to access to the genetic and biochemical components of biodiversity and act as the obligatory consultative body for procedures relating to requests for protection of intellectual rights over biodiversity;
- Strengthen public participation through representation in the Regional Councils of the Conservation Areas, created within the framework of the National System of Conservation Areas;
- Support the participatory process with communities to ensure that they benefit from *sui generis* community intellectual rights;

- Develop education programs for biodiversity conservation and sustainable use;
- Strengthen relations with international organisations that work in this area so as to share experiences and support programs that benefit local communities.

5. Current Status of the Law

The Ministry of the Environment and Energy has challenged the constitutionality of articles 14 and 22 of the Biodiversity Law in proceedings before the constitutional chamber. These articles establish the National Commission for Biodiversity Management (CONAGEBIO) and the National System of Conservation Areas (SINAC), respectively. The Ministry argues that it has jurisdiction over environmental and natural resources policies, and the use of public funds in this context. The National Incidence Network together with other sectors, is analysing the possible consequences of this action and is attempting to ensure that this does not become an insurmountable barrier to enforcement of the Law.

6. Lessons learned

- There is considerable political and economic pressure being brought to bear by interests who already have activities underway and seek to avoid regulation under the new Biodiversity Law;
- There is no systematised experience to draw upon from other nations in the South;
- The general public has access to very little information on biodiversity and its economic, ethical and social implications; only the academic/scientific elite is sufficiently informed on these issues;
- Participation of nations in the region in meetings of developing countries related to implementation of the Biodiversity Convention have been inadequate and sporadic;
- The State does not yet want to share decision making with other sectors in society, especially the small farmer and indigenous sectors.

The primary lesson we have learned from the legislative advisory process undertaken in Central America is that the law drafting process facilitates learning and the strengthening of capacities, critical considerations if any law of this nature is to be effective.