

**In this edition**

1. If there is will, a fair and equitable deal is possible
2. Rights, procedures and Protocols, as appropriate, as ever
3. The Technological Loophole that Could Make Benefit Sharing Obsolete
4. An ABS Protocol and the right to development

## **If there is will, a fair and equitable deal is possible**

*by Chee Yoke Ling (Third World Network) and François Meienberg (Berne Declaration)*

Finally there are actual negotiations on the Access and Benefit Sharing Protocol. Having arrived at this stage after so many years, while biopiracy continues and rights of indigenous peoples, local communities and countries of origin are violated, the challenge is that we go to Aichi-Nagoya with a strong protocol.

As in other treaty negotiations this is the moment when we hear the refrain “better no deal than a bad deal”.

Looking at the current Party-owned draft text, it is possible to finalise an effective tool to fight biopiracy and make the CBD’s 3<sup>rd</sup> objective a reality.

Since the substantive issues are so inter-related, we hope to see a package that will finally correct the injustices of biopiracy and implement the 3<sup>rd</sup> objective, which in turn also gives life to the conservation and sustainable use objectives.

Unless the Protocol has a comprehensive scope and the compliance obligations are effective, the treaty will be meaningless.

The list of exclusions in the scope article therefore cannot be supported. Concerns over the relationship between the Protocol and other instruments are more than adequately dealt with in the draft Article 3*bis*. For those concerned about the need to have ABS agreements over specific resources, this is now covered by Article 3*bis*.

With emerging technologies and evolving science, the Protocol must envisage situations where physical access may no longer be necessary – information provided here

at the current meeting on synthetic biology and the rapidly increasing commercial activities in this field has been very useful to alert many Parties.

If the protocol fails to ensure benefit sharing related to resources that have left the country of origin before the protocol comes into force, we are emptying the protocol dramatically before it is born. With political will, to again restore justice, the Protocol can have provisions to ensure benefit sharing from the new uses of such resources.

The text on compliance provisions, that form the core of the Protocol, contain the makings of a comprehensive system, including mandatory disclosure requirements at critical checkpoints, an internationally recognised certificate, and effective sanctions and remedies for non-compliance. This needs to become agreed text.

Meanwhile, some Parties continue to seek the delinking of traditional knowledge from genetic resources. This would be a major step backwards from the hard work by Parties and the IIFB in Cali that saw a high degree of common understanding verging on consensus that affirms the importance of this linkage.

The issue of patents and other intellectual property rights is missing. Interestingly the World Health Organisation’s on-going work on influenza virus and benefit sharing is considering two elements: (i) there should be no patents on biological materials contributed to the WHO system, a development that is gaining encouraging support from some user countries; and (ii) the possible idea of non-exclusive royalty-free licences for vaccine production.

**Thank you**

**The CBD Alliance thanks Swedbio for their ongoing support.**

# Rights, procedures and protocols, as appropriate, as ever

by James Lamouche, National Aboriginal Health Organization (NAHO)

At the opening of the inter-regional negotiation group (ING) of the resumed ABS 9 working group the participation of Indigenous Peoples continued to be a point of tension in the ongoing negotiations of the ABS Protocol. While respecting the current procedural issues within the context of the convention and international law, the International Indigenous Forum on Biodiversity (IIFB) has expressed, and continues to express, serious concerns regarding the development and future implementation and application of the Protocol.

Indigenous Peoples and local communities have made concerted and continuing efforts during negotiations in this working group, and the Working Group on Article 8(j), to explain that their fundamental rights and interests in these particular areas are critical to the well-being of communities, nations, and cultures and their connection to lands, resources and territories. The breaking of these connections is, in the view of many, one of the main drivers of the loss of biodiversity throughout the world.

The clear and present danger felt in the hearts and minds of many Indigenous participants at this meeting is that the creation of an ABS protocol that does not give due consideration and recognition to the rights of Indigenous Peoples will hollow out the content of one of the main pillars of the CBD. Further, it will seriously impair the ability of Indigenous Peoples to continue their role as custodians, stewards and protectors of biological diversity. While Indigenous Peoples are at the margins of this Convention from a procedural stand point, they are at the front lines of the continuing battle to stem the loss of biological diversity throughout the world. This is, in many cases, seen not as a battle for the environment but a battle for existence, because the current staggering loss of biological diversity is happening in parallel with an equally appalling loss of cultural diversity.

*“As we lament the collapse of biological diversity, we pay too little heed to a parallel process of loss, the demise of cultural diversity, the erosion of what might be termed the ethnosphere, the full complexity and complement of human potential as brought into being by culture and adaptation since the dawn of consciousness” (1)*

In the struggle against both these losses, the rights of Indigenous Peoples are key.

The position of the IIFB, most recently expressed at the opening of the ABS9 in Cali, Colombia, outlines some of the recommendations and observations of this Forum regarding how any legal instrument - and the ABS Protocol in particular - must be developed for best effect in the protection and preservation of biological diversity.

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 (2)

#### Footnotes:

- (1) Davis, W. (2001). *Light at the Edge of the World*. Vancouver, BC: Douglas & McIntyre, Ltd
- (2) International Indigenous Forum on Biodiversity, Opening Statement, March 22, 2010, Cali, Columbia



L to R, Merle Alexander and Preston Hardison

T-Shirt Text: *AB[S] Déjà Vu Tour. Good will. Good Faith. Good times.*

Photo courtesy of ENB, Franz Dejon, Photographer

# The Technological Loophole that Could Make Benefit Sharing Obsolete

by Diana Bronson and Jim Thomas, ETC Group

Technology is outpacing Access and Benefit-Sharing (ABS) negotiators. As governments, NGOs and Indigenous Peoples' organizations head into the final stretch of negotiations on ABS this week in Montreal, synthetic biology is developing the capacity to tap into digital libraries, download plant and microbial genomes, and artificially reconstruct synthetic life forms. These may -- or may not -- be "tweaked" to allow for patent monopolies beyond the reach of ABS, state sovereignty or Indigenous peoples. Almost 4000 organisms have already had their genomes sequenced—300 billion base pairs exist in official data bases. In brief, **Synthetic Biology** applies computer programming and engineering skills to build life forms from scratch using synthetic DNA and other human-made parts. ABS negotiators must now urgently plug into this loophole.

These manufactured **synthetic organisms** raise new risks that are not explicitly covered by existing regulations on genetic engineering. The proposed use of synthetic microbes in the production of the next generation of fuels, medicines and chemicals may massively increase human impact on biodiversity, while accelerating biopiracy and making a mockery of any notion of "benefit sharing".

The CBD has recently begun to grapple with the implications of synthetic life forms and is the first multilateral forum to do so. Delegates at the upcoming COP10 meeting in Nagoya in October will have the opportunity to address this new challenge to biological diversity (especially since the SBSTTA called for a moratorium on their environmental release).

## What is Synthetic Biology?

Synthetic Biology is a form of extreme genetic engineering that adds manufactured genetic parts (such as synthetic DNA, synthetic ribosomes or synthetic RNA) to a living cell in order to "hijack" the workings of the cell for industrial uses. Typically, synthetic biologists construct strands of DNA from scratch out of inert chemicals using a machine called a DNA synthesizer. By specifying the sequence of those chemicals, they attempt to 'programme' the 'code' of the DNA in order to change the behaviour of the organism. Adopting engineering principles, synthetic biologists attempt to create modular 'genetic parts' or 'biobricks' that can be easily snapped together to create more complex genetic 'programmes'.

## How does Synthetic Biology threaten biological diversity?

Near term applications of synthetic biology will impact the natural world in two main ways:

1. The **environmental release** could be deliberate (ex. Bio-weapons) or it could result from human error where microbes escape from bio-refineries and laboratories. We can only guess at the potential invasiveness of these artificial life forms in the wild. In cases where a microbe is intentionally engineered to break down cellulose or secrete toxic compounds, such an escape could be disastrous for both ecosystems and human health.

2. **The increased demand on land, biomass, water and other natural resources.**

While first generation agrofuels have already led to massive changes in land use, so-called "next generation" fuels will transform previously "low-value" forest and agricultural "wastes" such as straw and branches into valuable feedstock for chemical and energy companies. This is in itself a problem, as they are not "wastes", but important components of soil's recycling of nutrients and its capacity to sustain biodiversity and crops, absorbing CO<sub>2</sub> and water, and preventing erosion. But more than that, there is simply not enough land or plant matter for all the uses that are being contemplated for it.

The CBD's review paper on the definition of 'genetic resources' in the context of advances in modern biotechnology, including Synthetic Biology (UNEP/CBD/WG-ABS/9/INF/1), notes "*the ABS system may not be able to capture the future potential value of genetic material, not least when it is used in or as a basis for synthetic biology*", further noting that if the concept of genetic resources is not expanded to include "*informational and digital dimensions*" valuable uses of genetic resources will fall outside the ABS framework.

Parties to ABS 9 should close this potentially significant loophole by **ensuring that the definition of genetic resources explicitly includes genetic information stored or transmitted in a digital form.** Digital libraries must be explicitly mentioned in Annex II (the list of typical uses of genetic resources in the draft protocol, which is contained in (UNEP/CBD/WG-ABS/9/3). Parties to the resumed ABS 9 may wish to propose that **the construction of genetic parts, biobricks, metabolic pathways and synthetic chromosomes for use in synthetic biology should also be included under the international ABS regime**, whether or not those parts are derived from naturally occurring analogues.

# An ABS Protocol and the right to development

by Aurelie Arnaud, Quebec Native Women

What would be the purpose of an ABS Protocol if not to allow economic development based on genetic resources? Now genes are the new resource frontier and their trade in the new market is to engulf millions of dollars in research and development.

Let me reflect a second on what exactly is the purpose of economic development. We can find many different definitions, but in general economic development “refers to a sustainable increase in living standards. It implies increased per capita income, better education and health as well as environmental protection.” (1)

Therefore, the final aim of any economic development is the improvement of the education and health of the people/citizens/rights holders. However, improvement of education and health is subject to more than just an increase in the GDP. In the Declaration on the Right to the Development, development is understood as “a comprehensive economic, social, cultural and political process.” (2) It includes the right for the peoples to “freely pursue their economic, social and cultural development.” (3)

The right to development is now part of international human rights law. Also, in the Charter of the United Nations, pursuance of development is included as among the goals of its agenda for economic and social cooperation and, under the Charter, states pledge to contribute within the UN system to the promotion of development as well as the respect for human rights. From the UN's inception, development and human rights are also closely interlinked. The right to development can be viewed as broader than the human rights-based approach, because it involves a critical examination of the overall development process. However, the fact that it is intrinsically linked to human rights provokes a shift in the theoretical as well as the practical debate from a charity/aid approach to a responsibility/cooperation approach. Thus the right to development encompasses a right of all peoples to participation and to self-determination.

Even though the right to development was first developed in the context of the divide between the developed and developing countries, it must now be broadened to include Indigenous peoples. Indeed, their participation to a process that deals with their development must be encouraged and reinforced.

An ABS Protocol is crucial to the realization of the right to development as it seeks to establish rules to share benefits between providers and the users of genetic resources, thus recognizing the role played by providing parties to development. Indigenous peoples play a key role both as providers and users, as acknowledged in Article 8(j) of the CBD. The right of Indigenous peoples to development includes, *inter alia*, the right to their traditional knowledge, which must be approached holistically and cannot be separated from their right to resources.

Indigenous peoples and local communities have cared - and still care for - the biological diversity of this planet for centuries. They are the ones living amongst it, depending on it, using it on a daily basis for their survival, their economic development, and to ensure that it will still be there for future generations. It is not only about economic growth, but also about sustainable development.

As an ABS Protocol needs to accommodate both developed and developing countries views in order to reach an agreement that would truly serve the purpose of the CBD and the right to development. It needs to also accommodate Indigenous peoples' views as they are major rightsholders in the preservation of biodiversity and genetic resources and are playing a direct part in the realization of the right to development.

## Footnotes:

- (1) Peter's Business and Economic Issues, 2006, <http://schumpeter2006.org/blog/2006/12/20/definition-of-economic-development/>
- (2) *Declaration on the Right to Development*, *supra* note 42, preamble.
- (3) *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, common art. 1. See also *UN Declaration*, art. 3. The *Declaration on the Right to Development*, art. 1(2) affirms: “The human right to development also implies the full realization of the right of peoples to self-determination”.

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