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Biodiversity-related access and benefit sharing: dreams and realities through the prism of the French biodiversity bill

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The Nagoya Protocol and its transposition into the French bill on biodiversity are a step forward in preventing the unfair appropriation of biological resources. Local communities thus stand to gain more from the benefits arising from the commercialisation of living materials. However, private companies' interests still take precedence and the scope of the text appears rather symbolic.

Conflicts surrounding genetic resources: nature and people are losing out

Bioprospecting, the discovery and use of genetic resources for commercial purposes, has the potential for high returns. It is therefore no surprise that some people are seeking to lay claim to these benefits and that conflicts are arising. Local communities may see their natural living resources exploited and potentially generating substantial profits, without benefiting from these themselves, even when their own management practices may have played a part in protecting these resources. The problem is therefore not only a political one (unequal distribution of profits), but also a practical one in terms of conservation (local communities are not encouraged to protect the biodiversity in their territory). In South Africa for example, it took a very long time for the San people to gain recognition for their traditional knowledge about the *hoodia gordonii* plant, whose established properties as an appetite suppressant had previously been patented without their consent and [sold to the Phytopharm and Pfizer laboratories](#).

Towards a green and equitable Eldorado?

Faced with this situation, the **Nagoya Protocol** on Access and Benefit Sharing (ABS) was adopted in 2010 within the framework of the Convention on Biological Diversity (CBD), which are both binding international texts. The protocol, which since its entry into force in 2014 has become one of the key components of the global governance of biodiversity, must thus ensure the fair and equitable sharing of benefits arising from the use of genetic resources, as well as their associated conservation and sustainable use. The bioprospecting permits issued to companies and organisations and access to traditional knowledge are now subject to:

1. the states concerned obtaining prior, informed consent, and;
 2. the signing of mutually agreed terms for benefit sharing.
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An important innovation is that compliance with these rules must be enforced by both the countries that supply genetic resources *and* those that use them. Moreover, any sums paid under the agreements signed must be at least partially directed towards biodiversity conservation.

[The protocol](#), which has been ratified and transposed into national laws, thus helps to regulate access to genetic resources and traditional knowledge. It provides a basis for challenging patents filed unlawfully and for better redistributing the financial and non-financial benefits arising from the use of biodiversity. As such, it provides a means of encouraging the conservation and financing of biodiversity.

Let's face it: a protocol with a limited scope

The scope of the protocol nevertheless remains limited. First, the text does not refer to the [international system of intellectual property rights](#). Consequently, in most of the industrialised countries in which the headquarters of user companies are found, the authorities responsible for issuing patents do not require the disclosure of information on ABS (origin, prior consent, mutually agreed terms). The protocol does mention certificates of compliance recognised at the international level and specifying the information needed for ABS, but these are not imposed on patent law. This law therefore remains independent. The EU regulation (EU 511/2014), for example, contains no provisions regarding the European Patent Office as a checkpoint for compliance with the provisions of the protocol. Next, in reality the Parties have a considerable margin of discretion to decide on the use and distribution of sums paid. Not only can states and companies allocate these sums to uses other

than conservation, but they can also avoid involving local communities in ABS procedures, thereby reducing their incentives to protect biodiversity in their territories.

And in France?

Very soon to be at second reading in the French Senate, the bill on the recovery of biodiversity, nature and landscapes will enable France to ratify the Nagoya Protocol. In comparison with the legislation in other states, the text is ambitious. First, Title IV of the bill stipulates that “benefits shall be allotted to the conservation of genetic resources and associated traditional knowledge”, as well as to “projects directly benefiting the communities concerned”. Although this remains vague, it is a positive point for French biodiversity and local communities, particularly in the overseas territories. Second, contrary to EU regulations, the bill stipulates that applicants for patents to the Institut National de la Propriété Industrielle (INPI) shall provide this institute with any information associated with the provisions of the protocol. The INPI thus becomes a very useful checkpoint for monitoring compliance with the provisions of the protocol. The French bill also establishes, reinforces, or simply reproduces provisions for inspections prior to access to genetic resources (the first “A” of the ABS mechanism for Access and Benefit Sharing). In particular, this concerns applications for subsidies and permits issued to research.

However, there are still **three points that limit the scope of the text:**

- first, **the constitutional issue linked to the indigenous nature of the communities concerned.** Indeed, an official text cannot refer to this, in accordance with the principle of the indivisibility of the French people. Local communities, and those in the overseas territories in particular, will therefore struggle to obtain a fair share of the benefits arising from biodiversity in their territories;
 - second, although it mentions this new checkpoint, the text **does not require the INPI to refuse a patent if the consent and prior agreement of the communities concerned have not been obtained.** Patents and the provisions of the protocol therefore remain dissociated;
 - finally, **the bill will only apply to patents filed through the (French) national intellectual property institute.** Those filed through the European Patent Office, which are valid in France should the applicant so wish, will continue to be subject to EU regulations which, as previously mentioned, do not require the access inspections described above. However, patents filed for the French territory alone are, of course, the exception in this field: since it is possible to file a patent for the whole of Europe with a single (admittedly more expensive) procedure, the advantage of filing a patent through the French institute is, in principle, limited, especially if this institute implements (slightly) more restrictive procedures.
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To conclude, there is no certainty that either the Nagoya Protocol or its transposition into French law will help to better protect biodiversity and to ensure more equitable sharing of the benefits arising from it. The provisions of the bill will therefore have a mainly symbolic and political scope. But this scope is important: the need for prior consent and equitable sharing is increasingly influencing companies, for example in biotrade, and encouraging them to better monitor their supplies; perhaps one day it may lead Europe to do the same. Also on this issue, see the article by Romain Pirard (CIFOR) and Renaud

Lapeyre (IDDRI) in issue n°101 (first term 2016, pp.73-76) of the journal *Liaison Énergie-Francophonie*, "[Protocole de Nagoya : les multiples facettes de sa mise en oeuvre](#)".

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