



Laying the Foundations:

A partnership for researching the monitoring and enforcement of access and benefit-sharing contracts, and building the next generation of experts.

SUMMARIES OF LEGAL WORKING PAPERS

For Release:

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The Centre for International Sustainable Development Law (CISDL) is an independent legal research centre that has a strong collaborative relationship with the McGill University Faculty of Law. Its mission is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law. CISDL works in cooperation with the Université de Montreal Faculty of Law, and the Oxford University Faculty of Law. It has guidance from the three Montreal-based multilateral environmental accords (the NAFTA Commission for Environmental Cooperation, the UNEP Biodiversity Convention, and the Montreal Protocol multilateral fund), and is currently involved in two international research projects related to sustainable biodiversity law. First, the CISDL is developing materials and capacity building support for the development of regulatory frameworks for the regional and domestic implementation of the new Cartagena Protocol on Biosafety. Second, the CISDL is also developing an international research project on the benefits of an international regime on access to genetic resources and benefit sharing for local communities, in collaboration with partners in developing countries. The preparatory phase of this project 'Laying the Foundations' was supported by the IDRC and the government of Canada in 2004, for which the partners are grateful.

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II An International Research Agenda on ABS Law and Policy

When world leaders signed the Convention on Biological Diversity (CBD) in 1992, they agreed to its third objective:

“the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” (Art. 1)

It has been over ten years since the Convention entered into force, and much work remains to be done towards this objective.

In the early 1990s, when the CBD was being negotiated and ratified, many developing countries had visions of their biodiversity and the genetic resources it contains becoming a kind of ‘green gold’ that they could use to fund conservation and development. These visions failed to materialize, however, and expectations have now shifted towards elaborating the meaning of *fair* and *equitable* benefit-sharing and the obligations of user countries, amongst others.

There have been some efforts towards implementing the third objective of the CBD in the intervening years since 1992. At the sixth Conference of the Parties (COP) to the CBD in 2002, Parties agreed to adopt the *Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising out of their Utilization*. This is a voluntary set of guidelines designed to “serve as inputs when developing and drafting legislative, administrative or policy measures on access and benefit-sharing ... and contracts and other arrangements under mutually agreed terms for access and benefit-sharing” (para. 1). Many developing countries, particularly the Group of Like-Minded Mega-Diverse Countries, were dissatisfied and subsequently pushed for negotiations for an international regime on access to genetic resources and benefit-sharing (ABS) at the World Summit on Sustainable Development. In Decision VII/19 at COP-7 to the CBD in February 2004, the Parties agreed to launch such negotiations.

Over the course of the past years, with support and encouragement from IDRC, as well as in-kind support from both Southern and Northern partners and researchers, developing and developed country jurists and researchers from the Centre for International Sustainable Development Law (CISDL) have undertaken legal research and hosted a series of events designed to encourage discussion on access and benefit-sharing (ABS). In March 2003, CISDL presented a legal brief scoping the needs for an international regime on access to genetic resources and benefit sharing at an academic workshop held in conjunction with the CBD SBSTTA meetings in Montreal. This brief was expanded into a working paper that examined some of the key gaps in the existing system for access to genetic resources and benefit sharing. The working paper became a backgrounder to an experts event held at the second meeting of the Ad Hoc Open-Ended Working Group on ABS in Montreal in December 2003. CISDL organized a side event to the meeting where it presented the working paper on ABS and solicited feedback and

participation from the delegates in attendance. This side event was also used as an opportunity to engage with delegates on future research questions on ABS. This lively discussion provided the basis for a further brainstorming workshop held during COP-7 in Kuala Lumpur, Malaysia in February 2004.

A second opportunity arose in the seventh Conference of the Parties to the CBD held in Kuala Lumpur in February 2004. IDRC and CISDL organized a brainstorming workshop where leading experts on ABS engaged in a discussion on future research priorities on ABS at the international, national and local levels. The workshop also provided a platform for dialogue as part of a scoping study on the local and global aspects of access to genetic resources and benefit-sharing that CISDL conducted on behalf of the International Development Research Centre. Participants in the Malaysia workshop included leading experts in the field of ABS and the result was a lengthy list of research questions covering ABS topics from the local to the international level. (See Table 1) Consultations were also carried out with specific experts and other individuals working on ABS who were not able to participate in the earlier meetings.

As stated in “Sustainable Biodiversity Law: Global Access, Local Benefits”, the scoping study on future research priorities for access to genetic resources and benefit-sharing (Montreal: CISDL, 2004), “this is a historic time. The negotiations for an international regime are only just beginning and the Parties that have brought the CBD to this stage are a unique coalition of developing countries united by their outstanding biological heritage. Participatory, Southern-driven research over the next five years can further the development of a new regime and help to ensure that it responds to both the needs of communities on the ground in developing countries as well as the need for the sustainable development of new biological technologies. Developing and implementing a diverse yet collaborative research agenda will be a major task for international development.” The Scoping Study identified a future legal research agenda in this area. The research questions were divided into seven issue areas split into local and global categories.

Table 1: An Emerging Research Agenda in ABS Law and Policy

A) Proposals for a new international regime: What are the future research priorities?

Research Area #1: Proposing the Content of the International Regime

- What are possible objectives for the international regime? Decision VII/19 from COP-7 makes no mention of objectives for the international regime. What are some other possible sources of the objectives, e.g. the World Summit on Sustainable Development, the Millennium Development Goals, the UN CBD itself?
- What do different actors in ABS see as potential objectives for the international regime and how do these perspectives interact, e.g. preventing biopiracy versus generating benefits?
- What are some of the possible scenarios for the international regime and what would each scenario accomplish? How would different scenarios affect specific sectors like agriculture (including food security and hunger alleviation)? How do different proposals for the international regime correlate with different objectives, e.g. will a requirement for disclosure of origin of genetic resources in patent applications impede biopiracy?
- What information exists on potential elements of an international regime? What are the proposed elements? How did this constellation of elements come to be included in discussions as part of the international regime?

- What is the feasibility of different proposals for the international regime, like international certification and mechanisms for tracing gene flows?
- If sufficient resources have not been forthcoming for capacity building, and if monitoring, enforcement and dispute settlement has not met legitimate international expectations, how could an international regime address these challenges?

Research Area #2: Assessing the State of the Debate in the ABS Field

- What is the current state of ABS? What are the constraints, frustrations, and limits? What are the core issues driving the ABS debate?
- How has the field of access and benefit-sharing evolved over the past ten years? What are the possible future directions of ABS including non-state initiatives?
- What are the most pressing legal and policy challenges for ABS today and over the next few years, given existing national, regional and international tools (Bonn Guidelines, etc)? How can these challenges be addressed?
- Based on the outcomes from COP-7, what are the gaps in ABS and how can research help fill these gaps? What are the gaps in existing local, national and sub-regional ABS instruments?
- How do existing ABS systems help or hinder national objectives for biodiversity? Is regulating access to genetic resources the best way to achieve these objectives or would other means be more appropriate?
- What are the needs for an international regime? Why is ABS not working 'on the ground'? What would improve it, and could an international negotiations process help?
- Is there agreement among and within indigenous peoples about the need for an international regime?
- What does fair and equitable benefit-sharing mean in the context of access to genetic resources? How are the current access and benefit-sharing measures failing to achieve this goal?
- What were the specific expectations of developing countries in earlier ABS negotiations? Why have these expectations not been met, and how could an international regime succeed where other attempts have failed?
- Is there a need to shift focus onto the benefit-sharing aspect of ABS? How can users of genetic resources acknowledge past inequities in access to the benefits derived from genetic resources and move towards evening the balance in the current international system?
- What can users of genetic resources do to help dispel the distrust of the providers of these resources? Could greater efforts by users at providing access to, transfer of, and capacity to use technology as well as the development of relevant technologies for providers of genetic resources help to resolve the debate and mistrust? How can users be encouraged to undertake these measures?
- What kind of interim measures are needed while the negotiations for an international regime are in process?
- What strategies have countries adopted in dealing with ABS and how does it affect their participation in negotiations?
- What are the motivations of the major actors (e.g., negotiators, scientists, local and indigenous communities, etc.) in the negotiations for an international regime? Do the different actors in ABS have a clear understanding of the positions of the other actors? Do they have a clear understanding of their own position? How can the different sides communicate their positions in order to improve understanding and make progress towards resolutions on the different issues?
- What are the alternatives if the international community is unsuccessful in negotiating an international regime?
- What are the ABS capacity-building needs of different institutions?

Research Area #3: Feeding Research into the Negotiations

- How can existing research results help to inform the international process?
- What were the difficulties faced by other international negotiating processes? Why did these difficulties exist? What was the political process?
- How can we learn from experiences in negotiating other instruments, like the FAO International Treaty or the Bonn Guidelines, to help negotiations towards an international regime?

Research Area #4: Building Important Baseline Information

- What is the nature of the benefits derived from genetic resources? What is the role of genetic resources in different societies and in conservation?

- What is the demand for genetic resources in various sectors, e.g., pharmaceutical, botanical, agricultural? What are the realistic expectations for money to flow back to developing countries on the basis of ABS contracts?
- How could the international community track and record ABS arrangements to ensure they contribute to meeting the goals of the CBD? How can real progress toward these goals be accurately and accountably monitored? Would an international regime be necessary, or are other mechanisms available?

Research Area #5: Developing the Bigger Picture

- What is the broader context for negotiations of an international regime on ABS? How do discussions within the CBD affect other international fora and how do discussions in other arena affect negotiations within the CBD?
- How do different instruments and intergovernmental bodies dealing with similar issues, e.g. the International Treaty, the CBD, WIPO, the WTO TRIPS Agreement, interact? How can countries implement these agreements in a clear and coherent manner? What are the linkages between an international regime on ABS and other multilateral regimes?
- How can efforts under the CBD reinforce the multilateral system of access and benefit-sharing established under the FAO International Treaty, particularly for those crops not listed in Annex I of the latter agreement?
- Are there similar issues at play in different sectors – agriculture, biotechnology, medicine, etc.? Are there lessons to be learnt from these different sectors that can contribute to the negotiations towards an international regime?
- How do proposed elements of the international regime actually relate to national laws and other international agreements?
- Where can indigenous people come together to discuss ABS issues if they cannot speak as decision-makers at the United Nations?

B) Needs and views of communities: What are the future research priorities? What are the linkages between local and global aspects of ABS-related regimes?

Research Area #6: ABS and Traditional Knowledge, Communities and Intellectual Property

- Are there practical experiences with registering information that exist on the ground in local communities and that should be documented? Are registries useful? Are other instruments more useful?
- Where do databases of traditional knowledge take communities? Can the databases distort traditional knowledge? Do they create monopolies?
- What traditional knowledge is in the public domain and what is not? What are indigenous rights to traditional knowledge that is in the public domain? What sorts of mechanisms are needed to manage traditional knowledge in the public domain?
- How can indigenous and local communities manage traditional knowledge and access thereto that is not in the public domain?
- How can the rights of indigenous communities be incorporated into an international regime? How can their particular concerns, including those related to legal issues of sovereignty and self-determination, be addressed?

Research Area #7: Customary Law, National Law and International Law

- How can customary law be integrated or included in regional and/or international law? What systems can encourage the translation of customary law into national law? How does the larger political culture encourage or hinder customary law?
- What are the best practices in the hinge between customary law and national and international law? How does this hinge link to sovereignty and affect access to justice?
- How can customary law on traditional knowledge be strengthened? What is the customary law?
- How do community perspectives contrast with national laws and how can the two be linked?
- What are the best practices in developing countries with pluralistic legal systems (i.e., a mixture of common, civil, talmudic, and/or customary law) as this relates to ABS?
- Does the delegation of authority for ABS to local governments help or hinder in the process of ABS?

Research Area #8: ABS, Diversity, and Different Communities

- How can we distinguish between different communities who may have different perspectives and different thoughts on ABS?
- How can we transcend different worldviews in order to agree on common standards for ABS? Are there pan-indigenous principles on ABS that can be distilled?
- What are the realities of local and indigenous people and how does the ABS debate affect these realities?
- What sorts of impacts have ABS laws and contracts had on local communities? From the perspectives of such communities, is there really a need for a more developed international regime, and if so, what elements would best facilitate their efforts to conserve biodiversity and ensure sustainable use? What elements would they need to ensure that benefits are shared?
- What are the realistic opportunity costs for indigenous and local communities in the negotiation of an international ABS regime?
- How can an international regime make the link between access to genetic resources and local conservation of these resources, in order to meet the goals of the CBD? How can the regime be designed to ensure that it can actually deliver significant environmental conservation results?
- How can the benefits of traditional knowledge be shared in a way that is equitable, when this knowledge might have special spiritual or cultural, as well as industrial, applications?

Research Area #9: Dispute Resolution, Remedies, and Conflict Avoidance

- How does a community obtain access to justice?
- What are the success and failure stories in conflict resolution in ABS at all levels and including state and non-state actors? Who can serve as mediators to conflicts?
- What is the effectiveness of prior informed consent in avoiding conflicts?

A New Research Partnership to Focusing on Emerging Law and Policy Challenges

Amongst the research priorities that were identified were questions about monitoring and enforcement of ABS contracts, including issues of access to justice, as well as the need for ABS capacity-building in developing countries, particularly for new experts. These are two of the likely challenges in the negotiating process for an international regime on ABS. Five developed and developing country research organizations – SPDA in Peru, SEAPRI in Kenya, Gene Campaign in India, the University of Costa Rica and the CISDL in Canada – developed an international research partnership to address these issues. A series of projects were designed to investigate these issues, in order to lay the foundations for deeper research and in-country case studies.

Monitoring and Enforcement of ABS Contracts

One of the problems faced by communities and countries entering into ABS contracts is the difficulty of monitoring the implementation of these contracts and enforcing their terms. When, for example, an organization has agreed to share the benefits of any findings from its research, but then leaves the country with the biological samples, it becomes very difficult for the country providing these resources to determine what happens to them. Do the resources lead to new insights and understanding? Do they become the subject of intellectual property protection? Do they generate income for the organization using them? These are the sorts of areas that are likely to be covered by terms in an ABS contract, terms which will be challenging for the provider country to monitor and enforce once the activity moves outside its borders.

The Bonn Guidelines provide little guidance on monitoring and enforcement. They make little to no mention of the subject, leaving countries on their own as they try to determine how best to ensure compliance with the terms of a contract. Decision VII/19 from COP-7 in Kuala Lumpur recognizes, at least implicitly, the lacuna in the existing international ABS system in the area of monitoring and enforcement. Both the terms of reference for the negotiations of the international regime on ABS and Section E of the decision discuss measures related to compliance. In addition, third parties are invited to submit information on these measures.

There is a need to determine some of the extent of the monitoring and enforcement problem in the countries of the partner organizations. What experiences have national governments had with ABS contracts? What do these contracts say about monitoring and enforcement? What are the experiences of local and indigenous communities with bioprospectors? What sorts of mechanisms exist for access to justice for these groups if they feel their rights have been violated?

ABS Mentoring and Capacity-Building

A second obstacle likely to be faced by developing countries in the negotiations for an international regime on ABS is the limited number of experts from developing countries in this field.

Decision VII/19 from COP-7 includes Section F on the 'Needs for capacity-building identified by countries to implement the Bonn Guidelines'. The section adopts an action plan on capacity-building for ABS. Amongst the key areas identified for capacity-building is "[h]uman-resources development at all levels, including: legal drafting skills for development of access to genetic resources and benefit-sharing measures; contract-negotiation skills for indigenous and local communities and other relevant stakeholders; modalities for benefit-sharing; dispute resolution mechanisms" (Annex to Section F of Decision VII/19, para. 5(1)).

Both ABS negotiations and ABS research typically involve a few well-known names and faces. There is a need to build a new generation of ABS experts who can learn from the experiences of the current leaders and also invigorate the field with new thinking and new ideas. This can be done by creating and strengthening mentorship relationships between northern and southern ABS research organizations and junior researchers. The Research Partnership undertook to strengthen and build on existing efforts in this regard, as well.

As an initial effort, in 2004, junior researchers from around the world had the opportunity to participate in a three week seminar in Montreal, Canada at the McGill University Faculty of Law to learn about ABS issues, develop their research skills and begin collaborating with each other on a series of legal research projects. The legal working papers that are summarised in the following section of this paper describe the first fruits of the collaboration of this emerging generation of ABS researchers into sustainable development law and policy.

III Summaries of the Legal Working Papers

1. The Discovery of Eden: Paradise or Problem for Indigenous Peoples and Local Communities and Access to Genetic Resources

By Lillian Cherotich, Junior Researcher with SEAPRI-ICIPE, Kenya, and Rhodes Scholar 2004–2005, Oxford Faculty of Law

Part of the purpose of the Convention on Biological Diversity (CBD) is to facilitate access to genetic resources and the sharing of benefits derived from the use of these resources. It was thought that unless the custodians of this natural wealth benefited from these resources, the destruction of biodiversity would remain high. Access to genetic resources and benefit-sharing (ABS) was thus seen as a means of achieving conservation and sustainable use of biodiversity by increasing its indirect economic value. This article addresses the question of to what extent indigenous peoples and local communities have benefited from ABS processes.

After a review of the background to ABS, the article examines the effectiveness of the CBD in facilitating benefit-sharing for local and indigenous communities. It finds that the CBD has been effective in bringing the concerns of indigenous and local communities to international attention and that it will remain an important vehicle for the attainment of benefit-sharing by indigenous and local communities. On the other hand, the flexibility of the language in the CBD poses the greatest challenge to the facilitation of benefit-sharing. In this context, the article specifically examines the role of ownership of genetic resources and its impact on benefit-sharing and local and indigenous communities as well as traditional knowledge and its place in the ABS discourse.

Part 4 of the article examines ABS contracts and the participation of local and indigenous communities in these contracts. The experience of the Kani people in India is examined in detail. The case study suggests that states need to formulate clear laws and policies that will create legal certainty and an enabling environment for fruitful ABS negotiations in order to ensure that ABS contracts actually bring tangible benefits to local and indigenous communities.

In conclusion, the author makes five recommendations to strengthen and encourage the equitable sharing of benefits with local communities:

- Promulgation of clear laws and policies by states incorporating the need for prior informed consent from local and indigenous communities and promoting the sharing of benefits with them on mutually agreed terms.
- Providing incentives to stakeholders to voluntarily participate in ABS negotiations.

- Formulating *sui generis* systems for the protection of traditional knowledge.
- Capacity-building of local and indigenous communities to ensure they are equipped to negotiate favourable terms in ABS contracts.
- Encouraging indigenous and local communities to participate in national ABS processes.

Finally, hope is expressed that the negotiations on the international regime will serve as a point of convergence for ABS initiatives taking place in other fora and that the international regime can secure the interests and concerns of indigenous and local communities.

2. Access to Genetic Resources and Benefit-Sharing, Indigenous People and India

By Raghu Velankar, Junior Researcher with Gene Campaign, India

The methodology of some bioprospectors in searching for genetic resources for commercial purposes has been an issue of contention. More specifically, the concerns relate to how these resources are acquired, and what is the formal relationship between those who have historically held these resources and associated indigenous knowledge, and those parties who seek this knowledge for commercial purposes.

Both the CBD and the new FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT) contain key elements defining the parameters of ABS including definitions of terms such as biological resources, genetic resources and genetic material, and mechanisms for ABS such as prior informed consent, mutually agreed terms and material transfer agreements.

In India, the IT and the CBD have been implemented through the Protection of Plant Variety and Farmer's Rights Act, 2001 and the Biodiversity Act, 2002, respectively. The salient features of these pieces of legislation as they relate to ABS are summarized.

Benefit-sharing is examined in detail. The characteristics of indigenous people are discussed as well as their major demands in the area of ABS. Finally, the situation in India is analysed including relevant provisions from the constitution, the Indian Forest Act, 1927, the Wildlife Protection Act, 1972, and the Seeds Act, 1966.

3. Sharing Transboundary Genetic Resources: A Challenge for a Fair International Regime on Access to Genetic Resources and Benefit-Sharing

By Daniel Aguilar, Junior Researcher with the University of Costa Rica, Costa Rica

This article recognizes that the genetic resources and organisms covered by the CBD are governed by ecological rules rather than concepts of state sovereignty or national law. For this reason, some resources are shared by different countries and it becomes necessary to ensure clear responsibilities concerning these resources, especially in order to achieve their conservation and sustainable use as well as fair and equitable sharing of the benefits that could arise from their use. This challenge has also been recognized in paragraph (d)(viii) of the terms of reference for the negotiation of the international regime.

By way of background, the author explores the issues of scope, sovereignty and ownership in relevant national, regional and international ABS systems. Next, the issue of access to shared or transboundary genetic resources is explored in detail. Comparisons are drawn to other transboundary issues international environmental law including international watercourses, transboundary pollution, and shared natural resources in order to ascertain some common features. Genetic resources are examined in this context including the legal implications and social and economic concerns associated with their statuses as shared or transboundary resources.

Finally, the article looks to the future and possible ways to create a fair and equitable international legal framework for shared genetic resources. Different options are considered such as notifications and local registries, bilateral or multilateral prior informed consent procedures, environmental impact assessments for access with transboundary effects, market incentives, and regional agreements.

4. Access to Genetic Resources, Benefit Sharing, and Liability

By Pamela Ferro, Junior Researcher with SPDA, Peru

Despite the number of national ABS laws and policies, there has been little to no discussion of the liability a party to an ABS contract may incur if the party breaches terms of the contract. The lack of clarity and coherence on liability in ABS regimes has become an obstacle to the achievement of the objectives of the CBD.

The article makes a comparative analysis of liability provisions in Andean Community Decision 391 and two standard material transfer agreements (MTAs). While Decision 391 has a number of relevant provisions, the MTAs have few to none. Any liability provisions that are contained in the standard MTAs are also

quite weak. This means that there are few real consequences arising from the breach of ABS contracts.

The lack of liability provisions is somewhat to be expected as countries undertake the complex process of transition from a free access paradigm to a more developed and sophisticated ABS legal framework. It is natural that there are several voids that need to be filled as a result of this process and one void is definitely the issue of liability. The author advocates the creation of clear, simple and practical liability rules in order to create legal security and the resulting benefits to society.

Liability provisions serve several social functions. In addition to compensating for damages suffered from a breach, they also act as a deterrent, sanction and distributive justice system. The author also suggests three possible liability-related provisions for inclusion in ABS contracts: a requirement of compliance with the contract, termination of the contract and penalty or indemnification, and penalty without termination of the contract. In all cases, though, the will of the parties plays an essential role in what liability provisions are included in an ABS contract.

Three different mechanisms by which the content of liability provisions may be established are discussed: liability rules may be established by the parties to the contract, liability rules may be established by the provider country's legal system, and liability rules may be established by the international regime.

An important element in liability is monitoring and enforcement to ascertain compliance or breach of an ABS contract. Different methods of monitoring are discussed including audits, supervision of intellectual property rights applications, access to internal documents on research and development, as well as reports on scientific progress. The creation of an international body for tracking ABS contracts is proposed as a possible element of the international regime. In addition, good faith among the parties to an ABS contract is essential and most such contracts contain an implied principle of good faith as it is impossible for one party to control the conduct of the other party or parties.

Finally, four different means for resolving liability conflicts between the parties are discussed. These are litigation in the jurisdiction of the provider country, litigation in the jurisdiction of the user country, arbitration and a specialized tribunal created by the international regime.

IV About the ‘Laying the Foundations’ Partnership.

The research project “Laying the Foundations” is founded on a new partnership to investigate the monitoring and enforcement of access and benefit-sharing contracts, and build the next generation of developing and developed country experts in this field.

It has only been relatively recently that the Parties to the Convention on Biological Diversity (CBD) have begun to consider the third objective of the Convention on access to genetic resources and benefit-sharing (ABS). The most recent step was the launch of negotiations for an international regime on ABS at the seventh Conference of the Parties (COP) to the CBD in February 2004. CISDL’s work on access and benefit-sharing includes a scoping study conducted for IDRC, which identifies research priorities on this topic. Included among the priorities are questions about the monitoring and enforcement of ABS contracts and capacity-building in developing countries, particularly for new experts. These issues were also raised in decision VII/19 from COP-7.

Five research partner organizations – the Southern Environmental and Agricultural Policy Research Institute in Kenya, Gene Campaign in India, the Sociedad Peruana de Derecho Ambiental in Peru, the University of Costa Rica and the Centre for International Sustainable Development Law in Canada – have undertaken this initiative together.

They have committed to three principal objectives

- Field research objective: This involves initiating inquiries, by local research partners in developing countries, into how access and benefit-sharing contracts, and particularly their elements on monitoring and enforcement, are functioning in practice.
- International negotiations objective: The inquiries on local level experiences are used to inform the work of the Ad Hoc Open-Ended Working Group on ABS, the group that has been mandated to negotiate the international regime.
- Capacity-building objective: The project aims to establish a mentor relationship between each project partner and a small group of junior researchers in order to create additional expertise in developing countries in the area of access to genetic resources and benefit-sharing.

A research partner from each organization conducts initial research on the monitoring and enforcement of ABS contracts in his or her country and local communities. The research is conducted with the help of a small group of junior researchers, some of whom travelled to Montreal for a three-week collaborative seminar with other junior researchers from developing and developed countries, and a series of training workshops. This initial project culminates with a meeting of the project partners in Bangkok parallel to the Ad Hoc Open Ended Working Group on ABS to share initial results and plan for a larger and longer term project that builds on this foundation.

V About the ‘Laying the Foundations’ Research Partners

1. The Centre for International Sustainable Development Law (CISDL)

The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

The CISDL is governed by a distinguished Board of Governors, Chaired by Hon. Judge Charles D. Gonthier, formerly of the Supreme Court of Canada, with two CISDL Directors, and is guided a roster of honoured international advisors and expert collaborators. The CISDL is engaged in six primary areas of sustainable development law research, each of which is led by a CISDL Lead Counsel based at a developing or developed country law faculty or international organisation. These include trade, investment and competition law; sustainable developments in natural resources law; biodiversity law; climate change and vulnerability law; human rights and poverty eradication in sustainable development law; and health and hazards in sustainable development law. There are also two Lead Counsels responsible for cross-cutting sustainable development law issues (e.g. global governance, corporate social responsibility and accountability, financing mechanisms, and criminal and constitutional law aspects of sustainable development).

CISDL members include learned jurists and scholars from all regions of the world and a diversity of legal traditions. Through a competitive annual process, the CISDL selects Associate Fellows, Legal Research Fellows and Senior Research Fellows, who are holders of the associated privileges and obligations of membership.

As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal briefs in English, Spanish and French. The CISDL hosts academic workshops, dialogue sessions, legal expert panels parallel to international negotiations, law courses and seminar series, and conferences to further its legal research agenda. It provides instructors, lecturers and capacity-building materials for developing country governments and international organisations in national and international law in the field of sustainable development, and works with countries to develop national laws to implement international treaties in these areas.

CISDL Relationships with Key Partners

The CISDL is an independent legal research centre which collaborates with the McGill Law Faculty in engaging students and interested faculty members in

sustainable development law research and scholarly initiatives. The CISDL also works in cooperation with a network of developing country faculties of law, and is developing closer ties with the Oxford University Faculty of Law and the Université de Montreal, as well as the Yale Law School and the Cambridge University Faculty of Law. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme and the United Nations Development Programme, and a memorandum of understanding with the International Institute for Sustainable Development (IISD).

With the International Law Association (ILA) and the International Development Law Organisation (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership Initiative, 'International Law for Sustainable Development' that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity about international law on sustainable development. Leading CISDL members serve as expert delegates on the International Law Association Committee on International Law on Sustainable Development.

CISDL Location

The CISDL is based at 3661 Peel St., Montreal, Quebec, Canada, H3A1X1 in offices lent to it by the McGill University Faculty of Law by reason of the involvement of students, graduates and faculty members in its activities. The CISDL also has subsidiary offices at the University of Oxford, the University of Costa Rica, and the University of Nairobi, Kenya.

The CISDL is currently involved in two international research projects related to sustainable development and international law in the field of biodiversity. First, the CISDL is developing materials and capacity building support for the development of regulatory frameworks for the regional and domestic implementation of the Cartagena Protocol on Biosafety.

Second, for the purposes of the ABS Laying the Foundations project, CISDL serves as the coordinating organization, handling the administrative tasks of the project, as well as participating as a project partner by conducting research and training a junior researcher. Project administration and coordination will be conducted by Jorge Cabrera, Lead Counsel for CISDL in this area and a professor at the University of Costa Rica (see UCR, below), Marie-Claire Cordonier Segger, CISDL Director, and Kathryn Garforth, CISDL Legal Research Fellow, with Kathryn Garforth as the main contact.

Kathryn Garforth is a Legal Research Fellow with CISDL where she works with Jorge Cabrera on the International Sustainable Biodiversity Law Programme. Kathryn conducts research on both the topics of access to genetic resources and benefit-sharing as well as biosafety. Her biosafety work includes serving as a consultant to the UNEP-GEF project on the Development of National Biosafety Frameworks. She was part of the CISDL delegation to the 7th Conference of the

Parties to the Convention on Biological Diversity as well as the second meeting of the Ad Hoc Open-Ended Working Group on Access to Genetic Resources and Benefit-Sharing. Kathryn has several articles and manuals forthcoming for publication in the areas of access and benefit-sharing and biosafety. Kathryn holds a joint Bachelor of Laws – Masters of Environmental Studies from Osgoode Hall Law School, York University in Toronto, Ontario.

Marie-Claire Cordonier Segger is director of the Centre for International Sustainable Development Law, based in Montreal, Canada. She also directs the Americas Portfolio for the United Nations Environment Programme (UNEP), the CISDL and International Institute for Sustainable Development. Her research interests include regional trade and sustainable development law, general theory and practice of sustainable development law, biodiversity law, and corporate social responsibility and accountability. She has twice served as an advisor to the Canadian delegation to the Convention on Biological Diversity, is an instructor and lecturer in biosafety and benefit-sharing aspects of biodiversity, and has edited 3 books which address these issues. She has also written extensively about the Americas region, and has broad experience training and leading multi-cultural research teams, as well as managing research projects. She is a lead author of 'Sustainable Development Law: Principles, Practices and Prospects of International' (Oxford University Press, 2004 -forthcoming), with A. Khalfan, and 'Sustainable Justice' (Martinus Nijhoff, 2004 – forthcoming) with Judge C. G. Weeramantry. She is also lead author of 'Trade Rules and Sustainability in the Americas' (IISD, 1999), 'Ecological Rules and Sustainability in the Americas' (IISD/UNEP, 2002), and 'Social Rules and Sustainability in the Americas' (IISD/OAS, 2004), and as well as several law journal articles, chapters of books, and commissioned reports for the World Bank, the UNEP, the IISD, the United Nations Development Programme, the International Development Law Organisation (IDLO), the International Development Research Centre, the Canadian International Development Agency, Environment Canada and Foreign Affairs Canada. She has twice been selected as a Visiting Scholar at the Lauterpatch Research Centre for International Law in Cambridge University, and for valuable Fellowships from the AVINA Foundation in Switzerland. She has also been an Associate Fellow at the Royal Institute for International Affairs in London.

Ms. Cordonier Segger currently chairs 'International Law for Sustainable Development', a partnership between CISDL, the International Law Association and the IDLO to implement the outcomes of the 2002 Johannesburg World Summit for Sustainable Development. Ms. Cordonier Segger has a Masters in Environmental Law, Economics and Policy from Yale University (Highest Honours, Yale Teaching Fellowship), Degrees in Civil Law and Common Law from McGill University (Distinction, Wainwright Scholarship) and an interdisciplinary Bachelors Degree from Carleton University (Highest Honours, OPIRG Bursary). She is currently a coordinator of a new seminar series on Sustainable Development Law at Oxford University Law Faculty, and the Chevening Scholar in International Law at Exeter College, Oxford University.

2. The University of Costa Rica (UCR)

The research project at the UCR is led by Prof. Jorge Cabrera, who is also the Lead Counsel for the CISDL Biodiversity Law Programme.

Jorge Cabrera is a lawyer who, in addition to serving as Lead Counsel for CISDL's Biodiversity Law Programme, also works as a professor at the University of Costa Rica, legal advisor and consultant. He teaches environmental law and biodiversity law at the postgraduate level at the University of Costa Rica's Faculty of Law. He also teaches intellectual property in the Masters programme on Economic Law, constitutional law, and human rights at the UNED University in Costa Rica. In addition, Jorge serves as a tutor for WIPO's distance courses on intellectual property.

Jorge acts as a legal advisor to Costa Rica's National Biodiversity Institute (INBio) and as an consultant in the area of intellectual property and biodiversity, biotechnology and biosafety, access to genetic resources and benefit sharing for national and international institutions such as UNCTAD, ECLAC, IICA, SICA, CCAD, IPGRI, CYMMIT, REMERFI, CATIE, University of California, Environmental Law Center of IUCN in Bonn, COSUDE, EU projects, IISD, TNC, IDB, and the Institute of Economic Development of the World Bank, amongst others. Jorge has been a member of the National Biodiversity Commission of Costa Rica for more than four years. He has acted as a negotiator at the CBD on behalf of the Government of Costa Rica, including Head of the Delegation to the First Conference of the Parties and member of the delegation in the COP V, VI, and VII. Between 1999 and 2001 he served as co-chair of the CBD's Expert Panel on Access and Benefit Sharing and was subsequently selected to chair the Sub-working Group on IPR and Capacity-Building during the first meeting of the Working Group on Access and Benefit-Sharing in 2001. He is also a member of the delegation to the WIPO Committee on Genetic Resources and Traditional Knowledge and the Group of Like-minded Megadiverse Countries.

Jorge has extensive experience drafting ABS laws and policies in countries as diverse as Costa Rica, Nicaragua, El Salvador, Bhutan, Honduras, the Eastern Caribbean, Paraguay, and Central America. He also works as a trainer on ABS for several African countries, including Benin, Kenya, Tanzania, Botswana and Nigeria. He is an internationally-recognized author having published books and articles in the areas of IPR, ABS, biosafety, trade and environment in countries ranging from Argentina to the United Kingdom. Jorge graduated with honours from the University of Costa Rica, Faculty of Law and conducted postgraduate studies on environmental and agricultural law, commercial law and economic law.

3. Sociedad Peruana Derecho Ambiental (Peruvian Environmental Law Society, SPDA)

SPDA is a non for profit organization based in Lima, Peru which since 1987 has been working in the promotion of environmental law and policy in Peru and throughout the region. It is composed of: the Conservation Program; the Program

for International Affairs and Biodiversity; the Program for Industrial Pollution Prevention; the Public Interest Defense Program; and Outreach and Communications.

SPDA's International Affairs Program has focused its activities in the implementation of the CBD at the national, regional and international levels. In partnership with IUCN, in 1994, SPDA pioneered efforts in the development of ABS policies and laws for the Andean Community of Nations. Since then, it has participated in ABS academic, policy and legally related activities including assistance in development of legislation in Ecuador, Chile, Panama, Bolivia and Nicaragua. It has partnered with organizations such as IUCN, ICTSD, UNCTAD, FAO, CAF, ELI, IPGRI, Kew Gardens, CIP, ICBG Program and others in numerous workshops, research activities and policy and legal forums.

SPDA has also undertaken research (and published extensively) in a series of related fields including IPR, traditional knowledge protection and biosafety.

Its more recent activities have focused on developing a national and regional biopiracy prevention strategy and researching agrobiodiversity and its linkage to food security policies and laws. SPDA is also assisting the Peruvian Government in its IPR negotiation of a FTA with the US. SPDA is also working closely with the Andean Community to implement the Regional Biodiversity Strategy, particularly in the area of agrobiodiversity and ABS.

Manuel Ruiz Muller (Manolo) is a 34 year old lawyer who has been working on environmental law and policy since 1990. His activities have included legal research and technical assistance in natural protected areas conservation, environmental policy orientation to public and private entities as well as training in environmental law. Over the past few years Mr. Ruiz has become principal researcher in the International Affairs and Biodiversity Program of the Peruvian Society for Environmental Law (SPDA). He has become actively involved in the process to implement the Convention on Biological Diversity (CBD) at the national regional level and international, having participated as part of the Peruvian delegation in the Conference of the Parties (COP) I (Bahamas), II (Jakarta), III (Buenos Aires), IV (Bratislava), V (Kenya), VI (The Hague) meetings of the CBD and in regional governmental experts meetings on genetic resources and plant breeder's rights. His current position includes providing legal analysis on issues such as access to genetic resources, IPR's, biosafety, indigenous peoples rights, biotechnology and general environmental law, among others. He has also participated as speaker in events regarding these issues in Peru, Colombia, Chile, USA, Costa Rica, Bahamas, Indonesia, England, Germany, Venezuela, Switzerland, South Africa, India, Trinidad and Ecuador. Mr. Ruiz at present is Head of the International Affairs and Biodiversity Program of SPDA and is legal consultant of CONAM (the National Environmental Council) in the strengthening of the National Biodiversity Commission and issues related to the CBD. Mr. Ruiz also has expertise in trade, development and environment issues. He has also been a consultant to FIELD, UNCTAD, UNDP, FFLA, CAF, IUCN, among others.

4. Southern Environmental and Agricultural Policy Research Institute (SEAPRI)

SEAPRI's mission is to carry out legal and policy research in order to provide technical support to developing country governments and other public or non-profit institutions in the development of effective policies and legislative initiatives. (See Annex IV for a more detailed description of SEAPRI's background and activities.)

Kent Nnadozie, Director, is a Nigerian lawyer engaged in environmental and sustainable development law and policy issues, focusing especially on biodiversity and related intellectual property rights and local community aspects, and has a Masters in Business Administration (MBA). He was the executive Director of the Environmental Law Foundation of Nigeria, which promotes research and provision of education and expertise in local and international environmental law. He is the co-ordinator of the Network of African Environmental Lawyers established under the auspices of the United Nations Environment Programme (UNEP) and Network for Environment and Sustainable Development in Africa; and a member of the Earth Circle, an indigenous people's initiative as well as the IUCN Commission on Environmental Law and its Specialist Group on Indigenous Peoples and Environmental Law. A regular member of the Nigerian delegation to the Convention on Biological Diversity (COPs 4, 5 & 6) and has also participated in other multilateral environmental processes including the Climate Change Convention, the Convention on Desertification, Ramsar Convention, WIPO IGC and FAO International Treaty on Plant Genetic Resources for Food and Agriculture. Recently a member of the Special Task Force set up by the Federal Government of Nigeria to review of all Intellectual Property laws and to prepare drafts of relevant new legislation.

5. Gene Campaign

Gene Campaign was conceived out of a growing awareness that the subject of genetics, genetic research and genetic material had left the laboratory and reached the market place. It was also born out of the experience of seeing the unequal positions between the countries of the South and the North both in terms of wealth of genetic resources and control of intellectual property rights (IPR) over these resources.

Gene Campaign was convened by Dr. Suman Sahai, an Indian geneticist who saw the impact of changing intellectual property regimes on her laboratory work. Genetic material that was earlier shared freely began coming with all kinds of conditions. It could not be passed between laboratories and the talk of patents on basic methods used by almost all scientists was increasing.

Realizing what was at stake for India and other agriculture-based economies if seeds and agricultural products & practices became the property of corporate giants, she and her like-minded colleagues decided it was not enough to write in newspapers and journals and speak at meetings. Instead, they decided a public program was needed to inform and educate people and build public opinion to

convince the government not to accept such IPR conditions. They also realized that in order to involve people, it was necessary to go to them to discuss issues, especially when these issues were new and complex, and the government was secretive and not sharing information.

Having decided that these issues needed to be raised at the national level, Dr. Sahai held a series of discussions with people from diverse backgrounds to decide how best to proceed. Together with longtime colleague Mr. Mohan Prakash and experts in science, law, foreign policy and economics, they decided to launch a formal group called Gene Campaign on January 9, 1992.

Gene Campaign works full-time to raise awareness about the importance of genetic resources, the threats from IPRs and their consequences on the socio-economic fabric of India. The organization aims to raise these issues from the people's platform so that political parties are forced to take note and allow people a say in the policy-making. Gene Campaign is a people's movement and as such, it avoids an ivory tower approach to solving problems. It also began its work without funding in order to force itself to find strategies from below, with the people, by convincing them about the importance of the issues.