

TOWARDS A LAW ON THE ACCESS AND USE OF GENETIC RESOURCES IN MEXICO

By Claudio Torres Nach—n and Gaby Cantce

Center for Environmental Law and Economic Integration of the South.

DASSUR

email: dasurci@edg.net.mx

1. INTRODUCTION

In Mexico, there is no specific law or regulation focused on solving the problem of the access and use of genetic resources as well as the fair distribution of its benefits. This is due mostly because there's no consensus between the different social and production sectors involved. In response to the commitment of implanting in Mexico the legal dispositions resulting from the Agreement for Biodiversity, CONABIO (National Commission for the Knowledge and Use of Biodiversity) and the Environment and Natural Resources Commission from the Republic's Senate organized a seminar that took place in May 1997. It is essential to note that, according to Mexican laws, the seminar did not represent a formal beginning of a legislative process. We've been looking forward to the publishing of the Use and Access of Genetic Resources Seminar's Memory. The present report is a general view of the specific Mexican situation and does not intend to exhaust the vast quantity of specific possibilities.

1.1 PARTICIPATION OF THE CIVIL SOCIETY

The academic, social and private sectors, participated in the Seminar. Nevertheless such participation was very limited because the Seminar took place in Mexico City and there haven't been any adequate forums to receive and analyse the participative proposals of the same three sectors inside the country. This means that centralization is quite negative in the process of allowing civil participation into the legislative and decision taking processes. The only viable solution is to recognize and fortify the professional capacity of organizations inside the country that could organize education workshops on the subject, an adequate distribution of environmental information, and as a result, organize consulting and participative forums. Civilian participation in this area could only be effective with a previous and adequate education that could allow the civil and manufacturing sectors understand their own positions regarding a genetic resources access law. The consulting processes generally have elevated costs.

1.2 A CRITICAL VIEW TOWARDS CIVILIAN PARTICIPATION IN MEXICO

Unfortunately, in many cases, Mexican authorities understand the term “civilian participation” as a simple legal proceeding requirement that would fulfill a one or two day event. These events generally take place in Mexico City, which makes practically impossible an adequate representation of the communities from other parts of the country. Mexico is a country with an area of 3 million km², a population of 100 million inhabitants, 30% of which live in total poverty and marginalization, and in general, with a noticeable democracy deficit. However, in contrast, in terms of biodiversity Mexico is one of the biologically wealthiest countries on the planet. It’s a sine qua non condition that the civilian participation must be wide and decisive in such an important debate. Consequently, it’s necessary to have regional workshops all over the country to achieve a series of proposals that would reflect the biological greatness of Mexico.

2. THE LEGAL FRAMEWORK

We now present a brief resume of the legal frame related to the use and access of genetic resources in Mexico. There are other laws (cuerpos de leyes) that regulate merely procedure aspects such as the Federal Civil Code or The Federal Administrative Process Law. Nevertheless, we shall not consider their potential relevance.

2.1 THE GENERAL LAW OF ECOLOGICAL EQUILIBRIUM AND ENVIRONMENTAL PROTECTION (LGEEPA)

LGEEPA is the federal environmental law which serves as a frame for other laws that compliment and regulate the environmental protection and the control of natural resources in Mexico.

LGEEPA contains diverse dispositions relative to the sustainable use, genetic resources access and distribution of benefits.

The problem is, such dispositions are very general and difficult to apply since some of them only mention the general politics on the subject. Some of which are:

Article 3.- For the effects of LGEEPA, the following terms mean:

IV. Biodiversity: The variability of living organisms from any source, included, among others, terrestrial ecosystems, marine and other aquatic ecosystems and all the ecological systems they are part of; it also includes diversities within the species, between the species and of the ecosystems;

V. Biotechnology: every technological application using biological resources, living organisms or their components, for the creation or modification of products or processes for specific uses;

XXI. Genetic material: every vegetal, animal, microbial or other kind of material containing functional heritage unities;

XXVII. Biological resources: genetic resources, organisms or their parts, populations or any other biotic component from ecosystems with real value, utility or potential for the human being.

XXVIII. Genetic resources: genetic material with real or potential value;

XXXIV. Secretariat: Environmental, Natural Resources and Fishing Secretariat (SEMARNAP).

Article 15.- For the formulation and conduction of environmental policies and the expedition of official Mexican norms and any previewed instruments in this Law, in matter of preservation and restoration of the ecological balance as well as of environmental protection, the Federal Executive will observe the following principles:

XIII.- To guarantee the communities«, including indigenous populations, right to protection, preservation, use and sustainable exploitation of natural resources and the safeguard and use of biodiversity, according to what the present Law and other suitable ordinances determine.

Article 45.- The establishment of natural protected areas has as an objective:

II.- To safeguard the genetic diversity of the species in the wild on whom the evolution continuity depends; as to assure the preservation and sustainable utilization of the national biodiversity, in particular to preserve the species in danger of extinction, threatened, endemic, rare and subject to special protection;

V.- To generate, rescue and spread new or traditional knowledge, practices and technologies, that allow the preservation and sustainable exploitation of the national territory's biodiversity;

Article 48.- The biosphere's reserves will be constituted as nationally relevant biogeographic areas, representatives of one or more ecosystems not significantly altered by man or that require preservation or restoration in which national representative species live, including the endemic, threatened or in danger of extinction ones.

In such reserves the existence of the best preserved surface or surfaces, or non altered surfaces that contain ecosystems or natural phenomenon of special importance, or flora and fauna requiring special protection will be determined to be conceptualized as nuclear zones. In these, environmental preservation, scientific research and ecological education actions will be authorized, and exploitation and ecosystems altering actions will be limited or prohibited.

Article 79.- For the preservation and sustainable exploitation of the wild flora and fauna, there will be considered the following criteria:

IV.- The fight against traffic or illegal exploitation of species;

VII.- The promotion and development of investigation on wild flora and fauna and genetic materials to meet and know their scientific, environmental, economic and strategic value.

X.- Traditional biological knowledge and the community's participation, as well as the indigenous population's, on the formation of biodiversity programs in their living areas.

Article 82.- this law's dispositions are applicable to the possession, administration, preservation, repopulation, propagation, import, export and development of the wild flora and fauna and genetic material, without prejudice from the established in other laws or regulations.

Article 85.- when required for the protection of the species, the Secretariat will promote the total or partial establishment of regulations or restrictions, before the Secretariat of Commerce and Industrial Development (SECOFI), to the import and export of wild flora and fauna specimens and will impose the necessary restrictions for the circulation and/or transit of wild species of flora and fauna proceeding from, and destined to, a foreign country.

Article 87.- The exploitation of wild flora and fauna specimens in economic activities will be authorized when the particulars guarantee their controlled reproduction, or captivity and semicaptivity development, or when the exploitation rate is lower than the natural population renovation rate, according to official Mexican norms that the Secretariat imposes.

The exploitation over natural populations of threatened or in danger of extinction species will not be authorized, with the exception of cases in which their controlled reproduction, and the development of populations of the correspondent species, is guaranteed.

The authorization for the sustainable development of endemic species will be given according to Mexican official laws that the Secretariat issues.

The exploitation of wild flora and fauna species requires express consent from the legitimate owner of the property in which they are found. Also, the Secretariat will grant to such owners the correspondent cinegetic permits, under the guarantee of controlled reproduction and development of wild fauna populations.

The collect of wild flora and fauna species, as well as other biologic resources for scientific research, requires the Secretariat's authorization and will be submitted to the terms and formalities established by Mexican official norms, as well as other applicable commandments.

In every case it the research results' accessibility to the public must be guaranteed. Such authorizations will not be given in the case of biotechnology exploitation, which is submitted to Article 87 BIS.

The exploitation of non-timber forest resources and domestic firewood will be submitted to the Secretariat and any other applicable dispositions.

Controlled reproduction and development of wild fauna populations will be submitted to the correspondent cinegetic permits.

The collection of wild flora and fauna species as well as other biologic resources, for scientific research purposes requires the Secretariat's authorization and will be submitted to the terms and formalities established in Mexican official laws, as well as other applicable ordenances. Such authorizations will not be given in the case of biotechnology exploitation, which is submitted to Article 87 BIS.

Article 87 BIS.- the exploitation of wild flora and fauna species, as well as other biologic resources for biotechnology use requires the Secretariat's authorization.

Authorization referred in this article will only be given with the previous expressed and informed consent from the legitimate owner of the property in which such biologic resource is found.

Also, such legitimate owners will have the right to a fair distribution of the benefits derived from the exploitation referred in this Article, arranging the applicable legal dispositions.

The Secretariat and other competent dependencies will establish the necessary mechanisms to exchange information about authorizations or resolutions relative to the exploitation of biologic resources for this rule.

Article 87 BIS 1.- the incomes perceived by the Federation for the concept of permit, authorizations and wild flora and fauna licences granting, will be destined to biodiversity preservation and restoration actions in areas forming the wild flora and fauna's habitat to which permissions, authorizations or licences are granted.

2.2 THE INDUSTRIAL PROPERTY LAW

Basically, Article 16 of the Industrial Property Law points out that biologic and genetic material as found in nature, alike animal breeds, the human body and the living parts composing it and vegetable varieties, will not be patented. Nevertheless it doesn't mention anything about transgenic species.

On the other hand, Article 19 denies the possibility of patenting ancestral knowledge, because it isn't innovative and therefore it's not considered an invention.

In conclusion, intellectual property protection systems in Mexico don't seem ideal for the regulation of use and exploitation of genetic resources, neither for the distribution of it's benefits.

2.3 THE FEDERAL LAW OF VEGETAL VARIETIES

Recently entering to force in October 1996, the Federal Law of Vegetal Varieties, has the following objective according to it's first article: "to set the bases and procedures for the protection of vegetal variety rights obtainers."

Noticeably, the application of such law concerns to the Federal Agriculture, Cattle and Rural Development Secretariat, consequently, there might be some incompatibilities with the LGEEPA.

The Federal Law of Vegetal Varieties establishes the mechanisms to rule grantings of the “*obtentor* title”, besides establishing a copyright and emergency licences transmission system.

Additionally, the Federal Law of Vegetal Varieties establishes a National Vegetal Variety Register and a register canceling system.

Noticeably, the same Federal Law of Vegetal Varieties guarantees information access, in accordance with the recent LGEEPA and Constitution reforms on the subject.

3. CONCLUSION

The legal frame for the regulation of the access and use of genetic resources and the distribution of it`s benefits is still in the making. Although legal principles and specific dispositions exist in LGEEPA, there are still deep legal gaps to fill. In the near future it is expected:

- a federal access and use of genetic resources law;
- a regulation to the federal vegetal varieties law;
- the improvement and update of local environmental laws.

For that mission it`s essential to accelerate the process of the civil society participation in the subjects of access and use of genetic resources and the distribution of it`s benefits. Such process will accelerate the capacity to implement the 1992 Biologic Diversity Convention, and achieve what many call genetic democracy.