E C O

*The Voice of the NGO Community in the International Environmental Conventions*

VOLUME 10, ISSUE 4
FEBRUARY 12, 2004

**SPECIAL EDITION ON ABS**

*Available on the internet at www.itdg.org*

# Unfair and Inequitable: The Dirty Business of ABS

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**ABS (Access for Business Scoundrels)**

Yesterday saw the start of the negotiations on access and benefit sharing. Of course, these negotiations would come before the discussions on article 8j have even started, showing once again that Access for Business Scoundrels (ABS) comes first in the minds of the biodiversity bureau and negotiators, and Rights for the Holders of Traditional Knowledge, comes second. Meanwhile, we have all learned over the past twelve years of experimenting with the Bonn Guidelines and the ABS model these guidelines support, that ABS and rights for holders of traditional knowledge are simply incompatible. There is nothing fair and equitable to a large company acquiring access to the genetic resources and traditional knowledge of local communities, and subsequently commercializing and patenting that information, thus blocking of access for the original users. Likewise there is nothing fair and equitable to existing systems of intellectual property rights over life and associated knowledge. Patents on life are unfair and inequitable, and no certificate of origin or user measure will ever change that.

**TRIPS: An Agreement being Reviewed by an Organization in Disarray**

Of course, some people (especially notorious non-Parties to the Convention) will point at the Trade Related Intellectual Property Rights (TRIPs) agreement, which forces patents down the throats of countries of origin. But then, we should not forget that TRIPs is an agreement already under review due to the general recognition that it is impossible to implement. At a UN Conference on Trade and Development Hearing held a few weeks ago, a representative of Brazil rightly stated: it is time unfair and inequitable WTO agreements are reviewed, and, where necessary, revisited. And considering the complete state of disarray the World Trade Organization is currently in, the review of the incompatibility of current intellectual property right systems with Objective 3 of the CBD better take place in the CBD itself instead of the mess that is called WTO.

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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 by the NGO community around the seventh Conference of Parties to the Convention on Biological Diversity in Kuala Lumpur, Malaysia coordinated by Environment Liaison Centre International. The opinions, commentaries, and articles printed in ECO are the sole opinion of the individual authors or organisations, unless otherwise expressed.

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*Eco is produced by the CBD NGO community. Editorial board: Rosario Ortiz, Nathalie Rey, Barbara Gemmill, Ashish Kothari, Stas Burgiel, Jessica Dempsey, Patrick Mulvany.*

**NGO Meetings every morning from 9 – 10 in the NGO ROOM, Third Floor**

**A Vortex of Corporate Control**

It is also amazing to hear how governments believe that a little bit of money would be enough to compensate for the loss of cultural and biological diversity caused by biopiracy. No matter the "benefit sharing" payments, you simply cannot compensate the devastation caused by the fact that farmers, for example, cannot develop and use their own seeds anymore. Extinction cannot be paid off; at least, that is what we had thought and hoped. Were we wrong? Yesterday, the chair of a side event on business and biodiversity tried to carefully summarize the conclusions of the very lively debate in a recommendation that receiving financial support from business might actually not be the most effective strategy to counter corporate biodiversity destruction. But still, a representative from a conservation NGO actually stated that he would welcome such corporate "guilt-money for extinction".

A joke, of course, just like the same presenter joked earlier that "companies should work closely with governments". As if they didn't work closely enough with governments. The representative of Shell on the Dutch delegation who happened to be in the room could in any case see the humor of the statement… One can blame corporations a lot of things anno 2004, but not that they fail to influence government policies. Do you really believe business has not had any influence on the biosafety protocol? Do your really believe the Energy and Biodiversity Initiative had nothing to do with the fact that the World Parks Congress did not succeed to reach agreement on a clear recommendation that there should be no mining or oil exploration in parks? Do you really believe corporations are asleep while we are discussing negotiations on an international regime on (…) benefit sharing? (btw., we really could not find that word "access" in the WSSD text…)

So let us step out of this vortex of increasing corporate control over biodiversity negotiations. Let us go back to square one and consider the rights of the holders of traditional knowledge and the main managers of ecosystems first. Some have called the NGOs who totally reject the Bonn Guidelines and the system of biodiversity privatization and commercialization they support "politically unrealistic". But let us be clear, if there is something politically unrealistic, it is the presumption that Objective 3 of the Biodiversity Convention can be implemented when current practices of patenting life and associated knowledge are in place. An international regime on benefit sharing does not make any sense in the current situation, and an international regime on *access and* benefit sharing was actually never called for!

**SIDE EVENT - Technology Transfer and Agricultural Biodiversity**

A CSO perspective on best and worst practices in technology transfer with special reference to the sustainable use of agricultural biodiversity.

**Kampung Space, TODAY! 13.00 – 14.30, LUNCH IS PROVIDED**

# The Four Pillars: Towards an International Regime on Access to Genetic Resources and Benefit Sharing

d r . p a u l o l d h a m ● C E S A G e n

The development of an international regime on access to genetic resources and benefit sharing under the Convention on Biological Diversity should adopt a four pillars approach involving:

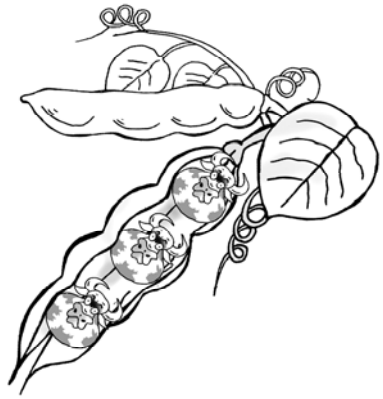
**1. The International Environment and Development Regime:** the establishment of an international regime on access to genetic resources and benefit sharing under the CBD should take into account relevant international environment and development instruments and processes. These agreements include, inter alia: the International Treaty on Plant Genetic Resources for Food and Agriculture, Agenda 21, the Millennium Development Goals, the WSSD Plan of Implementation, the Convention to Combat Desertification, the Ramsar Convention, and the work of the United Nations Forum on Forests.

**2. The International Human Rights Regime:** Under the United Nations Charter the binding obligations set out within the international human rights regime constitute the primary obligations of governments. In connection with the exploitation of genetic resources, the United Nations Sub-Commission on Human Rights has expressed particular concern surrounding the protection of the rights of indigenous peoples to both their knowledge and resources.[1] In establishing an international regime Parties should ensure that the regime is developed in compliance with human rights obligations and adopt additional measures to ensure compliance.

**3. The International Intellectual Property Regime:** Patents represent a burden on society: in a globalised world, that burden is disproportionately borne by indigenous peoples, local communities, and citizens of developing countries. The international patent system can only be justified where it serves the global social good. The negotiation of an international regime provides an opportunity to redress the burden of patents and develop appropriate alternatives to serve the global social good.

**4. The International Trade Regime:**

The development of an international regime provides opportunities to redress the imbalances and concerns that surround the role of intellectual property in relation to genetic materials within international trade agreements and pursue international development goals.



**FOR SALE…**

**CHEAP!**

**Genetically-enhanced cow-peez !**

[1] Sub-Commission on Human Rights resolutions 'Intellectual property and human rights' (res. 2000/7 and 2001/21)

# From Global Enclosure to Self Enclosure: Ten Years after – a critique of the Bonn Guidelines

***Issue:*** Since 1994, the Convention on Biological Diversity (CBD) has been promising "benefit sharing" to Indigenous Peoples in return for access to biodiversity (i.e., bioprospecting). During these ten years, Indigenous Peoples and farming communities have worked long and hard to realize this goal. Government's response has come in the form of the so-called "Bonn Guidelines." These guidelines turned the CBD into a global enclosure system instead of a benefit-sharing mechanism and they have undermined the historic resilience of Indigenous Peoples by encouraging curtailment of their customary systems of resource-exchange.

***Impact:*** Although not legally binding, the Bonn Guidelines are meant to "operationalize" the convention's ABS provisions, providing a template for national legislation. The CBD awards sovereignty to the State and offers no legal right to Peoples and communities. The Bonn Guidelines assume ABS can be achieved through contracts and "germplasm ownership." The net effect is to encourage biopiracy and discourage customary forms of knowledge and germplasm exchange. Biodiversity is of primary value to Indigenous Peoples and rural communities. Anything that constrains customary exchange fundamentally harms their wellbeing. If these policies prevail, then ETC believes that all bioprospecting will unavoidably be a form of biopiracy, regardless of its "legal" status or level of compliance with the CBD.

***Policy:*** After ten years, it is clear that the CBD is not a magic bullet for the conservation of biological diversity nor does it guarantee the improvement of the rights and roles of Indigenous Peoples and communities. The communities will have to strengthen their own resilience strategies outside the Biodiversity Convention. At COP 7, governments must NOT undertake work on a legally binding international regime on access and benefit sharing based on the Bonn Guidelines. COP7 should instead reformulate the Bonn Guidelines and focus on ways to help strengthen Peoples' resilience and their resistance to biopiracy. Governments should work to establish non-proprietary systems of benefit sharing, implementing one of the options posed in the Bonn Guidelines, the creation of a fund supporting the conservation and development of biodiversity. With monies from governments, the global biodiversity fund would act as an endowment advancing the interests of Indigenous Peoples and other biodiversity actors without attempting to reduce their contributions to quantifiable commodities.

**More information:** A new 15 page communiqué is available from ETC group which offers a short introduction to biopiracy followed by a critique of the CBD and, specifically, of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* and the related Cancún Declaration of Like-Minded Megadiverse Countries. This is available online at www.etcgroup.org or from CBDC stall in the NGO area of COP7 – Level 3

# ACCESS TO GENETIC RESOURCES : IN FAVOUR ON WHOM AND FOR WHAT ?

isaac rojas • COECOCeiba-friends of the earth costa rica

The documents that served as basis for the December 2003 Ad-Hoc Working Group on Access and Benefit-Sharing discussions on access to genetic resources and the fair and equitable distribution of the benefits derived from them, makes us think that the international regime on access that is now on the table does not differs much to the current situation by the following:

**The use of terms, definitions and/or glossaries,**The Ad hoc working group documents discuss if a glossary or definitions for terms such us access to genetic resources, participation in the benefits, commercialization, derivates, supplier, user, interest Party, ex-situ collection and voluntary character, is more convenient , and they discuss the process of writing the glossary. The definition of concepts are key in any access regime. Through definitions, for example, some access or benefit sharing activities could be eliminated from compliance with the regime, or their compliance with standards could be determined with few requisites. It could be argued through definition, for example, that access rights are personal and thereby non transferable. By this definition, the current business of the transfer of access permits would be eliminated a better control of the so called fair and equitable distribution derived from access would be facilitated. Similar consequences would bear on the definition of supplier and user. Definitions will define a specific model of access to genetic resources. Its recommended to make a compilation of definitions of these concepts to be discussed in the next Conference of the Parties. Yet, given how very important definitions are to the model of access and benefit sharing, definitions must not be left to a small drafting group of government representatives; they must be developed through a consultation responding to criteria of wide participation, information, justice and equity.

**Other approaches in conformity to what is established in decision VI/24 B:** it is recommended to make a similar process to the previous point. These additional approaches are seen as complementary to the Bonn guidelines and as tools that could help Parties, and other interested sectors, in the application of the dispositions of access to genetic resources and the participation in the benefits derived from them. These additional approaches refer to the regional legal frameworks ( such us Andean Pact, a Centro American project, Asiatic and African); others which are international (FAO treaty, for example) as well as voluntary guidelines coming from interested actors wanting to have access such as botanical gardens and private companies. All these additional approaches, far from questioning the intellectual rights on life forms contained in these treaties of the World Trade Organization (WTO), serve to legitimize them.

An important aspect is the discussion around the international certificate of origin, an instrument by which it is sought to always enunciate where the genetic resources come from or the traditional knowledge that is accessed and that it has been obtained by prior informed consent. The documents for the December meeting discussed if this certificate could be a requisite to patent and therefore under the norms of the WTO Agreement on Trade-related Aspects of Intellectual Property (TRIPs). Such a proposal would force the publication of, for example, the origin of traditional knowledge and its characterization - details that could be sacred for certain indigenous peoples. This proposal favors the commodification of traditional knowledge, as well as of the biological diversity. It would mean that a regime would revolve around the patent process which is, at the end of the day, the central focus for an industry that looks at access through a narrow lens: they don't want to invest unless they can be guaranteed a monopoly through intellectual property rights. In this way, aspects that could be tools for the promotion of the participation in the decision making process, are transformed to requisites for patenting.

**Measures, incluiding the consideration of their feasability, practicality and costs, to support compliance of prior inform consent of the contracting Party providing genetic resources and mutually agreed terms on which access was granted in Contracting Parties with users of such resources under their jurisdiction** Prior informed consent has been sold to the Parties as an instrument that ensures that any given acess permit should be given once the provider of the resource has been informed. It has been promoted as facilitating access to information and participation rights in the decision making process. But, in this case, prior informed consent iis made subject to intellectual property rights and does not make any reference to existant mechanisms such as the consultation of the article 6 of the Convention 169 of the International Labour Organization and other substantive aspects of this Convention. The prior informed consent is an aspect that needs more discussion particulary from indigenous peoples and local communities perspectives. If they accept it, they must conceptualize it according to their cultural practices. In the documents for the December meeting, this procedure is weakened when it is suggested that this be converted into a requisite of patenting. It is hard to know who this proposed instrument is favour of, if it both allows the informed participation of local communities and indigenous peoples and yet it is subject to diverse criteria such as the econmic ones.

**The needs for capacity-building in countries in order to apply the Guidelines:** The documents emphasize the need in national policies and legislations for measures and better participation for users, science and technology. But these measures would facilitate access without taking into account the highlighted aspects in the first paragraphs of this document.

Having an international regime or continuing with the current situation (bilateral negotiations) is not the central aspect that should be debated. The discussions should be focused on which is the basis and objective of both of these. . An international regime, or the maintenance of the current situation, including the detrimental aspects noted here, are opposed to sustainability and would become tools for the growth of injustice, inequity and the ecological debt increase. A regime as this will continue to enhance biopiracy, an activity that is characterized for violating the collective rights that indigenous peoples and local communities have over biological diversity. Furthermore, biopiracy facilitates the appropriation of biological diversity resources and the traditional knowledge, through the use of patents or other appropriation mechanisms.

# Actually implementing the CBD: Customary law in the Talaandig community

*How does customary law relate to biodiversity conservation? The experiences of the Talaandig community of Bukidnon located in the Philippines clearly demonstrates the importance of customary law for securing territorial rights, cultural strength, and the conservation of biodiversity. The Talaandig community is actually walking the talk of the convention in respect to article 8j, traditional knowledge, and the conservation and sustainable use of mountain ecosystems. Mr. Victorino Saway, leader of this community, talks with ECO.*

**eco**: Mr. Saway, please tell us about your territory.
**vs**: The Talaandig community of Bukidnon is one of the 110 indigenous groups in the Philippines, and is located in a mountainous and forested area, rich in biodiversity. In the past, we practiced a traditional rotation method of farming, but after logging was introduced in the 1970s, everything changed. Our lifestyle changed, and now most practice a type of high value farming – market vegetables, and such. Traditional culture is slowly dying. Our remaining territory in Mt. Kitanglad, with an area of 47,270 hectares, is a remaining living marker of our community – our history comes from it. The mountain is a sacred place. We need to regulate everything in this area, as it is the last piece of land that is truly collective. Also, Mt. Kitanglad is an important watershed area, as many rivers begin here. If there is no Mt. Kitanglad, there is no Talaandig.

**eco**: can you give us some history of the regulation of resources in your community?
**vs**: In the past, all resource activities (hunting, gathering, etc) were strictly regulated by laws that came from religious beliefs, and extended to everything, including economic and political life. They governed and regulated the cultural practices and traditions of our community. When foreign concepts of law and government were imposed, customary law became weak. These laws permitted massive logging and the collection of forest products for business. In fact, under these new laws, many of our activities became *illegal* and destructive activities became *legal*. For example, the environment office legally gives licenses to cut trees, and issues logging permits. It is very ironic, as the institution that is supposed to protect the environment actually destroys it. They "legally" destroy millions of trees. But when one of our community members destroys only 1 tree, he is sent to court. It is 'illegal' for us to use even abandoned logs.

**jd**: Can you give us an example of how you have, and are using customary laws to conserve biodiversity and strengthen your community and culture?
**vs**: In 1995, the Phillipine National Museum in collaboration with a research institute in Texas collected botanical specimens inside our territory without prior informed consent. When the collectors came down from the mountain, we confiscated the 15 bags of specimens and immediately imposed a cultural penalty constituting (8) heads of carabaos, (26) chickens, (8) metres of red, white, and black cloth, and 150 Pesos. After a month, the group finally paid the penalty. After the submission of their payment, we conducted a reconciliation ritual. After the ritual, the specimens were released to the researchers.

In 2001, Provincial and Community Environment offices of the Department of Environment and Natural Resources attempted to confiscate the lumber being used by our tribe to build a school. The environment people brought a truck load of police officers to confiscate the lumber, but the Talaandig community refused to release it because the lumber was taken from trees within their ancestral territory. Ultimately, they filed a case against me (as the leader of the tribe) for illegal possession of forest products in violation of Philippine forestry laws, claiming the lumber came from trees cut in the protected area. This case failed, however, because I did not personally collect the tree, nor was I in actual possession of the tree. Besides that, the lumber mentioned was collected on private property, not the protected area.

After the case was dropped, we decided to impose a penalty on the environment people for desecrating the leadership of the tribe and putting a bad image to the Talaandig people. The penalty was assessed at (10) carabaos, (8) metres of red, black and white cloth, one pig, (7) chickens, and (1) ganta of one peso coins. The environment people did not pay. After this, we decided to close the case and proclaimed full jurisdiction over Mt. Kitanglad as a cultural territory. Starting last year, the Talaandig people increased the number of cultural guards to protect the indigenous territory against encroachment and destruction.

**jd**: what is the response of the state to these actions?
**vs**: Because we have the force of law behind us (there are several Philippine laws that support the use of customary law), they comply, but we have to push. We have to cite these national laws, and international laws. The existing national laws do help us enforce customary laws. This is why it is important for governments to pass laws that can allow us to practice our own laws and traditions. If we cannot practice our laws and traditions, we are lost. But in spite of the existing provision of laws, recognition of indigenous rights remains a struggle in practice. The models of development carried out by government and non-government institutions still follow the western and colonial framework. This is evident by the problems and issues confronting the indigenous peoples in the protected areas of Mt. Kitanglad. The main problem right now is non-recognition . We say, you are the colonizer, you dominate, suppress, and do everything against us. To change, to support indigenous people, we need to have recognition of our land rights, and our right to practice our traditions – this includes our own customary laws.

## Recognising Outstanding Efforts to End Biodiversity!

Greenpeace is launching today a special award for CBD COP7– the *2004 Champion Assassin of Life on Earth Award*. This award goes to the Government that has done the most to bring an end to biodiversity on our little planet. Greenpeace will announce a daily candidate for the final dishonor throughout the COP, based on contributions made to the debate during the day's meetings. The grand prize will be awarded on the last day in a special award ceremony. In the meantime, the trophy can be viewed at the Greenpeace stand in the Exhibition Area.

The first nomination goes to **Chile** for the convoluted and regressive comments that the delegate made in Working Group 1 stating that the protected areas programme of work was not yet "mature", and should return to SBSTTA. He clearly does not understand the urgency of doing something to protect biodiversity TODAY. Nominations are very welcome at the following email address: nathalie.rey@int.greenpeace.org