

Participation in Access and Benefit-Sharing Policy  
Case Study no 4

# **Developing the Philippines' Executive Order No. 247 on Access to Genetic Resources**

Krystyna Swiderska, Elenita Dano and Olivier Dubois

February 2001

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## **DEVELOPING THE PHILIPPINES' EXECUTIVE ORDER NO. 247 ON ACCESS TO GENETIC RESOURCES**

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## ACRONYMS

AIM	Asian Institute of Management
ASOMPS	Asian Symposium on Medicinal Plants, Spices and Other Natural Products
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species
DAO	Department Administrative Order
DENR	Department of Environment and Natural Resources
DOH	Department of Health
DOST	Department of Science and Technology
E.O.	Executive Order
FPE	Foundation for Philippines Environment
KAMMP	National Alliance of Indigenous Peoples' Organisations
IACBGR	Inter-Agency Committee on Biological and Genetic Resources
IPRA	Indigenous Peoples' Rights Act
IRRs	Implementing Rules and Regulations
IRRI	International Rice Research Institute
LGU	Local Government Unit
MTA	Material Transfer Agreement
MSI	Marine Science Institute (University of the Philippines)
NAST	National Academy of Science and Technology
NCI	National Cancer Institute
NCIP	National Commission for Indigenous People
PAMB	Protected Area Management Board
PAWB	Protected Area and Wildlife Bureau
PCARRD	Philippine Council for Agriculture, Forestry and Natural Resources Research and Development
PCSD	Philippine Council for Sustainable Development
PHAP	Pharmaceutical and Healthcare Association of the Philippines
PIC	Prior Informed Consent
PNCNP	Philippine Network for the Chemistry of Natural Products
PO	Peoples' Organisation
SEARICE	South East Asia Regional Institute for Community Development
TAMA	Traditional and Alternative Medicine Act
UNCED	United Nations Conference on Environment and Development
UP	University of the Philippines
UST	University of Santo Tomas
WRI	World Resources Institute

## **EXECUTIVE SUMMARY**

In recent years there has been a growing awareness of the importance of stakeholder participation in the development of policy or law on access to genetic resources and benefit-sharing (ABS) in order for such policy to be effective. However, in practice, the extent to which stakeholders have really been integrated into the decision-making process is often questionable, particularly for weaker groups such as indigenous and local communities.

The Philippines' Executive Order No. 247 is notable not only for being the first national legislation on ABS ever to be introduced, but also for the level of public consultation that went into its formulation. This report examines the strengths and limitations of the consultation process for developing EO 247 and its Implementing Rules and Regulations (IRRs), based on the views of a range of actors involved in the process, and identifies recommendations for securing effective participation in the development of ABS policy. The report also identifies priorities for improving the implementation of EO 247.

The process to develop EO 247 was initiated by a group of scientists which had long recognized that the exploitation of Filipino biodiversity had rarely been of benefit for the country. A core group of university scientists and government agencies led the drafting process, with the assistance of a legal expert. The involvement of scientists ensured that their concerns were directly represented in the drafting process, and incorporated in regulation, for example in provisions on scientific capacity building. The involvement of a legal drafter linked to an NGO ensured that the interests of indigenous and local communities were addressed through a requirement to obtain local Prior Informed Consent (PIC), and provided much of the impetus for opening up the process through broader consultation. The involvement of government agencies helped to ensure the eventual adoption of the regulation.

The broader consultation process involved a number of meetings in the capital region, including a large multi-stakeholder conference at the University of the Philippines; consultative meetings with NGOs of the Philippines Council for Sustainable Development; and a multi-stakeholder seminar convened by the Asian Institute of Management. The process enabled the views of many different actors to be considered - NGOs, indigenous peoples' organisations, scientific institutions, the private sector and different government departments. It also helped to generate interest in, and support for, EO 247 amongst them. The IRRs were also drafted through a multi-stakeholder consultation process.

Although very little funding was available for public consultation, interested organizations hosted/sponsored consultative events and the process made use of existing consultation mechanisms. A key enabling factor was the political context – civil society had become strong and active in the wake of the 25-year Marcos dictatorship.

While the consultation process was generally praised for being fairly broad and comprehensive, it also had some limitations:

- It was rather ad-hoc, and was limited to the capital region.
- Protected area and local government officials were given responsibility for local PIC, but not consulted, and as a result they often lack awareness of EO 247 or commitment to its implementation.
- Some organisations felt that their concerns were not taken on board and that the process was biased towards NGOs.

Indeed EO 247, and the requirement to obtain local PIC in particular, has generated some controversy. The regulation is generally supported by government agencies, NGOs and scientists, which feel that local PIC is a critical element because it allows local communities to have a say in the use of genetic resources collected from their land and to participate ABS arrangements. However, some scientists feel that the provisions on local PIC are too cumbersome and costly, and that EO 247 should only apply to foreign organizations and commercial research. The scope of EO 247 was extended to cover Filipino organisations as well as foreign ones because local scientists often collect biodiversity on behalf of foreign partners. It was decided that academic research should be subject to EO 247 since it can give rise to a commercial discovery.

Some scientific organisations involved in academic and commercial research feel that EO 247 will deter foreign partners, while some academic scientists and conservation organisations feel that EO 247 will hinder scientific progress. Although the regulation distinguishes between commercial and non-profit research in order to minimize restrictions on the latter, there is still concern about EO 247 amongst the scientific community, and it is generally acknowledged that the scope of the regulation needs to be reconsidered and possibly refined. Interestingly, the study suggested that foreign partners would be willing to meet the additional costs and time implications of local PIC in material transfer agreements.

The Philippines' experience shows how access regulations can affect divergent interests and become quite contentious. Some opposition is inevitable when a new regulation is introduced. However, opponents may be reluctant to apply ABS legislation and could even threaten its existence. Processes should therefore be carefully planned and facilitated in order to maximize the level of consensus.

Priorities for improving the implementation of EO 247 include:

- examining ways of narrowing the scope of the regulation and making it more flexible for non-profit research, whilst maintaining its ability to control bioprospecting;
- facilitating local PIC (eg. by developing guidelines for collectors and identifying focal points which can facilitate local PIC in particular regions/ethnic groups);
- consulting foreign partners to see if they would be willing to include additional funds and time for local PIC in material transfer agreements;
- undertaking a thorough information campaign to raise awareness about EO 247;
- ensuring that the national committee which processes applications (the IACBGR) operates quickly and effectively;



- improving monitoring systems for the collection and export of biological resources.

This study on EO 247 has enabled a number of general conclusions and recommendations on participation in the development of ABS policy to be identified:

1. In order to promote fair and equitable partnerships in practice, representatives of *all* key stakeholders – from commercial and scientific users of genetic resources, to local resource custodians - should be actively involved in developing ABS policy, for example through a multi-stakeholder drafting group.
2. Participation at the policy making stage builds awareness, capacity and commitment amongst stakeholders, which are essential conditions for policy implementation.
3. Building consensus can be difficult. Consultation processes should be carefully planned and facilitated to minimize opposition from those who will be most affected in practice. A careful balance may need to be struck between providing sufficient flexibility for non-profit research and ensuring that bioprospecting is effectively controlled. Consulting foreign organisations might also help to address the concerns of their in-country partners (eg. with respect to meeting the costs of local PIC).
4. Consultative processes should engage regional and local stakeholders, including officials involved in administration and monitoring (eg. those responsible for issuing collection permits or conducting local Prior Informed Consent (PIC)).
5. Consultations should seek to engage representatives of indigenous and local communities based at regional level which may be better placed to reflect the diversity of ethnic groups and communities than national coalitions. Ideally, a representative sample of indigenous and local communities should also be directly consulted to inform the development of local PIC procedures and build community awareness about ABS policy.
6. The costs of consultative processes need not be high. Costs can be minimized by making use of existing consultation mechanisms at national and regional level (eg. councils for sustainable development, regional development councils, protected area management boards, networks etc); and by using the existing strengths and resources of organisations. However, funding is likely to be required for raising awareness and engaging regional/local actors (eg. for travel costs).
7. Foreign companies and organisations involved in the use of genetic resources should be consulted during policy formulation to avoid imposing unreasonable restrictions that might deter them.

## 1. INTRODUCTION

The 1992 UNCED Convention on Biological Diversity (CBD) requires countries to introduce “legislative, administrative or policy measures” with the aim of ensuring the equitable sharing of benefits arising from the use of genetic resources (Article 15). It also requires countries to encourage equitable benefit-sharing from the use of the “knowledge, innovations and practices of indigenous and local communities” (Article 8(j)).

Policy or legislative measures on access to genetic resources and benefit-sharing (ABS) affect a wide range of actors, including: companies and scientific organisations that use genetic resources to develop commercial products; intermediary organisations involved in the collection, supply and analysis of biological samples (eg. universities, botanic gardens and museums); local providers of genetic resources and related knowledge (eg. indigenous and local communities); and government agencies responsible for administering ABS policy.

There is a growing awareness of the importance of securing participation in the development of ABS policy in order to build the awareness, capacity and commitment amongst stakeholders necessary for the policy to be effective<sup>3</sup>. However, in practice, the extent to which stakeholders have really been integrated into the decision-making process has often been questionable, particularly for weaker groups such as indigenous and local communities.

In 1999, IIED initiated a collaborative research project to examine some of the more comprehensive examples of participation in ABS policy development, and identify lessons for securing effective participation. A key concern was to enhance the participation of indigenous and local communities in the policy process as a means to promote their subsequent involvement in access and benefit-sharing partnerships.

The project involved four case studies of stakeholder participation in policy-making:

- the Philippines’ Executive Order No. 247
- Peru’s *sui generis* law to Protect Traditional Knowledge,
- India’s Biodiversity Law and community registers, and
- South Africa’s Biodiversity Policy.

A Synthesis report has been prepared containing key findings from the studies and recommendations for securing effective participation in the development of ABS and traditional knowledge policy<sup>4</sup>.

This study examines the process of stakeholder participation in the development of EO No. 247, and assesses its strengths and limitations based on the views of a range of

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<sup>3</sup> See: UNEP/CBD/COP/4/23. Review of measures and guidelines for implementing Article 15.

UNEP/CBD/COP/5/8. Report of the Panel of Experts on Access and Benefit-Sharing (1999).

<sup>4</sup> Swiderska K. (2001). Stakeholder Participation in Policy on Access to Genetic Resources, Traditional Knowledge and Benefit-Sharing. Case Studies and Recommendations. IIED Biodiversity and Livelihoods Issues No. 4.

stakeholders involved - government agencies, academics, scientists, indigenous people's organisations, NGOs and the business community. Since EO 247 was introduced in 1995, the study was able to gain some insights on the role of participation in policy making from early experience with implementation. As well as providing lessons for other countries, it is hoped that the study will be useful for future consultations on EO 247, biodiversity and other natural resource policy in the Philippines.

Interviews were conducted in Manila, Baguio City and Los Baños Laguna in July 1999; and a multi-stakeholder workshop on the formulation and implementation of EO 247 convened by SEARICE and IIED in Quezon City, Manila, July 13-14 1999. The participants are listed in Annex 1 and 2.

Section 2 of this report examines the historical and political context to the formulation of EO 247, as well as the objectives of the regulation and the impetus for its development. Section 3 describes the steps in the consultation process; while Section 4 provides an assessment and analysis of the process. Section 5 presents lessons on consultation with indigenous people based on the experience of some anthropologists and indigenous organisations in the Philippines. Section 6 identifies key challenges for improving the implementation of EO 247; and Section 7 presents conclusions and recommendations on stakeholder participation in ABS policy.

## **2. BACKGROUND TO THE FORMULATION OF EO 247**

### **2.1. Historical and political context**

During the 25 years of President Ferdinand Marcos' military-backed government, poverty and natural resource degradation became widespread. The country was effectively controlled by powerful business interests represented by the relatives, cronies and close allies of Marcos, who also controlled political power from the national to the local levels. Their economic and political interests were protected by the military and institutionalized through laws and executive orders issued by Marcos. Rebel groups, most notably the New Peoples' Army, emerged under Marcos, as a result of poverty, rampant corruption, neglect and oppression.

When Marcos was overthrown in 1986, a democratically elected government was established, first under President Corazon Aquino, and then under President Fidel Ramos. The struggle to overthrow Marcos gave rise to an active civil society sector, with strong links both within and between different groups (academics, NGOs, Peoples' Organisations etc). NGOs have become very assertive and were officially recognised as equal partners in development by the governments of Aquino and Ramos, and later under President Estrada, who was elected in 1998. Slogans such as 'people empowerment', 'sustainable development' and 'participatory development' became by-words in government policies and documents. The Aquino and Ramos administrations provided considerable political space for civil society organizations by harnessing their strength

and influence at community level to promote government programmes, and by encouraging the implementation of their own development agenda.

It was also during the post-Marcos administrations that individuals from civil society organizations and cause-oriented groups were recruited to join the government as "progressive bureaucrats". These individuals have greatly contributed to promoting awareness of the civil society agenda within the government ranks, and, in some cases, have even promoted the civil society agenda for less political issues such as biodiversity conservation, sustainable agriculture and peoples' participation, within government programmes. NGOs have thus played a crucial role in empowering local communities and promoting sustainable development and biodiversity conservation in the Philippines.

By Southeast Asian standards, policy making in the Philippines has become open and consultative and the country has gained considerable experience in public consultation in recent years. As part of the Philippines' efforts to implement Agenda 21, President Ramos created the Philippine Council for Sustainable Development (PCSD) in 1993. The PCSD provides a formal mechanism for consultations on policies relating to sustainable development and includes representatives from NGOs, People's Organisations, government agencies, business and trade unions. The media has also played a key role in ensuring an open and accountable government in the post-Marcos era.

Despite the democratic reforms and active civil society, the last decade has seen little progress with development and poverty reduction outside metropolitan Manila. Much of the country is still dominated by old-style politicians and crony capitalists, who are often the first to be involved in illegal natural resource activities. Even in Manila, policy decisions still tend to be dominated by business interests, often at the expense of weaker groups such as indigenous people and local communities.

Decentralisation in rural areas and in relation to natural resources was launched in 1992. During the first few years there was much confusion concerning the respective mandates of local government units (LGU) and agencies of the Department of Environment and Natural Resources (DENR), exacerbating open access to natural resources and illegal activities. This situation seems to have improved in recent years. However, increased local autonomy has not yet been matched by strong and effective accountability mechanisms – both upwards and downwards – and has often entailed ad-hoc and opportunistic arrangements at local level. This poor performance occurs mainly where indigenous peoples do not represent the majority of the population, and are therefore insufficiently represented in local government councils. A key concern for local authorities is the difficulty of accessing funds allocated to them by central government agencies.

Indigenous people in the Philippines have historically been marginalised and have struggled for the right to ancestral domain and self-determination. Many of the rebel groups, such as the New Peoples' Army, emerged as a result of oppression of indigenous people under the Marcos regime. The 1998 Indigenous Peoples' Rights Act (IPRA), born out of the government's peace plan, makes the Philippines the only country in Southeast

Asia that formally recognises and promotes the rights of indigenous people. In practice, however, many local government and DENR officials still fail to recognise the provisions of IPRA, and indigenous people continue to be marginalised and exploited by more powerful interest groups. There is still a high level of mistrust of government agencies and businessmen amongst local people.

### **Box 1 - Biodiversity, indigenous people and bioprospecting**

The Philippines has the highest level of biodiversity and endemism per unit area of any country in the world, and ranks 7th or 8th in absolute terms, despite the loss of most of its original forest cover. Indigenous people make up an important part of the population: there are 67 different ethnic groups which make up about 15 % of the total population (Domingo Siazon, GICOS, 1996). Indigenous people often live in areas of high biodiversity, particularly in mountain and coastal areas.

Bioprospecting activity has been increasing in the Philippines over the last decade, particularly for medicinal plants, and, more recently, marine organisms. Collection of biological samples is usually undertaken by Filipino scientists for screening by foreign organisations. However, the country has received few benefits from the commercial use of its biodiversity, and, although Executive Order 247 was introduced in 1995 to regulate access to genetic resources, it is not being implemented effectively. There is a need to ensure that the principle of equitable benefit sharing is applied by both foreign and national organisations involved in the collection and use of the Philippine's biological and intellectual resources.

## **2.2 EO 247 and related policies**

The Philippines was the first country to introduce legislation on access to genetic resources, with the signing of Executive Order No. 247, "Prescribing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, their By-Products and Derivatives, for Scientific and Commercial Purposes, and for Other Purposes" by President Fidel V. Ramos in May 1995. In June 1996, the Department of Environment and Natural Resources (DENR) issued Implementing Rules and Regulations for EO 247 ((DAO) 96-20). The purpose of EO 247 is to:

- regulate the research, collection and use of biological and genetic resources, so that such resources are conserved, used sustainably and benefit the national interest; and
- promote the development of local capability in science and technology.

Under EO 247, all bioprospecting activities are subject to research agreements with the government, containing terms for the provision of information and samples, technology cooperation and benefit-sharing. For the collection of biodiversity in areas where local and indigenous communities live, the prior informed consent (PIC) of such communities is required. The Indigenous Peoples Rights Act (IPRA), signed in October 1998, reinforces EO 247 by requiring PIC for any activity carried out on indigenous peoples'

lands, and, being a Republic Act, rather than an Executive Order, it takes precedence in law<sup>5</sup>. IPRA also reinforces EO 247's PIC requirement by recognising the rights of indigenous people to ancestral domain.

EO 247 does not contain any explicit requirement on the use of traditional knowledge related to genetic resources, although the provisions on local PIC provide an opportunity for local and indigenous communities to place conditions on the use of such knowledge. However, the rights of indigenous peoples over their knowledge systems and practices are explicitly recognised by IPRA, and by the Traditional and Alternative Medicine Act (TAMA, 1997) which requires benefits to be shared with communities that provide traditional knowledge.

### **2.3 The impetus for developing EO 247**

In 1992, the Southeast Asia Network for the Chemistry of Natural Products adopted the Manila Declaration on the Ethical Utilisation of Asian Biological Resources, at the Asian Symposium on Medicinal Plants, Spices and Other Natural Products (ASOMPS VII). The Declaration was developed in response to alarming biopiracy problems in the region. Scientists had long recognised that the exploitation of Asian biological resources, notably medicinal plants, had rarely been of direct benefit for the scientific or economic development of the region.

The Manila Declaration recognises national sovereignty over biological resources. It also recognises the need for local scientists to be involved in research on biological resources, and for countries to receive a fair share of the commercial benefits arising from such research. It contains a code of conduct for foreign collectors and identifies the need for countries to develop legislation to control the collection and export of biological resources.

Two years after the Declaration was adopted, the Philippines Network for the Chemistry of Natural Products (PNCNP) decided to initiate a process to develop legislation on the use of biological resources by foreigners, in preparation for the next ASOMPS meeting. The Philippines' scientific community, traditionally faced with funding shortages, was concerned about the growing level of biodiversity prospecting activity in the country. Their main objective was to ensure that the Philippines, and the scientific community in particular, would benefit from the collection and use of biodiversity.

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<sup>5</sup> Executive Orders are as legally-binding as Republic Acts but are lower in the hierarchy of laws because they emanate from the Executive Branch of the government, rather than being borne out of a legislative process, and cannot include sanctions and penalties. They can be modified at any moment by the Office of the President, while changes in a Republic Act require consultation and parliamentary approval.

### **3. KEY STEPS IN THE CONSULTATION PROCESS**

EO 247 and its Implementing Rules and Regulations (IRRs), which set out the details for its administration, underwent a fairly broad consultation process in the capital region. The level of consultation was probably unprecedented for an executive order, which usually only require very limited consultation. A core group of scientists and government agencies led the drafting process, with the assistance of a legal expert affiliated to an NGO. Several consultative meetings were held over a two-year period, involving the academic and scientific community, different government agencies, NGOs, Peoples' Organisations and the business sector. Although initiated by the scientific community, the process managed to gain sufficient interest from government agencies and other actors to ensure the eventual adoption of the regulation.

#### **3.1 Drafting EO 247**

In February 1994, an initial draft of EO 247 was developed by a small group of chemists of the PNCNP from the University of the Philippines (UP) Diliman, Ateneo de Manila University and the University of Santo Tomas (UST). The draft was designed to regulate the collection and use of biological and genetic resources by foreigners, based on the Manila Declaration.

The group of chemists asked a legal expert, Dr. Antonio La Vina (who at the time worked with an NGO involved in ancestral land issues), to assist with drafting the legislation. Dr. La Vina revised the draft, introducing elements from the Convention on Biological Diversity (agreed at the Earth Summit two years earlier), and made two significant changes. The scope was revised to cover Filipino as well as foreign scientists, and academic as well as commercial research. In addition, a requirement for collectors to obtain the prior informed consent of local and indigenous communities was introduced.

Dr. La Vina advised the scientists that the vehicle for the new regulation should be an executive order rather than a republic act as this would be quicker and easier to approve. An executive order only requires the approval and signature of the President, which can be obtained upon the endorsement of appropriate government officials. A republic act, on the other hand, usually takes a few years to be approved by Congress due to the different political interests that need to be considered.

The subsequent consultation process involved the following steps:

- 1. Consultation with scientists (June-July 1994):* Consultations were held with academics and scientists from leading universities in Manila, including a few organisation involved in bioprospecting, such as the Marine Science Institute (MSI) and the National Museum. Comments were also solicited from members of the PNCNPs in the provinces.
- 2. Consultation with the Department of Science and Technology (July 1994):* Meetings were held with officials from the Department of Science and Technology (DOST) and with government scientists from the National Academy of Science and Technology

(NAST) (an agency affiliated to DOST), and the draft was revised in light of their comments.

3. *Broadening the drafting group:* In July 1994, DOST and NAST joined the core group of chemists. They ensured that the government's scientific research bodies, notably those of the Philippine Council for Agriculture, Forestry and Natural Resources Research and Development (PCARRD, also affiliated to DOST) were consulted on every draft. The NGO Earth Savers, an environmental network, also had some involvement in the drafting process.

4. *Multi-stakeholder Conference at UP (August 1994):* The first broad consultation was a multi-stakeholder conference organised by NAST at UP Diliman (about 100 participants). The conference mainly targeted the academic and scientific community, including a few scientists from UP in the regions (Baguio City and Los Baños Laguna). But it was also attended by a number of government agencies, including DOST, DENR and PAWB, a few NGOs (mainly members of the PCSD), and KAMMP (the National Alliance of Indigenous Peoples' Organizations).

5. *Consultations with DENR/PAWB and NGOs (August-December 1994):* After the NAST conference, DENR and PAWB became actively involved in the development of EO 247. At the time, PAWB was responsible for issuing collection permits for biodiversity under the existing system, and it later became the lead agency for implementing EO 247, in collaboration with DOST. Consultative meetings were also held with other government institutions, NGOs and POs. A few NGOs, such as the Southeast Asia Regional Institute for Community Education (SEARICE) became actively involved in the development of EO 247 after participating in the NAST conference.

6. *Consultation with NGOs (early 1995):* NAST organised a series of consultative workshops with NGO members of the Sub-Committee on Biodiversity of the Philippines Council for Sustainable Development (PCSD). Two representatives of indigenous people from the regions (Mindanao) participated in one of the meetings. The PCSD Council, which includes a few NGOs, was also consulted and had to endorse EO 247 before it was approved.

7. *Consultation with politicians (early 1995):* NAST presented the draft executive order at a meeting of the Cabinet Cluster on Agriculture and Agro-Industries composed of cabinet secretaries and top-level officials from agriculture-related line agencies.

8. *Multi-Stakeholder Seminar at AIM (April 1995):* Shortly before EO 247 was approved, a one-day seminar was hosted by the Asian Institute of Management (AIM) to broaden support for EO 247, particularly amongst the business community. Amongst the 40-50 participants were PHAP (the Pharmaceutical and Healthcare Association of the Philippines, which includes foreign members), and a few representatives from pharmaceutical and agrochemical companies (eg. Monsanto), as well as government officials, academics, scientists and NGOs. The results of the seminar fed into the final draft of EO 247, which was approved by President Ramos in May 1995.



### 3.2 Drafting the Implementing Rules and Regulations (IRRs)

The development of EO 247's IRRs began immediately after EO 247 was approved and took one year because of the many perspectives represented in the process. In September 1995, a multi-stakeholder Inter-Agency Committee on Biological and Genetic Resources (IACBGR) was set up to coordinate the implementation of EO 247 and develop the IRRs.

The IACBGR is co-chaired by DENR and DOST, and includes representatives from the Departments of Agriculture, Health and Foreign Affairs, the National Museum, the academic/scientific community, NGOs and indigenous peoples' organisations. It appointed a small core group to draft the IRRs, composed of the legal staff of PAWB, DENR and DOST, and scientists. DOH was also closely involved in drafting the IRRs. When Dr. La Vina was appointed as Under-Secretary for legal and legislative liaison of DENR in January 1996, he took responsibility for drafting the IRRs.

The first draft of the IRRs was circulated for comment for about three months, revised and sent out for a second round of comments. The drafts were circulated to:

- different government departments;
- the PCSD Sub-Committee on Biodiversity and the PCSD Council (which include NGOs and POs);
- applied scientists (Biotech and PCARRD);
- industry groups and national pharmaceutical companies.

#### **Box 2 - Steps in the Formulation of EO 247 and its IRRs**

##### **Executive Order No. 247 (February 1994 – May 1995):**

February 1994: Initial draft prepared by chemists at UP and UST

April: Draft revised by Dr La Vina

June-July: Consultations with academics and scientists

July: Consultation with DOST and NAST, which join the core drafting group

August: Multi-stakeholder Conference organised by NAST at UP

Aug.-Dec.: DENR, PAWB and a few NGOs become actively involved

Early 1995: Consultation with NGOs and POs on the PCSD Sub-committee for Biodiversity  
Consultation with the Cabinet Cluster on Agriculture and Agro-Industries

April 1995: Multi-stakeholder Seminar organised by AIM (targeting the business sector)

>> EO 247 signed by President Fidel V. Ramos in May 1995.

##### **Implementing Rules and Regulations (June 1995 – June 1996):**

Septem. 1995 IACBGR (a multi-stakeholder committee) established

Core group appointed to draft the IRRs (DENR, PAWB, scientists)

Oct-May 1996 1<sup>st</sup> and 2<sup>nd</sup> drafts circulated for comment to a range of actors (active NGO input)

>> IRRs approved by DENR in June 1996.

Certain NGOs such as SEARICE, Green Forum and the Green Coalition played an active role in commenting on the IRRs. Indigenous people also became more involved in EO 247 debates at this time due to an incident where biodiversity was collected from their land without consent. PHAP was invited to some discussions on the IRRs and obtained

comments from colleagues in Europe through the IFPAA, an international federation of pharmaceutical companies. One official commented that, ideally, consultative meetings should have been held to discuss the IRRs, but there was not enough funding. The IRRs were signed by the Secretary of DENR in June 1996.

## **4. ASSESSMENT AND ANALYSIS OF THE CONSULTATION PROCESS**

### **4.1 Overview**

This section examines the strengths and limitations of the consultation process for developing EO 247 and its IRRs, drawing on the views of a range of stakeholders involved. Most people praised the process for involving a broad range of actors in the capital region. They felt that, overall, it was probably the best process that was possible, given the constraints that existed at the time. One indigenous group commented that this was one instance where the academic community had shown that ‘its heart was in the right place’.

Nevertheless, it was also felt that the process was too Manila-based. There was very little involvement of regional and local stakeholders, including officials with responsibility for implementation. In addition, some organisations involved in academic research and commercial partnerships felt that their concerns were not sufficiently addressed. They feel that the requirement to secure local PIC is too cumbersome and that EO 247 should only apply to foreign scientists and commercial research.

### **4.2. The core drafting group**

Many people identified the core drafting group of EO 247 as a strength of the process. Composed of very credible and committed scientists, it made a brave attempt to develop a complex piece of legislation, for which very little precedent existed. The involvement of university scientists ensured that their concerns were directly represented in the drafting process, and incorporated in regulation, for example in provisions on scientific capacity building. The involvement of a legal drafter linked to an NGO ensured that the interests of indigenous and local communities were addressed through a requirement to obtain local Prior Informed Consent (PIC). The involvement of government agencies helped to ensure the eventual adoption of the regulation.

The small size of the group facilitated the drafting process and enabled the technical aspects to be addressed before the political. However, it also meant that EO 247 was essentially drafted by a fairly closed group of academics and bureaucrats. It was suggested that other stakeholders - NGOs, indigenous and local communities, companies and certain scientific organisations – should have been formally represented in the drafting group.

### **4.3 Broadening the consultation process**

Broad consultation was not initially envisaged as part of the drafting process. The scientists in the core group did not consider this to be their responsibility, nor did they have funding for such a process. They intended to develop a trial piece of legislation which could reduce biopiracy in the short term, and then be tested and refined.

The involvement of Dr La Vina provided much of the impetus for opening up the process beyond the scientific community, and various actors took the initiative to consult more widely as they became involved in the process. A key factor driving the process was the political context and, in particular, the strong civil society organisations and networks that emerged in the struggle to overthrow the Marcos regime.

### **4.4 Funding for the consultation process**

Experience with EO 247 shows that it is possible to undertake a fairly comprehensive consultation process in a capital region with very little funding, when existing consultation mechanisms and fora are used (eg. the PCSD) and interested organisations are able to host/sponsor consultative events.

The initial consultations amongst the scientific community were sponsored by UNESCO's Regional Network for the Chemistry of Natural Products in Southeast Asia, which funded the development of the first draft of EO 247. NAST sponsored the conference at UP and other consultative meetings with government agencies and NGOs. PAWB funded the PCSD meetings, while AIM sponsored the final seminar. DENR provided some funding for the drafting and consultation process of the IRRs. In addition, networks and associations facilitated consultation with particular sectors (eg. scientific networks, business associations, NGO networks).

There was, however, insufficient funding for consultation with regional and local stakeholders and for awareness raising activities. The process could have achieved some measure of involvement of regional actors by making use of existing consultation mechanisms, particularly if it had had clear official status. Such mechanisms include: the Department of Interior and Local Government (DILG), which has permanent links with regional and local government; Protected Area Management Boards (PAMBs) which include local PAWB staff, local mayors, NGOs and indigenous representatives; and Regional Development Councils (RDC) which include Local Government Units (LGUs), local mayors and barangays (village chiefs). There are also various actors working at regional and local level which can assist with information and consultation activities, such as the Church, LGUs, NGOs and POs.

### **4.5 Implications of a process initiated by the scientific community**

The process to develop EO 247 differed from normal legislative drafting in that it was not initiated or led by a particular line agency. This meant that no group was officially

responsible for public consultation, or for providing the necessary funding, which probably contributed to the ad-hoc nature of the process. Furthermore, participants did not always officially represent their organisations or ensure feedback to them. If the process had had an official status from the start, participants would have had an official commitment to the process and its output. They could have been mandated to formally represent their organisations and ensure feedback within them.

#### **4.6 Involvement of government agencies**

While a number of different government agencies in Manila were actively involved in the process, the lack of involvement of regional and local officials was a key limitation of the process. LGUs are responsible for conducting local PIC outside protected areas, while provincial and local PAWB officials are responsible for applying EO 247 within protected areas. Lack of consultation with these officials during the formulation of EO 247 has led to problems with its implementation because many officials are not aware of EO 247, do not fully understand it, or do not feel any ownership and thus tend to ignore it. Consultation becomes all the more important when local government offices already feel resentment because they are rarely consulted. Had local authorities been involved in the formulation process, they would be more inclined to demand the resources needed for implementation from central government agencies.

It was suggested that the more junior technical staff of PAWB, which work on the day to day administration of EO 247, should have been more actively involved. It was also suggested that customs officials should have been consulted, since they could play an important role in monitoring the export of biological materials at major air and sea-ports (the Philippines is an archipelagic state composed of more than 7000 islands).

#### **4.7 Involvement of NGOs, POs and local communities**

A number of Manila-based NGOs or NGO networks working on biodiversity and community development were consulted through the PCSD, as well as a few indigenous peoples' organisations, such as KAMMP, a national coalition. These organisations helped to reflect the perspectives of indigenous and local communities. However, some people felt that organisations at regional level should also have been involved to enable a more direct representation of indigenous and local communities.

Consultation with indigenous and local communities was impeded by lack of funding and time, logistical constraints, local political reality, and the difficulty of defining representation given the diversity of peoples and communities. In view of these constraints, the rules on PIC were included to provide a mechanism for consultation with communities in the implementation of EO 247. Nevertheless, some people felt that a representative sample of local and indigenous communities should have been consulted, targeting communities in areas of high biodiversity. As well as enabling a better understanding of their particular concerns, this would have provided a means to test and refine local PIC procedures and raise awareness about EO 247 amongst local communities.

#### **4.8 Involvement of the scientific community**

While leading universities participated actively in the development of EO 247, other scientific organisations engaged in applied or commercial use of biodiversity (eg. Biotech, IRRRI and the National Museum) were not so involved. Some organisations only became interested in the process once EO 247 had been approved, when the detailed IRRs were being developed and the full implications of the policy became evident. One organization became disillusioned with process and chose not to participate further.

The participation of scientists that most often collect biodiversity in the field, such as biologists, ecologists and taxonomists, was also considered to be limited. Some were only consulted at the start of the process, limiting their ability to comment on particular provisions. Furthermore, the consultation process (eg. the UP/NAST Conference) mainly targeted the directors and managers of organisations, rather than the technical staff which collect biodiversity from the field and are therefore directly affected by EO 247.

#### **4.9 Involvement of the business sector and foreign partners**

AIM helped to engage the business sector in the process, as did PHAP, an association of national and foreign pharmaceutical companies. However, overall, the involvement of business was limited, partly because few national companies are affected by EO 247, but also because of limited awareness about EO 247 and limited interest in the process. EO 247 does not affect many pharmaceutical companies in the Philippines because they mostly lack the technology and resources to develop active ingredients for drugs<sup>6</sup>, although it does affect a few companies involved in the development of herbal medicines, which often work in partnership with foreign companies.

#### **Box 3 - Who are the foreign stakeholders?**

A number of overseas organisations have agreements with Filipino scientists to obtain biological materials for taxonomic and academic research, such as the National Museum of the Philippines which has long established partnerships with the US Smithsonian Institute and the Museum of Chicago. There are also some foreign organisations/companies engaged in commercial agreements. For example, the University of Utah, Cornell University and the pharmaceutical company Wyeth Ayerst Squibbs are involved in a bioprospecting initiative which involves MSI of the University of the Philippines; while Shaman Pharmaceuticals and the US NCI have been involved in bioprospecting agreements with the National Museum. Companies in Germany, Switzerland, Korea, Singapore, Japan and Thailand are developing herbal medicines using Filipino biodiversity.

While some people felt that it would be inappropriate to engage foreign actors in national policy decisions, most generally recognised the value of consulting them on particular issues in order to avoid placing unreasonable restrictions that might deter them. Furthermore, their involvement would help to raise awareness about access policy amongst foreign partners, and might even generate a sense of commitment to ensure and

<sup>6</sup> Only two scientific organisations, Biotech and PCCARD, have technological capacity to develop active ingredients for pharmaceuticals from natural products.

facilitate its application by in-country partners (eg. through the provision of funds for local PIC).

#### **4.10 Building consensus**

Overall, the process led to broad consensus amongst NGOs, POs, government agencies and many scientists, which generally support EO 247. Some scientists which were opposed to EO 247 at first came to accept it when they were better informed. The AIM seminar provided a good forum for dialogue and consensus building because AIM is an independent and well respected organization, generally perceived to be neutral and fair. Techniques such as log-frames were used to balance stakeholder views without letting emotions run high.

However, some of the organisations that are most affected by EO 247 in practice felt that the process was biased towards NGOs. They feel that the local PIC procedures are too cumbersome, costly and time-consuming, and that the regulation will hinder legitimate scientific research, and should only apply to foreign organisations. Discussions on EO 247 have been heated at times, with people walking out of meetings or calling for it to be scrapped.

One organisation engaged in both academic and commercial research is concerned that EO 247 will deter its foreign partners which provide an important source of income and hence put jobs at risk. Another feels that EO 247 is hindering research on Integrated Pest Management designed to support biodiversity conservation and the needs of poor farmers. Some academics and conservation NGOs feel that EO 247 is hindering conservation and teaching activities and impeding students from obtaining academic qualifications.

The local PIC procedures require at least two visits to the field, a minimum consultation period of 60 days, and the provision of animals for rituals, especially when the site of collection is within indigenous territories. The 60 day consultation period means that obtaining a collection permit takes at least five months, and applications are often further delayed in the IACBGR approval process.

The rules on local PIC were included to provide a mechanism for local and indigenous communities to have some control over access to biodiversity on their territories. It is regarded as the heart and soul of EO 247, and non-negotiable, by the drafters, NGOs, POs and many government agencies. In fact, some indigenous groups feel that PIC is not stringent enough, that EO 247 is just a mechanism to facilitate access by multinationals, and that bioprospecting on indigenous territories should be banned.

The drafting group decided to extend the scope of EO 247 to include Filipino scientists and academic research because of two potential loopholes: local scientists often collect resources on behalf of foreign organisations, and academic research can give rise to commercial discoveries, or be used as a pretext for commercial research. Although

academic collections require a less in-depth PIC process, and in some cases are not subject to EO 247, many scientists feel that the requirements are still too stringent.

Interestingly, PHAP, which represents the interests of major national and international pharmaceuticals, suggested that foreign companies would be prepared to wait up to six months to obtain collection permits, to provide additional funds for local PIC and to share a greater proportion of their commercial benefits.

The main concern of PHAP is the requirement to disclose research objectives under the PIC process. This, it feels, could violate confidentiality agreements, affect Intellectual Property Rights (IPRs) and deter foreign companies, even though the process only requires information about the collection activity to be disclosed.

Regulating access to genetic resources can evidently be very contentious. Consultation processes should be carefully designed and managed in order to bring people on board. However, some opposition is inevitable when a new regulation is introduced and full consensus rarely possible.

In the Philippines, a number of steps could be taken to enhance support for, and compliance with, EO247. Rather than doing away with local PIC, the priority should be to explore ways to reduce the burden on non-profit research and to facilitate local PIC. These and other implementation issues are discussed further in Section 6.

#### **4.11 Identifying stakeholders and representatives**

Although a range of actors participated in the process, it was suggested that the identification of participants relied too much on personal contacts, and that a stakeholder analysis should have been undertaken at the start to identify all those that would be most affected by the policy. The importance of carefully selecting representatives to ensure they legitimately and effectively represent their sector or group was also emphasised. After EO 247 was approved, questions were raised about how the NGO and PO members of the PCSD had been selected.

The identification of legitimate NGOs in Philippines can be difficult, since there are some 60,000 registered NGOs and 30,000 cooperatives, many of which are “fly-by-night” organisations, set up by present or former officials to take advantage of funds for “community-based” projects. DENR has attempted to address this problem by registering a list of accredited NGOs, but the list is thought to include many questionable organisations.

#### **4.12 Information and awareness**

Information dissemination during the consultation process was limited. Some business, scientific and indigenous organisations felt that they were not sufficiently well informed to participate effectively. It is likely that the process would have secured greater interest

from these sectors if they had been better informed. In addition, some of the consultative meetings were not sufficiently well publicized.

Official information about EO 247 was only distributed after its adoption. In 1997, the World Resources Institute (WRI) and the Foundation for Philippines Environment (FPE) published a Manual on EO 247, in collaboration with DENR<sup>7</sup>. Information has been disseminated to government agencies, local government units, research institutions, academics (including some regional universities), industry, NGOs and organised sectors. In addition, PAWB has provided information about EO 247 to some foreign organisations which have been involved in the collection or use of Filipino biodiversity. Despite these efforts, awareness about EO 247 is still limited, particularly outside Manila, amongst local authorities, DENR officials and local communities.

#### **Box 4: Key strengths, limitations and constraints of the consultation process**

##### **Strengths**

- Multi-stakeholder process.
- Active involvement of key government agencies, scientists and national NGOs.
- Consideration of local communities interests by the core group.
- AIM seminar as a means to involve the private sector.

##### **Limitations**

- Lack of consultation with LGUs, local PAWB staff, and regional representatives of indigenous and local communities.
- Limited involvement of applied scientific organisations and the private sector.
- Limited information dissemination.
- Concerns of some scientists, academics and business representatives not sufficiently addressed.
- Limited consideration of biodiversity conservation objectives.

##### **Constraints**

- Shortage of funding and time.
- Logistical constraints to engaging regional actors.
- The difficulty of defining representation.
- The diversity of interests affected.
- Lack of official status.

#### **4.13 Taking advantage of a political opportunity**

If there had been more time for developing EO 247, the consultation process could have been more extensive. However, the drafters wanted to get the regulation approved before the forthcoming election, in order to take advantage of the favourable political climate for the approval of EO 247 that existed under President Ramos, and before pressure against it mounted which could hinder or delay its adoption. EO 247 might never have been

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<sup>7</sup> La Vina A., Caleda M.J., Baylon M.L. Eds. (1997). Regulating Access to Biological and Genetic Resources in the Philippines. A Manual on the Implementation of Executive Order No. 247.



approved under the Estrada administration which placed less emphasis on biodiversity conservation and strongly promoted business interests.

In such a situation, there is clearly a trade-off to be made between carrying out ample consultation, including with local governments and communities, which often pays off at the implementation stage, and fast tracking the consultation process to maximise the chances of a regulation being adopted.

The drafting group chose to develop an executive order rather than a republic act as this would be quicker and easier to approve. An executive order only needs to be signed by the President, while a law requires approval by Congress, which usually takes at least three years. An EO also has the advantage of being much easier to amend once approved. However, under different circumstances it may have been better to develop a republic act, which is a stronger legal instrument, can include sanctions and penalties, and requires a more comprehensive consultation process.

#### **4.14 Considering biodiversity conservation objectives**

A number of people felt that biodiversity conservation objectives should have been given greater attention in the development of EO 247. As well as helping to ensure that access agreements contribute to conservation, this might have ensured greater consideration of the potentially adverse impacts of EO 247 on conservation activities that rely on the collection of biodiversity. Furthermore, indigenous groups felt that the regulation should have been developed as part of a broader biodiversity policy which also addressed activities that pose a significant threat to biodiversity, such as mining and dam building.

#### **Box 5 - The consultation process to develop the Traditional Medicine Act (TAMA)**

TAMA, which was approved in 1997, underwent a much more extensive consultation process than EO 247 because it is a Republic Act. The first draft of TAMA was the consolidation of five years' consultation at local level. TAMA was developed through a nationwide consultation process involving:

- regional meetings with traditional healers, local government health officials and NGOs;
- meetings at local and community level;
- national meetings involving traditional healers and drug companies; and
- Senate hearings involving stakeholders from the provinces.

The process was facilitated in the following ways:

- Before drafting began, DOH spent several years campaigning to build public support for traditional medicine. The main purpose of the campaign was to win over doctors using conventional medicine who opposed the use of traditional medicine because they saw it as a threat to their business. Rather than confronting doctors, DOH adopted a consumer driven strategy to win their support, and set up an organisation to advocate for traditional medicine.
- DOH provided funding for campaigning and consultation.
- A community based project funded by UNDP provided credibility for traditional medicine and facilitated identification of NGOs active in this field.

## **5. CONSULTATION WITH INDIGENOUS PEOPLE**

In the Philippines, as elsewhere, indigenous people often live in areas of high biodiversity, depend on biodiversity for their livelihoods and have extensive traditional knowledge about its properties and uses. They are therefore directly affected by ABS policy and should play an active role in its formulation. By engaging representatives of indigenous and local communities in the development of access policy, and demonstrating a real willingness to address their concerns, governments can start to build the trust and collaboration necessary to maximize the potential benefits of their country's biological resources for both the national interest and that of local resource custodians.

As experience in the Philippines shows, efforts to consult indigenous people are not always very effective. This section reviews some of the lessons from experience of consultation with indigenous people in the Philippines, based on interviews with indigenous organisations and anthropologists.

### **5.1 Representation in government**

The National Commission for Indigenous People (NCIP) is responsible for representing indigenous people within government and for issues of ancestral domain. It is composed of seven Commissioners, one for each region, mandated to consult with indigenous people on policy issues and ensure that their rights are respected. There is, however, concern because the commissioners are usually appointed by the government rather than elected by indigenous people, and are often not connected to the grassroots or supportive of the interests of indigenous people. Furthermore, there are too few commissioners to reflect the cultural diversity of the country.

### **5.2 Participation in consultative meetings**

Indigenous people tend not to be well represented at consultative meetings. Meetings are often dominated by academics and development NGOs, which can highlight indigenous concerns but cannot represent or speak for indigenous peoples as they are neither indigenous nor directly affected by the issues. Although anthropologists usually have a good understanding of indigenous concerns, they tend to represent the mean rather than the range of views.

Indigenous representatives that participate in consultative meetings tend not to have the time or resources to consult their constituents before a meeting, and have little access to information on policy proposals. Draft IRRs are published in the Law Gazette, but this is only available in English and at law schools and courts in regional capitals. Participation in meetings can also be difficult for indigenous people when consultations are not held in native languages, technical language is used and western concepts/issues are discussed. Given that access to genetic resources is a highly specialised area and that indigenous people have little access to information, facilitators may need to provide particular support to indigenous representatives to enable them to participate on an equal footing as other participants.

Indigenous people are sometimes reluctant to participate in consultative meetings for fear of agreeing to something which they do not fully understand, or being co-opted. Local people can be co-opted or even forced to take a particular positions, and there is sometimes collusion between government and industry, and even NGOs. It is therefore critical that those who are consulted are fully informed about the issues before they participate in meetings.

### **5.3 Consultation with indigenous and local communities**

Local communities and organisations are often suspicious when they are approached by government officials or companies because they have been manipulated in the past. DENR has a notorious track record with many local NGOs and POs. Some local organisations have become wary of ‘biodiversity’ projects since these have been used to serve the interests of corrupt officials. Where such mistrust exists, consultations need to be carefully designed, with selected local organisations acting as intermediaries. Even NGOs and POs have to earn their credibility amongst local communities.

Consultations should be undertaken in accordance with the decision making practices of the community, which vary depending on the cultural practices of the ethnic group or community. Furthermore, many different actors organise indigenous people for their own purpose, which means there may be a number of different ‘representatives’ which do not in fact represent the cultural leadership of a community but act as brokers between the community and various external actors (eg. the Church, NGOs, government, business). It may also be difficult to identify the real decision makers because of the collective nature of indigenous decision-making. Several elders are often involved in making a decision and what constitutes the council of elders varies depending on the issue.

Consultations with indigenous communities often involve giving out information, but do not allow enough time for indigenous people to reflect on the issues and discuss them amongst themselves before providing a response. Effective participation requires an enabling process which builds the capacity of a community to make an informed decision. This can take a long time when the issues or concepts to be addressed relate to western society and are new for the community.

#### **Box 6 – Participation in development of the Indigenous Peoples’ Rights Act (IPRA)**

Experience with the formulation of IPRA (1998) shows that it is possible to directly involve local and indigenous communities in all phases of policy formulation. IPRA is the culmination of many years of lobbying and advocacy by indigenous peoples and their supporters. Most of its provisions, including those on traditional knowledge, were proposed by representatives of indigenous peoples, and the law incorporates the views of a large range of tribes and communities. The process to develop IPRA involved community meetings, consultations in key regions (Luzon, Visayas and Mindanao) and in provinces with large indigenous populations, as well as at national level. Capacity building to assist indigenous people to make informed decisions was part of the agenda.

Outsiders seeking to consult indigenous communities should carefully study the particular decision-making processes of the community before conducting a consultation. They should work with a local organization which knows the community, is trusted by it, and which can facilitate the process. LGUs can help to identify a suitable local facilitator, in consultation with the local community, and assist with the process.

## **6. THE IMPLEMENTATION OF EO 247**

The implementation of EO 247 has met with some difficulties, which is not entirely surprising given that the Philippines has been a pioneer and testing ground for access policy, and that EO 247 is still a relatively young policy. This section examines some of the problems with the implementation of EO 247 and identifies priorities for addressing them.

Since the approval of EO 247 in 1995, PAWB has received significantly fewer applications for the collection of biodiversity: eleven applications for research and about 20 for conservation/taxonomic use<sup>8</sup>. Only two research agreements have been approved - one Commercial Research Agreement and one Academic Research Agreement - largely because applicants have not completed the approval process. This may be because the applicant was unable to comply, or decided not to carry out the research. However, the low level of application and follow-up by applicants also suggests a low level of compliance.

Some organisations are against EO 247 because they feel that the scope of the regulation is too broad and that the provisions on local PIC are too cumbersome. They may therefore be reluctant to apply it. A further constraint to implementation is limited capacity for administration, monitoring and enforcement, both centrally and in the field. As one commentator put it: “the brains of the system are in place but it has no arms or legs”.

A number of workshops have been held to examine the implementation of EO 247, including multi-stakeholder meetings convened by WRI and FPE in 1997, and by SEARICE in 1997-1998. The recommendations of the SEARICE workshops were not presented for endorsement under the early Estrada administration because of uncertain commitment to EO 247 in DENR. At the workshop convened by SEARICE and IIED in June 1999, DENR’s Under-Secretary for Policy made a commitment to consider these recommendations. However, limited progress appears to have been made in addressing concerns about the implementation of EO 247, resulting in some frustration amongst stakeholders.

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<sup>8</sup> Whereas research agreements for academic or commercial use are subject to EO 247, some applications for purely conservation or taxonomic purposes can be approved under a less stringent Memorandum of Agreement – Gratuitus Permit (MOA-GP).

## **6.1. Scope and coverage**

EO 247 covers all collection of biodiversity, except for traditional use. The regulation already distinguishes between commercial and academic research. Academic agreements, which can only be formed with Filipino organisations, allow a single agreement to cover all the collections made by an organisation. PIC procedures still need to be applied for each collection, with a period of 60 days for consultation, but a less in-depth consultation process is required.

A further concession was introduced more recently, allowing collections which are purely for conservation, taxonomy or teaching, and do not involve the processing of materials to make extracts, to be exempt from EO 247, although applications still need to be conveyed to the IACBGR. This third type of permit, the Memorandum of Agreement (MoA-GP) does not require 60 days for PIC, but only requires the permission of relevant government agencies. The MoA-GP does, however, explicitly include the salient provisions of EO 247 on equitable benefit-sharing in the event of commercialization of products or processes resulting from the research.

Nevertheless, some people still feel that EO 247 is too stringent with respect to non-profit research, and that this will hinder scientific progress. They feel that all collections for academic, taxonomic and conservation purposes should be excluded from EO 247, and that more emphasis should be placed on monitoring the collection, use and export of materials to ensure compliance by commercial users which may be operating under the guise of academic research.

It was suggested that, by looking at the method used to collect and store samples, it is possible to determine whether collections are for commercial or non-profit use. For example, if samples are kept in formalin, they are likely to be for taxonomy rather than extraction, whereas large quantities of plant material are likely to be for extraction of active ingredients for commercial research. Criteria were developed under the previous permitting system to determine whether collections are for taxonomy or biochemistry, which could be used by technicians and customs officials to monitor compliance with EO 247.

## **6.2. Local Prior Informed Consent (PIC)**

The requirement to obtain the PIC of local and indigenous communities for collections made in areas where they live is widely regarded as a critical component and strength of EO 247. However, there are concerns about PIC, amongst both collectors/intermediaries, and representatives of local communities. Some scientists feel that the rules on PIC are too stringent and should be relaxed to facilitate and improve compliance. However, few people have actually tried out the procedures.

### **The collector's perspective:**

- Many collectors feel that the sixty day consultation period required for local PIC is too long because it means that the process requires at least two visits to the field.

There is also some concern that the sixty day requirement could affect students who need to meet deadlines to obtain qualifications.

- Many also feel that PIC is too costly. The main cost of local PIC is for travel, which can be covered under travel budgets in research proposals. Government agencies that fund scientific research such as DOST and PCARRD require PIC and their policy is to include funds for this in their grants. However, the rules of the Commission on Audit will not allow the cost of PIC to be covered unless it has already been foreseen and included in the research budget. There is also concern that the cost of animals needed for rituals cannot be covered in research budgets.
- Another potential difficulty for collectors is knowing how to convey information about proposed research to local communities in such a way that it will be fully understood.

One person suggested that PIC should be conducted only if and when a commercial product is going to be developed. The collector would buy samples from the community and sign a contract with the community stating that the regulation will apply in the event of commercial development. This might be better for the community because bargaining would take place at a point when much more is known about the value of the resource. However, it would be very difficult to ensure that local PIC is carried out when the resources have already been collected, a number of years may have elapsed and the resources may have been transferred to third parties and left the country.

#### **The community perspective:**

- A number of NGOs and indigenous people feel that 60 days should be a minimum requirement because it can take a long time for local communities to develop sufficient understanding about proposed collections and hold the necessary internal discussions to enable them to make an informed decision. There may be practical complications, for example when a number of communities using the same area need to be consulted. However, it was also suggested that the consultation period could be reduced in cases where less than sixty days is required to obtain the full and informed consent of the community.
- Under EO 247, the PIC certificate can be signed either by the local community or by a local government official. It was felt that the signature of a representative of the local community should be required in every case in order to ensure that the PIC of the local community has been obtained.

Many people feel that local PIC is a key provision of EO 247, because it promotes the rights of local and indigenous communities, and the objectives of the CBD. They would argue that, rather than doing away with it, there is a need to consider options for narrowing the scope of EO 247 and for facilitating local PIC. It was suggested that foreign partners could include funds for PIC in their contracts with national organisations.

### **6.3 Institutional capacity**

The IACBGR, which is responsible for screening applications, coordinating implementation and monitoring compliance, needs a strong driver and full political backing from DENR and DOST (the co-chairs) to ensure that it operates effectively. The approval process is sometimes slow because meetings are not called often enough and are generally not well attended, which means there is rarely a quorum. It was also suggested that the IACBGR is too centralised and that committees could be set up at regional level to make the approval process more efficient and facilitate monitoring.

DENR/PAWB, the main agency responsible for EO 247, has less than one person full time working on its implementation. Human and financial resources are required to strengthen capacity for administration and monitoring.

### **6.4. Monitoring systems**

There is a need to establish a monitoring group and develop a monitoring strategy for EO 247, with emphasis on monitoring at the point of collection in the field and at export points.

- *Monitoring at the point of collection*

Mechanisms exist for monitoring natural resource activities in rural areas which could also be used for monitoring the collection of biological resources. Community-based monitoring systems could be developed and built into the local economy. To improve monitoring, there is a need to raise awareness about EO 247 amongst regional/local officials (of PAWB, PAMBs and LGUs), NGOs, POs and local communities.

- *Monitoring at the export points:*

There is a need to examine how best to track samples getting out of the country through export points such as airports and coastal ports. PAWB already has surveillance and monitoring teams in major airports and coastal ports across the country to monitor exports of endangered and exotic species under CITES, which could also monitor the application of EO 247.

Although sanctions cannot be applied under EO 247, other than confiscation of samples, the provisions of related laws such as the forestry law and CITES could be used to impose sanctions and penalties in some cases.

### **6.5 Recommendations for improving the implementation of EO 247**

The following recommendations for improving the implementation of EO 247 have emerged from this study. Many of these were already identified at the SEARICE workshops in 1997-1998. As a first step, the IACBGR should consider the suggestions that emerged from the SEARICE workshops.

1. *Ensuring the IACBGR operates effectively:* There is a need for increased commitment to the implementation of EO 247 from all the agencies involved in order to improve the operation of the IACBGR and avoid delays in the consideration of applications.
2. *Improving administration and monitoring:* Resources are needed to strengthen the administrative capacity of PAWB and improve monitoring systems. In view of funding shortages, monitoring efforts should be strategic, eg. by targeting areas where collection and export are most likely, and building on existing monitoring systems.
3. *Fine-tuning the scope of EO 247:* Some organisations are reluctant to apply EO 247 because they feel that the local PIC procedures are too cumbersome, and that academic research should be exempt. There is a need to consider options for fine-tuning the regulation to narrow its scope, without overlooking the need to control bioprospecting. Greater flexibility should be accompanied by improved monitoring to track the collection and export of samples and distinguish between collections for commercial and non-profit use.
4. *Facilitating local PIC:* The local PIC procedure should be tested and facilitated, and then fine-tuned if necessary. Possible ways to facilitate local PIC include: developing guidelines for conducting PIC with communities of different ethnic groups; establishing focal points responsible for conducting PIC in particular regions/ethnic groups; strengthening feedback mechanisms from local to national levels; and including the costs of local PIC in MTAs.
5. *Raising awareness:* There is a need for a thorough information campaign on EO 247, particularly at regional and local level. Priority should be given to informing LGUs, local DENR/PAWB offices, Protected Areas and indigenous communities in areas of high biodiversity. Information is also needed on the CBD, IPRA and related laws, and materials should be translated into local languages where necessary.
6. *Overcoming funding constraints:* Future information and consultation activities should make maximum use of existing stakeholder fora such as Regional Development Councils and Protected Area Management Boards, and seek assistance from organisations working at regional/local level eg. LGUs, NGOs, POs, universities and the Church.
7. *Enhancing commitment:* Any future discussions or consultations on EO 247 should engage all key stakeholders actively, including regional/local officials to generate a sense of commitment to the policy.
8. *A stakeholder analysis* of the provisions of EO 247 is imperative to ensure that all the key sectors and organisations are targeted in future information campaigns and consultations.



9. *Considering the legal form of EO 247:* As it is not a Republic Act, EO 247 cannot include sanctions or penalties and can be modified at any time by the office of the President without consultation. Some people feel that there is a need to strengthen the legal basis of EO 247 by creating explicit links to related Acts, such as IPRA and TAMA, including some of its provisions in IPRA and TAMA, or converting it into a Republic Act.
10. *Promoting biodiversity conservation:* Future discussions on EO 247 should be broadened so that the issues are considered in the context of biodiversity conservation objectives.

## **7. CONCLUSIONS AND RECOMMENDATIONS ON PARTICIPATION IN ABS POLICY**

The Philippines experience with developing EO 247 demonstrates the value of stakeholder participation in the development of ABS policy to raise awareness and generate a sense of policy ownership amongst those with responsibility for implementation. The costs of consultation need not be high when existing consultation mechanisms are used.

The design of a consultation processes should take into account the fact that different stakeholders may have very different interests which need to be accommodated as far as possible to maximise support for the policy. For example:

- collectors and in-country intermediaries may be opposed to any new administrative procedures, particularly if they bring added costs (eg. local PIC);
- NGOs and indigenous organisations will want to ensure that the activities of collectors/users are effectively controlled and community interests protected.
- Some NGOs/POs might take the position of opposing any bioprospecting activity on indigenous territories.

A careful balance needs to be struck to ensure that bioprospecting is effectively controlled without imposing unreasonable restrictions on scientific research. While it may be necessary to make academic research subject to ABS regulations, a distinction should be made between commercial and academic research, to minimise restrictions on the latter.

Participation alone will not guarantee effective implementation. This will also require sufficient political commitment and institutional capacity to ensure efficient administration and monitoring.

The rest of this section presents general conclusions and recommendations on participation in the development of access policy, drawn from the Philippines' experience with Executive Order 247. These may be useful for other countries, particularly those with a similar socio-economic and political context.

## DESIGNING AND IMPLEMENTING A CONSULTATION PROCESS

1. **Active stakeholder participation in policy drafting, coupled with a broader consultative process, facilitates policy implementation by:**
  - raising awareness of those affected and responsible for administration,
  - helping to identify and address the concerns of different stakeholders'
  - generating a sense of policy ownership,
  - triggering public discussion and motivating collective action, and
  - improving the practical feasibility of a policy.
2. **A multi-stakeholder drafting group provides a useful mechanism to enable key stakeholders to participate actively in policy drafting.** The drafting group should be established at the start of the process and comprise representatives from all stakeholder groups, including government agencies at central, regional and local level, universities, scientific organisations, *ex-situ* conservation facilities (eg. museums), the business sector, NGOs and indigenous and local communities.
3. **A stakeholder analysis of the provisions of an access policy should be conducted at the start of the process** to ensure that all those which are responsible for administration and are most affected are involved in the process.
4. The selection of participants should **give priority to organisations/individuals which are linked to a broader constituency** (eg. networks and associations), and which *legitimately* represent their sector or group.
5. **Representatives on the drafting group should initiate consultations within their sectors** early in the process, making maximum use of the existing resources and strengths of their organisations.
6. **Consultation at regional level is likely to be required** to effectively engage certain stakeholders, such as regional and local officials with responsibility for implementation, and organisations representing indigenous and local communities from different regions and ethnic groups.
7. **To legitimise the process, the first step could be to hold consultative meetings in key regions**, where representatives for the drafting group are selected and the broad steps of the consultation process are agreed.
8. **Consultations should be institutionalised so that participants have an official mandate to speak on behalf of their organisation/sector**, and will ensure feedback to their organisations. A multi-stakeholder process will only succeed if the commitments made by participants are recognised by their organisation or sector.
9. **Ideally, any effort to develop an access policy should have an official nature from the start** so that the government and other actors have an official commitment to the process and its output.

10. **Awareness raising is a pre-requisite of effective participation.** Special efforts may be required to raise awareness of certain actors to enable and encourage them to participate actively in the process (eg. indigenous organisations, business representatives and applied scientific organisations).
11. **Consensus building should be a key objective of a consultation process and should be built into its design** in order maximize the level of support for a policy amongst different stakeholders. Independent organisations which do not have vested interests can provide useful fora for dialogue and consensus building. Techniques such as log-frames can be used to balance stakeholder views without letting emotions run high. However, full consensus is rarely possible.
12. **Access regulations should be developed in the context of biodiversity conservation objectives** and ensure that conservation activities are not impeded.
13. **A decision on the legal form of an access regulation should be taken in consultation with stakeholders.** While a stronger legal instrument may be desirable, a weaker one may be easier to approve. The relationship between access legislation and other policies and laws relevant to biodiversity and indigenous people should also be examined.

## **IDENTIFYING STAKEHOLDERS**

14. **A range of government agencies may have responsibility for administration,** including departments for biodiversity, environment, science, health, indigenous affairs, education and foreign affairs, and regional and local authorities. Customs/export authorities could play a role in monitoring the export of biological material.
15. **Scientific organisations, universities and museums that supply biological resources to foreign partners may be most affected by access legislation.** Only a few national companies may be affected (eg. those involved the development of herbal medicines), since national companies may not have the capacity to develop active ingredients for pharmaceuticals.
16. While it may be inappropriate for foreign organisations to participate in national policy making, **key foreign partners should be informed about policy proposals and consulted on particular issues** to ensure that access is not unreasonably restricted. This might also generate a sense of commitment to ensuring and facilitating the application of procedures by their in-country partners.
17. **As well as senior management, consultations should target operational and technical staff in organisations,** such as those responsible for day to day administration, and those that collect biodiversity in the field.

## OVERCOMING PRACTICAL CONSTRAINTS

18. **The costs of a fairly broad consultation process need not be high** if maximum use is made of existing consultation mechanisms at national and regional level (eg. councils for sustainable development, regional development councils, protected area management boards, networks etc), and when interested organisations sponsor consultative events. However, funding may need to be identified for engaging regional and local stakeholders, and for awareness raising activities.
19. Given the technical nature of regulating access, **it may be more efficient to address the technical aspects before the political**. After the objectives and principles have been discussed with all key stakeholders, a smaller group could develop the first draft, as the basis for further discussion.
20. **If there is a time constraint for drafting a policy** due to the need to take advantage of a favourable political climate for its adoption, it may be best to introduce an interim measure which can later be refined through more extensive consultation.
21. In view of the complexity of regulating access, it may be best **to complement consultation with testing**, for example through pilot cases of implementation, and then refine it on the basis of practical experience.

## CONSULTATION WITH INDIGENOUS AND LOCAL COMMUNITIES

22. Facilitators of consultative meetings may need to **provide extra support to indigenous participants to enable them to participate on an equal footing** as other stakeholders. Native languages should be used wherever possible, and technical jargon avoided. Indigenous representatives should be given sufficient time and resources to consult their constituents before they participate.
23. **Ideally, a representative sample of local and indigenous communities should be directly consulted in the development of ABS policy** to ensure that their concerns are adequately addressed, facilitate the development of appropriate PIC procedures, and raise community awareness. Processes should give priority to communities in areas where collection of biodiversity is most likely (eg. biodiversity hot-spots).
24. **Consultation with local and indigenous communities can be constrained** by lack of funding, local political reality and the difficulty of defining representation given the diversity of peoples and communities. Local organisations, such as the Church, NGOs, POs, or LGUs might be able to assist with information and consultation activities.

25. **Consultations should build the capacity of local communities to make informed decisions** and allow them to discuss the issues amongst themselves before they provide a response. They should also be facilitated by people who are trusted by the community, and conducted in accordance with community decision making processes.
26. **To facilitate indigenous participation in policy making, it may be advisable to establish a government agency** composed of representatives of indigenous people. The indigenous representatives should be elected by indigenous people, connected to the grassroots, and reflect a country's cultural diversity.

**ANNEX – 1****List of People Interviewed**

Ms Bridgette Pawid, CPF  
Ms Victoria Tauli-Corpuz, CPA  
Dr Rowena Boquiren, UP Baguio  
Dr Amelia Guevarra, UP Diliman  
Dr Fabian Dayrit, Ateneo de Manila  
Dr Delfin Ganapin, FPE  
MS. Norma M. Molinyawe, PAWB  
DR. Francis[co] WADE Gomez, Pascual Laboratories  
Dr Perry Ong, Conservation International and UP Diliman  
Dr Jocelyn[e] E. Eusebio, PCARRD  
DR. Marcelino U. Siladan, PCARRD  
Dr. Lourdes Cruz, UP-MSI  
Mr Roger Birosel, Earth Savers  
Mr Alberto T. Barrion, IRRI  
Mr SamUEL Ferrer, Green Forum  
Mr Leo P. Wassmer, Jr., PHAP  
Mr Eufe M. Tantia, PHAP  
Dr Manuel S. Gaspay, AIM  
Dr Reynaldo de la Cruz, Biotech  
Dr Eliseo Banaynal, DOH  
Dr R. Caberoy, NMP

**ANNEX 2 – List of Participants at SEARICE-IIED Workshop, Quezon City,  
13-14 July 1999**

Ms Luahati Lachica-Alino, ICLARM  
Ms Rachel F. Verbo, Castillo Laman Tan Panteleon & San Jose Law Office  
Ms Josie Lyn a. Catindig, IRRI  
Ms Zenaida Pawid, CPF  
Atty Wlpidio V. Peria, SEARICE  
Mr sam Ferrer, Green Forum  
Dr M V A Bravo, ERDB-DENR  
Mr Marcelino Siladan, PCARRD-DOST  
Mr Rene Ledesma, BFAR-CO  
Dr Lourdes Cruz UP-MSI  
Dr Gisela Conception, UP-MSI  
Dr Amelia Guevara, UP Institute of Chemistry  
Ms Pinky Serafica, Environmental Broadcast Circle  
Dr Ramon Paje, DENR  
Ms J. de Leon, PAWB  
Mr Celestino Ulep, PAWB  
Ms Nermalia M Lita, PAWB  
Mr Roger Birosel, Earth Savers  
Ms Luz Baskinas, WWF-Philippines  
Mr Raymundo Rovillos, Tebtebba Foundation  
Ms Julie Charmain Bonifacio, TMU-DOH  
Datu Vic Saway, NCIP/KIN  
Ms Rofe-Amor Obena, Pascual Laboratories  
Ms M. Abigail Lawas, PFEC  
Ms Didith Tayawal, Office of Senator Juan Flavier  
Ms Luz B. Curpoz, PAWB  
Mr Rommel Reyes, DENR-Legislative  
DR. Delfin Ganpin, PFEC  
Dr Perry Ong, Institute of Biological Science, UP, (& Conservation International)