

## The new ABS Regime has to make a difference

françois meienberg - berne declaration

hartmut meyer - german NGO forum on environment & development

Delegates coming together for the third meeting of the ad hoc open-ended working group on access and benefit-sharing have substantial tasks ahead of them. First of all, they (especially the ones from OECD countries) have to recognize that biopiracy is still a major, unresolved problem. The current regulations, guidelines (including the Bonn Guidelines) and practices in place have failed to prevent biopiracy. This demonstrates that we need a strong, legally binding international regime, a regime that must lead to the fair and equitable sharing of benefits *and* protect the inalienable rights of indigenous peoples and local communities over their territories, genetic resources and traditional knowledge.

### CONTENTS

New Regime ? .....	1
Theft @ COP 7 .....	1
The New Delhi declaration.....	2
International Seed Treaty.....	4

ECO has been published by the NGO (non-governmental organisation) community at most Conferences of Parties of the International Environmental Conventions. It is currently being published at the 3<sup>rd</sup> Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing to the Convention on Biological Diversity in Bangkok, Thailand. It is coordinated by the NGO 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. Please give to Joyce Hambling at the morning NGO meetings (8.30 am), or email to [seeds@gn.apc.org](mailto:seeds@gn.apc.org)

Prior to the Bangkok meeting, many important features of a potential new regime have been tabled by the Group of Megadiverse Countries. Well-established demands are the mandatory disclosure of the country of origin of biological material and associated traditional knowledge in IPR applications or the internationally recognised certificate of legal provenance of genetic resources. The working group will certainly be negotiating through these potential attributes. But there are some other questions which have to be kept in mind. A coalition of NGOs is calling to put following aspects on the negotiation table as well:

#### Scope

One of the reasons of the failure of the current system is that the CBD definition of what a biological or a genetic resource is, *is itself simply not precise enough*. Thus, stakeholders who are not willing to share benefits with the donors of the genetic resources are trying to reduce the scope of the CBD to processes using explicitly the genetic information (for example for breeding purposes). This was certainly not the aim of the parties when establishing the CBD. Such a definition would hollow out the whole ABS-System.

....continued on page 2

## The CBD's Shame - THEFT AT COP 7

joyce hambling - seeds

We were informed last week by the farmers from Nan Province, Northern Thailand, that some of their farm developed rice seeds were stolen from a display at COP 7 in Kuala Lumpur last year. The packet of seeds easily contained enough viable genetic material for use in a breeding programme. That this should happen at a CBD meeting is disgraceful, and the thief brings shame upon us all. This highlights the fact that the demands of local communities, indigenous peoples and civil society are not just naive idealism, but positions reached from bitter experience, and which cannot be compromised.

As for the Nan farmers, what recourse do they have to get their seeds back, and stop them being used, modified or patented illegally? Do they know who took them? No, but it can only

be one of the thousand or so people who were allowed to enter the building. Do they have the resources to monitor R&D around the world, search patent applications and then do DNA tests to establish original ownership? No, No and No.

In the real world, this happens day in and day out. The regime negotiated here must do more than pay lip service to these issues.

## Perspectives on Benefit Sharing: Benefits, benefits, who's got the benefits?

The Edmonds Institute, TWN and the Tebtebba Foundation –

Conference room 3, level 1, lunch, and copies of a new book about benefit sharing will be available

- *Continued from page 1*

- A new regime must be broad in scope and include any access to genetic resources. Genetic resources are all biological resources incorporating any material of plant, animal, microbial or other origin containing functional units of heredity - no matter what the intended use is.
- With a broad scope it might be necessary to differentiate access procedures and benefit-sharing agreements for each different announced use, or uses.

### **Access**

In most discussions and in the decisions taken by the Conferences of Parties the topic of "first access to the genetic resources" has always been prominent. But the issue of continued access to the genetic resources *after* they have been collected by the user *is as important as first access*. The whole CBD would lose its balance, forcing countries of origin to provide facilitated access - but giving users patent rights that could prevent any further access to the genetic resource for twenty years. If a new regime were to prohibit any intellectual property or other rights that limit the facilitated access to genetic resources, this would not result in the elimination of benefits to be shared (a terribly backward argument, which is often put forward by the biotech-industry). First of all, many patented inventions are *based* on genetic resources but are not a genetic resource themselves (e.g. a new drug). Second, there are a lot of benefits derived from genetic resources that are not related to patents at all (e.g. the herbal market).

- The new regime must make sure that recipients of genetic resources shall not claim any intellectual property or other rights that limit facilitated access to the genetic resources, or their genetic parts or components.

### **Illegal use – a task for user countries**

CBD member states are bound to prevent the sale of biopiracy products on their territory. But to our knowledge not a single user country has made an effort to ban from the marketplace products that violate CBD-rules. It is therefore important that an international regime define such measures as a clear and binding responsibility:

- Clear and binding rules committing user countries to either deny approval to or remove from the marketplace any products based on resources acquired in violation of CBD-provisions.

Member states must establish conditions and mechanisms that allow them to effectively punish producers and sellers of biopiracy products (fines, revoking sales licenses, etc...). A part of the fine corresponding to the amount lost through absence of benefit sharing shall be paid to the stakeholders.

---

## **Mega-diverse countries want legally binding anti-biopiracy regime**

*Taken from an article first published in SUNS (north-south development monitor), 25 January 2005, by Martin Khor, TWN*

The Delhi Declaration states that the proposed international regime on access and benefit sharing (ABS) should include "mandatory disclosure of the country of origin of biological material and associated traditional knowledge in the IPR (Intellectual Property Rights) application, along with an undertaking that the prevalent laws and practices of the country of origin have been respected and mandatory specific consequences in the event of failure to disclose the country of origin in the IPR application".

The countries also agreed to ensure that the proposed ABS regime includes prior informed consent of the country of origin and mutually agreed upon terms between the country of origin and user country. The Declaration called for "disclosure of legal provenance of genetic resources and associated traditional knowledge in the applications for grant of intellectual property rights." It added: "Internationally recognised certificate of legal provenance of genetic resources should include evidence of compliance with access legislation, including prior informed consent and mutually agreed terms."

The requirements to obtain the certificate will be nationally defined, in line with CBD provisions. The criteria for global recognition of the certificate shall be established in the legally binding instrument. The certificate should include "a standardised code that accompanies the biological material and is placed to all extracts, derivatives or information, through the least expensive channels, in a way that it can be shown at specific and relevant checkpoints in the R&D process (including product approval and intellectual property). There should be high cost of non-disclosure in order to induce users to behave legally. The specific conditions for access should be included in a clearing house, so that users, interested parties and authorities can check the conditions."

The Declaration also urged countries to adopt suitable legislation on recognition and protection of the rights of indigenous and local communities over traditional knowledge. It also said that the countries had agreed to jointly further work towards creating the Mega-diverse Cooperation Fund for supporting projects in member countries that meet the objectives of the Group.

In inaugurating the New Delhi meeting, the Indian Minister for Environment and Forests, Thiru Raja, who is also Chairman of the group, said that a significant part of the pharmaceuticals industry and its products are developed based on traditional and indigenous knowledge. "However, local and indigenous communities rarely get any benefits from the resulting products. The mega-diverse countries, with home to nearly 60-70% of the global biodiversity, should be in a position to influence the bulk of trade in bio-resources... the reality is that most of the mega-diverse countries continue to remain impoverished despite the richness of bio-resources that they possess," he added.

Stating that the relationship between genetic resources, traditional knowledge and intellectual property rights is one of the most debated issues in the negotiations of several multilateral agreements, the Indian Minister pointed out that the CBD and the WTO's TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreements, both touch on issues relating to genetic resources and intellectual property, giving rise to a range of legal and practical issues concerning both their relationship in international law and their implementation at the national level. There is therefore a strong need for harmonization of the provisions of these agreements.

Formed in February 2002 at a meeting in Cancun, Mexico, the aims of the Group, as set out in the Cancun Declaration, include working together to obtain fairer access and benefit sharing terms in the use of biological resources, developing biological resources, protecting traditional knowledge and rights of indigenous peoples, addressing issues of intellectual property rights, and seeking common positions in international negotiations. Prior informed consent of countries of origin and local communities is also highlighted. The Convention on Biological Diversity is the framework for the Group.

At the World Summit on Sustainable Development in 2002, members (supported by the Group of 77) succeeded in getting a decision to negotiate an international regime, within the CBD framework, to promote and safeguard the fair and equitable sharing of benefits arising out of the use of genetic resources.

The Group proposed at COP 7 in February 2004 to initiate a work programme on an international regime. This move is the result of dissatisfaction with the voluntary Bonn Guidelines adopted at the previous COP, which focuses more on obligations and responsibilities of countries with biodiversity.

The Group, in advocating an international regime, argues that national laws and action alone are not sufficient to ensure that benefits flow to the countries of origin, especially when genetic material sourced from one country is utilized in another country for developing products and processes on which patent protection is obtained. Several of the Group's members have also proposed in the WTO's TRIPS Council that amendments be made to the TRIPS agreement for requirements of disclosure of country of origin and prior informed consent in respect of genetic resources and traditional knowledge.

# International Seed Treaty – opens access, limits benefits?

patrick mulvany - itd g

The purpose of the International Seed Treaty (International Treaty on Plant Genetic Resources for Food and Agriculture - IT PGRFA) is to ensure that the agricultural biodiversity of the crops nurtured by farmers over millennia is conserved and that there is equitable benefit sharing from its sustainable use. It was renegotiated in harmony with the CBD and came into force in June 2004 and is now international law.

But there is much work to do to make sure its laudable purpose is not undermined by economically powerful countries and their corporations seeking to use it to access the genetic resources covered by the Treaty without paying benefits already agreed in 1996.

There should now be new funds flowing to farmers for their conservation efforts, as promised in the Leipzig Global Plan of Action (GPA) for the conservation and sustainable use of agricultural seeds. The GPA called for significant, new and additional funding for the on-farm conservation of the myriad but threatened diversity developed by farmers – up to 95% lost from farmers fields in the past century as a result of the ravages of industrial agriculture.

The GPA was put on hold until the Treaty became law. Articles 5 and 6 of the Treaty now provide the legal framework for the GPA which should be rolled out without delay. Countries should be queuing to fund these programmes, but where are they? The two trillion dollar food industry is based on these resources – now is payback time.

Smallholder farmers worldwide, the principal guardians and developers of these vital genetic resources, are under threat and require support. Support is needed together with full international implementation of their inalienable Farmers Rights to produce, exchange and sell seeds, free from restrictions imposed by intellectual property rights (IPRs). The diversity that feeds the world was created through the free exchange of seeds by farmers within and between communities, countries and continents. Farmers Rights are an essential prerequisite for ensuring this free exchange can continue to be practiced by smallholder farmers worldwide. But the Treaty's provisions on Farmers Rights (Article 9) are weak, subordinating them under national IPR rules, which are increasingly restrictive.

There should be no problem as the Treaty is international law and should take precedence over national laws. However, while the text clearly states that no IPRs may be taken out on the genetic resources covered by the Treaty, there is still an opportunity to privatise resources extracted from the common pool, if these resources are modified and are no longer "in the form received" (Article 12.3 (d)).

In the current negotiations on a universal Material Transfer Agreement – the agreement that provides the rules of access to the common resources covered by the Treaty – developing countries may find themselves short-changed. Eager to support the conservation efforts of their farmers, they will find themselves increasingly embattled as they struggle to defend open access without any evidence of commitment to

benefits, such as through funding the GPA.

The Governing Body, made up of all the countries that have ratified the Treaty, will be put under great pressure to accede to the demands of economically powerful for the privatisation of genes taken from the common gene pool. And these same countries are the ones that should be paying for the conservation programmes in the GPA. Will they threaten to withhold payments unless their corporations get such concessions?

If the global community were serious about conserving agricultural biodiversity it would not be arguing about privatising these resources. It would be strengthening and supporting the organised efforts of smallholder farmers (as agreed in CBD Decision V/5 on agricultural biodiversity).

The global farmers movement, La Via Campesina, has reasserted its commitment to conserving the seeds of humanity and calling for the adoption of food sovereignty policies that would, *inter alia*, outlaw privatisation of genetic resources for food and agriculture. The sights of La Via Campesina are set not only on the conservation and development of seeds but also livestock breeds and the diversity of aquatic organisms. It provides the structure for a global conservation effort.

The Treaty should have provided a possible model for the conservation of all types of agricultural biodiversity. But, although it is now international law, in negotiations about implementation the Treaty is still ensnared in a battle for control of these resources by giant corporations. Smallholder farmers, who have developed the resources and require support for their conservation efforts and the implementation of their Farmers' Rights, are being squeezed out.

The way forward should be clear. First, provide benefits and support smallholder farmers to ensure continued development and conservation of diverse seeds in agroecologically sustainable farming systems. Only then, and secondly, provide sustainable and non-restrictive access to these resources and any derivatives.

The Governing Body of the Treaty could insist on upfront benefits before allowing non-restrictive access, but will it?

When the history is written of this sorry period of the destruction of farmers, farming and the natural resources on which the world depends for its food, the writer may wonder why humanity was so foolish not to encourage and support smallholder farmers who best could ensure the diversity of tomorrow's foods. Historians may well recall the words of Fidel Castro at the 1996 World Food Summit when he said: *"The bells that are presently tolling for those starving to death every day will tomorrow be tolling for all humankind if it did not want, did not know how, or could not be sufficiently wise, to save itself."*