

There will never be an end without a beginning

François Meienberg - Berne Declaration

Hartmut Meyer - German NGO-Forum on Environment and Development

Parties wanting to block progress towards a new regime on ABS did a good job at ABS WG5 in Montreal. The sixth working group session in Geneva must overcome this blockage and start real negotiations towards a regime. If reflections and notes are the only outcome of this meeting, without any formal text for further negotiations, it will be a complete waste of time. The only winners will be the users of *stolen* genetic resources and indigenous knowledge; the only winners will those who are breaking the rules of the CBD, those not asking for PIC and not sharing benefits. Everybody who blocks the process for a binding Regime plays into the hand of the biopirates.

The Co-Chairs did their best to bring the process forward. But without a constructive collaboration of the parties their task is hopeless. The parties willing to negotiate a new Regime on Access and Benefit-Sharing should go on, leaving the naysayers aside. Remember the endless negotiations for the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)? Parties that were a hindrance during the ITPGRFA negotiation have still not ratified the treaty. So why let parties block a process and water down the ABS text, if they will not ratify anyway?

Even if there is willingness on the part of the parties, these ABS negotiations will be hard, complex and time consuming. Already the first topic on the agenda in Geneva "Measures to support compliance with PIC and MAT" needs more intellectual input and creativity than we have seen in Montreal and before. The argument that contract law will be the ideal, if not the only tool to support compliance is weak, as it will not solve the biopiracy cases where there is no contract at all. And even if there is a contract, it could be in contradiction with the rules of the CBD. On the other hand the disclosure of compliance in patent applications could be one important measure to support compliance but it will be crucial that:

(1) it is not only a disclosure of origin (e.g. to name the provider country) but also a disclosure of compliance (to be in line with the CBD and national laws), and the certificate of origin will make this request an easy task; and

(2) the disclosure requirement be fixed in the new regime. Parties asking to handle the ABS issue in WTO or at WIPO are often the same who block related processes in these bodies – the switch of fora will not accelerate the process, but rather stop it totally. And even more important: There is at least one important player in the WTO which is not party to the CBD and therefore never agrees to bring the TRIPS Agreement in line with the CBD.

The first 15 years of the CBD demonstrate that measures to support compliance are crucial to bring the concept of ABS into reality. Especially user countries have failed to implement the ABS requirements of the CBD. When the San People from Southern Africa, supported by Swiss and German NGOs, wrote to the Governments in Switzerland and Germany asking them to oblige the importers and vendors of Hoodia products to comply with the CBD and the Bonn Guidelines, the governments' answers were evasive, and no action was taken. This case shows that even if a community has negotiated ABS agreements and the country of origin has a biodiversity law in place, there will be no real benefit-sharing if the user countries do not do their homework. So we should not forget to think about the lack of political will and understanding in Northern governments and companies when "capacity-building" is on the agenda.

Today's ECO

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- 2. *WHO and Avian Flu***
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**ECO and the CBD Alliance
thank Swedbio, Hivos-
Oxfam Novib Biodiversity
Fund, and CIDA for their
on-going support!**

**Special Feature: Canada, Australia, New Zealand and the EU receive ABS
Report Cards! See page 3 for full assessment and grades (their parents will not be impressed).**

W.H.O work on Avian Flu Virus will continue

Sangeeta Shashikant - Third World Network

As the CBD-ABS negotiations begin in Geneva delegates should also examine the concrete case of the sharing of the benefits of avian influenza virus research that is being fought out at the World Health Organisation.

A four-day WHO meeting on the contentious issue of the sharing of avian influenza viruses and of benefits (such as vaccines) derived from the use of viruses took place on 20-23 November. There was no agreed framework, but government representatives decided to meet again for a resumed session in 2008. Three documents were produced at the November meeting.

The Intergovernmental Meeting (IGM) on *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits* produced an "interim statement" which in effect sets up interim measures before a permanent system is established.

The main interim measures are a "traceability" system to track the movement and use of H5N1 viruses and other viruses with pandemic potential that countries contributed to the WHO system, and an advisory group to be set up by the WHO Director-General Dr. Margaret Chan.

The IGM, which was chaired by Jane Halton of Australia, also produced two important documents that emerged from the meeting's two parallel processes:

- * A draft text on principles on virus sharing, benefit sharing, financing, collective action, sovereign rights, capacity building and technology transfer, intellectual property, and oversight mechanism.

- * A draft on operational components (on Virus Sharing, Benefit Sharing, Financing and Oversight Mechanism). This is a compilation of draft texts proposed by various countries for "operational components" (i. e. the standard terms and conditions which are to govern the operations of countries, WHO collaborating centres and laboratories receiving specimens and viruses from countries, and companies and institutions receiving seed viruses which are used for developing vaccines).

A "dictionary of terms" was also issued, although it had not been properly discussed. All three documents were attached as annexes to the Report of the IGM. The interim statement was incorporated within the Report itself.

These documents are to be the subject of further negotiations at two more meetings. The IGM decided to continue its work in an open-ended working group (with balanced representation from developed and developing countries) to be convened by the Chair, in Geneva, prior to the May 2008 World Health Assembly (WHA). This working group will then report to a resumed session of the IGM that will meet after the 2008 (WHA).

None of the attached documents are agreed documents (except the agenda and the participants' list!); in fact, some of the documents were not even discussed adequately (e. g. the document "Dictionary of Terms").

The document on principles had been originally proposed by Indonesia and the draft was the result of four days of discussions at the meeting's plenary.

The document on "operational components" contains the proposals on the "nuts and bolts" of the reformed system to be established. The draft compiles proposed texts, usually in legal language, of the conditions under which countries are to contribute viruses, the WHO collaborating centres (national laboratories in a few developed countries such as the US, Australia, the UK and Japan) are to conduct their research activities, and the companies are to share the benefits of their eventual products.

Among the conditions proposed are the limitations on applications for patents by the centres and companies, and measures by which the companies are to provide benefits to developing countries (such as contribution to a vaccine stockpile, to a fund, and to technology transfer). The compilation of the "operational components" includes proposed texts by the Africa Group and Thailand.

The final expected outcome of the process is a reform of the WHO's present Global Influenza Surveillance Network (GISN), which has come under strong criticism from developing countries led by Indonesia, for requiring countries to contribute their viruses to WHO collaborating centres, and which provides candidate vaccine strains (containing parts of the viruses) freely to companies, but which does not give benefits in return to the contributing countries, or to developing countries in general, which then have to purchase scarce vaccines at high cost.

No trust in the existing system: In the interim statement that was provisionally agreed to at the end of the November meeting, there is an admittance of "a breakdown of trust" in the existing GISN system and that it does not deliver "fairness, transparency and equity". This issue has taken on an urgency -- admitted by the WHO Director-General who attended the whole meeting, and who said that she had never taken a WHO meeting so seriously -- because of the highly-publicised reluctance of Indonesia to continue to share its avian flu viruses under the GISN system because of what it claims are the abuses in the system and the lack of benefits accruing to developing countries like itself.

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Report Card: Who supports Indigenous Peoples' Rights in Access and Benefit Sharing (PART 1)

Le`a Malia Kanehe - Indigenous Peoples Council on Biocolonialism

Going into the Sixth Meeting of the Working Group on Access and Benefit Sharing, Indigenous peoples are gauging where the Parties are at in their willingness to support Indigenous peoples' rights in the negotiations. With the absolute failure of the Working Group on Article 8(j) to fulfil its COP8 mandate to provide views to the Working Group on ABS on possible traditional knowledge elements for discussion at this meeting, there appears to be no better time to grade their performance. Here the focus is on the industrialized states of the North. A second part, in a subsequent ECO, will evaluate the South's progress.

Not surprisingly, each of the three Parties (Canada, Australia and New Zealand) who voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, also sought to undermine our rights in the context of access and benefit sharing at the Fifth Meeting of the Working Group and the Fifth Meeting of the Working Group in October 2007. All three Parties took turns denouncing the UN Declaration and its status as embodying customary international law. Furthermore, all three made very worrisome proposals that traditional knowledge protections should be non-binding elements of an international regime.

Canada – In reference to their aboriginal land title, a wise Nuu-chah-nulth elder from Vancouver Island, British Columbia, Canada once said in an interview that “the white man speaks with forked tongue.” This is also applicable to the Canadian position in ABS on Indigenous rights. On one fork, the delegation plays up how committed the government is to the protection of Indigenous peoples' rights. But on the other fork, the truth is revealed. In the WG 8(j)-5, the Canadian delegation proposed that “Indigenous Guidelines” on access and benefit sharing should be created to guide national policy and legislation, indicating very clearly that they see any Indigenous rights issues, whether to genetic resources or Indigenous knowledge, as non-binding elements of an international regime. For this Canada earns a resounding F.

Australia - There was no doubting Australia's position against Indigenous peoples' rights in Montreal. Both on the floor and in contact groups, the Australian delegation resoundingly opposed any suggestion that Indigenous peoples have rights to control access to both our territories (including genetic resources) and our own knowledge. For example, the Australians blocked any discussion or outcomes to occur on the agenda item on *sui generis* systems for the protection of TK in the WG8(j)-5.

However, with the very recent change in government in Australia and their public promise to do an about-face and sign the UN Declaration, it will be very interesting to see and hear in their interventions to what extent their delegation will change their stance in this Working Group. For this, Australia earns an incomplete (the jury is still out).

New Zealand – With a claim in the Treaty of Waitangi Tribunal still pending over the sovereign rights of the Maori iwi (tribes) to the flora and fauna within their traditional territories, lands and waters, the New Zealand government has conveniently failed to commit to any international obligations regarding ABS. Clearly, if this government works in cooperation with other industrialized states to establish the lowest possible standard in an international regime on ABS as it pertains to the recognition of Indigenous peoples' rights, with the hopes that their domestic obligations to uphold the inherent and treaty rights of Maori will be less. Of course, the government may still attempt to illegally legislate to extinguish Maori rights in genetic resources which was perpetrated a couple of years ago in relation to their rights to the Foreshore & Seabed. For this, New Zealand earns a disastrous D.

European Union – Interestingly, the EU member states have been great supporters of the UN Declaration on the Rights of Indigenous peoples, for which they should be applauded. However, the EU has unfortunately not advocated for the implementation of the relevant provisions of the Declaration (particularly Article 26 and Article 31) within the ABS discussions as binding. Like Canada, the EU proposals centre on non-binding elements related to the protection of traditional knowledge, seeming to place much faith in ethical codes of conduct. For this, the EU earns a lukewarm C.

ABS REPORT CARD	
PARTY	GRADE
Canada	F
Australia	Incomplete
New Zealand	D
EU	C

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ECO NOTES

Report card, continued from page 3

As active observers in these negotiations, the Indigenous Peoples Council on Biocolonialism believes we can evaluate the commitment of states to recognize and protect the rights of Indigenous peoples in an international regime on ABS against the following indicators:

POSITIVE INDICATORS	NEGATIVE INDICATORS
Parties support the right of Indigenous peoples, based on the right of self-determination and free prior informed consent, to control access to their traditional territories and genetic resources originating therein	Parties use the language "subject to national legislation" in relation to Indigenous peoples' rights
Parties support the right of Indigenous peoples, based on the right of self-determination and free prior informed consent, to control the utilization of their own Indigenous knowledge	Parties side-line all traditional knowledge discussion to the Working Group on Article 8(j)
Parties recognize a different status for Indigenous knowledge (and related rights) as compared to general traditional knowledge	Parties propose to deal with <i>sui generis</i> protection of TK after the international regime is established
Indigenous peoples are allowed to actively participate (including through interventions) in all sessions of the Working Group (plenary, contact groups, friends of the chair)	Parties suggest that <i>sui generis</i> protection issues should be dealt with in the WIPO Intergovernmental Committee
Parties recommend an intercessional process between COP9 & 10 that creates a venue for Indigenous input on potential key components of an international regime relevant to Indigenous peoples' genetic resources and associated Indigenous knowledge	Parties limit rights of Indigenous peoples to benefit sharing arising from the utilization of traditional knowledge

!STAY TUNED FOR PART 2 of the ABS Report Card on Indigenous Rights!

Avian flu continued from p. 2

At the start of the meeting, Indonesian Health Minister Dr. Siti Fadilah Supari charged that her country had experienced unfair and non-transparent treatment by the system, which had failed to respond to the needs of humanity. She called for the replacement of the GISN with a fairer mechanism.

The IGM was mandated by the World Health Assembly in May 2007, following a lengthy discussion during which developing countries complained that they were not deriving benefits such as access to affordable vaccines although they had freely shared their influenza viruses with WHO collaborating centres under the GISN scheme.

Although the IGM was unable to complete its work in November, many developing country delegations as well as health-related NGOs who were present were satisfied with the results, as the discussion and the documents were seen to have laid the foundation for a fundamental reform of the flawed GISN system.

Interim measures: The interim statement contains two immediate measures for delivering transparency. The first is

a traceability mechanism that is to be established to track all shared H5N1 and other potentially pandemic human viruses and their parts. A report on the progress of the implementation of the system will be provided to the May 2008 WHA.

The statement adds that pending the functioning of such a mechanism, an interim system providing full disclosure of information on transfer on movement of virus shall be made operational immediately. Secondly, an advisory group to the WHO Director-General will be set up to monitor, provide guidance to strengthen the functioning of the system and undertake necessary assessment of the trust based system needed to protect public health. The group is to be appointed by the WHO DG in consultation with Member States based on equitable representation of the WHO regions and of affected countries.

At the closing, the WHO DG agreed that the GISN system needed fixing, adding that it has to be fair, equitable and transparent.

ECO has been published by the NGO (non-governmental organisation) community at most Conferences of Parties to International Environmental Conventions. It is currently being published at the Sixth Open Ended Working Group on Access and Benefit Sharing to the Convention on Biological Diversity in Geneva, Switzerland coordinated by the CBD Alliance. The opinions, commentaries, and articles printed in ECO are the sole opinion of the individual authors or organisations, unless otherwise expressed.

SUBMISSIONS: Welcome from all civil society groups. Email to jdempsey@interchange.ubc.ca and lkanehe@ipcb.org