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The ABS Protocol – Key Issues from a CSO Perspective

The opening session of the 9th Open-ended Working Group on Access and Benefit Sharing (ABSWG-9) clearly showed that there is an almost universal political will to negotiate a *legally binding* ABS Protocol under the Convention on Biological Diversity (CBD).

The African Group, the LMMC and the EU announced ministerial decisions that oblige their delegations to work towards this goal.

But one CBD Party explicitly prefers to be regressive, insisting on leaving all options on the nature of the regime open. CSOs hope that this Party will not obstruct the completion of draft protocol text.

In order to be an effective ABS Protocol, seven key issues must be addressed:

- 1) The ABS Protocol in the context of the UN human rights agreements has to recognise the rights of indigenous peoples and local communities, and stress linkage between the UN Declaration on the Rights of Indigenous Peoples and the Protocol. This could be in the preamble.
- 2) The scope of the ABS regime must be broad enough to include all cases that are generally regarded as typical utilisation of genetic resources (GR) and associated traditional knowledge (TK). The scope must also provide sufficient legal clarity to ensure that there is a common understanding of typical utilisation of GR. Article 3 of the draft text on Scope can take the broadest approach possible and leave it to national implementation to specify the range of typical utilisation. The ABS Protocol can provide an indicative list of typical uses.

Preparatory work in this regard has been undertaken at the technical experts group meeting in December 2008 in

Windhoek and served as the basis for the submission on definitions by CSOs to ABSWG-9. A Protocol that does not give any guidance to Parties on how to set the scope of national ABS legislation bears the risk of excluding certain activities of major sectors from ABS requirements and thus justifying on-going biopiracy.

- 3) The ABS Protocol must deal with associated TK as a crosscutting issue. Access to such associated TK and benefit sharing has to be dealt with at the same level as that related to GR. Thus associated TK has to be included *inter alia* in Art.1 (Objective), Art.12 (Compliance) and Art.13 (Tracking and Monitoring).
- 4) The user measures in the ABS Protocol must ensure that only legally acquired GR and associated TK can be used and marketed. This would, amongst others, include the establishment of a system of checkpoints and disclosure requirements that effectively captures all stages of research, development and commercialisation of GR, derivatives and products developed out of them.

To complete the suggested list of checkpoints, a requirement to disclose evidence of prior informed consent and mutually agreed terms in offices and institutions dealing with all types of intellectual property rights is necessary. To capture the increasingly important activities of private research and public-private partnerships that aim to utilise genetic resources, institutions that - besides public funding - also receive incentives and subsidies should be included in this list.

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5) The benefit sharing requirement of the ABS Protocol must include all benefits arising from the utilisation of genetic resources, derivatives and products utilising them. The scope for benefit sharing has to be broad enough to capture the final steps in the utilisation of GR and associated TK that are likely to generate the major share of benefits. This would necessarily include the use and marketing of derivatives and certain products based on GR and associated TK.

6) The ABS Protocol must set up clear and binding rules for a compliance regime. This would, amongst others, include the establishment of a tracking and monitoring system that does not rely on voluntary, uncoordinated action by individual providers and users but rather be developed under international and national ABS laws.

Furthermore, a comprehensive certificate of compliance must be developed in the intersessional period before the entry into force of the Protocol for adoption at the first meeting of the Parties to the ABS Protocol. This certificate would also be used as a source of information on existing ABS contracts in an ABS clearing house, providing information on the provider and user, on the covered GR and associated TK and their intended use. Without such a tracking and monitoring system, and publicly available information on existing ABS contracts, it would be almost impossible to follow the actual utilisation of a GR and the TK associated with it.

7) The ABS Protocol must contain provisions on non-Parties and users and providers in the territory of non-Parties.

This article reflects views from Civil Society Organizations present at ASBWG-9 in Cali, presented by the Church Development Service

Agricultural Biodiversity Sustained

Patrick Mulvany, Practical Action

“Keep agricultural biodiversity alive, protected and developing on-farm!”

This was the view coming out of an informal workshop a couple of weeks ago. The workshop, hosted by Indonesia and Norway, discussed the implementation of the non-monetary Benefit Sharing mechanisms of the International Seed Treaty (IT PGRFA) – Article 13. The Treaty is quite clear (Art:13.3) that it is the farmers, especially farmers at smaller scales that “conserve and sustainably utilize plant genetic resources for food and agriculture”, who should be primary beneficiaries.

For those who are not familiar with the Treaty <www.planttreaty.org>, in its several provisions there is a Multilateral System of access and benefit sharing (MLS). It facilitates access to plant genetic resources for food and agriculture – especially the 50 genera of crops and 35 fodder species listed in Annex 1. It also declares that (non-monetary) benefits should result especially through activities relating to information exchange, technology transfer and capacity building. All of this is set in the context of other Treaty provisions e.g. conservation; sustainable use; Farmers’ Rights; intellectual property rights; promotion of the Leipzig GPA; norms for *ex situ* collections; finance etc.

In detail, some of the ideas discussed in the workshop about benefit sharing through information exchange, technology transfer and capacity building included:

a) Information:

- Provision of more ‘popular’ information on the Treaty, its purposes, mechanisms and implementation for different audiences
- Easier access to agronomic data associated with the materials covered by the Treaty – it should be possible through the Treaty’s information system to identify seeds and traits that might fit, or be useful to try out, within local (and changing) agroecosystems with subsequent facilitated access for small-scale food providers without threats of controls over use of these resources from intellectual property systems, seed laws and use restriction technologies.

b) Technology Transfer:

- Promote appropriate transfer of technology (including knowledge and skills), especially for on-farm conservation and development of agricultural biodiversity, between actors within and between different communities, countries and regions– South-South, South-North and North-South.
- Protect communities from inappropriate and unwanted technologies promoted by more powerful actors. The forms of protection need to respect the Precautionary Principle, using mechanisms of prior informed consent, prior impact assessments etc.

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International Indigenous Forum on Biodiversity - Opening Statement

22 March 2010

I welcome you on behalf of the Indigenous Peoples of Colombia.

We indigenous peoples of the world come here united.

Our thought is like the stream of a great river that is fed by its tributaries that are the thoughts of the diverse indigenous peoples of the world.

We have come here to negotiate an international regime that deals with our traditional knowledge and associated genetic resources.

Traditional knowledge is very important to us.

Due to its nature, is intimately and closely linked to our ancestral territories, to mother earth, and to the identity of our peoples.

Traditional Knowledge is dynamically created and recreated based on cultural principles of balance, harmony and connectivity with all forms of life.

Traditional Knowledge is tangible and intangible,

holistic and integral, and integrating.

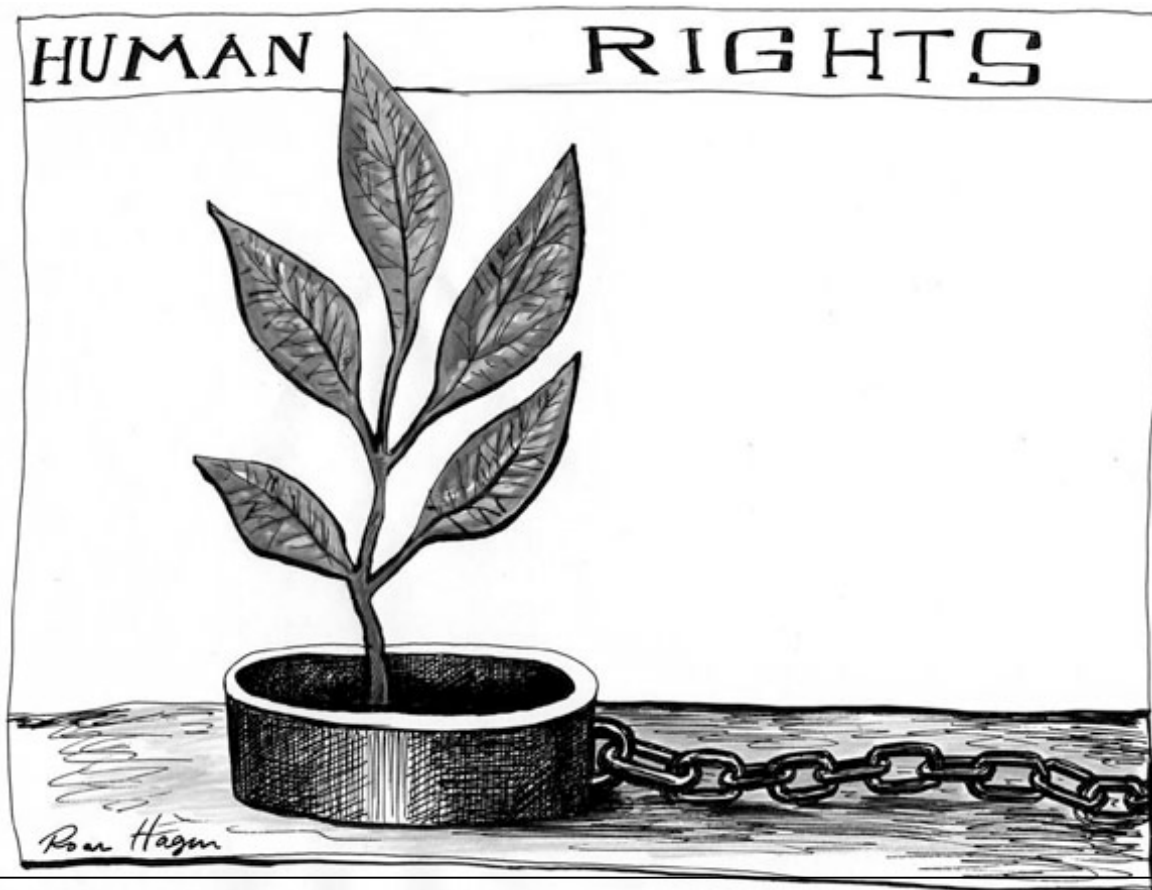
Traditional Knowledge secures practices which guarantee our physical and spiritual continuity under the principles of reciprocity, complementarity, and an ethic of solidarity, to reach the good way of life.

We come to this meeting from Montreal with positive feelings towards a legally-binding international regime on ABS, knowing that our concerns had been taken into account in the text of the Montreal annex, and knowing that many Parties are supporting our rights and interests.

This is in harmony with the international developments in recognition of our identity as peoples and our rights.

We are deeply disappointed however that the draft protocol does not include our rights and interests that had been supported in the Montreal annex.

If we are to go forward in achieving an agreed protocol for the international regime then certain key issues must be included now in the draft protocol.



Necessary components of the Protocol, IIFB views, continued from page 3

These are minimum and necessary requirements:

- 1. The protocol shall state in the preamble that the rights of indigenous peoples and local communities are respected.*
- 2. Where traditional knowledge is being accessed, the prior informed consent of the indigenous peoples and local communities must be obtained, and this shall not be subject to national legislation.*
- 3. The protocol shall recognise the rights of indigenous peoples and local communities to genetic resources.*
- 4. The importance and relevance of traditional knowledge shall be fully integrated throughout the protocol, especially in the Compliance section.*
- 5. The protocol shall recognise the existence and role of customary laws of indigenous peoples and local communities.*

We want to make it clear that each of these requirements is already included in the Montreal annex.

Our delegations of indigenous peoples and local communities have made much effort during negotiations in this working group, and the Working Group on Article 8(j), to explain that our fundamental

rights and interests in these particular areas are vitally important to our well-being.

If any of these requirements are overlooked in the protocol then we cannot accept the continued negotiations will result in a fair and equitable regime for the access to genetic resources and benefit-sharing.

We do not agree with the view that the CBD does not have human rights implications.

Such arguments have no basis in law.

The Convention on Biological Diversity makes it clear that all rights of States must be exercised “in accordance with the Charter of the United Nations and the principles of international law”.

The Charter of the United Nations requires all States to “achieve international cooperation by “promoting and encouraging respect for human rights ... for all without distinction”.

There is no exception in the UN Charter that indicates that environmental instruments are exempt from respecting human rights.

We are prepared to continue negotiations if good faith can be demonstrated.

It is the International Year of Biodiversity and we call upon all Parties to now show their commitment to achieving a fair and equitable international regime for Access to Genetic Resources and Benefit-Sharing.

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c) Capacity Building

- Increase skills of ‘facilitators’ – those who interact with local smallholder farmers and other food providers – to help them work more effectively through listening and learning from the farmers themselves more than telling and instructing them what to do.
- Reframe research priorities and protocols in order to help scientists and other researchers to work better

with smallholder communities, building on their existing knowledge and skills and their local varieties of seeds.

The CBD, when negotiating the International Regime on ABS, should deal with these matters in a coherent manner with the FAO and its instruments. It is these resources, managed by small-scale food providers that are so essential to secure future food and sustain the biosphere.

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