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In this edition

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SUBMISSIONS: Welcome from all civil society groups. Email to reachmiriam@earthlink.net and jdempsey@interchange.ubc.ca

"Pathogenic" Organisms should not be excluded

Chee Yoke Ling (Third World Network), François Meienberg (Berne Declaration) and Christine von Weizsäcker (ECOROPA)

Biologists and ecologists know about the crucial role of microorganisms, including pathogenic organisms for the maintenance and balance of biodiversity and ecosystems. Medicinal and health experts know about their role in both causing diseases and as the basis for drugs. Since the 7th Working Group on ABS (ABSWG-7), the EU, under the pressure of their pharmaceutical industry, has tried to carve "pathogens" out of the ABS Protocol. By now, all CBD Parties are aware that medically relevant microorganisms, including pathogenic organisms, will play a central role in the ABS negotiations.

Research institutions and industry have been collecting and continue to collect microorganisms from all over the world for their microbial collections. Access to these collections is blocked for some countries on political grounds, and also made difficult and expensive due to patents and commercial structures. Vaccines and diagnostic kits are often costly even for the middle income and certainly unaffordable for the poor.

In 2008, at ABSWG-7, the pharmaceutical industry and the supportive governments all argued that inclusion of pathogens into the ABS Protocol – or even in the CBD itself - would contradict the CBD's conservation objective. As stated above, pathogenic organisms are an inherent part of biodiversity and are essential for the balance of ecosystems. There is no biodiversity without pathogenic organisms.

What is central is the UTILIZATION of an organism that triggers benefit sharing. Selected flu viruses, from which vaccines are derived, are a clear example. Access to pathogenic organisms can be crucial for public health when there is the threat of a pandemic. An *a priori* exclusion of these organisms, however, seems to be based on an unwillingness to share benefits, the third CBD objective.

The current Draft ABS Protocol reflects the problem and suggests a way out of the deadlock creating specific language in Art. 6(b): "In the development and implementation of their national legislation on access and benefit-sharing, Parties shall pay due regard to: (b) Emergency situations including serious threats to public health, food security or biological diversity."

The overwhelming majority of participants at the Co-Chairs' Informal Inter-Regional Consultations (CIIC), including representatives from the EU, welcomed this proposal of the Co-Chairs, who suggested including pathogens in the ABS Protocol with the task to establish preferential treatment in emergency situations. Only the representatives of industry still called for the exclusion of pathogens from the scope of the ABS Protocol.

The common understanding amongst the Parties at CIIC is now threatened since the EU with the arrival of all their delegates changed its position and brought back "pathogens" into the draft text as a specific item under draft article Art.6, stressing that the debate at ABSWG-7 was "unpleasant" but had to be continued at ABSWG-9.

We urge the EU to accept the compromise in the Co-Chairs draft text.

Read more on pathogens @ WHO, see page 3

Eyes on Nagoya – Indigenous Peoples' Call for Rights

Les Malezer, International Indigenous Forum on Biodiversity
(representing Foundation for Aboriginal and Islander Research Action)

Soon Nagoya will be centre stage as governments, peoples and organisations converge to save the planet from human destruction.

As we travel through this International Year on Biodiversity we are constantly reminded that the world's biodiversity is being lost at an unacceptable rate. For Indigenous Peoples, we will witness yet another modern milestone where our identity and relationship with Mother Earth will be tested. Our struggle to emerge from 500 hundred years of colonial domination will face its next big test.

The Tenth 'Conference of Parties' to the Convention on Biological Diversity (CBD) will conclude the first relevant International Treaty – the Protocol being negotiated here in Cali - since the United Nations adopted the Declaration on the Rights of Indigenous Peoples.

The prospects in the Protocol for due protection of our rights are not good. As the official working group nears the end of its last meeting before Nagoya, Indigenous Peoples' delegations are acutely concerned that the protocol is avoiding the issue of human rights, and the impact upon the world's Indigenous Peoples.

Indigenous delegations to the working group remind the delegations that the Protocol is deficient because it does not adequately address their human rights.

The response to Indigenous Peoples' concerns has almost become automatic. 'We are the States. We have sovereign rights over genetic resources.'

Such an entrenched position relies upon text of the Convention on Biological Diversity which was negotiated almost twenty years ago, but is uninformed by more recent and significant developments in international law. In particular, in 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples.

Although it is not a treaty, the Declaration addresses rights held by Indigenous Peoples; rights recognised in international law but yet rights that are almost universally denied to the Indigenous Peoples of the world.

The Declaration, adopted by the UN General Assembly, outlines international concerns for the rights of Indigenous Peoples. These concerns include awareness of the need to restore lands, territories and resources to Indigenous Peoples, the legitimate political right of Indigenous Peoples to maintain our own form of governance and autonomy as self-determination, and the requirement that independent and fair adjudication of disputes between Indigenous Peoples and the State be established.

So far, the proposed independent protocol on access and benefit-sharing to genetic resources ignores Indigenous Peoples rights over the resources within their territories.

While the protocol is able to recognise Indigenous Peoples ownership of their traditional knowledge it does not accept that Indigenous Peoples have rights relating to material biodiversity, including genetic resources.

Many States' delegations may have little or no awareness or understanding of human rights law and cannot fully appreciate that the interests of people, human beings, are strongly bound to biodiversity.

The failure to understand the significance and complexity of the relationship between Indigenous Peoples and their lands, territories and resources may lead to an inadequate Protocol establishing access to the genetic resources within their territories.

Those drafting the international Protocol must address this problem in order to avoid problems in the operation of the international regime. It is certain that Indigenous Peoples, as they have done for centuries, will continue to resist incursions into their territories and livelihoods.

While Indigenous Peoples have been losers in past conflicts over lands, territories and resources, since 2007 we now have international law on their side.

While State sovereignty, including 'territorial integrity' is the foundation of modern global security and stability, the United Nations has established a form of global cooperation that challenges, and even overrides territorial integrity in certain instances.

The United Nations was founded, for good reasons, on the principle that the world consists of peoples, and that States are the political institutions and representatives of the peoples.

Sixty years after these foundations were laid the United Nations finally affirmed that Indigenous Peoples are also peoples with the right of self-determination.

The United Nations is aware that Indigenous Peoples have been marginalised and overlooked by States in their territories. The UN also accepts that Indigenous Peoples may not be fully or fairly represented by States because of constitutional and historical contexts, leaving Indigenous Peoples without sufficient capacity to develop socially, economically or culturally.

Continued next page

Indigenous Rights, continued from page 2

Many UN resolutions call upon States to take greater interest in the situation of Indigenous Peoples and to support the development of Indigenous Peoples in their territories.

The international regime relating to access to genetic resources must be an instrument complying with the UN standards.

The challenge remains for State representatives to go beyond their domestic or national policies and to adopt an international approach to the fair and equitable use of the world's biological diversity.

Like it or not, they must give due attention to human rights interests as they relate to the biodiversity, and Indigenous Peoples feature prominently in this regard.

The days, weeks and months ahead are a test for the Declaration on the Rights of Indigenous Peoples, as much as a test on the Convention on Biological Diversity.

ABS at the WHO still Elusive

Chee Yoke Ling (Third World Network), François Meienberg (Berne Declaration) and Christine von Weizsäcker (ECOROPA)

We often hear that the World Health Organization (WHO) is working on ABS related to influenza viruses and vaccines, and that is an example of a potential "specialized" international arrangement that justifies removing "certain uses of pathogens" from the scope of the CBD's ABS Protocol.

The reality is that these WHO negotiations came to a halt last year when developed countries refused to renew the mandate of the Intergovernmental Committee on the framework for "Pandemic Influenza Preparedness: sharing of influenza viruses and access to vaccines and other benefits". It was then agreed that the Director General (DG) would initiate a transparent process to finalize the remaining elements of the framework, including the Standard Material Transfer Agreement (SMTA).

The WHO work was triggered by Indonesia when it discovered in 2006 that its unconditional contribution of avian flu viruses to the WHO network of laboratories (almost all in developed countries such as the US, UK and Japan) for public health purposes was being abused. There was shock that some of the laboratories were patenting gene sequences from viruses originating in Indonesia and other countries (such as China, Malaysia, Thailand, Vietnam and Panama), while the vaccine companies that accessed the virus strains were also sometimes patenting genetic material and definitely patenting the diagnostic kits and vaccines developed from the viruses. There was also a considerable loss of confidence in the WHO as a "trustee" of the virus specimens and the interests of virus providing countries. According to the WHO Director-General's report, "To date, well over 23,000 viruses and other specimens have been submitted to the WHO Network laboratories for analysis".

The issue of access and benefit sharing was thus pushed to the forefront at the WHO. Indonesia and some other developing countries asserted their sovereign rights over biological resources including microorganisms and invoked the CBD's third objective on fair and equitable benefit sharing.

However, agreement in the WHO remains elusive.

Developed countries wish to see voluntary benefit sharing with no links to virus sharing and to allow entities receiving biological materials from the WHO to make patent claims over the materials and parts thereof, as well as over the products developed using the biological materials. They are resistant to the idea of an SMTA being the contractual document for the sharing of biological materials, although developed countries and their laboratories commonly use it for the purpose of sharing viruses.

On the other hand, developing countries stress the need for entities receiving biological materials from the WHO to commit to benefit sharing through SMTA, and for entities receiving biological materials to *not claim* IPRs over the biological materials, adding an exception, i.e. industry may claim IPRs over the products developed using the biological materials but such IPRs must be licensed to developing-country entities on a royalty-free basis.

A group of like-minded countries including Bolivia, Brazil, Cuba, Egypt, India, Indonesia, Iran, Nigeria and Sri Lanka has issued a joint statement stressing on a "sustainable solution", stating that "while ad hoc solutions, including donations were useful, it does not provide a sustainable systematic solution". On IPRs, the group reiterated that IPRs must be balanced in the context of rights and obligations including those pertaining to the public at large.

Developing countries' dissatisfaction with the DG's consultation process led to an agreement in January to hold an open-ended working group for negotiations between Member states that will take place on 10-12 May.

Fuzzy Edges between Taxonomy and Genetic Analysis and Non-commercial and Commercial Biodiversity-related Research

Christine von Weizsäcker (ECOROPA) and Hartmut Meyer (advisor to Church Development Service (EED))

The current draft ABS Protocol in its Article 6(a) suggests that biodiversity-related research should be treated preferentially in the context of ABS obligations:

> *6. In the development and implementation of their national legislation on access and benefit-sharing, Parties shall pay due regard to: (a) Avoiding or minimizing impediments to biodiversity-related research, important for the conservation of biological diversity and the sustainable use of its components*

This special treatment is based on the assumption, that public research, especially in the field of taxonomy, with no direct intention of commercializing, can be clearly separated from public and corporate research aiming at commercialization.

The language of Art.6(a) of the present draft Protocol has been included on the basis of this assumption. But can this assumption be maintained in the present realities of biodiversity-related research? Can the calls for special treatment for all kind of biodiversity-related research, including corporate activities, be maintained? Do the assumptions pass the reality check for example with regard to the most prominent taxonomic initiative, the Consortium for the Barcoding of Life (CBOL)? What does a closer look tell us?

CBOL's mission is:

> *- The creation of a public database of barcode reference sequences linked to voucher specimens and associated biological information; [...]*
>
> *- The involvement of researchers and users of barcode data from all regions of the world, especially those with high biodiversity;*
>
> *- The development of intellectual activity involving DNA barcode data in the wider academic community among diverse users throughout society; [...]*
>
> *These records are stored in the three global databases of gene sequences: GenBank, EMBL, and DDBJ, where they are available without charge. (Note 1)*

In the context of an ABS Protocol it raises concerns that the home base of the largest biodiversity-related taxonomy initiative lies in the big CBD *Non-Party*. CBOL stores the voucher specimens in the territory of the Non-Party, publishes associated traditional knowledge with no assured PIC from the legitimate holders of such knowledge in indigenous peoples, local communities and countries of origin and involves members from the private sector utilizing biodiversity samples, especially their derivatives as basis for their R&D. This is what corporate partners make public:

> ***bioNov**o: Tapping into a deep knowledge of biological mechanisms and traditional Chinese medicine as our discovery engine, we isolate, purify and test potent active ingredients from herbs and other botanicals, then formulate them into novel drug products which can be packaged as powders or pills for easy use by patients. We have identified the active chemical components underpinning the mechanism of action for all of our drug candidates, and in some cases, we have developed synthetic methods of production. (note2)*
>
> *FAQ 6. Can you please describe Bionovo's patent estate? Bionovo has full ownership of all of its drugs and drug candidates. Bionovo is securing its drugs and related diagnostic methods with all aspects of potential protection in order to secure the company's future potential earnings. (note 3)*
>
> ***life technologies™:** "Life Technologies is a global biotechnology tools company dedicated to improving the human condition. [...] The company had sales of more than $3.3 billion, employs approximately 9,000 people, has a presence in 160 countries, and possesses a rapidly growing intellectual property estate of approximately 3,900 patents and exclusive licenses. Life Technologies was created by the combination of Invitrogen Corporation and Applied Biosystems Inc. (note 4)*

The difficulties of differentiating between non-commercial and commercial applications become even more pronounced when analysing the activities of the Canadian CBOL partners, the Canadian Barcode of Life Network and the Canadian Center for DNA Barcoding. The Biodiversity Institute of Ontario (BIO) plays a central role in implementing the Canadian initiatives:

> *The Biodiversity Institute of Ontario is a large-scale project supported by the Canada Foundation for Innovation (CFI), the Ontario Innovation Trust (OIT), Genome Canada (GC), and the Ontario Genomics Institute (OGI). BIO research programs are supported by the Natural Sciences and Engineering Research Council of Canada (NSERC), the Gordon and Betty Moore Foundation, and other sources (note 5)*

The activities of BIO and other members of the Canadian initiatives, all of them public research institutions, focus on genomic analysis of biodiversity specimens. At least two donors to these activities give reason to believe that they do not only support basic taxonomy and genomic analysis but also link it to commercialisation as their vision and mission statements show:

> *The vision of Genome Canada is to position Canada as a world leader in genomics and proteomics research. Objectives: [...] the support of large-scale projects of strategic importance to Canada, which are beyond current capacities by bringing together industry, government, universities, research hospitals and the public; [...] (note 6)*

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The mission of the Ontario Genomics Institute (OGI) is to use world-class research to create strategic genomics resources and accelerate Ontario's development of a globally-competitive life sciences sector. (note 7)

OGI's Business Development team catalyzes access to and the impact of the outcomes of genomics research, working with scientists and their host institutions to find paths to the marketplace for their discoveries and the products to which they lead.
Business Development works with the province's life-sciences sector to bridge the gap between basic research and commercialization through activities and events. (note 8)

After reading the publicly stated objectives of the Canadian R&D funding organisations we should stop naively assuming that the specimens, associated biological information and the research results of the supported barcoding initiatives are going to end up in herbaria and fridges of Canadian public research institutions and in basic scientific publications.

Furthermore, there are no obvious indications from the web pages of the CBOL and the Canadian barcoding initiatives that they would advocate for or follow the 18 year-old obligations on benefit sharing of the CBD, not even the voluntary Bonn Guidelines. Unless, of course, you assume that commercialization and investor-returns on their investment trickle down to countries of origin and automatically fairly and equitably share the benefits with Indigenous peoples and local communities and miraculously conserve biodiversity and provide sustainable development. Past experiences show that such a miraculous mechanism hoped for by some economic schools did not materialize.

The analysis of the CBOL example shows that a blank "avoiding or minimizing impediments" to all kind of biodiversity-related research as suggested would legitimize the ever-widening loophole, releasing some from the objectives and provisions of the ABS Protocol. Public-private R&D networks obscuring the traceability of genetic resources and associated traditional knowledge are certainly no contribution to the often quoted and much desired legal certainty in the context of the ABS Protocol.

Notes
1 - http://www.bolinfonet.org/conferences/assets/files/BOLI_Brochure_Final.pdf
2 - http://bionovo.com/about/company
3 - http://bionovo.com/investors/faq
4 - http://www.lifetechnologies.com/about-life-technologies/company-fact-sheet.html
5 - http://www.biodiversity.uoguelph.ca/about.html
6 - http://www.genomecanada.ca/en/about/vision.aspx
7 - http://www.ontariogenomics.ca/about-ogi
8 - http://www.ontariogenomics.ca/business-development/business-development

No compliance without checkpoints

François Meienberg, Berne Declaration

The reason we have been sacrificing our time in nine ABS Working Groups? Because Parties have not implemented Article 15.7 of the Convention! Article 15.7 of the CBD says that each Party shall take measures with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources. This has not taken place. Benefits have not been shared.

If the new protocol is intended to make a difference to the status quo of biopiracy the compliance paragraph must add some new obligatory measures. We should not repeat something that has not worked. The difference will be tight checkpoints, especially at places where the benefits are generated – IPR Offices and market approval authorities. It is hard to imagine a Protocol obliging Parties to ensure compliance and yet allowing the same Parties to grant patents based on genetic resources accessed illegally, or in non-compliance. In such cases the Ministry of Environment would have to bring the office responsible for Intellectual Property to court for supporting biopirates and undermining national obligations. No negotiator has overtly stated that they want to *allow* patents based on biopiracy, but Canada, New Zealand and Switzerland are trying to shift the discussion to WIPO.

This makes little sense for several different reasons, many of which have been mentioned in the Contact Group discussions. But most importantly, it makes no sense in terms of the negotiation process. Checkpoints and compliance measures must be in balance with requirements for access and benefit sharing. This balance should be negotiated just now, while we are working on the draft protocol.

It does not make sense to exclude the main checkpoint from the Protocol with the hope that it will be installed by negotiations in another forum. Who knows if this ever will take place? (Especially knowing the position of a non-party.) If compliance through efficient checkpoints cannot be guaranteed now, it will be hard for Parties to grant or even facilitate access. Therefore, a comprehensive and balanced protocol will have to include mandatory disclosure of compliance at main checkpoints.

ABS +

Harry Jonas, Natural Justice: Lawyers for Communities and the Environment

There is an emerging, yet contested, customary rule of international law that environmental laws are required to be implemented in accordance with human rights standards towards the joint objectives of social and environmental justice. The debate is being conducted in no starker terms than in the context of the UN Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD). In those negotiations, Indigenous Peoples and local communities ("communities") are voicing their concerns that REDD may be implemented in ways incommensurate with their rights to self-determine their futures and to the customary uses of their natural resources.

NGOs are also raising serious questions regarding perceived flaws in REDD's environmental integrity, such as the debate about the definition of what constitutes a "forest" and what practices are included in the term "sustainable management of forests." The result is that communities and NGOs are either shunning the proposed mechanism or calling for safeguards to ensure that REDD projects also contribute to environmental and social justice. This broader conception of REDD is referred to as REDD+.

International law stands or falls at the local level. Indeed, global biodiversity targets are reached only by concerted local actions. The Co-Chairs' Non Paper, constituting a draft of the ABS protocol, is currently under negotiation at the 9th meeting of the Working Group on Access and Benefit Sharing (ABS) in Cali, Colombia. Article 1 states that its objective is to "ensure the fair and equitable sharing of the benefits arising from the utilization of genetic resources, contributing to the conservation of biological diversity and the sustainable use of its components". It is a laudable objective, yet only attainable when realized by individual ABS agreements at the local level.

In that context, the Co-Chairs' Non Paper is problematic for two main reasons. First, it lacks integration of environmental standards throughout the body of the text. Article 7, entitled "Contribution to Conservation and Sustainable Use", is a stand-alone provision that merely "encourage[s]" parties to ABS agreements to direct benefits towards conservation and sustainable use of biodiversity. Its current wording clearly makes it ancillary to the greater ABS framework. Second, the treatment of traditional knowledge (TK) under Article 9 is incommensurate with its roots in Article 8(j) of the Convention on Biological Diversity (CBD). Whilst Article 8(j) calls on states to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity", the Non Paper focuses only on TK that is of interest to researchers. According to this analysis, the current draft of the Protocol does not guarantee that ABS will contribute to its broader environmental and social aims.

Integrity, as a holistic concept, judges the quality of a system in terms of its ability to achieve its stated objective(s). A system that lacks integrity can be reformed if it is dynamic. In this context, an ambiguous ABS Protocol can attain integrity by the way in which it is implemented. Returning to the idea that the success of international law is subject to its local implementation, Natural Justice and others argue that whether ABS delivers environmental and social benefits (ABS+) is contingent on how it is used by individual communities living within diverse ecosystems. Thus, the implementation of ABS must be responsive to local communities and the ecosystems in which they live.

If the subject of ABS is genetic resources and associated TK, then "sustainable ABS" is incumbent upon communities' abilities to sustain their knowledge, innovations and practices (Article 8(j)) through their continued customary uses of natural resources (Article 10(c)). Whether ABS can assist communities in this pursuit is to ask what ABS can contribute to communities whose ways of life are commensurate with the objectives of the CBD. A clue to that answer lies in the extent to which national governments support and respect communities' rights to manage their own natural resources and to engage with ABS according to the principle of free, prior and informed consent. In this context, and with reference to a recent article about land tenure and REDD by Lorenzo Cotula, we ask: will ABS be implemented with communities as a starting point or as an afterthought?

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