DISCUSSION PAPER

The road to effective prior informed consent for accessing the traditional knowledge and genetic resources of Indigenous and local communities in Colombia

Gabriel Ricardo Nemogá Soto, Director, Research Group on Policy and Legislation on Biodiversity, Genetic Resources, and Traditional Knowledge (PLEBIO), National University of Colombia. E-mail: grnemogas@una.edu.co

Introduction

Fulfillment of prior informed consent (PIC) in countries like Colombia is subject to an effective legal framework that clearly stipulates the property regime over biological and genetic resources and traditional knowledge. By analyzing the Colombian property regimes and the issue of access, gaps, uncertainties and complexities surrounding the effective application of an international regime at the national level will be revealed, specifically with regards to PIC. Finally, indigenous and local community responses to inappropriate access to their resources and the conditions for effective PIC in Colombia will be discussed.

Background: Colombia's Property Regime

Biological Resources

Colombian law clearly distinguishes property regimes applicable to biological resources. Biological organisms can be public goods, private property, state property, or collective property. As public goods, biological resources have distinct characteristics: they can not be commercialized, seized, and the State's rights over them do not extinguish over time. As private property, the owner can use, exploit and commercialize the biological resources. Private property rights are not absolute in Colombia. According to the 1991 Constitution, private property has a social and ecological function. As state property, biological resources are owned by a state institution that can acquire, exploit and sell them and the products thereof. In Colombia, collective property over biological resources is held by indigenous and local communities.[1] In terms of common law, there are no biological resources in Colombia that fall under an open access regime or are considered public domain.

Genetic Resources

The property regime applicable to genetic resources is established by interpreting different laws. The Colombian Constitution establishes that the state is obliged to control the entry and exit of genetic resources. Law 99 of 1993 assigns the function of inventories and control of genetic resources to the Ministry of Environment, Housing and Territorial Development (MAVDT). Therefore, the MAVDT is responsible for preserving and guaranteeing the country's rights over their genetic resources. The 1995 Law 164, which ratified the CBD, affirms that the country has sovereign rights over its genetic resources. Article 6 of Andean Decision 391

[1] This includes indigenous, Afro-Colombian and local communities.

(1996) establishes that genetic resources have the distinctive characteristics of public goods mentioned above. Accordingly, Colombian courts affirmed in two separate cases that genetic resources in Colombia are public goods.[2]

Traditional Knowledge
Property rights over traditional knowledge have not yet been clearly established in Colombia. Nevertheless, there are two main interpretations regarding the legal status of traditional knowledge. First, traditional knowledge is seen as national patrimony and deserves state protection as public goods, and second, traditional knowledge is considered the collective property of indigenous and local communities. The first interpretation is grounded within copyright law. Article 189 of Law 23 of 1982, although it does not refer directly to traditional knowledge associated with biological resources, states that indigenous cultural expressions, including dances, songs, handicrafts, and artwork, are part of the cultural patrimony. Moreover, the Constitutional Court, referring to the distinctive ways that indigenous and local communities relate to their environment and their traditional practices of resource management and use, declared that these communities are unique cultural expressions and constitute part of the national identity.

More recent laws permit a different interpretation. Law 397 of 1997 on Culture, again without direct reference to knowledge associated with biological resources, guarantees the collective rights of ethnic groups on their cultural creations. Article 61 of the Colombian Constitution protects the rights of creators over their intellectual works. On these grounds, indigenous and local communities are the legitimate holders of property rights over their knowledge, innovations and practices. A different interpretation regarding property rights of indigenous and local communities would imply that the creations of those communities are not, in fact, intellectual creations or that members of those communities do not have the same rights as other Colombian citizens. However, such a view has no validity within Colombian law. Furthermore, Article 7 of Decision 391 recognizes that indigenous, Afro-Colombian and local communities have decision-making rights over their knowledge, innovations and practices associated with genetics resources and the derivative products. The consideration of the knowledge of communities as national patrimony makes sense only in relation with the special protection that the state affords to the ethnic and cultural diversity of the nation.

Problems in the Colombian Legal Regime

The Gaps
The main gap is the absence of explicit laws on PIC in relation to genetic resources and traditional knowledge in Colombia. There are stipulations concerning prior consultation with communities under Law 21 of 1991, which ratified the International Labour Organization's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries[3]. *Article 6* of the Convention 169 state that government must consult the peoples concerned, through appropriate procedures regarding legislative or administrative measures which may directly affect them. These consultations must be carried out in good faith and using appropriate procedures to the circumstances. The Constitutional

[2] Ruling of the Constitutional Court C-317 and Administrative tribunal concept C-977 of 1997
[3] Article 13 of Law 21 of 1991

Court has affirmed that consultation is a fundamental right for the protection of the ethnic, economic, social and cultural integrity of indigenous and local communities[4]. Similarly, article 76 of Law 99 (1993) states that the exploitation of natural resources has to be carried in a way that does not affect cultural, economic and social integrity of indigenous and local communities. Similar laws exist which pertain to Afro-Colombian communities[5]. In addition to these laws, paragraph of Article 330[6] of the Constitution asserts that exploitation of natural resources in indigenous territories should not have negative impacts on their culture, economy and social well-being.

Decree 1320 of 1998 regulates prior consultation in Colombia. However, this norm has limitations in guaranteeing the prior informed consent of indigenous and local communities. First, it does not deal specifically with their effective participation in activities for accessing their traditional knowledge and biological resources in their territories. Second, the decree allows for only one consultation meeting, even if there are many other communities involved. Third, when communities from the affected area do not present a certificate of recognition as indigenous communities from the Interior Ministry - today the Ministry of Government and Justice - within a certain period of time, it can be assumed that those communities do not exist and therefore the project can go forward without consultation. Fourth, the norm assumes that communities agree with the prevention, mitigation, control and/or compensation measures undertaken to counteract the impacts of a given project when they do not attend a meeting. This norm does not fully guarantee the communities' right to decide the fate of their own resources.

The principal gap in the existing laws is that they do not call for prior informed consent of indigenous and local communities, only consultation. Moreover, the consultation process in Colombia is oriented more to inform stakeholders about development projects, rather than to achieving agreement or consent to the proposed project.

The Uncertainties

Given the different property regimes applicable to biological resources and genetic resources there is uncertainty in the legal system regarding who owns genetic resources in indigenous territories. If we are dealing with biological organisms, they are considered collective property of the indigenous and Afro-Colombian communities who hold title to the territory. But if we are dealing with access to genetic resources, it is the state who grants permission through the national authority (MAVDT). It is not understood by the communities that they can own the biological organisms but not the genetic information that makes up the animals, plants and other living beings. The property regime of biological resources is even more confusing when indigenous territories overlap with national parks.

The uncertainties regarding property regimes are no less numerous when dealing with traditional knowledge. The two contesting interpretations of property rights on traditional

[4] Ruling SU039 de 1.997. Constitucional Court

[5] Law 70 of 1993

[6] Article 330. Paragraph. "Exploitation of natural resources in the Indigenous (Indian) territories will be done without impairing the cultural, social, and economic integrity of the Indigenous communities. In the decisions adopted regarding the said exploitation, the government will encourage the participation of the respective communities' representatives."

knowledge have already been mentioned. Additionally, even if knowledge or innovations were recognized as belonging to indigenous and local communities, there are still issues to resolve. The law does not have rules to apply when there are different rights holders for example, neighboring communities. Uncertainties on the legal rights on the subjects of access (genetic resources and traditional knowledge) make transaction costs too high or impossible to cover.

The Complexities
The complexities with regard to PIC of indigenous and local communities does not derive only from the property regimes. There are situations that come from Colombia's environmental legislation and the distribution of knowledge within communities that are relevant when considering this problem.

First, the environmental legislation designated conservation areas under special categories for example, national parks, flora and fauna sanctuaries and forest reserves. Importantly, these protected areas did not take into account the indigenous peoples who inhabited those territories. Many conservation areas have partially overlapped indigenous territories, and in at least two cases, national parks (Macuira and Puinawai) have been completely superimposed upon indigenous lands. In those cases, to obtain access to genetic resources and traditional knowledge would be a real challenge.

Second, the distribution of knowledge within communities is not even. It has been documented that cultural variation in traditional knowledge systems is a distinctive characteristic. Distribution of knowledge has been explained by the social division of labour and socio-demographic variables.[7] Important components of knowledge may be held only by certain individuals like healers or shamans.

Therefore, the overlap of Indigenous territories and protected areas, the several property regimes on biological and genetic resources, and the uneven distribution of knowledge make it quite complex to identify who is entitled to grant consent.

Indigenous and Local Communities' Response

To deal with the inappropriate access to biological resources, genetic resources and traditional knowledge, indigenous communities are adopting various strategies. One is social and territorial control. Through this mechanism, community members are obligated to control and monitor the collection and extraction of biological material and associated knowledge from their territories. Some organizations, like the Indigenous Organization of Antioquia (OIA), have even established regional by-laws regarding research activities on biological resources and traditional knowledge. Another strategy of indigenous communities, like that of the Regional Organization of the Embera Wounaan of Chocó (OREWA), has been to establish their own research centre. This approach affirms that communities themselves can identify the subject of research or appropriate projects that improve their environmental, socio-economic, educational and human health needs. Finally, several indigenous authorities have

[7] Studies have shown that gender, age, expertise, ethnicity, and kinship affiliation are relevant in explaining the distribution of cultural information (Boster, 1985, 1986; Ellen, 1975; Boster and Johnson, 1989; Nemogá, 2004).

called for a moratorium[8]. This position puts forth that while no effective guarantee of the rights of indigenous communities over their resources and knowledge exist, there must not be any access to their traditional knowledge and biological resources within their territories.

Conditions for Effective PIC in Colombia

Furthermore and in conclusion, indigenous communities in Colombia have put forward principles for the appropriate and effective granting of PIC. First, there needs to be the legal recognition of their territories. Territorial rights of Indigenous Peoples is fundamental for the continued conservation of biodiversity and for the maintenance of their knowledge, practices innovations and livelihoods. In Colombia, the long standing armed conflict has made life very difficult for Indigenous Peoples and this has had pronounced impacts on the environment. Second, with respect to the right to prior consultation, PIC can not be effective without the reformulation of the Colombian laws on prior consultation. When faced with bioprospecting activities, indigenous communities need to have the opportunity to participate equally so they can actively develop and agree to the terms of access and benefit-sharing. Capacity building is a necessary tool to ensure a more balanced playing field in access negotiations. Third, indigenous communities demand the right to freely make decisions regarding the biological resources within their territories and their associated knowledge. The right to oppose access must be recognized when cultural, socio-economic and/or environmental integrity of indigenous communities is at risk. Finally, indigenous communities demand that their collective ownership of biological resources and traditional knowledge be explicitly recognized in order to prevent misappropriation of their resources. It is critical that access to biological resources and traditional knowledge and implementation of PIC within a perspective of ABS allows indigenous communities to preserve and maintain practices embodying lifestyles relevant for the conservation and sustainable use of biodiversity.

References

Boster, J. S., 1985. *Requiem for the omniscient informant: There's life in the old girl yet*. Pp. 177-197 in Dougherty, J. W. D. (Ed.). Directions in Cognitive Anthropology. University of Illinois Press, Urbana, IL.

Boster, J. S., 1986. *Exchange of varieties and information between Araguaruna manioc cultivators*. American Anthropologist, (88):428-436.

Ellen, R., 1979. *Omniscience and ignorance: Variation in Nuaulu knowledge, identification, and classification of animals*. Language and Society, 8:337-364.

Nemogá S. Gabriel R., 2004. *Inter and intra-cultural variation of medicinal plant knowledge in the tropical forest of Calakmul, Mexico: Implications for the conservation,*

[8] Access to the Resources of Biodiversity and Indigenous Peoples by Lorenzo Muelas Hurtado (*Movimiento Autoridades Indígenas de Colombia)* 1998. http://www.edmonds-institute.org/muelaseng.html (Last accessed on October 21, 2004)

protection and resilience of traditional knowledge. Ph. D. Dissertation, University of California. Davis.