The Road to an Anti-Biopiracy Agreement

The Negotiations under the United Nations Convention on Biological Diversity

TWN
Third World Network

Updated 2nd Edition

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Second Edition

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CONTENTS

Introduction

IN the early hours of the morning of 30 October 2010, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation, a new treaty under the United Nations Convention on Biological Diversity (CBD), was adopted. The occasion was the 10th Conference of the Parties to the CBD that was held in Nagoya, Japan.

For decades, developing countries, civil society groups and organisations of indigenous peoples and local communities have called for global action, in particular actions by developed countries, to stop and prevent biopiracy of biological resources and traditional knowledge from developing countries and their peoples.

That is why the CBD that was adopted in 1992 by more than 180 governments has three objectives: biodiversity conservation; sustainable use of biodiversity components; and the fair and equitable sharing of benefits arising from the utilisation of genetic resources. The third objective is a recognition that for too long, biological resources from developing countries were taken for research and commercialisation in sectors such as seeds for food, pharmaceuticals (including vaccines), horticulture and a range of other products but the benefits did not accrue fairly or equitably to the countries of origin and their communities.

With the quick entry into force of the CBD in December 1993 due to the keen support of a large number of countries, there were hopes for an equally swift implementation of the legal obligations for users of genetic resources or associated traditional knowledge to fairly and equitably share the benefits of such use with the countries of origin or countries that provide the resources, as well as with the relevant indigenous peoples and local communities.

However, almost all developed countries and their research institutions and industries failed to fulfil this objective and to date the United States, the host of probably the largest and most influential research entities and corporations that acquire and use biological resources and traditional knowledge, is practically the only country that is not a Party to the CBD. It was clear that the relevant CBD provisions needed to be supplemented with clearer implementing obligations, concrete measures and mechanisms especially for compliance with the laws and measures of countries of origin and provider countries. Regardless of the US, the world needs an effective international law to fight against biopiracy and make the CBD's third objective a reality.

An overwhelming number of developing countries thus started the move in the late 1990s to develop a legally binding agreement or protocol on benefit-sharing under the CBD. The African Group had been calling for a protocol soon after the entry into force of the CBD. Political momentum was triggered by the Group of Like-Minded Megadiverse Countries (LMMC) that led to the Group of 77 and China's united push for the World Summit on Sustainable Development in 2002 to agree that there shall be negotiations on an "international regime on the fair and equitable sharing of benefits" under the CBD.

Despite this political commitment at the level of heads of state and government, developed countries and their industries as well as many research entities that either hold large collections of genetic resources or oppose regulation over their activities, continued to resist. When the legal mandate was finally negotiated, agreement was reached in 2004 at the 7th Conference of the Parties to the CBD in Kuala Lumpur, Malaysia when developing countries compromised by agreeing that the international regime will also include provisions on access, a matter that is clearly subject to national regulation under the CBD. Still, developed countries sought to delay, arguing that there was no need for a single instrument and that there should not be any legally binding agreement on access and benefit-sharing (ABS).

A few more years of difficult and highly contentious discussions took place, with developing countries often frustrated by the refusal of many developed-country Parties to actually engage in negotiation of text that would constitute a treaty.

By the time the Conference of the Parties (COP) met in Nagoya in October 2010, textual negotiations had just about started in earlier meetings in July and September. Developing and developed countries remained far apart on the most crucial issues, including on the scope of the protocol and the strength of the compliance system. Developed countries sought to limit the scope and wanted a weak compliance system that would have rendered any resulting protocol meaningless. The US, though not a CBD Party, was an active participant in the JUSCANZ group comprising Japan, the US, Canada, Australia and New Zealand.

In the second week of the Nagoya negotiations there was talk in the corridors that the Nagoya deadline for concluding a protocol was unrealistic and that an extension with an Extraordinary Meeting of the COP in 2012 could be an option. After all, this was the path that led to the January 2000 adoption of the Cartagena Protocol on Biosafety, also under the CBD.

Then in an unexpected turn of events, the negotiations that had a reputation over the years for openness, inclusiveness and transparency under the co-chairmanship of Fernando Casas (Colombia) and Timothy Hodges (Canada) went into disarray during the last few days in Nagoya. The crux of the final version of the protocol that was presented to the COP was not the result of intergovernmental negotiations, but was the outcome of a compromise struck by a small group, essentially the European Commission on behalf of the European Union, Brazil and Japan with some involvement of Namibia, the African Group chair. With immense pressure on the Parties not to have a Nagoya "collapse", Japan's Environment Minister, who presided over the final stages of the talks, visibly pushed to get the protocol adopted. Bolivia, Cuba, Ecuador and Venezuela, representing the views of the regional Bolivarian Alliance for the Peoples of Our America (ALBA), put on record that they could not accept a protocol that failed to meet the minimum requirements of preventing biopiracy. However, they did not stand in the way of all the other Parties that agreed to adopt the Protocol. Many developing-country negotiators and civil society observers were left stunned.

The question now is whether the Nagoya Protocol will meet the CBD objectives and tackle biopiracy.

In a research paper published by the South Centre in March 2011 entitled "The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries", the author Professor Gurdial Singh Nijar, Director of the Centre of Excellence for Biodiversity Law (Faculty of Law, University of Malaya, Malaysia) and one of the lead negotiators of developing countries, concluded:

"*As is common knowledge, the Nagoya Protocol was rushed through in the final hours of COP 10 in an attempt to secure a binding instrument on ABS. As a result the Protocol represents, at best, a partially negotiated instrument. In the process, transparency, legal certainty and balance seem to have been sacrificed. The silver lining, however, is that the generalised provisions, crafted in an attempt to accommodate seemingly polarised positions, provide considerable flexibility. It is for developing countries to exercise the options open to them as a result, ... through national law as well as through COP/MOP at the crucial implementation stage after the Protocol is ratified. Hopefully, this will finally provide the world with an instrument truly supportive of national ABS laws and policies to end biopiracy and restore fairness and equity in the exchange of genetic resources across the globe. For, ultimately, only on the basis of fair and equitable sharing of benefits can the conservation and sustainable use objectives of the CBD be finally realised.*"

[The South Centre is an intergovernmental think-tank of developing countries based in Geneva; the paper is available on: http://www.southcentre.org/index.php?option=com_content&view=article&id=1558%3Athe-nagoya-protocol-on-access-and-benefit-sharing-of-genetic-resources-analysis-and-implementation-options-for-developing-countries&catid=154%3Aintellectual-property-and-biological-diversity&Itemid=364&lang=en]

Third World Network followed the negotiations over the long years and participated in several of the official consultations that included observer organisations. We are pleased to present this compilation of the articles and reports that we published as part of the informal record of the negotiations from February 2004 when the mandate was adopted in Kuala Lumpur to October 2010 in Nagoya.

7th meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 7)

Kuala Lumpur, Malaysia
9-20 February 2004

COP 7 – some progress, but vigilance needed

Chee Yoke Ling

This article was published in Third World Resurgence*, No. 163-164, March-April 2004.*

FOR two weeks, there was intense focus on the fate of the planet's biodiversity and the obligations and rights of peoples over nature's bounty that is under severe threat. Environmental ministers were unanimous in their alarm that biological diversity is being lost at an unprecedented rate as a result of human activities. There was increased jostling over trade interests and an assault on the precautionary principle that almost turned a major biodiversity event into a forum for the World Trade Organisation (WTO).

The occasion was the seventh meeting of the Conference of the Parties (COP 7) to the Convention on Biological Diversity (CBD) that took place from 9-20 February in Kuala Lumpur, Malaysia. More than 2,300 participants attended, representing 161 governments, as well as United Nations agencies, non-governmental organisations (NGOs), intergovernmental organisations, indigenous peoples and local communities, the academic community and industry.

Thirty-three decisions were adopted after two weeks of often intensive, even tense, negotiations. Significant progress was made in starting work on an international regime on access and benefit-sharing, and in establishing an expert group on technology transfer and scientific and technical cooperation as part of a new work programme on technology.

COP 7 adopted new work programmes on protected areas and mountain biodiversity after protracted debates. There were revised work programmes on inland water ecosystems, and marine and coastal biodiversity; guidelines on biodiversity and tourism; decisions on Article 8(j) and other relevant provisions on traditional knowledge; identification, monitoring, indicators and assessments; the ecosystem approach; biodiversity and climate change; sustainable use; invasive alien species; a framework for evaluating the Strategic Plan to implement the CBD; incentive measures; communication, education and public awareness; scientific and technical cooperation and the clearing-house mechanism (CHM); financial resources and mechanism; and national reporting.

A number of working groups open to all governments and observers as well as smaller expert groups were set up to deal with the huge tasks in the coming years. A major target is to significantly reduce the current rate of biodiversity loss by 2010.

Delegates raised general positions and concerns in plenary sessions, discussed issues in two Working Groups and negotiated most of the issues in informal sessions called "Contact Groups". Issues that were polarised went to smaller groups called "Friends of the President" established by the COP 7 President. Small "Friends of the Chair" groupings were also formed by the two Working Groups for the difficult issues. Consensus, compromises and specific text were then brought back into the various stages for final approval, changes and adoption.

A Ministerial Segment hosted by the Malaysian government was held on 18-19 February, and more than 120 ministers and heads of delegation adopted the Kuala Lumpur Ministerial Declaration. For the first time at a COP Ministerial, statements were made by representatives from the NGO community, indigenous peoples and farmers.

The number of side events (seminars, workshops and panel discussions) by NGOs, indigenous peoples' groups, international organisations and some governments throughout the two weeks was unprecedented.

As delegates clustered into negotiations, the reality of biodiversity loss and resulting damage and human rights violations flooded the corridors and side events rooms. There was also extensive media coverage.

Stock-taking

COP 7 was significant as it was a stock-taking after more than 10 years of implementation of the CBD. Governments reviewed existing work programmes and decisions and took on new ones. While some progress was made, the overall conclusion was that biodiversity loss is worsening and the world is far from meeting the three objectives of the CBD: conservation of biodiversity; sustainable use of biological resources; and the fair and equitable sharing of benefits from the use of genetic resources.

Governments were also challenged to commit to concrete steps to fulfil their promises at the 2002 World Summit on Sustainable Development (WSSD), including the target of significantly reducing the current rate of biodiversity loss by 2010, and the start of negotiations for an international regime on access and benefit-sharing. The plight of small island developing states that have vulnerable ecosystems due to their size, compounded by the onslaught of climate change, was taken up by COP 7.

COP 7 reaffirmed that the CBD is the most appropriate policy framework to address biodiversity. In addition to the specific decisions, a framework was also adopted to evaluate the implementation of the CBD Strategic Plan 2002-2010. The Plan was adopted at COP 6 to improve the implementation of the CBD's three objectives and to achieve the 2010 target (later endorsed at the WSSD). Such a plan is necessary since the CBD issues are wide-ranging with numerous cross-cutting themes such as technology and alien species that threaten ecosystems, habitats or species.

Trade rules: a growing threat

But even as governments were grappling with the enormous task of slowing down biodiversity loss that brings widespread ecological destruction and human suffering, another threat loomed larger than ever at COP 7.

From mountain ecosystems to invasive alien species, language that brought in trade interests and trade rules took prominence by the second week of the meeting. This included a reversal of a cardinal CBD principle that is regarded as a trade constraint: the precautionary approach.

In an unexpected move, Brazil and Argentina wanted references to trade agreements in the decision on the work programmes on inland waters ecosystems and mountain ecosystems. This seemed to be an attempt to prevent or reverse trade distortions caused by agricultural subsidies given by developed countries, which is a raging issue at the WTO that contributed to the collapse of the Cancun Ministerial Conference in 2003. Other Parties and observers were concerned that by drawing in trade references (especially those on the WTO), there was a danger that some developed countries would then bring in more language that would result in yielding the CBD to trade rules that do not support sustainable development.

As expected, Australia, backed by the US and New Zealand, was a leading voice in pushing for WTO supremacy in a number of critical decisions. At one point there was even rejection of the phrase "consistent with the CBD". This happened in the battle over the precautionary approach as a guiding principle in dealing with invasive alien species (IAS).

Australia has spent the last two years challenging a COP 6 decision that adopted Guiding Principles on IAS. This continued into the corridors and behind-the-scenes negotiations throughout COP 7. The solution brokered by Hans Hoogeveen, the Dutch official who had chaired COP 6, would have effectively redefined the spirit and language of the precautionary approach under the CBD. Not surprisingly, the overwhelming majority of Parties rejected this; the issue remains unresolved and will now be postponed to COP 9.

The European Union (EU) and Norway were opposed to the WTO links that would undermine the CBD. To resolve the issue, a "Friends of the Chair" group was formed. NGOs lobbied for the integrity of the CBD and many wore stickers that called for "WTO out of the CBD". Flyers with the same message were placed on the seats of all the government delegations in the Working Group.

Some countries proposed a standalone decision on the CBD-trade relation that would be cross-cutting. This was rejected and trade/WTO references in some draft decisions were removed. A number of references remained that reaffirmed the mutual supportiveness of environment, trade and development agreements as well as called for cooperation between the CBD and WTO processes.

But even the EU was prepared to turn its back on the CBD when it came to the battle over where intellectual property rights (IPRs) should best be resolved in the negotiations on access and benefit-sharing.

Developing countries called for the CBD COP to reassert its responsibility and a lead role in protecting traditional knowledge and ensuring fair and equitable sharing of benefits, particularly on disclosure of information such as the country of origin/source and prior informed consent of indigenous and local communities in IPR applications.

However, developed countries including the EU insisted that the World Intellectual Property Organisation (WIPO) be the leader. The moves in WIPO to harmonise patent rules that go even further than the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are controversial, and the unfortunate earlier decisions at the CBD to hand over IPR studies to WIPO needed to be reversed.

Intense and skilful negotiations by developing countries' representatives successfully brought the IPRs issue back to the CBD, while keeping a role for WIPO and other fora, especially the UN Conference on Trade and Development (UNCTAD).

Invasive alien species

Away from the limelight were continual attempts by the COP 6 President Hoogeveen to close the chapter on Australia's refusal to accept the decision on Guiding Principles for IAS.

This was a test case for the implementation of the precautionary principle (or "approach", as is preferred by many governments), and for incorporation of socioeconomic and cultural considerations in decisions on risk analysis and management.

Actions to deal with and prevent damage caused by IAS are important to protect biodiversity and safeguard local livelihoods, socioeconomic activities and cultural values. Thus Article 8(h) of the CBD calls on Parties to "prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species".

Even though the IAS Guiding Principles are non-binding, and the result of long negotiations at COP 6, Australia objected to their adoption even after its concerns were recorded in footnotes to the COP 6 decision. Firstly, Australia wants the IAS Guiding Principles to be consistent with "other international obligations" – a code for trade rules and the WTO.

Secondly, Australia prefers to apply the limited approach in the 1992 Rio Declaration on Environment and Development where "cost-effectiveness" and capabilities of States circumscribe measures to prevent environmental degradation. The IAS Principle 1 states that the precautionary approach is that set out in Principle 15 of the 1992 Declaration and in the CBD Preamble. The introduction part states clearly that the extent of implementation of the Principles "ultimately depends on available resources". This was not good enough; reference to the CBD preambular paragraph was unacceptable to Australia.

Thirdly, when decisions take into account socioeconomic and cultural considerations, Australia wants these to be "consistent with other international obligations and objective, transparent and science-based assessment". In essence this was a rejection of those important considerations.

The quest to satisfy Australia was carried out in numerous discussions between the COP 6 President and other Parties. The amendments (in effect rewriting the intent and spirit of the COP 6 decision and rejecting the CBD formulation of the precautionary principle) that were finally tabled to the COP 7 meeting were rejected.

Almost all Parties were frustrated, with some expecting Australia to obstruct consensus on other issues. Australia made two strong statements at the beginning and the end, expressing disappointment and a willingness to continue seeking a solution.

A spokesperson for the Group of 77 (G77) developing countries described the proposed amendments as a "compromise of a compromise of a compromise". Since Australia has very stringent national rules on the introduction of alien species given its own experience, it was clear to everyone that its position was primarily driven by a desire to minimise regulation over international trade in genetically engineered organisms and commodities.

While the procedural aspect of the adoption of the IAS decision at COP 6 raises questions, the two-year-long debate is a stark reflection of the dominance of trade considerations. Canada and the EU requested that the COP 7 report include their interpretation of consensus agreement, as outlined by a UN legal opinion on the issue (supporting the legality of the COP 6 decision), and expressed regret that the IAS issue was not resolved. The delegate of Brazil reiterated her concern over the process by which the COP 6 decision had been adopted.

The saga is thus not ended, and will resurface when IAS work is reviewed at COP 9 in 2008.

International agreement on access and benefit-sharing

THE Group of Like-Minded Megadiverse Countries (LMMC) played an active role in the negotiations. The 15 countries had been instrumental in obtaining a WSSD decision to negotiate an international regime on benefit-sharing. At COP 7 the LMMC urged delegates to convene a working group to begin negotiations.

The EU, Australia, Canada and Switzerland favoured the voluntary Bonn Guidelines on access and benefit-sharing (ABS) and wanted to defer any new negotiations. They also insisted that any regime must be about access as well. The African Group supported a legally binding regime that balanced access with benefit-sharing concerns, and included technology transfer. The International Indigenous Forum on Biodiversity took a strong stand against any work on an international access and benefit-sharing regime until indigenous peoples' rights are guaranteed.

A joint NGO statement called for a strong legally binding international regime because existing benefit-sharing regulations and practices have failed and biopiracy remains a major problem. A precondition for a new regime must recognise the inalienable collective rights and customary laws of indigenous peoples and local communities. Thus their free and prior informed consent, as well as that of countries of origin, must be guaranteed. Subsequent to the negotiated access, there must be no IPRs (especially patents) that restrict access or violate community rights. The NGOs also called for the regime to establish a multilateral mechanism for benefit-sharing of resources originating in more than one country or outside national territories such as Antarctica.

The final COP 7 decision was that the existing Ad Hoc Open-ended Working Group on Access and Benefit-Sharing will cooperate with the Working Group on Article 8(j) to develop an international ABS regime. These CBD working groups are open to all governments and observers. The ABS Working Group will meet twice before COP 8. The Article 8(j) Working Group will meet once in conjunction with one of those meetings.

The ABS Working Group will work out further details on the nature, scope and elements (listed in the COP 7 decision) of an international ABS regime. There was no agreement to have a legally binding treaty, so this will be decided later. The regime's scope covers access to genetic resources and promotion and safeguarding of fair and equitable benefit-sharing; and traditional knowledge, innovations and practices in accordance with Article 8(j).

A list of elements to be considered by the ABS Working Group includes measures to: promote collaborative scientific research and sharing of its results; ensure fair and equitable sharing of benefits arising from the use of genetic resources and their derivatives and products; and ensure compliance with relevant national legislation and compliance with prior informed consent of indigenous and local communities holding associated traditional knowledge.

The regime should also have measures to prevent unauthorised access to genetic resources and to promote access for environmentally sound uses.

Other important elements are derivatives (i.e., to what extent the products developed from genetic resources would be subject to the ABS regime); disclosure requirements in patent applications; certificates of origin/source/legal provenance (proof of legality of genetic resource collections); protection of the rights of indigenous and local communities over their traditional knowledge relating to genetic resources; measures to ensure that bioprospecting beyond the jurisdiction of countries of origin is in compliance with the CBD; monitoring, compliance and enforcement; and dispute settlement.

The role of WIPO

Another contentious point in the ABS negotiations was the role of the World Intellectual Property Organisation (WIPO), which has a memorandum of understanding with the CBD Secretariat. COP 6 gave a bigger role to WIPO than any other organisation to deal with IPR issues in implementing ABS arrangements. The key issues are the protection of traditional knowledge and the enforcement of prior informed consent from countries of origin/source of collected genetic materials, and from indigenous and local communities.

Thus at COP 7, WIPO submitted a Technical Study on Patent Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge, as requested by COP 6. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore set up in 2001 is responsible for the work that relates to the CBD.

Developed countries wanted WIPO to remain the primary forum for the ABS/intellectual property issues and development of proposals for CBD implementation. Most developing countries wanted the CBD COP to provide more direct guidance because some governments were concerned that the direction and emphasis in WIPO may not be fully consistent with the CBD. They also strongly supported a role for UNCTAD to safeguard developing countries' interests.

The final decision is that WIPO will continue to examine the issues concerned but will "regularly provide reports to the CBD on its work", especially on actions or steps proposed to address those issues. This will enable the CBD to then provide its inputs to WIPO. A negotiator from a developing country who was in the small group negotiations said that this was a significant move – WIPO as a separate forum is now required to "report" to the COP. In the negotiations there were frank discussions about the lack of full confidence in WIPO, as opposed to UNCTAD, by the developing countries.

In COP 6, the UN Food and Agriculture Organisation (FAO), UNCTAD, WTO and UN Commission on Human Rights were also listed as those invited to contribute to the CBD process on the role of IPRs in ABS arrangements. This is the first time that UNCTAD is thus asked to specifically submit a report to the CBD. Other international organisations will also be asked, in addition to UNCTAD, to examine the ABS/IPR issues and prepare a report for the CBD process.

At the same time, the ABS Working Group will also be providing its views and inputs to WIPO and other relevant fora. It is hoped that this new arrangement will put the CBD back in a leadership role, ensuring that the CBD objectives will prevail.

Meanwhile, COP 7 adopted a decision to deal with gaps and inconsistencies in the international regulatory framework and support activities especially in developing countries; improve coordination of regional measures to address transboundary issues; incorporate IAS considerations into regional agreements; and consider the introduction of positive incentive measures.

The COP invites the WTO to consider risks from IAS in its work, and requests the CBD Executive Secretary to collaborate with the WTO Secretariat to raise awareness on IAS-related issues, and renew his application for observer status in the WTO Committee on Sanitary and Phytosanitary Measures.

The CBD's scientific body will establish an ad hoc technical expert group to address gaps and inconsistencies. In the closing plenary, Australia expressed regret that no agreement could be reached on a paragraph on trade-related issues in the chapeau (i.e., introductory part of the decision).

Protected areas

With biodiversity loss continuing at an alarming pace, there was much urgency for a strong work programme on protected areas (PAs) to be adopted at COP 7, especially to meet the target of significantly reducing the current rate of biodiversity loss by 2010.

The major conservation organisations such as Conservation International, The Nature Conservancy, WWF, Wildlife Conservation Society, Fauna and Flora International, World Resources Institute and Birdlife International lobbied intensely over the past two years to get official recognition in the CBD work programme. The EU also had PAs as a matter of priority at COP 7.

NGOs, indigenous peoples' organisations and community groups, especially from developing countries, were very worried about the aggressive approach of the Northern conservationists. Their experiences on the ground, especially in Latin America, were filled with conflicts and tensions. Reports of land rights violation and conservation approaches that enclosed and privatised nature leading to biopiracy and loss of sovereignty at the peoples' level (even national level in some cases) were presented at numerous side events during COP 7.

Two main issues proved contentious at the negotiations. First, some countries favoured corridors and networks of PAs that focus on "hotspots" including transboundary areas. This was supported by the majority of large Northern-based conservation groups. However, this was not accepted by most developing countries which preferred to link conservation with sustainable use of resources to meet national development needs. The adopted work programme will now be implemented "in the context of nationally determined priorities, capacities and needs". COP 7 also emphasised the importance of conserving biodiversity not only within but also outside PAs.

Secondly, the International Indigenous Forum on Biodiversity lobbied strongly for the protection of their rights under international law when PAs are established. A few countries were reluctant, preferring to leave this to national laws. The final agreement noted that "the establishment, management and monitoring of PAs should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations".

The COP 7 decision calls on Parties to estimate the cost of implementing the necessary activities to meet the targets of the work programme and report back to COP 8, and integrate PA objectives into their

Indigenous peoples' rights

A COP 7 achievement was the adoption of the Akwe: Kon Voluntary Guidelines. These deal with the cultural, environmental and social impact assessment regarding developments that affect sacred sites and lands and waters traditionally occupied or used by indigenous and local communities.

Parties are encouraged to conduct legal and institutional reviews of impact assessments; involve indigenous and local communities in impact assessments; take steps to ensure transparency; and provide the necessary capacity and funding to ensure that the measures are implemented in accordance with the Guidelines.

COP 7 also decided to establish a voluntary funding mechanism under the CBD to facilitate indigenous participation, giving special priority to participation from developing countries, countries with economies in transition and small island developing states.

All the work programmes and decisions of the COP were closely monitored by the International Indigenous Forum on Biodiversity (IIFB), which has been well organised over the years.

Delegates generally supported the recognition of indigenous land rights and prior informed consent, as well as *sui generis* systems for traditional knowledge protection on the basis of customary laws and traditional practices.

There were some reservations among a few countries, with New Zealand expressing this most openly, including unhappiness with a reference to lands and waters traditionally used or occupied by indigenous and local communities in another decision (this was ultimately retained). Such concerns are related to ongoing domestic disputes.

The IIFB throughout COP 7 asked for recognition of their rights under international law, stressing that these should not be subject to national legislation alone.

The same issue arose in the negotiations on protected areas where the IIFB lobbied strongly for the protection of their rights under international law when such areas are established. Part of the concern, expressed by Malaysia, was that a general reference to international law was too vague as it would cover laws that are yet to be made while also opening the way for trade rules at the WTO to be applied inappropriately. The final agreement noted that "the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations".

On the development of elements of *sui generis* systems for the protection of traditional knowledge, COP 7 asked the Secretariat to compile information on customary laws and to develop a glossary of terms relevant to Article 8(j). There will be more cooperation between the ABS and Article 8(j) Working Groups.

The Working Group on Article 8(j) will: develop as a priority issue, elements for *sui generis* systems for the protection of traditional knowledge; review the relevance and applicability of the Bonn Guidelines on ABS; assess the role of databases and registers; and explore the conditions under which the use of existing IPRs can contribute to reaching the objectives of Article 8(j). An annex to the COP 7 decision contains potential draft elements to be considered in the development of a *sui generis* system for the protection of traditional knowledge.

The Working Group will also develop draft elements of an ethical code of conduct to ensure respect for the cultural heritage of indigenous and local communities for biodiversity conservation and sustainable use.

Due to lack of funds, there will be only one meeting of the Working Group on Article 8(j) before COP 8, to be held in conjunction with the ABS Working Group. With so many important issues and such a heavy agenda, many observers are concerned that the working group will face an uphill task.

The CBD Secretariat will prepare a progress report on the integration of Article 8(j) into thematic areas such as forest, agriculture, mountain biodiversity, marine and coastal biodiversity.

development strategies. To accommodate the various views, Parties are asked to consider options such as ecological networks, ecological corridors, buffer zones and other approaches.

The stated objective of the work programme is to establish and maintain by 2010 for terrestrial areas, and by 2012 for marine areas, effectively managed and ecologically representative national and regional PA systems that contribute, through a global network (as defined in the document), to achieving the three objectives of the Convention and the 2010 target. A definition of global network is footnoted.

COP 7 established an ad hoc open-ended working group on PAs to support and review the implementation of the work programme, and assess progress in the implementation of the work programme at each COP meeting until 2010. This working group will meet at least once before COP 8.

Technology transfer and cooperation

COP 7 directed the Secretariat to set up an experts group on technology transfer and scientific and technical cooperation. This will work on proposals including best practices for access to and adaptation of environmentally sound technologies (both public domain and proprietary technologies), and consider ways to overcome barriers to technology transfer.

North-South technology transfer was emphasised by developing countries, consistent with the intent of the CBD. Thus, while recognising the importance of traditional technologies developed by local communities and indigenous peoples as well as South-South transfers, developing countries wanted the work programme to clearly focus on North-South flows.

At the 9th meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) before COP 7, the Sunshine Project (a US-based NGO) alerted delegates to arbitrary export controls that are imposed by a select club of technology-rich countries called the Australia Group, while Third World Network lobbied for strong language on technology assessment which was supported by many countries. Element 1 of the work programme is now "Technology Assessments", with the objective that "Technology needs, the potential benefits, costs and risks of such technologies, and the related capacity-building needs of Parties are identified in response to national priorities and policies".

Programme Element 3 on "Creating Enabling Environments" in its original draft at SBSTTA-9 was criticised by some developing countries and NGOs as promoting more liberalisation in favour of foreign investors and failing to sufficiently recognise the barriers put up by industrialised countries such as IPRs and export controls.

The work programme now calls for technical studies that analyse the role of IPRs in technology transfer and "identify potential options to increase synergy and overcome barriers to technology transfer and cooperation ... The benefits as well as the costs of intellectual property rights should be fully taken into account".

Developed countries should also provide an enabling environment for technology cooperation and studies are to be done on "obstacles that impede transfers of relevant technologies from developed countries".

It would be crucial for Parties and the Secretariat to ensure that this work programme's implementation is focused on environmentally sound technologies and that technology assessment should also cover the socioeconomic and cultural aspects.

Conclusion

While progress was made in some areas, especially in new programmes on protected areas and mountain ecosystems, the overall sense of COP 7 was that more effort went into protecting the basic principles, objectives and provisions already agreed in the CBD more than 10 years ago.

The vigilance and well-organised lobbying by indigenous peoples through the International Indigenous Forum on Biodiversity that is now a recognised platform in the CBD process was a strong and consistent force in safeguarding indigenous peoples' rights and interests.

However, it was also clear from COP 7 that the dominant trade interests, including private intellectual property rights, of major developed countries will continue to be an assault on the CBD. That calls for vigilance from all parties, governments and citizens alike, in the work of the various CBD bodies until the next COP meeting in Brazil in 2006.

4th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Granada, Spain
30 January-3 February 2006

Africans propose draft CBD access and benefit-sharing protocol

Chee Yoke Ling

This article was published in the South-North Development Monitor (SUNS)*, No. 5957, 2 February 2006.*

AFRICAN countries have submitted a draft of a legally binding protocol on access and benefit-sharing (ABS) for biological resources and traditional knowledge at the start of a working group meeting under the Convention on Biological Diversity (CBD) being held in Granada on 30 January-3 February.

The African draft was supported by several other countries as the starting point for negotiations for an international ABS regime. However, some developed countries were opposed to using it as the negotiating text.

The tabling by the African Group of its draft was the latest attempt by developing countries to speed up negotiations on an international agreement to combat biopiracy, and ensure the fair and equitable sharing of benefits between countries of origin/source and users of biological resources and traditional knowledge associated with those resources.

Governments that are Parties to the CBD started the second round of negotiations on an international ABS regime in Granada on 30 January.

The majority of developing countries, including the African Group and the Group of 17 Like-Minded Megadiverse Countries, want the work at the Granada meeting to focus on developing a single international instrument.

But developed countries continue to set a slower pace, and are attempting to steer the discussions to national laws and measures, the voluntary Bonn Guidelines on ABS adopted under the CBD, other international processes, and more analysis of gaps.

The mandate for the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing is to further elaborate and negotiate an international regime for adoption by the Parties to the CBD. This mandate with terms of reference was the outcome of intense negotiations at the 7th meeting of the CBD's Conference of the Parties (COP) in February 2004 held in Kuala Lumpur, Malaysia. Two sessions of the Working Group were scheduled for negotiations before the 8th COP in Curitiba, Brazil in March 2006.

In addition, one meeting of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and related provisions was scheduled, and this took place on 23-27 January. This Working Group deals with the protection of traditional knowledge, innovations and practices of indigenous and local communities, their rights to fair and equitable sharing of benefits as well as prior informed consent relating to access and benefit-sharing.

In Bangkok in February 2005, the result of the ABS Working Group's first attempt at negotiation was a lengthy menu of options on the scope, nature, objectives and elements for an international regime. Developed countries further insisted on more gaps analysis and wanted work to focus on a matrix of such gaps.

The concept of a regime itself was disputed, with some countries wanting the Working Group to look at national laws and measures, existing international instruments, voluntary and legally binding components. However, the majority of developing countries, including the African Group and the Like-Minded Megadiverse Countries Group, maintain that the Working Group's mandate is to negotiate an international regime, and that logically means one instrument addressing the acknowledged gap of ensuring benefit-sharing.

As the South African delegation remarked at the Bangkok meeting, the Working Group cannot be responsible for creating an "analysis paralysis".

Developing countries thus welcomed the statement by Spain's Environment Minister Dona Cristina when she opened the meeting of the Working Group on Article 8(j) on 23 January. She expressed hope that the results of the meetings in Granada would be very clear in complying with the mandate given to establish a truly international regime to regulate access to genetic resources and a fair and equitable sharing of the benefits. "We have criteria, we have recommendations and we have all the work that has led to the Bonn guidelines. Now, we need to move on to an international regime that I believe needs to be a binding regime. We need to move from voluntary guidelines to a compulsory regime."

Delegates at the Granada meeting have before them an unwieldy collection of proposals, options and comments that, according to a delegate, "creates frustration even before we begin our work".

In a significant move on 30 January, several countries (including Brazil, Colombia, India and Malaysia) supported the use of the draft text of an ABS protocol submitted by Ethiopia, and endorsed by the African Group at their regional meeting on 29 January, as a starting point for the Granada talks.

The Ethiopian/African Group draft is the only document on the table that is structured. It is in the form of a protocol (i.e., a legally binding agreement under the CBD) and it includes substantive provisions on access and benefit-sharing and compliance provisions.

The developing countries that supported using this text as a basis for negotiation made it clear that their support was not necessarily for all the provisions or even for the final outcome to be a protocol, but the draft did provide a good basis and starting point.

Ethiopia, on behalf of the African Group, introduced the draft at the opening plenary. "The African Group is submitting it as a starting point to negotiate a legally binding protocol. We would like to invite other regions to adopt this as a starting point," said Dr. Tewolde Egziabher of Ethiopia. He pointed out that there was no other document submitted in the form of a self-standing instrument, and added that the move was exactly in line with the clear call of Spain's Environment Minister when she opened the meeting of the Working Group on Article 8(j) on 23 January.

Colombia, supporting the African draft as a basis for negotiations, said it provided a concrete opportunity to get the negotiations going.

Malaysia also supported using the African draft as it wanted to see some shape of the international regime emerging sooner rather than later. It added that there was a whole range of issues and a huge menu compiled from and since the Bangkok meeting. The African draft had garnered many elements into a structured document but it was a flexible document. "It means that we can start in earnest ... Structure is important. Otherwise, this meeting will be a litany like Bangkok, ending up unstructured and not moving forward."

Brazil reiterated that an international ABS regime was an urgent priority, and it favoured starting with the African draft. As the next President of the CBD Conference of the Parties, Brazil would like to take to COP 8 (in March) a concrete result.

Egypt said that despite their experience with the Bonn Guidelines, a legally binding international instrument on ABS was necessary. Dr. Ossama El Tayeb, the spokesperson, invited Parties to immediately negotiate on the basis of the African Group draft. He also cited the same Spanish Minister's opening speech that in both Article 8(j) and Article 15, "we need to ensure that we apply the principles of precaution, prevention and social justice and participation".

Dr. Ossama recalled that it was in Spain 10 years ago that the Cartagena Protocol on Biosafety was first shaped, and hoped that this week's meeting would be the beginnings of a Granada Protocol on ABS, on the basis of the African text.

The Working Group chairperson, noting that a large group of countries were interested in the African Group contribution, suggested that it be translated to all UN languages to be used by the delegations while proceeding with the structure provided by the Secretariat. (Submissions compiled into a set of "information" documents are, in accordance with the UN practice, distributed in the language received.)

Australia objected to the selection of one submission for translation, and expressed concern as to why "we are moving so quickly".

The European Union said that they had consulted among themselves based on the Secretariat documents and would have difficulties. Thailand also expressed some reservations.

In light of the lack of consensus, the chairperson said no translation would be done but he encouraged all Parties to read the document and strongly urged them to negotiate.

The Working Group proceeded to exchange views on the elements compiled by the Secretariat from the Bangkok meeting and submissions since then. Many developing countries including Colombia, Malaysia and Uganda expressed their concern that this approach would not make much headway.

Ethiopia, on behalf of the African Group, said that once access has been granted, the sharing of benefits need not necessarily happen, and in fact does not happen. A legally binding international regime would ensure benefit-sharing, and the Bonn Guidelines cannot be a substitute. "If the Group's text was not acceptable," said Ethiopia, "give us another text as a starting point so that we don't go meandering all over, as Australia wants us to do."

Developing countries have been arguing for the urgency of supplementing national laws with an enforceable international regime, because when biological resources and/or associated knowledge are taken and used for research and commercialisation, and often patented in the user countries, the provider countries have no reach.

On the other hand, developed countries resist international legal obligations to ensure benefit-sharing, while demanding "facilitated access" under an international regime. Under the CBD, the sovereign rights of States over their natural resources are reaffirmed, and accordingly the right to regulate access under national law, with prior informed consent as a central feature.

In the opening plenary session, the Group of Like-Minded Megadiverse Countries called for the Working Group to fulfil its negotiation mandate by streamlining a single text rather than have a document with multiple options. The gaps analysis matrix should not become a diversion while it provided a useful background information document. Even then, one glaring feature identified by the matrix was the evident gap on fair and equitable sharing of benefits, which required an international instrument binding at least in its essential or core elements.

In acknowledging the work of other processes such as TRIPS, WIPO, the International Treaty on Plant and Genetic Resources for Food and Agriculture and UPOV (International Union for the Protection of New Varieties of Plants), the Group emphasised that the CBD must always remain central to the elaboration and negotiation of the international regime.

The Group also stressed that they were aware of the rights of indigenous and local communities regarding their traditional knowledge associated with genetic resources, and "we would like to ensure that the international regime will reinforce and safeguard those rights".

Like other developing countries, the Group reiterated the CBD's recognition of the right of States to regulate by national legislation the conditions for access to their natural resources.

South Africa supported the statements of the African Group and the Group of Like-Minded Megadiverse Countries (both of which it is a member). It said that ABS covers international transboundary transactions that cannot be implemented at the national level alone. A legally binding international regime will complement national efforts to provide clear standardised procedures and enforceable measures, it stressed.

Global rules on access and benefit-sharing of biodiversity take shape in Granada meeting

Chee Yoke Ling

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IT can be described as a long, winding and uphill road. This is the struggle for many developing countries to forge a global agreement to regulate access to their biological resources and to protect the rights of their indigenous peoples and local communities from biopiracy.

The potential of the diversity of biological resources, and the wealth of traditional knowledge associated with that biodiversity, for research and development has long been exploited by those with technological advantage and financial resources. While the former lies largely in the developing world, the latter is still dominated by industrialised countries. Upon that chasm have also been laid the rules of patenting and other monopolistic intellectual property claims, which have led to further North-South inequities and deepened violation of the rights of indigenous peoples and local communities.

When the United Nations Convention on Biological Diversity (CBD) was first concluded in 1992 and quickly entered into force in December 1993 with the support of almost all countries (the US remains practically the only non-Party today), there were high expectations for a fairer system. States' sovereign rights to regulate access to their biological resources, with prior informed consent as a central feature, were reaffirmed. The knowledge, innovations and practices of indigenous peoples and local communities were to be protected by States. Environmental limits to the exploitation of nature were accepted and the precautionary approach was enshrined.

Within that framework of the CBD there was also to be a fair and equitable sharing of benefits from the sustainable use of biological resources. This sharing is both between countries and within countries, where the rights of indigenous and local communities (and their prior informed consent) are to be ensured.

The converse has played out in the last 12 years, however. While developing countries in varying degrees have tried to implement national laws and policies on access and benefit-sharing (ABS), the patenting of biological resources and their parts has accelerated in a number of industrialised countries with prominent biotechnology, pharmaceutical and agro industries. This is particularly acute in the US, which has the broadest scope for patenting of lifeforms and their derivatives.

Well-known cases such as the patents associated with the uses of neem and turmeric, challenged by civil society groups and the government of India respectively, expose the weaknesses in the US and European patent system. But such challenges throw the burden of proof and costs on the wronged party.

At the same time, all other kinds of uses of biological resources and associated traditional knowledge are taking place every day. This can be collection or bioprospecting for research, and in many cases even commercialisation without claims of intellectual property rights. The common thread is that the benefits are not fairly and equitably shared with the countries of origin or source of those resources, let alone the affected indigenous peoples and local communities.

Where bioprospecting contracts are signed, the majority are not fair or equitable. And there is certainly no tracking and monitoring system across borders to enforce agreements where they are fair.

All these and more have preoccupied governments, indigenous peoples' organisations and concerned NGOs for the past decade. Unknown to the general public, an unending battle has been going on to give life to the spirit, objectives and legal obligations of the CBD.

In 2002, heads of state at the World Summit on Sustainable Development in Johannesburg agreed that there shall be negotiations on an "international regime on the fair and equitable sharing of benefits" under the CBD. This was the result of a concerted initiative of the Group of Like-Minded Megadiverse Countries (LMMC) supported by the larger developing-country grouping, the Group of 77.

The LMMC number 17 countries today. These are Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela.

First steps

The latest round of talks took place from 30 January to 3 February in Granada, Spain at the 4th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing ("open-ended" in UN meetings means that all Parties and observers can attend). In the end, the main ingredients of an international agreement on access and benefit-sharing were set out in one document.

The draft elements of the international regime were formulated after strenuous efforts by developing countries and despite objections and resistance by most developed countries.

Agreement was reached on a recommendation to be forwarded to the 8th meeting of the Conference of the Parties (COP 8) to the CBD in March in Curitiba, Brazil for the next phase of work, and on a draft that will be the basis for future negotiations. This draft, entitled "International Regime on Access and Benefit-Sharing" and annexed to the recommendation, is entirely bracketed, reflecting a lack of consensus over the notion of one instrument.

However, the draft contains a structure and core issues in six pages, compared to the unwieldy and lengthy document that had arrived in Granada. Developing countries are hopeful that this will set the stage for formal negotiations towards a single instrument within a time-frame to be decided at COP 8.

The battle over IPRs

Chee Yoke Ling and Sangeeta Shashikant

A new twist in global negotiations is taking place. "The World Trade Organisation (WTO)" is a term not desired by major developed countries in talks at the Convention on Biological Diversity where an international regime on access and benefit-sharing is being fought out.

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the creation of big business delivered by the US, the EU and Japan to the world. Over the past few years, a group of developing countries with a mandate from the Doha Ministerial Conference of the WTO has been pushing for an amendment of the TRIPS Agreement. They want to include three items when there is a patent application relating to biological resources and associated traditional knowledge: disclosure of the country of origin/source; evidence of prior informed consent; and evidence of a fair and equitable benefit-sharing arrangement according to national law.

Developed countries and industry reject this at the WTO. So in the ABS negotiations in the CBD, when developing countries argue for the Parties to carry out their responsibility to ensure that IPRs protection does not conflict with the CBD objectives, there is a flurry of objections.

In the Granada meeting of the ABS Working Group, Brazil, Malaysia, Ethiopia and Uganda in a contact group session stood against Australia, Canada, the EU and Japan.

In the contact group, delegates discussed from midnight 2 February this controversial item. There was no consensus on whether the CBD is the appropriate forum to address disclosure of origin/source/ legal provenance in IPR applications.

Brazil played a key role and proposed text to ensure the primacy of the CBD, reiterating that "since CBD provisions are negatively affected by intellectual property rules, this is an appropriate forum to tackle them".

Brazil saw the work of the CBD Parties and the WTO's TRIPS Council as complementary, with a group of developing countries at the WTO "deeply engaged to move forward disclosure requirements" in the TRIPS Agreement. The delegate said IPR applications whose subject matter makes use of derivatives and products should disclose the country of origin, evidence that PIC has been complied with, and evidence of benefit-sharing.

"There must be sanctions that affect the IPR in question when there is non-compliance, and the international regime should incorporate this binding requirement of disclosure in IPRs applications," said Brazil, adding that the developed countries' proposals would not be effective in dealing with biopiracy.

Uganda, supported by Malaysia and Ethiopia, stressed that compliance with PIC and MAT is an important component of the international regime. "In the interest and spirit of transparency these measures will show that there is nothing to hide if one is applying for intellectual property protection, and ensure that benefit-sharing has taken place with the right people and in accordance with national law. This should be part and parcel of the international regime."

The EU and Switzerland preferred the World Intellectual Property Organisation (WIPO) as the appropriate forum and said that there are proposals to amend the WIPO Patent Cooperation Treaty requiring the disclosure of country of origin. Australia, Japan, Canada and the US agreed that WIPO and not the CBD should address IPR issues.

The resulting draft recommendation adopted by the Working Group contains several bracketed sections. COP 8 is asked to "invite parties and relevant stakeholders to continue taking appropriate and practical measures to support compliance with PIC of parties providing genetic resources, including countries of origin, and MAT on which access was granted".

Brazil and Ethiopia's proposal to include "derivatives, products and associated traditional knowledge" is in brackets. This aspect of scope is bracketed throughout.

There was also no agreement on the listing of organisations invited to address and/or continue their work on disclosure requirements in IPR applications, taking into account the need to ensure that this work does not run counter to the CBD's objectives.

The controversial organisation is the WTO, with developing countries wanting to mention it and most developed countries not wanting this.

Brazil was not in favour of singling out WIPO as there were many other organisations that looked at the inter-relation between the CBD provisions and IPRs. It said the CBD has received an excellent study by the UN Conference on Trade and Development (UNCTAD). It proposed the following wording: "Invites relevant organisations such as FAO, UNCTAD, UNEP, UPOV, WIPO and WTO..."

Australia insisted that special reference be made to WIPO distinct from others. It was supported by Canada, the EU and Japan. Australia proposed the following: "Invites WIPO, UNCTAD and other relevant international organisations." Both formulations are now in brackets.

The next Working Group meeting is requested to further consider measures to ensure compliance with PIC and MAT, including disclosure of origin/source/legal provenance. Language stating that these measures should be considered "as one of the possible elements ... for inclusion in the international regime" is bracketed.

The following paragraph proposed by Brazil for COP 8 to take note of, is also in brackets: "Notes the progress in international discussions regarding disclosure of origin/source/legal provenance in intellectual property rights applications, in particular in the framework of the Doha round of negotiations of the World Trade Organisation, and requests the Executive Secretary to renew the request for accreditations of the CBD as an observer at the WTO TRIPS Council."

Brazil, supported by Malaysia and India, also proposed the inclusion of an additional operative paragraph that recommends that COP 8: "Reiterates the terms of Article 16(5) of the Convention and Decision VII/19 D and notes that the international regime negotiations shall consider disclosure of origin/source/legal provenance in intellectual property rights applications." Decision VII/19 D was made by COP 7 and sets out the mandate and terms of reference for the negotiations of the international regime.

Australia objected, and wanted Article 16(2) to be included while bracketing the whole text. Article 16(2) refers to "the adequate and effective protection" of IPRs regarding access and transfer of technology under patents or other IPRs. [Note: Article 16(2) also states that this must be consistent with Article 16(5) on the primacy of the CBD objectives.]

Exhausted negotiators from developed countries but energised negotiators from developing countries left the room at almost 3am on 3 February morning.

The battle will continue.

Bones of contention

The contentious issues that keep countries deeply divided include: the need for a new instrument and whether it should be legally binding; the inclusion of derivatives and products of genetic resources and associated traditional knowledge; disclosure requirements in applications for intellectual property rights; and enhanced participation of indigenous and local communities in the ABS negotiations.

The disclosure requirements relate to the country of origin or source of genetic resources, derivatives and products and/or associated traditional knowledge, evidence of prior informed consent, as well as evidence of fair and equitable benefit-sharing according to national law.

With a large majority of countries wanting to start work on a negotiation text, and the major developed countries resisting and delaying, Chairperson Prof. Margarita Clemente of Spain steered the week's debate with a firm hand. Though the resulting three documents are heavy with brackets, reflecting a lack of consensus, a significant turning point in the negotiations has been reached.

The Granada meeting was the second session following the decision of the CBD's 7th meeting of the Conference of the Parties (COP 7) in February 2004 to authorise two meetings to "elaborate and negotiate" an international regime on ABS.

On 3 February, the ABS Working Group adopted three recommendations to be forwarded to COP 8 for final decision. Besides the recommendation on the international regime on access and benefit-sharing, the other two were on issues related to an international certificate of origin/source/legal provenance, and measures to ensure compliance with prior informed consent and mutually agreed terms. With no consensus on these documents, however, the road towards an agreement remains very challenging.

Nevertheless, according to the Chairperson, Prof. Clemente, there had been fruitful discussions, and while the text on the ABS regime is bracketed, it is useful to highlight options that need further reflection. Importantly, a path has been set and Parties now can walk that path to an international regime on ABS.

Brazil's head of delegation, Hadil Fontes Da Rocha Vianna, said the meeting produced a well-organised and structured basis to fulfil the Working Group's mandate to negotiate an international ABS regime. India, on behalf of the Group of Like-Minded Megadiverse Countries, welcomed the outcome document that could be used as a basis for negotiations. Mongolia, on behalf of the Asia-Pacific Group, expressed disappointment with those Parties who questioned the appropriateness of the Working Group's mandate to negotiate an international ABS regime. Venezuela, on behalf of the Group of Latin American and Caribbean States (GRULAC), said that the adoption of a draft document was a major step forward towards an international ABS regime.

The EU was disappointed with the rejection of its proposal on indigenous peoples' participation. The International Indigenous Forum on Biodiversity had requested at the Bangkok Working Group meeting for more procedural rights in the Group along the lines of the Working Group on Article 8(j).

The Forum's spokesperson expressed deep disappointment at their limited participation, and said that the outcome document did not reflect the recognition of indigenous peoples' rights over their lands, natural resources and traditional knowledge.

Throughout the week, industry representatives were present in large numbers, including those from the International Chamber of Commerce, Pharmaceutical Research and Manufacturers of America and American Bio-industry Alliance. A representative of the Japan Bio-industry Alliance was a key spokesperson in the delegation of Japan.

The decision on the international regime

In the first outcome document, the Working Group decided to transmit to COP 8 in Brazil the annex containing the international regime text, and a "gap analysis" matrix developed by the CBD Secretariat.

(Developed countries, apart from Norway, had tried to delay work on a "gap analysis" to determine what is lacking in existing national and international instruments relating to access and benefit-sharing. According to some observers, this was a tactic to make a case that there is no need for a legally binding instrument to prevent biopiracy and ensure fair and equitable sharing of benefits between the providers and users of genetic resources and traditional knowledge.)

Parties are now called upon in the Working Group recommendation to review the Group's progress to elaborate and negotiate the international regime, and to reconvene the Group to continue its work and establish a work schedule "so as to expedite and facilitate the early elaboration, negotiation and conclusion" of the international regime on ABS.

The Group also recommended that COP 8 request the Secretariat "to prepare a final version of the gap analysis ... bearing in mind that this work will proceed in parallel and not hold up the work relating to the elaboration and negotiation of the international regime". This qualification is an important recommendation welcomed by developing countries that did not want the gap analysis to be a stumbling block.

A final recommendation is a call for funds from all Parties to enable the Working Group to meet.

A lack of consensus on the nature of the regime resulted in a reiteration of the mandate from COP 7, i.e., "The international regime could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures legally and/or non-binding."

Accordingly, the title of the Working Group decision is "International Regime on Access and Benefit-Sharing", in contrast with the original Chair's draft that was entitled "International [Legally Binding] Regime on Access and Benefit-Sharing within the CBD Framework".

(Note: The brackets throughout the various documents indicate a lack of consensus and may sometimes include alternative wordings of different countries.)

On the "Objectives" of the international regime, developing countries maintain that regulation of access to genetic resources is a sovereign right under the CBD. They reject the notion of "facilitated access" that major developed countries want to include in the international regime, reflecting the interests of the biotechnology, pharmaceutical and agribusiness sectors. Thus, any access should be subject to national legislation, with prior informed consent (including the right to say No) as a fundamental component.

This lack of consensus led to the first objective being framed as: "To endeavour to create conditions to [facilitate] [regulate] access to genetic resources for environmentally sound uses by other Parties and not to impose restrictions that run counter to the objectives of this Convention." There are 12 other objectives listed, with nine totally in brackets.

There is a section on "Scope", with "derivatives and products" bracketed. Regarding traditional knowledge, innovations and practices of indigenous and local communities, many Parties wanted to use the term "protect" while others wanted to stick with the CBD language of "respect, preserve and maintain". The inclusion of human genetic resources is also contested, and this poses a dilemma for countries as there is widespread prospecting and patenting of human genes for research and commercial development of medical products.

The relationship with other international agreements and processes such as the FAO International Treaty on Plant and Genetic Resources for Food and Agriculture, WTO TRIPS Agreement (especially on the disclosure requirements in patent applications) and WIPO is also contentious and the two relevant paragraphs are bracketed.

Elements (with brackets) for the international regime include:

- Access to genetic resources [and derivatives and products];
- [Recognition and protection of] traditional knowledge associated with genetic resources [derivatives and products];
- Fair and equitable benefit-sharing;
- [Disclosure of legal provenance/origin/prior informed consent and benefit sharing];
- [Certificate of origin] [International certificate of origin/source/legal provenance];
- Implementation, monitoring and reporting;
- [Compliance and enforcement];
- Access to justice;
- [Dispute settlement mechanism];
- Capacity-building [and technology transfer];
- [Institutional support];
- [Non-Parties].

The element concerning Non-Parties does not have any specific provisions yet. This is expected to be a heated topic as the US, which is not a Party to the CBD, houses the major bioprospectors of genetic resources and has the world's broadest scope of patent law, with many questionable patents being issued, resulting in many potential cases of misappropriation.

While developing countries consider the title of this section to be "Elements" identified for the regime, developed countries still argue that these are "Potential elements to be considered for inclusion in the international regime". The text is bracketed accordingly to reflect this.

Brazil has been taking the lead in insisting that the international regime must provide for compliance with national access and benefit-sharing legislation, and require the disclosure of country of origin or source, evidence of prior informed consent, and evidence of fair and equitable benefit-sharing in applications for intellectual property rights. Compliance and enforcement of prior informed consent and mutually agreed terms for granting access are priorities for developing countries.

Developing countries also wanted derivatives of genetic resources to be included in the scope of the international regime, as data emerging from bioprospecting activities and numerous cases of misappropriation relate to derivatives. However, developed countries reject this inclusion.

"If there are no derivatives included, we may as well stop talking, as there will be no benefits to share," said Uganda in one of the mid-week discussions. The African Group in its draft protocol includes derivatives and products in the scope.

Despite the numerous brackets (and brackets within brackets!), the outcome document is a significant step forward as COP 8 will now consider a six-page document containing key issues, compared to the much longer and unstructured documents that arrived in Granada.

Tracking and monitoring

The second set of recommendations from the Granada meeting related to a more detailed examination of an international certificate of origin/source/legal provenance that could be an element of an international regime on ABS.

Developing countries stress the importance of such a certificate to ensure transparency in the transboundary movement of genetic resources. It would also help ensure that those who access genetic materials have done so legally, in full respect of the national legislation of the country of origin/source.

In the discussions at the meeting, Mexico was a key player in providing details on an international certificate. Supported by many developing countries, it argued that a certificate would be an instrument to track genetic resources and ensure compliance with CBD obligations, and have clear triggers to activate disclosure requirements.

Brazil supported a certificate of legal provenance of genetic resources, derivatives and traditional knowledge issued by the country of origin, in accordance with nationally defined requirements, internationally recognised by the international ABS regime.

Norway said a certificate should verify compliance with the CBD and national legislation on access.

Developing countries unite

DEVELOPING countries came to Granada prepared for negotiations, with the intention to streamline the lengthy and unwieldy compilation of proposals and views into a structured draft instrument. There was visible cooperation among the regional groupings (Africa, GRULAC and Asia-Pacific) and the Group of Like-Minded Megadiverse Countries.

Although Japan and the Republic of Korea are part of the Asia-Pacific regional group, they were absent from the coordination meetings chaired by Mongolia. Japan is also part of JUSCANZ comprising Japan, the US, Canada, Australia and New Zealand. Although the US is not a CBD Party, it is active in the group and its position was consistently advanced.

From the start, developing countries were concerted in their efforts to make progress. The African Group's draft protocol on ABS received support from a number of other developing countries as a basis for the week's discussions. This was rejected by JUSCANZ countries and the EU.

A three-page Chair's draft was circulated on 1 February, entitled "International [Legally Binding] Regime on Access and Benefit-Sharing within the CBD Framework". This was endorsed by the Parties present, except for the JUSCANZ countries.

Developing countries supported the draft as a good starting basis but Norway was the only developed country that supported it. Japan, Australia, the Republic of Korea, Canada and the EU objected to using the Chair's draft.

The EU and Switzerland preferred a gap analysis first. It appeared to many observers and developing countries' delegations that these developed countries were not prepared to engage in negotiations.

Australia told the Chair that it was "very concerned with the text and process you have taken". Korea also said it was not ready to discuss the legally binding nature of the regime. Switzerland said the draft did not reflect the discussions. Canada proposed that the Chair's draft be added to the existing compilation of views and submissions on the regime.

The Philippines objected to Canada's proposal, saying that "it would take us back to Bangkok", where the previous Working Group meeting had been held. Colombia stressed that the basic gap had already been identified at the World Summit on Sustainable Development, i.e., an international ABS regime. "We have an unavoidable mandate from our Presidents and Heads of State that the gap is benefit-sharing," it said. The delegate went further to say that this was an "abyss".

Colombia was concerned that 12 years since the CBD entered into force, benefit-sharing as the Convention's third pillar remained unfulfilled. "More gaps analysis might take us another 12 years," it said.

On some developed countries' worry that the discussions were moving too fast, Colombia said that other fora such as the WTO and WIPO were moving faster. "Here at the CBD some people don't want us to move at all," it said.

It was then agreed that the draft would be a basis for "discussions" and not negotiations. After another long discussion, a revised Chair's draft was distributed, which again met with objections from developed countries. Australia said: "We are not prepared to negotiate ... We cannot support this document."

Later, a "Friends of the Chair" group was set up to negotiate this document. The structure and core issues provided by the Working Group Chair essentially provided the basis for developing the final text, heavily bracketed as it was.

While the EU said an international certificate could be a key component of an international regime, it cautioned against a "one size fits all" certificate, preferring the term "internationally recognised" certificate rather than "international certificates", as agreed in the 3rd meeting of the ABS Working Group in Bangkok in 2005.

The US and industry spoke in favour of voluntary certification schemes. After protracted discussions, the meeting agreed to retain references to an "international certificate".

The Granada Working Group finally recommended that COP 8 establish "a regionally balanced ad hoc technical expert group, consisting of Party-nominated experts, to elaborate possible options for form and intent, practicality, feasibility and costs of an international certificate of origin/source/legal provenance, for achieving the objectives of Article 15 and 8(j) of the CBD".

Article 15 deals with access and benefit-sharing, and Article 8(j) deals with traditional knowledge, practices and innovations of indigenous and local communities. COP 8 will provide terms of reference for this expert group, which will submit a report of its work to the 5th meeting of the Working Group on ABS.

Attached to the recommendation is an annex containing a "list of potential rationale, needs and objectives, desirable characteristics/features, implementation challenges, including costs and legislative implications

of an international certificate of origin/source/legal provenance as a possible element of the international regime on access and benefit-sharing".

Reflecting the polarised positions on key aspects of the international regime, the following parts of the list are bracketed:

- whether the international certificate may be one means, if required/applicable under national legislation, to comply with disclosure requirements in IPRs applications, or if national legislation so requires, it could be one means to comply with disclosure requirements in IPRs applications;
- "minimum checkpoints" as a potential characteristic/feature of an international certificate;
- the need for an international legal framework that recognises internationally the certificates issued by countries of origin or provider countries including countries of origin to certify compliance with national access legislation;
- limits of "one size fits all" approaches;
- challenges associated with extracts/derivatives of genetic resources;
- existence of national access and use legislation as a precondition for the operation and enforcement of the certificate system;
- need for practical implementation studies in different countries and in different sectors; and
- the interface with or the exclusion from the proposed certificate requirements of the standard material transfer agreement under the multilateral system of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture.

Prior informed consent and a fair deal

The third recommendation of the Granada meeting was on measures to ensure compliance with prior informed consent (PIC) and mutually agreed terms for access (MAT) which are obligations under the CBD.

Many developing countries called for international measures to guarantee compliance with PIC, MAT, national ABS laws and CBD provisions, transparency in patent applications and disclosure requirements. Several Latin American countries such as Brazil, Colombia and Ecuador called for binding compliance measures, periodic monitoring, and user measures to prevent misappropriation and ensure compliance with PIC of countries of origin as well as PIC of indigenous and local communities.

On the other hand, some developed countries favoured voluntary guidelines and codes of conduct to promote compliance with the voluntary Bonn Guidelines on ABS. The US added "best practices" of industry as another preferred option.

IPRs a hot issue

Australia and Japan objected strongly on a number of occasions to moves to have the CBD forum address IPRs. They insisted that the CBD was not the forum for discussing IPR issues. Switzerland and Thailand also preferred discussing disclosure of origin in other fora. Singapore said that non-compliance with disclosure requirements should not lead to an invalidation of a patent.

Brazil, Colombia and Malaysia were among developing countries that disagreed and said that IPR aspects of biodiversity were the responsibility of CBD Parties. Malaysia pointed out that Article 16(5) of the CBD clearly recognises that IPRs may have an adverse influence on the implementation of the CBD, and that Parties cannot abdicate from their responsibility to ensure that IPRs "are supportive of and do not run counter to [the] objectives [of the CBD]".

The outcome is a heavily bracketed document with a number of proposals by Brazil to address IPRs in the context of the CBD (see box on "The battle over IPRs").

The biodiversity-IPRs debate: The really tough issues

Elpidio Peria

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THE 4th meeting of the ABS Working Group was an opportune occasion to revisit the difficult issues that States, indigenous and local communities and other stakeholders need to grapple with as they come to grips with the interplay of biodiversity and intellectual property rights.

This is important as developing countries, save the Like-Minded Megadiverse Group, have not effectively come up with a good strategy to put forward their proposals on the table, except to argue that benefits from the utilisation of biological and genetic resources should go rightly to them as a matter of social justice. This has not been articulated very well as there appears to be confusion over the means to achieve this, whether through the protection of the rights of indigenous and local communities as an end in itself or just a matter of rhetoric to achieve a largely State-centred set of objectives.

These issues are crucial to enable developing countries to achieve coherence in their positions as they continue in their quest to achieve a binding international instrument on access and benefit-sharing.

Interface between the rights of States and indigenous and local communities

Developing countries assert the right to claim benefits from the use of biological and genetic resources and associated traditional knowledge, innovations and practices in the name of indigenous and local communities, but how much of these benefits will actually flow to the communities themselves?

The outcome of the recent meeting of the Working Group on Article 8(j) in January amply demonstrated that States do not want to relinquish control in making decisions on how the international regime on ABS is to be negotiated and elaborated. That is why they resoundingly rejected a proposal to allow the Working Group on Article 8(j) to take up certain elements in the international regime and develop these in parallel with the Working Group on ABS. This would most likely mean that in the matter of deciding on where benefits should go, if and when there is already this binding international instrument which ensures the flow of benefits to the developing-country States, the States will largely keep it to themselves.

With this development, it is uncertain how far the assertion by the indigenous and local communities for the recognition of their rights to their biological and genetic resources and associated traditional knowledge, innovations and practices would be realised in the near future, given that States are sensitive in sharing their prerogatives with indigenous and local communities on these issues.

What has happened is that this is being seized upon by the developed countries as a wedge to divide the developing countries. As can be observed in the statements made on this issue at the Article 8(j) Working Group meeting in Granada, the EU as well as Switzerland and even Ethiopia were supportive of the demands of the indigenous and local communities to actively participate in the negotiation and elaboration of the international regime on ABS.

As such demands went unheeded, the calls were renewed the following week at the 4th meeting of the ABS Working Group. An "informal discussion" group was set up, chaired by Norway, to deal with the issue of the participation of indigenous and local communities. As that meeting came to a close on 3 February, the EU again reiterated its proposal to support certain participatory rights of indigenous and local communities. However, this proposal was rejected by Argentina and Venezuela, due to some procedural difficulties in the manner in which it was made, where no document was prepared and circulated to the Parties about such a proposal and it was not translated into the required six UN languages for it to be taken up for consideration by the plenary. These proposals by the EU were supported by Norway and Canada, even if Canada likewise attempted to undermine the status of the International Indigenous Forum on Biodiversity as the sole representative of indigenous peoples and local communities in the Convention on Biological Diversity.

It must be questioned, however, whether these developed countries are serious in pushing for the recognition of the rights of indigenous peoples and local communities, when during the elaboration of the text of the international regime, it was they themselves who led or somehow abetted the move to bracket language which recognises the substantive rights of indigenous and local communities to their resources and knowledge as it relates to the issues of access and benefit-sharing.

This could mean that they are in support of the participatory rights of indigenous peoples only for as long as it will help derail the accelerated discussions and early conclusion of the negotiations on the international regime on ABS. But there would then be nothing to further debate when the indigenous peoples and local communities finally get to participate as these fundamental rights have already been thrown in doubt in the text of the international regime.

Leaving the matter of negotiations aside, the substantive challenge is to determine what set of rights to accord to the States and their indigenous and local communities. It is a matter of national legislation, as the States would argue, but to what extent should the rights of self-determination be recognised so that it will not lead to the break-up of the State and will ensure its sovereignty to be able to claim benefits from the use of its biological and genetic resources as well as the associated traditional knowledge, innovations and practices of its indigenous and local communities? In other practical matters, should both the State and its indigenous and local communities be co-owners of the resources or should the State act as trustee of these resources and manage them for the long-term benefit of its indigenous and local communities?

In the debates concerning the international regime on ABS, the States as well as the indigenous and local communities in their territorial boundaries should work together so that they can achieve a compromise where both of their rights to these resources are recognised and protected at the international level, especially in going after users of these resources outside their boundaries.

Patents on lifeforms and processes

The current discussions at the WTO TRIPS Council are mainly focussed on the requirements for the disclosure of origin, evidence of prior informed consent and evidence of a benefit-sharing arrangement according to national law.

This does not delve into the patentability of lifeforms and processes, which is a subject matter of the ongoing review concerning Article 27.3(b) of the TRIPS Agreement. Even at this time, no other country has supported the African Group's "no patents on lifeforms" position in the WTO, in spite of the issue's importance given its serious implications on morality and *ordre public* as well as the long-term stability of the patent system.

These debates have a bearing on the international regime on ABS as the disclosure of origin/source/provenance and other mechanisms such as certificates of origin are its key elements. Developed countries clearly do not want the CBD to deal with IPRs even where these clearly have an impact on the CBD implementation. The same countries are also unhappy with the proactive role of the group of developing countries which is pushing for disclosure requirements to be part of the consideration of any patent application. Their preference for WIPO was evident in the Granada meeting.

But given that this element of the international regime on ABS will have a component for national implementation, the question for countries is what combination of policies should be developed that will enable them to have the flexibility of not allowing the patenting of lifeforms and processes within their jurisdiction, as a response to public sentiments on this issue. There are also concerns that entry into any access and benefit-sharing agreements with the users of its resources with this kind of policy of not allowing patenting of lifeforms and processes would put them at a disadvantage compared to countries that will allow such patenting.

Thus, countries that do not wish to include the patenting of lifeforms and processes within their jurisdiction should be able to develop a set of policies and commercial instruments giving commercial incentives and rewards for innovations on biological and genetic resources and the associated traditional knowledge, innovations and practices. These must be recognised and enforceable at the international level. There are no clear models on this at this point, and perhaps a lot of work needs to be done for this idea to move forward.

***Sui generis* approaches**

The previous question also brings us to the other puzzle that countries are grappling with – what sense to make of *sui generis* systems for the protection of biological resources and associated traditional knowledge. Ever since provisions on such systems were inserted in Article 27.3(b) in the TRIPS Agreement, the concept has not undergone much development except for an established organisation such as the International Union for the Protection of New Varieties of Plants (UPOV) asserting that its model of plant variety protection is one such model. There have been attempts in other countries to come up with other systems, in India,

Thailand and Malaysia, for example, in the plant variety protection systems that they have come up with. However, their administrative experiences in running these systems are too recent to be able to assess whether they are workable in giving protection to their plant breeders as well as indigenous and local communities.

Based on the discussions in the Working Group on Article 8(j) in Granada, there appear to be two emerging concepts of *sui generis* means of protecting traditional knowledge, innovations and practices: intellectual-property-based and non-intellectual-property-based systems.

Intellectual-property-based systems seem to embody the characteristics of intellectual property rights which are commercial in nature and monopolistic. Non-intellectual-property-based systems are based on customary law or other considerations such as environmental protection, respect for human rights and perhaps social justice.

Perhaps the quest to develop a set of commercial incentives and rewards for innovations on biological and genetic resources and the associated traditional knowledge, innovations and practices, as discussed above, can also be integrated with non-intellectual-property-based *sui generis* models. While debate on this needs to continue, an important element of *sui generis* approaches that needs to be explored might be the combination of knowledge exchange and responsibility for that knowledge among indigenous and local communities that fully reflects the ways these communities have nurtured and developed these knowledge, innovations and practices up to the present time.

Moving forward

It is believed that once these issues are resolved, there would be greater clarity on the elements of the international regime on ABS and a clearer idea of how to establish it. The debates over biodiversity and IPRs are not only about the issue of social justice or the interface of rights among States and local and indigenous communities. What may need to be resolved for the future is what kinds of instruments need to be developed to integrate innovations on these types of resources to enable developing countries to at least catch up with developed countries in terms of technological capacity and market positioning on products derived from biological and genetic resources and the associated traditional knowledge, innovations and practices. Developing countries want to achieve technological development and obtain an international market for these products. The present IPRs system will simply not enable them to achieve these objectives.

Is there space for indigenous peoples in the negotiations on access and benefit-sharing?

Jennifer Tauli Corpuz

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THIS year, Granada was a place that held great promise for the 70 or so indigenous peoples and local community representatives who went there. The beautiful and historic Spanish city hosted back-to-back the fourth meeting of the Working Group on Article 8(j) (8(j) WG) and the fourth meeting of the Working Group on Access and Benefit-Sharing (ABS WG) from 23 January to 3 February.

Both the 8(j) WG and ABS WG are bodies set up by the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) to aid in the realisation of the three main CBD objectives: biodiversity conservation, sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.

The main mandate of the ABS WG is the elaboration and negotiation of an international regime on access and benefit-sharing. The 8(j) WG, on the other hand, is mandated to work for the protection of the traditional knowledge of indigenous peoples and local communities and the integration of indigenous issues in other areas of work of the CBD.

Though it is States that are the Parties to the CBD, which means that they are the ones who have the power to negotiate and make decisions, indigenous peoples nonetheless endeavour to influence the negotiations by lobbying States to take on indigenous positions and by actively asserting their rights on the floor. In order to achieve this, however, indigenous peoples must be accorded full and effective participation within the CBD.

Hoping to import the indigenous-friendly methods of work of the 8(j) WG into the ABS WG, indigenous peoples carefully laid out a battle-plan at several preparatory meetings. Outcomes from the 8(j) WG, expected to favour enhanced indigenous participation, were supposed to feed into the ABS WG. Fate was not on their side, however, as the outcomes from both meetings failed to measure up to indigenous peoples' expectations.

Indigenous peoples and the 8(j) WG

The experience of indigenous peoples in most CBD processes, especially in the ABS WG, is not much different from the usual: that of marginalisation.

Within the CBD, best practices in fostering the full and effective participation of indigenous peoples and local communities (ILCs) are exemplified in the system of work of the 8(j) WG, which focusses on advising the COP on how to implement CBD provisions that are important for indigenous peoples.

In recognition of the vital role that ILCs play in realising the three CBD goals, the 8(j) WG, unlike other CBD bodies, provides valuable support that enables full and effective participation of ILCs. Such support ranges from funding to enable indigenous participants to attend the actual meetings and administrative support (such as room use, photocopying, computer and printer use, etc.), to participation in formal and informal groups (such as contact groups and Friends of the Chair groups). Also, the Sub-Working Groups (SWGs) have indigenous Co-Chairs chosen by the International Indigenous Forum on Biodiversity (IIFB) from among themselves. (At the fifth meeting of the COP, the IIFB was given official recognition as an advisory body.) The indigenous Co-Chairs and several other indigenous representatives are designated as Friends of the Bureau, articulating indigenous issues at Bureau meetings. Further, ILC representatives are allowed ample speaking time, a very important participatory mechanism that allows for timely intervention on important issues.

Disaster at the 8(j) WG

Because the 8(j) WG and the ABS WG meetings were being held back to back, several States Parties, especially the less financially capable, sent their ABS negotiators to the 8(j) WG. As a result, there was a lack of full understanding among the Parties present of the nature of the 8(j) WG and its indigenous-friendly systems. This was the first disaster at the 8(j) WG.

Although part of the agenda of the 8(j) WG was its collaboration with the ABS WG in negotiating an international regime on access to genetic resources and benefit-sharing, discussion on the substance of the regime was limited. Observers opined that States seemed to be playing their cards close to their chest, taking care not to prematurely reveal their negotiating positions and strategy for the following week's ABS negotiations. Consequently, initial discussions on the agenda item consisted of States making general statements, without presenting any concrete recommendations. The IIFB, however, came prepared to discuss fully the nature of the collaboration between the two working groups and accordingly presented its concrete proposals.

Since there were so few recommendations coming from the floor, the Co-Chairs decided to compile all the participants' proposals and present it as a draft for discussion. This provoked an extremely negative reaction from States, most of whom rejected the draft, noting that it contained IIFB recommendations but not State positions. The Group of Latin American and Caribbean States (GRULAC) volunteered to present a more balanced draft, containing positions of both States and the IIFB. Predictably, the GRULAC proposal cut out the strongest recommendations on indigenous participation. This was the second disaster.

Preparing for the ABS WG

In order to prepare themselves for the next stage of the struggle, the IIFB convened a preparatory meeting over the weekend to discuss its position on the proposed international regime and to strategise on how to get this position reflected in the official documents. The consensus was that ILCs should fully engage in the negotiation process and endeavour to shape the development of the international regime to ensure the promotion and protection of indigenous rights.

There were strong proposals for the IIFB to agree in principle to a legally binding international regime, based on the argument that this form of regulation is preferable to the status quo of open access and rampant theft of indigenous knowledge (biopiracy). Unfortunately, there was no consensus on this proposal, with some representatives arguing that agreeing to a legally binding regime implies acquiescence to unbridled commercialisation of genetic resources and associated traditional knowledge of ILCs.

In contrast, there was strong consensus on proposals on mechanisms for full and effective participation. The IIFB agreed to push for the proposals it had tabled at the ABS WG meeting at Bangkok in 2005, in essence adopting the system of work of the 8(j) WG. In addition, selected IIFB proposals at the 8(j) WG the previous week were again going to be presented.

Core strategy

One of the key strategies of ILCs in the CBD is to constantly remind States Parties of their obligation to respect indigenous peoples' rights. This position seeks to counter-balance the emphasis of the CBD on State sovereignty over natural resources. Indigenous peoples feel that this undue emphasis on State sovereignty could undermine the gains achieved in the recognition and protection of indigenous peoples' rights in international and regional human rights fora. In fact, the CBD has already been cited in some human rights meetings as the basis for denying indigenous peoples their rights over resources found within their lands and territories.

Indigenous peoples maintain that sovereignty is not absolute. The CBD itself, in Article 3, acknowledges that sovereignty is limited by the United Nations Charter and the principles of international law. The vast majority of States Parties to the CBD have ratified the international human rights treaties that recognise indigenous peoples' rights to self-determination and to their lands, territories and resources. Thus, the CBD must respect indigenous peoples' rights, as must the vast majority of its States Parties when giving effect to the Convention at the domestic level.

Further marginalisation at the ABS WG

At the ABS WG, one of the first actions of the Chair was to convene a group, initially called Friends of the Chair, to discuss mechanisms to ensure full and effective participation of ILCs. The group was chaired by Norway and included seven indigenous representatives. This move was a response to the wish of Parties to avoid delay and distraction in the negotiations on an international regime.

Everything about the group turned out to be controversial, from its name to its authority to generate recommendations and draft decisions. The Bureau refused to call the group "Friends of the Chair", preferring instead to refer to it as an "open-ended informal consultative group to continue discussion of the draft decision put before the third meeting of the working group by the IIFB". Parties feared that if the group were called "Friends of the Chair", then this might have a precedent-setting effect, providing a basis for indigenous peoples to demand participation in such groups in future CBD meetings.

At the meeting of the informal group, the IIFB presented its Bangkok proposals, essentially seeking to import the 8(j) WG method of work into the ABS WG. The EU likewise presented its proposal, and efforts were undertaken to harmonise both proposals. The resulting "revised EU proposal" embodied the absolute minimum demands of indigenous peoples.

The group was not allowed to present draft decisions, however, leading observers to comment that the group was set up merely to occupy indigenous peoples and make it seem like progress was being made on their issues, while the actual ABS negotiations went on uninterrupted. The exercise was likened to keeping indigenous peoples in the kitchen while States partied at the dinner table.

The North-South dynamic

At this juncture, it is useful to point out that there is a North-South dynamic in the ABS negotiations. Developed countries (the North) do not agree that there is a need for a legally binding international regime on ABS, while developing countries (the South) assert quite strongly that there is a need. As a result, the negotiations have become highly polarised. Moreover, it is countries from the North, particularly European countries, that are willing to support indigenous positions. The close association between the positions of the North and the IIFB has resulted in consistent rejection by the South of indigenous positions. This is unfortunate because indigenous peoples have many interests in common with the South in the ABS negotiations.

Where do indigenous peoples lie within this polarised negotiation process? Indigenous peoples and local communities, whether in the North or in the South, want their rights to have control over their resources recognised in the international regime. Such recognition could consist of, inter alia, requiring users of genetic resources to obtain indigenous peoples' free prior and informed consent (FPIC) before access can be granted. Further, ILCs expect the State to help regulate access to genetic resources by recognising indigenous peoples'

permanent sovereignty over their natural resources and setting up the institutional infrastructure to enforce this right.

This position has been rejected by the South, however, because of fears that companies from the North might go directly to the provider ILCs and cut the provider State out of the benefit-sharing agreement. As a result, the countries from the South have insisted on requiring only prior informed consent (PIC) from the State, with India strongly insisting that it is the State that should give PIC on behalf of ILCs because most ILCs lack the capacity to grant PIC. Again, this is an unfortunate situation that can be remedied through dialogue between ILCs and countries from the South. Why not, for example, explore a workable solution whereby indigenous rights as well as State rights to natural resources are both recognised and protected?

Opening up spaces for indigenous peoples

There is a need to clarify and sharpen indigenous positions on a legally binding international regime. This is a long-overdue discussion, the results of which will help immensely in formulating a more coherent strategy both for ensuring that indigenous peoples' and local communities' rights are respected and for enhancing their full and effective participation in the ABS WG.

Also, there is a need to continually push for the full and effective participation of ILCs at the ABS WG. In particular, there should be mechanisms to enable more than one voice to be heard from the ILCs, both in recognition of the fact that indigenous positions are not homogenous and to enrich and nuance discussions on pertinent ABS issues.

Finally, it would be really useful to open up dialogues with countries from the South. Such dialogues will lead ILCs and developing countries to a better understanding of each other's positions and possibly enable the development of common positions on certain ABS issues.

Some key issues for the negotiations of the international regime on access and benefit-sharing

This was published as Third World Network Briefing Paper No. 1 for the 4th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing held in Granada on 30 January-3 February 2006.

1. The mandate for the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing is clear, i.e., **to further elaborate and negotiate an international regime for adoption** by the Parties to the Convention on Biological Diversity.
   Heads of State agreed at the 2002 World Summit on Sustainable Development to "**negotiate** ... an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilisation of genetic resources".
   In 2004 the CBD Conference of the Parties in Decision VII/19 D mandated the ABS WG to "**elaborate and negotiate** the nature, scope and elements of an international regime on access and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention".
   At the Bangkok meeting of the Working Group in February 2005, it was agreed that the task of the Working Group's 4th meeting is "**further elaboration and negotiation by Parties**" (UNEP/CBD/WG-ABS/3/7 Decision 3/1 para. 2). The UN General Assembly in December 2005 has reiterated the call "to continue ongoing efforts towards elaborating and negotiating an international regime".
   This is THE one gap that needs to be filled to prevent biopiracy and to achieve the objectives of the Convention on Biological Diversity. What is not needed is protracted "gaps analysis" of the matrix: as the South African delegation aptly remarked at the Bangkok meeting, the Working Group cannot be responsible for creating an "analysis paralysis".
2. Parties should no longer delay the important and urgent work that needs to be done. The outcome of the ABS WG must be **one legally binding international instrument**, with its central focus being the fair and equitable sharing of benefits from the sustainable use of biological resources and/or associated traditional knowledge.
3. It is time for the **CBD to assert its primacy**. While the World Intellectual Property Organisation (WIPO) has provided much food for thought, the current fundamental thrust of WIPO will eventually

lead to proprietary monopolistic systems. The ABS Working Group and the Article 8(j) Working Group should now develop further the thinking and elaboration of *sui generis* options, while providing an understanding of, and approach to, intellectual property from the CBD perspective. The guiding provision should be Article 16(5) of the CBD which requires Parties to ensure that IPRs "are supportive of and do not run counter to" the CBD objectives.

4. At the same time, governments at the World Trade Organisation's TRIPS Council should seriously work towards:
   i) the completion of the review of Article 27.3(b) of the TRIPS Agreement to define the **scope of patentability** that would exclude the patenting of plants, animals, microorganisms and parts thereof as well as human genetic material. At the very least the rights of Members to exclude patentability of these materials, including some derivatives, must be maintained.
   ii) where patentability of certain derivatives or products is permitted, the amendment of the TRIPS Agreement to include the three **disclosure requirements** in patent applications relating to genetic resources and/or associated traditional knowledge. These are disclosure of: country/source of origin, evidence of prior informed consent under national law, and evidence of a fair and equitable benefit-sharing arrangement under national law. The 6th Ministerial Conference of the WTO in December 2005 requested the WTO Director-General "to intensify his consultative process" on the relationship between the TRIPS Agreement and the CBD. "The Director-General shall report to each regular meeting of the [Trade Negotiations Committee] and the General Council. The Council shall review progress and take any appropriate action no later than 31 July 2006."
5. The **linkages between the work of the ABS Working Group and the Article 8(j) Working Group** are one central component of the negotiations of the international instrument under the CBD. **Prior informed consent** is the foundation for matters relating to access to biological resources, both at the level of the State and of indigenous peoples and local communities. An essential feature of PIC is the right to say No. Benefit-sharing rules and arrangements must also ensure the **protection of the rights of indigenous peoples and local communities**.
6. The **scope of the international regime** should include all biological resources (parts thereof, gene sequences) and the information relating to or obtained from such biological resources; derivatives; and/or traditional knowledge associated with biological resources and/or derivatives.
7. The **central focus of the international regime must be fair and equitable benefit-sharing**, including the establishment of principles, standards and implementing mechanisms (international, regional and national). **Access is primarily a matter for national regulation**, as clearly spelt out in Article 15(1) of the CBD. Conditions for access in national regulatory systems include: a) conservation; b) sustainable use; c) environmentally sound uses; d) Article 8(j) and related provisions; e) benefit-sharing. The CBD sets the legal basis for **"regulated access" and not "facilitated access"** as demanded by a few Parties.
8. While the international regime is being negotiated, the ABS Working Group should recommend that the CBD Secretariat undertake work to set up a **mechanism for the monitoring and documenting of biopiracy**. This can include established and possible cases of the misappropriation of biological resources and/or associated traditional knowledge. This can build on initiatives started by some national governments (e.g., the Brazilian congressional committee on biopiracy; research and documentation by the government of India), research institutions and non-governmental organisations (e.g., the US-based Edmonds Institute; the successful challenge to a number of patents on the uses of neem given by the European Patent Office, by the International Federation of Organic Agriculture Movements, the Research Foundation for Science, Technology and Ecology of India and the Greens/EFA in the European Parliament).

   Such biopiracy acts can include the illegal or inappropriate use of patents (such as "broad" patents that violate the basic tenets of patent law) and other intellectual property claims, as well as misappropriation outside the field of IPRs.
9. The intensification of **bioprospecting for microorganisms** and their potential uses within and outside national territories, including from marine and deep seabed resources, requires urgent attention. More information is also needed on the **role of intermediary parties** involved in bioprospecting of all biological resources and/or associated traditional knowledge. The gathering and documentation of such information will be very helpful for the international regime negotiations and for developing implementing tools and mechanisms.

8th meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 8)

Curitiba, Brazil
20-31 March 2006

CBD sets 2010 deadline to set up global ABS regime

Lim Li Lin

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THE 8th Conference of the Parties (COP 8) to the UN Convention on Biological Diversity (CBD) ended late in the night on the last day of the meeting (31 March) with agreement on how to progress on access and benefit-sharing (ABS), a key issue that has dogged the CBD for many years.

Delegates and NGOs heaved a collective sigh of relief when all the decisions of COP 8 were finally adopted. Almost to the end, it was not clear whether a decision on ABS would be reached at all.

The two-week meeting was held in Curitiba, Brazil immediately after a one-week Meeting of the Parties to the Cartagena Protocol on Biosafety, a protocol of the CBD dealing with the regulation of genetically modified organisms.

The final COP 8 decision on ABS comprised a compromise deal on three sticky issues. Firstly, it set a deadline to finalise the work of the ABS Working Group before the 10th Conference of the Parties (or COP 10). This implies that negotiations on an international ABS regime should be completed by 2010, as COP 10 is scheduled to meet in that year.

The second and third components of the package relate to whether to include "derivatives" of genetic resources in the scope of the international ABS regime.

The developing countries insisted that derivatives (such as extracts of genetic resources or chemical compounds derived from such resources) had to be included, as these are the components often or mostly used in the making of products based on genetic resources. This was opposed by several developed countries.

As no definite or explicit solution to this was possible, the language in the final decision left this issue open for future negotiations to decide on. The future discussions on derivatives will be in at least two areas: (i) an internationally recognised certificate of origin/source/legal provenance (being discussed by a technical experts' group); and (ii) measures to ensure compliance with the prior informed consent of the contracting Party providing genetic resources and mutually agreed terms on which access was granted.

The issue of the fair and equitable sharing of benefits arising from the use of genetic resources has been a very contentious outstanding issue in the CBD. The CBD has three objectives: the conservation of biological diversity, the sustainable use of the components of biological diversity, and the fair and equitable sharing of benefits arising from the use of genetic resources.

While progress has been made on work programmes and decisions on the first two objectives, the issue of access and benefit-sharing has remained unresolved. The CBD was adopted in 1992, and only now, 14 years later, has agreement on the process and deadline to negotiate and elaborate an international regime on ABS finally been reached.

This issue has polarised developing and developed countries for many years. Biodiversity is concentrated mainly in developing countries, which are the main providers of genetic and biological resources. Traditional knowledge on the uses of the biological resources has been developed over millennia and is held by indigenous peoples and local communities.

Much of these resources are taken from developing countries, usually with no knowledge or permission from the countries or communities, by companies from the developed world, and utilised in extremely lucrative pharmaceutical, agricultural, industrial and cosmetic production.

On top of that, patents granting 'ownership' over this biological and genetic material and associated traditional knowledge are often obtained or claimed by many of these companies.

Usually, little or none of the profits and benefits that these companies derive from the use of the biological resource and the associated traditional knowledge is shared with the countries concerned, much less with the communities and indigenous peoples who have used, preserved and developed the knowledge about the biological resource.

When the CBD was being negotiated, developing countries fought hard to place this "biopiracy" issue in the forefront, resulting in the third objective of the CBD.

A recent study released by the US-based Edmonds Institute and the African Centre for Biosafety in South Africa has pointed to 36 cases of biopiracy from African countries.

Developed countries like the US (a non-Party to the CBD), Australia, Canada, New Zealand and Japan have consistently fought against recognition of this phenomenon, and have attempted to prevent or delay any meaningful progress on this issue in the CBD. Developing countries, on the other hand, have insisted on a legally binding international ABS regime to address biopiracy effectively. They have argued that national-level regulation is inadequate because of the transboundary nature of the problem, and the fact that ensuring compliance with any such national laws places the burden on developing countries themselves.

Progress on ABS has been slow through the years. There have been four meetings of the Ad Hoc Open-ended Working Group on ABS under the CBD. The last meeting in Granada in January had been a turning point in the protracted discussions, as it put together a working negotiating text, placed in an annex, which however is square-bracketed (indicating no consensus) in many parts.

The developing countries had expected and hoped that COP 8 would endorse the Granada annex as the basis for further ABS negotiations.

COP 8 was meant to decide how to take the work forward and set a deadline to finalise an international ABS regime, as well as consider other approaches such as an internationally recognised certificate of origin/source/legal provenance, measures to support compliance with the prior informed consent of the provider country and mutually agreed terms on which access was granted, and possible indicators for ABS.

At the start of the meeting, the lines were already clearly drawn. Developing countries, including the African Group, Latin America and the Caribbean (GRULAC) and the Like-Minded Megadiverse Countries (LMMC, comprising 17 countries), insisted that the heavily square-bracketed text in the annex from the Granada meeting be the basis for negotiating the ABS regime.

Developed countries, on the other hand, tried to undermine the text, instead insisting on work to focus on "gap analysis", to assess the need for an international regime on ABS.

In a "contact group" (a small group formed to work through difficult issues) that was formed, the developing-country Group of 77 and China proposed some text as a compromise.

However, Canada, supported by Australia, counter-proposed that the Granada annex be drawn upon only "as appropriate" at the next Working Group meeting, along with other inputs such as the final version of the gap analysis and the matrix, the progress report on the work of genetic resources and national property law, and "other inputs submitted by Parties relating to ABS".

This drew angry reactions from developing countries. Ethiopia said the Canada-Australia-suggested move would definitely delay the process. It said this delaying tactic could backfire, as developing countries may take unilateral action in the form of strict domestic laws if the international regime on ABS could not be achieved.

To resolve the highly contentious issue, a smaller group was convened, called Friends of the Co-Chairs of the Contact Group. It comprised Australia, Canada, New Zealand, the EU, Ethiopia, Malaysia, Brazil and Mexico.

The developing countries insisted that paragraph 2, dealing with the Granada annex, had to be dealt with first before any discussion could take place on the work to be undertaken at the fifth and sixth Working Group meetings.

The developed countries, and Co-Chair Francois Pythoud from Switzerland, had tried to move the discussion in the opposite direction. They also suggested that the annex need not be part of the COP 8 decision but merely referred to, claiming it made no difference if the annex formed part of the COP 8 decision or was merely referred to in the decision.

This drew furious reactions. Brazil declared it would not participate in such a Friends of the Co-Chairs group if this was to be the basis of the discussions. The persistence and insistence of the G77 and China paid off. The Friends of the Co-Chairs met to discuss paragraph 2 well into the early hours of the morning on the last day of the meeting, according to the basis that developing countries had insisted on.

The final COP 8 decision does include the Granada annex and gives it pre-eminence as the main document for the purposes of continuing to elaborate and negotiate the international regime. Other documents,

such as the outcomes of the meeting of the technical group of experts on the certificate of origin/source/legal provenance to be held, as well as a progress report on the gap analysis and the matrix, are also transmitted to the next Working Group meeting as inputs.

The final COP 8 decision on ABS comprised a three-pronged package deal that reflected a delicate balance of the competing interests on the sticking points.

First, the decision included a deadline to complete the ABS Working Group's work before COP 10, to be held in 2010.

The second and third parts are on whether to include derivatives of genetic resources in the scope of the international ABS regime. The developing countries insisted on including derivatives, while most developed countries were opposed.

The language in the decision left the derivatives issue open for future negotiations to decide on, in at least two areas: an internationally recognised certificate of origin/source/legal provenance; and consideration of measures to ensure compliance with the prior informed consent of the contracting Party providing genetic resources and mutually agreed terms on which access was granted.

Developing countries had wanted the ABS work to be completed either through two more one-week Working Group meetings or one two-week Working Group meeting in order that the international ABS regime can be adopted at the next COP in 2008. Developing countries were supported by Norway.

(Developing countries wanted the cost for the Working Group meeting(s) to come from the core budget of the CBD. The meetings in Curitiba had already suffered from a lower level of developing-country participation due to insufficient and late pledges from donor countries.)

The LMMC proposed that some discussions to remove the annex's square brackets be held in the second week of the COP, to accelerate the process.

Developed countries such as Australia, New Zealand, Canada, Japan, South Korea and the EU indicated they did not want such quick progress.

The final COP decision requests that the ABS Working Group continue the elaboration and negotiation of the international regime, and instructs the Working Group to "complete its work at the earliest possible time before the tenth meeting of the Conference of the Parties". COP 10 is expected to be held in 2010.

The decision's inclusion of a clear deadline for completing the Working Group's work (i.e., to finalise the ABS regime) is a significant step forward. In the negotiations at COP 8, the developed countries in general had not wanted any clear deadline commitment, and some developed countries wanted no commitment to an international regime at all.

These divergent positions were reflected in the earlier draft text as "[with a view to its completion and adoption by the ninth meeting of the COP]" and "[with a view to its early completion]". The former was watered down to later read "[and endeavour to complete it by the ninth meeting of the COP and no later than at its tenth meeting]".

Later in the contact group, Japan asked for the paragraph specifying the timeline to be deleted completely. When this was questioned by Malaysia and Ethiopia, Japan was unable to defend its position and was forced to allow the two bracketed text alternatives, reflecting the two divergent views, to be the point of discussion, rather than deleting the paragraph altogether.

The Co-Chair from Switzerland himself said that the better option in his opinion was "with a view to its early completion". His statement and his handling of the contact group which favoured the developed countries upset many delegates and observers.

The other outstanding issue was the issue of derivatives of genetic resources which the G77 and China have been insisting must be part of the scope of the international ABS regime.

In the production of pharmaceutical and other products based on genetic resources, usually only the extract or a chemical compound is used, which is a derivative, or a part of the genetic resource itself. If the regime's scope does not include derivatives, then there may not be much point to it, as the bulk of what such a regime should attempt to regulate lies in derivatives.

This issue surfaced in discussions on the terms of reference for the technical experts' group which will meet to discuss an internationally recognised certificate of origin/source/legal provenance before the fifth Working Group meeting, as well as in the consideration of measures to ensure compliance with the prior informed consent of the contracting Party providing genetic resources and mutually agreed terms on which access was granted.

Earlier, in the first week of the COP 8 meeting, the Working Group Chair (Sem Shikongo of Nambia) convened a small informal consultation comprising Mexico (as convener), Australia, New Zealand, Canada,

Japan, the EU, Malaysia, Brazil, Uruguay and Uganda, in an attempt to remove the square brackets from the indicative list of issues that Parties and other stakeholders had been invited to submit views on, as inputs for the technical experts' group.

Due to the intransigence of Australia, no agreement could be reached, and the entire list was deleted, as Australia refused to remove any square brackets despite numerous qualifications that other Parties were prepared to offer. As it was merely a list which indicated the issues that views could be submitted on, the list should not be bracketed in any way, as this would indicate that views were not sought on the issues that were square-bracketed. All issues should simply be listed, and views could be submitted on all issues, and this would include issues that were important to all sides in the spectrum of positions.

The final decision for the terms of reference for the experts' group includes a provision to "analyse the distinctions between the options of certificate of origin/source/legal provenance and the implications of each of the options for achieving the objectives of Articles 15 and 8(j) of the Convention".

An earlier draft had included the words "related to genetic resources and associated traditional knowledge and [derivatives]" after the word "provenance". The compromise was to delete the entire reference to genetic resources, traditional knowledge and derivatives, since the developed countries refused to agree on including derivatives. As it was not possible to agree to remove the brackets around the word "derivatives", the developing countries felt it would be better to delete the entire reference to what the technical experts' group could address in its scope of work. In this way, nothing is explicitly included or excluded, and thus all the issues are still on the table for the group to discuss.

Article 8(j) relates to the knowledge, innovations and practices of indigenous and local communities. Article 15 is the article in the CBD relating to ABS, and stipulates that the "benefits arising from the commercial and other utilisation of genetic resources" should be shared fairly and equitably with the contracting provider Party. "Utilisation of genetic resources" is also broad enough to include derivatives in its scope.

The final part of the package deal was also about derivatives, this time in the section on measures to support compliance with the prior informed consent of the contracting Party providing genetic resources and mutually agreed terms on which access was granted.

This entire section had been in square brackets, with numerous brackets in different parts of the text as well. In the end, a clean text was produced which, inter alia, "invites relevant fora to address and/or continue their work on disclosure requirements in intellectual property rights applications taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention, in accordance with Article 16(5)".

Article 16(5) recognises that patents and other IPRs may have an influence on the implementation of the CBD and seeks to ensure that such rights are supportive of and do not run counter to the objectives of the CBD.

Again the word "derivatives" had to be excluded, in relation to "measures to support compliance with prior informed consent in cases where there is utilisation of genetic resources or associated traditional knowledge, in accordance with Article 15 of the Convention and national legislation".

However, "utilisation of genetic resources" is interpreted by the G77 negotiators to allow for the inclusion of derivatives. Also, the reference to national legislation clearly indicates that even if the CBD were to exclude derivatives in the end, national legislation can and will include derivatives.

COP 8 elected two permanent Co-Chairs for the future Working Group meetings – Fernando Casas from Colombia, and Tim Hodges from Canada. The fifth and sixth Working Group meetings will be held before COP 9, and the fifth meeting will be held immediately after the 8(j) Working Group meeting.

The technical experts' group will meet in Lima, Peru before the fifth meeting of the Working Group. A meeting of indigenous peoples and other stakeholders will also be held immediately before the expert group meeting, organised by Canada and the United Nations University.

The fifth Working Group meeting will be financed from the core budget of the CBD, and the sixth, through voluntary contributions. By the end of COP 8, a number of pledges had already been received totalling $450,000 from Canada, Finland, France, Norway, the Netherlands, Sweden, Switzerland and Ireland.

The next Conference of the Parties to the CBD (COP 9) and the next Meeting of the Parties to the Cartagena Biosafety Protocol (MOP 4) will be held in Germany in 2008.

Meeting of the Group of Technical Experts on an Internationally Recognised Certificate of Origin/Source/Legal Provenance

Lima, Peru
22-25 January 2007

Report of expert meeting on an internationally recognised certificate of origin/ source/legal provenance

Sangeeta Shashikant

This report was circulated through the Third World Network Info Service on Intellectual Property Issues (5 March 2007).

A GROUP of 25 experts (nominated by Algeria, Argentina, Australia, Belgium, Brazil, Canada, China, Costa Rica, Cuba, the Czech Republic, the European Community, Ethiopia, Finland, India, Japan, Lebanon, Madagascar, Malaysia, Mexico, Mozambique, Niger, Peru, the Russian Federation, Spain and Thailand) met in Lima, Peru on 22-25 January 2007 to examine various options for the implementation of an internationally recognised certificate of origin/source/legal provenance. The Group of Technical Experts was established by the 8th meeting of the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) (in accordance with Decision VIII/4 C) "to explore and elaborate possible options, without prejudging their desirability, for the form, intent and functioning of an internationally recognised certificate of origin/source/legal provenance and analyse its practicality, feasibility, costs and benefits with a view to achieving the objectives of Article 15 and 8(j) of the Convention".

The outcome of the Expert Group meeting as reported by the CBD Secretariat (in document UNEP/ CBD/WG-ABS/5/7 dated 20 February 2007) is reproduced below.

The outcome of this Expert Group discussion is a technical input to the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing when it meets next on 8-12 October 2007 in Canada to continue negotiations on an international regime on access and benefit-sharing.

The terms of reference of the Expert Group were:

"(a) Consider the possible rationale, objectives and the need for an internationally recognised certificate of origin/source/legal provenance;

(b) Define the potential characteristics and features of different options of such an internationally recognised certificate;

(c) Analyse the distinctions between the options of certificate of origin/source/legal provenance and the implications of each of the options for achieving the objectives of Articles 15 and 8(j) of the Convention;

(d) Identify associated implementation challenges, including the practicality, feasibility, costs and benefits of the different options, including mutual supportiveness and compatibility with the Convention and other international agreements."

This issue that is being discussed at the CBD is closely linked to discussions on an amendment of the TRIPS Agreement, proposed by a group of developing countries (Brazil, China, Colombia, Cuba, Ecuador, India, Pakistan, Peru, South Africa, Thailand and Tanzania) at the WTO, to include a disclosure requirement in patent applications. The proposed amendment states that "Members shall require applicants to disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin. Members shall also require that applicants provide information including evidence of compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilisation of such resources and/or associated traditional knowledge."

The proposal also requires that "Members shall put in place effective enforcement procedures so as to ensure compliance with the obligations set out in paragraphs 2 and 3 of this Article. In particular, Members shall ensure that administrative and/or judicial authorities have the authority to prevent the further processing of an application or the grant of a patent and to revoke, subject to the provisions of Article 32 of this Agreement, or render unenforceable a patent when the applicant has, knowingly or with reasonable grounds to know, failed to comply with the obligations in paragraphs 2 and 3 of this Article or provided false or fraudulent information."

This proposal further states: "For the purposes of establishing a mutually supportive relationship between this [TRIPS] Agreement and the Convention on Biological Diversity, in implementing their obligations, Members shall have regard to the objectives and principles of this Agreement and the objectives of the Convention on Biological Diversity." (See WTO documents WT/GC/W/564/Rev.2, TN/C/W/41/Rev.2 and IP/C/W/474.)

General background

The CBD ABS Working Group was established by COP 5 in 2000 and was mandated to develop guidelines and other approaches to assist Parties and stakeholders in addressing access and benefit-sharing. The Working Group successfully negotiated the voluntary Bonn Guidelines on access and benefit-sharing, which were adopted by COP 6 in 2002.

The issue of an international certificate of origin was first considered within the framework of the CBD at the second meeting of the ABS Working Group in December 2003, as another potential approach to assist with the implementation of the access and benefit-sharing provisions of the Convention.

At COP 7, the need to further examine other approaches including an international certificate of origin/source/legal provenance, in particular the operational functionality and cost-effectiveness of such an international certificate, was emphasised.

Most importantly, COP 7 mandated the Working Group to negotiate an international regime on access and benefit-sharing. Developing countries at the CBD had successfully argued that the voluntary Bonn Guidelines are inadequate to fulfil the CBD objective of fair and equitable benefit-sharing. In the terms of reference of the Working Group, the list of elements to be considered for inclusion in the international regime includes an "internationally recognised certificate of origin/source/legal provenance of genetic resources and associated traditional knowledge".

It should be noted that COP 8 held in Curitiba, Brazil decided that the ABS Working Group would continue the elaboration and negotiation of the international regime in accordance with its terms of reference in Decision VII/19 D, and instructed the Working Group to complete its work at the earliest possible time before COP 10 in 2010.

OUTCOME OF THE MEETING OF THE GROUP OF TECHNICAL EXPERTS ON AN INTERNATIONALLY RECOGNIZED CERTIFICATE OF ORIGIN/SOURCE/LEGAL PROVENANCE

1. The Group of Technical Experts attempted to provide information and guidance in response to each of the elements contained in decision VIII/4 C, paragraph 1, of the Conference of the Parties. The following reflects the outcome of discussions without prejudice to the desirability of the options or agreement on any specific option.

A. Possible rationale, objectives and the need for an internationally recognized certificate of origin/source/legal provenance

2. Any option considered should contribute to achieving the objectives of the Convention. The group was aware that all countries are both providers and users of genetic resources.

3. National legal systems alone are not sufficient to guarantee benefit-sharing once genetic resources have left the provider country. In this respect, the certificate as part of a broader access and benefit-sharing regime, could be an important tool to reduce this limitation.

4. A certificate could assist to address a number of concerns of the Parties and therefore cover several other objectives. The Group identified the following:

(a) Legal certainty;
(b) Transparency;
(c) Predictability;
(d) Benefit-sharing facilitation;
(e) Facilitation of legal access with minimal transaction costs and delay;
(f) Technology transfer;
(g) Preventing misappropriation;
(h) Minimizing bureaucracy;
(i) Supporting compliance with national law and mutually agreed terms;
(j) Enabling and facilitating cooperation in monitoring and enforcement of access and benefit-sharing arrangements;
(k) Facilitating development of national access and benefit-sharing frameworks;
(l) Protection of traditional knowledge.

5. Depending on the model, advantages of adopting a certificate could include, in addition, ensuring greater compliance with requirements of the Convention, assisting the fair and equitable sharing of the monetary and non-monetary benefits from the utilization of genetic resources and associated traditional knowledge, and facilitating cooperation among different jurisdictions. Another advantage could arise from simplifying access processes to genetic resources.

6. Achievement of these objectives will depend on the specific characteristics of the model.

B. Distinctions between the options of certificate of origin/source/legal provenance and the implications for Articles 15 and 8(j) of the Convention

7. After due deliberations, the Group discussed further the definitions, similarities and differences between a certificate of origin/source/legal provenance. The Group recognized that the basic role of the certificate is to provide evidence of compliance with national access and benefit-sharing regimes. Thus, it found it practical to refer to the certificate as a certificate of compliance with national law, in accordance with the Convention.

8. The certificate of compliance would support the effective implementation of Article 15 and Article 8(j) of the Convention, given the appropriate national framework.

C. Potential characteristics and features of different options of such an internationally recognized certificate

9. The Group identified potential features and characteristics of the certificate, as well as various options with respect to the obligations of users and providers of genetic resources.

10. The Group considered that the sovereign rights of Parties over their natural resources allowed them to regulate access and to determine the range of genetic resources and associated traditional knowledge that could be covered, providing flexibility to the Parties and avoiding the need to harmonize national access legislation and thereby significantly reducing implementation costs. This may also allow Parties to include derivatives in the national system if they so wish. It was felt that some harmonization of user measures and checkpoints may be necessary.

11. In order to facilitate and ensure the fair and equitable sharing of benefits, there was a need to provide greater transparency regarding the access to and use of genetic resources and associated traditional knowledge and to ensure compliance with access and benefit-sharing requirements in both user and provider countries. It was agreed that a national certificate, with standard features to allow its international recognition, in combination with control points to be established in the user countries to monitor the use of genetic resources and associated traditional knowledge in accordance with national laws, including prior informed consent and mutually agreed terms, was a possible way to meet these goals. This would require an implementation effort on the part of both providers and users.

12. Considering that there is a conceptual link between the sharing of benefits and conservation and sustainable use, it is important to ensure that countries and relevant indigenous and local communities that conserve and sustainably use biological diversity should be beneficiaries of this system.

13. In accordance with its mandate, the group assessed the practicality, feasibility, costs and benefits of such a system and examined various options for the implementation of the certificate. These options were:

	Provider	User
Option 1	All provider countries required to provide a certificate	All user countries required to request a certificate
Option 2	National discretion to provide a certificate	All user countries required to request a certificate
Option 3	All provider countries required to provide a certificate	National discretion to request a certificate
Option 4	National discretion to provide a certificate	National discretion to request a certificate

14. The combination of these options could lead to several models ranging from models based on purely voluntary instruments to mandatory ones and those having a mixture of voluntary and mandatory instruments.

Nature

15. In all the options presented, the certificate of compliance with national access and benefit-sharing legislation is considered to be a public document to be issued by a competent national authority appointed in accordance with national law, to be reviewed as appropriate at checkpoints by user countries.

Scope

16. Under all models considered, in principle, all types of genetic resources could be covered by the system, in accordance with national law. In a system providing for the mandatory issuance of a certificate in all provider countries, such a system should be in accordance with the scope of the Convention. However in a voluntary mechanism in which the issuance and request of the certificate is discretional, the scope could even go beyond that of the Convention on Biological Diversity.

17. It was considered that providers may establish general or specific exemptions[1] for specific purposes, limited to matters of public interest, such as health.

18. With regard to plant genetic resources for food and agriculture, the Group recognized that they fall within the scope of the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations and that duplications with that treaty should be avoided.

19. With respect to traditional knowledge associated with genetic resources, the Group felt that its intangible nature poses practical difficulties in some cases, and distinct implementation challenges hence requiring special consideration. The country of origin should consider including traditional knowledge in the certificate, in accordance with national legislation. Further exploration may be needed in order to determine whether the certificate should be extended to traditional knowledge.

20. In order to determine whether the certificate should apply to genetic resources used for scientific research, it was felt that possible implications should be further assessed in order to avoid impeding such research and promote incentives. Various alternatives could be considered, such as excluding genetic resources used for research purposes, providing clear demarcation between commercial and non-commercial activities or establishing a simplified procedure for the issuance of the certificate.

21. In all the models presented, it was agreed that the certificate would serve to provide evidence of compliance with national access and benefit-sharing legislation, as may be required at specific checkpoints to be established in user countries. These checkpoints may be established to monitor compliance in relation to a range of possible uses. The certificate, in accordance with national law, could establish specific uses of the resources accessed.

[1] In accordance with decision II/11, paragraph 2, of the Conference of the Parties, human genetic resources are beyond the scope of the Convention.

Content and format

22. To facilitate international recognition of the national certificates, the certificate identified by a codified unique identifier[2] could contain the following minimum information:

(a) Issuing national authority;
(b) Details of the provider;
(c) A codified unique alpha numeric identifier;
(d) Details of the rights holders of associated traditional knowledge, as appropriate;
(e) Details of the user;
(f) Subject-matter (genetic resources and/or traditional knowledge) covered by the certificate;
(g) Geographic location of the access activity;
(h) Link to mutually agreed terms;
(i) Uses permitted and restrictions of use;
(j) Conditions of transfer to third parties;
(k) Date of issuance.

23. A standardized internationally recognized format for certificates was considered most appropriate. Certificates, should, where possible, provide a link to a national database providing non confidential information of prior informed consent (PIC) and mutually agreed terms (MAT), as appropriate.

24. In designing the content of certificates and related information on PIC and MAT, information to be provided should be gauged to take into account relevant requirements of the checkpoints.

25. The use of a freely available read-only access system based on a unique identifier (alphanumeric code) that links to national databases for additional information was considered desirable. Nevertheless, differences in the capacities of the countries to implement this system were noted. Any system would need to be flexible enough to allow for a mixture of paper and electronic formats.

26. Use of unique identifiers would enable any subsequent identification of material to relate back to the certificate. Transfers to third parties should require maintenance of the link with the certificate and the mutually agreed terms applying to the resources.

27. It is desirable to have some degree of standardization when there is a sub-identification of genetic resources, although it may not be feasible initially. In addition, measures necessary to ensure security should be considered as well as the costs of establishing such a system and the security measures included.

28. Countries that cannot provide for the mandatory issuance of a certificate may wish to consider its issuance on a discretionary basis in light of the benefits for both providers and users that may derive from standard practice in all countries.

Procedure

In the provider country

29. A national authority in charge of issuing the certificate should be designated and listed in a common international database. Furthermore, countries should be encouraged to streamline rather than add to current internal mechanisms for access, and issuance of permits, contracts and certificates.

30. The issuance of the certificate will be triggered at the request of a user. Countries will be encouraged to issue a certificate as soon as possible after the request and to establish a simple procedure in order to increase incentives for the use of the certificate. While a certificate should be requested as early as possible, a user should have the possibility to request it at any time or at the request of the checkpoint. Issuance could also be an automatic act triggered by the granting of access or agreement on mutually agreed terms.

In the user country

31. One or more national authority or entity identified as checkpoint(s) should be appointed by the competent national authority of the user country and listed in the common international database. It would be desirable that the latter be the same issuing authority as when the country is a provider.

[2] For example, code certificate BR 2007 N XXXXXXXX. This would designate a resource provided by Brazil under a certificate issued in 2007 for non-commercial purposes.

32. Checkpoints identified were:

(a) Registration points for commercial applications (e.g. product approval processes);

(b) Intellectual property rights offices (in particular patent and plant variety authorities).

33. In the case of non commercial uses, additional checkpoints could be further explored such as entities funding research, publishers and *ex situ* collections.

34. The designation of a national authority as a focal point could be also considered.

35. Opinions varied on the requirements for reporting at checkpoints. Options include:

(a) No reporting to a central clearing-house mechanism or a national authority required; however the user would be obligated to record the certificate identifier on publication, on applications for patents and commercial product registration;

(b) Reporting to the clearing-house mechanism.

At the international level

36. An international registry containing electronic copies of the certificate or the unique identifier of the certificate could serve as a clearing house mechanism (CHM). Countries could be required to notify the international registry when they issue a certificate. Checkpoints may be required to notify this registry upon the presentation of a certificate. A simple procedure for notification could be agreed. Opinions varied on the amount of information to be stored in the clearing-house mechanism. It ranged from only the unique identifier with a link to the issuing country database to duplication of the information in the certificate.

37. A committee could be constituted to consider logistical aspects of implementation.

38. Harmonization of processes in both provider and user countries related to the issuing and monitoring of certificates may enhance the efficiency and legal certainty of the whole system.

Consequences of infringement

39. Legal consequences will vary depending on the nature of the procedure under which the presentation of the certificate is requested. In cases where the certificate is required but not presented, the consequences may range from the suspension of the procedure until due presentation of the certificate to its withdrawal. In case of false representation or forgery, legal consequences may entail administrative sanctions, including fines; criminal sanctions; and, judicial action on the part of the issuing country. In a voluntary system, legal consequences will not apply.

D. Implementation challenges, including the practicality, feasibility, costs and benefits

40. There will be some implementation costs, particularly in the setting up of national authorities (where they have not yet been established), in capacity building and in the maintenance of the international registry as suggested. Other costs may include opportunity costs, direct costs and transaction costs. The implementation and opportunity costs may escalate if for example the model establishes the need of substantive review of certificates on both sides, considers excessive tracking, reporting and monitoring, generates more bureaucracy than required, slows down procedures unnecessarily or discourages research and product development.

41. Additional implementation challenges or costs may be related to the coexistence of genetic resources inside and outside the certificate system, the setting up and maintenance of checkpoints in user countries and the possibility of enforcing the certificate across various jurisdictions.

42. It should be borne in mind that, to the extent that the international certificate could lower significantly the transaction costs and provide more flexibility (and legal certainty), it could balance the additional costs mentioned above, especially when considered in the long run. The certificate may also avoid the costs resulting from a growing number of uncoordinated national regimes.

43. In addition, a preliminary assessment of options was made in relation to practicality, feasibility, cost, and benefits. Among the key factors in assessment will be the extent to which each option provides the basis for a certificate system which reduces transaction costs, builds trusts between Parties and furthers the effective realization of the access and benefit-sharing provisions of the Convention.

44. In evaluating options available for a certificate system the group noted that legal certainty may be increased as the level of obligations to provide certificates in provider countries and request certificates in user countries increased. Conversely, the level of legal certainty may decrease as any system becomes more discretionary.

45. Analysis of feasibility requires consideration of political willingness, institutional capacity and changes necessary to make certificates a part of systems for the management and use of resources.

46. With regard to the issue of costs, it was considered necessary to take into account not only transaction costs but also direct costs associated with implementation. In some cases, while it is likely that initial costs would be high in the start up phase of a global regime, the transaction costs (e.g. marginal costs of each additional transaction) may under certain circumstances be relatively low.

47. The potential benefits of a certificate system to achieve the access and benefit-sharing objectives of the Convention are likely to increase with greater participation of parties at both the user and provider end.

48. The Group considers it useful for Governments, industry, the research sector, international institutions, indigenous and local communities to further study these issues.

Capacity development

49. The Group noted the important role that capacity development will play in securing the effective implementation of any certificate system. The costs of capacity-building may need to be shared by national authorities and the international community. While institutional costs may in large part be borne by national authorities, building technical expertise and technological capacity will require international support.

5th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Montreal, Canada
8-12 October 2007

Biopiracy meet ends with no progress

Lim Li Lin and Chee Yoke Ling

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THE persistent opposition of several developed countries to coming up with a clear negotiating text for an international treaty against biopiracy resulted in a disappointing ending to the 5th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing (ABS), a subsidiary body of the United Nations Convention on Biological Diversity (CBD).

After a week of talks that ended on 12 October in Montreal, the two Co-Chairs of the Working Group, Fernando Casas from Colombia and Tim Hodges from Canada, produced two documents – a paper containing their reflections on areas of potential convergence, options, possible tools and concepts for clarification, as well as a paper which contained a compilation of key concrete proposals from the 17-member Group of Like-Minded Megadiverse Countries (LMMC) and bullet points from other CBD Parties that had been made over the course of the week.

The LMMC countries, all Parties to the CBD, are Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela.

The LMMC, which holds the majority of the Earth's species, had submitted text proposals reflecting their position on each of the substantive issues for discussion. These issues were fair and equitable sharing of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity-building. Under compliance, there was examination of measures to support compliance with prior informed consent and mutually agreed terms; an internationally recognised certificate of origin/source/legal provenance; as well as monitoring, enforcement and dispute settlement.

The Co-Chairs' proposal that the next (6th) meeting of the Working Group be regarded as an integral part of the Montreal meeting was accepted by all Parties and non-Parties. The 6th meeting will elaborate and negotiate on compliance, traditional knowledge and genetic resources, capacity-building, and the nature (legally binding or not), scope and objectives of the international regime.

The initial proposal of the two Co-Chairs had been to annex their two documents to the report of the meeting, which would be adopted on the final day. This would then be passed on to the next negotiation session in January 2008 as it will remain as the Co-Chairs' text for the next meeting. However, this met with strong opposition from Australia, Canada, New Zealand and Japan. The US also shares the same position, but it is not a Party to the CBD and is thus less vocal. Interestingly, the statements by industry and these opposing countries share much common ground.

The meeting had seen a split approach taken by Parties, reflecting divergent views on whether they should start negotiating the text of a treaty already or whether they should just continue discussing concepts of how to deal with biopiracy. Between the developing countries and the opposing developed countries was the European Union, which sought to play a bridging role that many questioned, because a fundamental choice was at stake – whether there will be a an international regime or not.

The LMMC's submissions were based on a distillation of various text proposals compiled at the last meeting of the Working Group in Granada, Spain in February 2006. This document, popularly known as the Granada text, has the beginnings of a structure of an international agreement. Opposing countries continue

to advocate contracts between those seeking genetic resources and those providing the resources, whether they are private parties, local communities or government institutions. They also prefer codes of conduct rather than anything legally binding.

The EU was prepared to start serious substantive discussions, which was a marked shift from previous meetings.

The approach of the LMMC was to take the negotiations forward by working on actual text rather than to simply continue to generally discuss the issues. This was supported by the African Group and the Group of Latin American and Caribbean States (GRULAC). However, it was clearly the strategy of some of the developed countries to engage in general discussion, since they oppose any progress in developing an international regime on access and benefit-sharing.

The eighth meeting of the Conference of the Parties to the CBD (COP 8), held in Curitiba, Brazil in March 2006, had clearly decided that the Granada text be used by the Working Group "for the purposes of continuing to elaborate and negotiate the international regime" and to complete its work at the earliest possible time before the tenth meeting of the Conference of the Parties (2010). It had also identified other inputs for the Montreal meeting.

Developing countries stressed throughout the week that the Working Group has a clear mandate from the decision of heads of State at the 2002 World Summit on Sustainable Development to negotiate an international regime on benefit-sharing. This was endorsed by the UN General Assembly later in the same year, and the CBD Parties had arduously negotiated the terms of reference at COP 7 in 2004. Again, very difficult negotiations in COP 8 resulted in the final decision to specifically transmit the Granada text for further work on the international regime.

The international regime on access and benefit-sharing is expected to set the rules on how benefits from the utilisation of genetic resources and associated traditional knowledge are to be fairly and equitably shared between the provider countries (mainly developing countries) and the indigenous and local communities which are the holders of the knowledge, and the companies and research institutions which are mainly from developed countries.

Underlying the discussions is an attempt – led by developing countries and resisted to varying degrees by developed countries – to address the problem of biopiracy, where the unique properties of biological material, from the forests and the seas and even the soil of developing countries and indigenous and local communities, are taken from them without their knowledge and consent and are then developed and patented into useful products and medicines which are often unaffordable to the people from where the resources and knowledge generate. A study conducted in 1999 estimates the global market value of industries using biological and genetic material at between $500-800 billion.

The historic adoption by the UN General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples in September 2007 has given a major boost to the demands of indigenous peoples in the ABS discussions. The Declaration sets out the individual and collective rights of indigenous peoples, recognises their rights to land and other resources, calls for the maintenance and strengthening of their cultural identities, and emphasises their right to pursue development in keeping with their own needs and aspirations. It also prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them.

Directly relevant to the discussions on issues pertaining to genetic resources and traditional knowledge is Article 31 of the Declaration: "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, etc. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. States shall take effective measures to recognise and protect the exercise of these rights."

Only four countries – the US, Canada, Australia and New Zealand – voted against the Declaration, while 11 countries abstained. During the discussions at the biopiracy meet in Montreal, Canada continually asserted that the Declaration was not legally binding and that it does not represent customary international law. It insisted that this be reflected in the report of the meeting, and objected to any reference to the Declaration in the documents that were being developed.

As a result of the disagreement on the status of the two Co-Chairs' papers – "Co-Chairs' Reflections on Progress Made by the Working Group on ABS at its Fifth Meeting" and "Notes from the Co-Chairs on Proposals made at WGABS-5" – the meeting was held up by numerous consultations within and between regional and political groupings on the final day.

Malaysia, on behalf of the LMMC and supported by GRULAC and the African Group, had initially proposed that all the submissions from the meeting be merged into the Granada text in the appropriate places, and that Parties be given the opportunity to submit proposals preferably in legal text form according to the issues identified by the sub-headings in the Granada text.

The developed countries, led by Australia, refused to accept the Co-Chairs' documents and made it clear that they would not negotiate on the basis of the Granada text and opposed the LMMC's proposal to do so. Instead, they proposed that Parties be allowed to submit a summary of their own proposals as annexes to the meeting report.

On the morning of the final day, the meeting was delayed by several hours in order to allow for regional and political groupings to consult. The meeting then heard further proposals from Brazil, who forwarded the position of the LMMC, GRULAC and the African Group in support of progressive work on developing the international regime.

Brazil, on behalf of those countries, also proposed that Parties should be invited to make submissions preferably in the form of operational text by the end of November 2007 in respect of elements that are being considered by the Working Group. The CBD Secretariat would then compile the submissions so that more elements can be added on to the Notes. Brazil also requested that the Co-Chairs, with the support of the CBD Executive Secretary, compile and distribute a working paper in operational text format for the purposes of elaborating and negotiating an international regime on access and benefit-sharing.

This again met with further opposition. The EU stated that Parties should determine the form and language of the submissions, and that all submissions should be made available at the next Working Group meeting instead of being compiled by the Secretariat.

Canada made the point that it did not matter how many Parties were aligned with one view, what mattered was that there were several views and that the work should be focused on bringing these views together. Canada proposed that submissions in the Co-Chairs' Notes document should be attributed to Parties and that such submissions could be pulled together in a document. Canada then suggested that the next Working Group meeting should also be conducted in plenary and since there was so much material on the table, it might be better to begin with a clean slate.

Given that the positions stated by countries at that time were poles apart, the Bureau of the Convention, a decision-making body of the CBD composed of regional representatives of the CBD Parties and presided over by the country which previously hosted a Conference of the Parties, stepped in and convened a meeting right after that session.

After the lunchtime Bureau meeting, the Co-Chairs convened the meeting again and announced that the documentation for the 6th meeting of the Working Group would be the same as it had been for this Working Group meeting. In addition, the Co-Chairs' Notes will be open to Parties for further submissions until the end of the meeting.

Importantly, further submissions on concrete options on the substantive items by Parties, governments, indigenous and local communities, and stakeholders were invited until the end of November. The Secretariat would then circulate a compilation of these options as soon as practicable prior to the next meeting of the Working Group.

The Co-Chairs stressed that all of these elements have been strongly and fully supported by the Bureau. The Bureau and other Parties have strongly urged the Co-Chairs to continue informal consultations with a view to moving this process forward.

To the relief of the delegates, the report was then adopted by the meeting, with some minor amendments. However, Australia immediately objected on the basis that they had expected to discuss the two Co-Chairs' documents that were attachments to the report.

After another recess giving Australia time to consult, Australia proposed that new language be inserted into the report of the meeting, replacing text referring to the Co-Chairs' two papers. Firstly, that the Working Group urges the Co-Chairs to continue consultations with a view to reaching a common understanding on the way forward. And secondly, that the Co-Chairs' two papers were their sole responsibility, and would have the status of information documents, and not be attached to the report of the meeting.

After some discussion, it was finally agreed that the Co-Chairs' two documents would be information papers for the next Working Group meeting and, at the insistence of Mali, that these documents would be translated into all the six UN languages. Normally, information documents are only made available in the language received.

Developing countries were deeply disappointed with this final outcome, as the process had hardly, if at all, moved forward. Developing countries had wanted to begin negotiations on the basis of the Granada text, and had hoped that the work of the Working Group over the week would make progress on the Granada text. Instead, the week's work had simply been downgraded to an information document.

Nevertheless, Malaysia, on behalf of the LMMC, emphatically stressed that the Montreal meeting had elaborated on key issues and the next stage has to be about actual negotiations. Therefore, Malaysia called for the next negotiation session to focus on the concrete text to be submitted by Parties by the end of November in respect of the substantive elements on the agreed agenda of the Working Group.

The sixth meeting of the Working Group will be held in Geneva from 21-25 January 2008.

6th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Geneva, Switzerland
21-25 January 2008

NGOs call for legally binding ABS regime

Kanaga Raja

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NON-governmental organisations (NGOs) attending the sixth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing (ABS) of the Convention on Biological Diversity have called for a legally binding international regime on access to genetic resources and the equitable sharing of the benefits arising from their use.

The meeting took place from 21-25 January and continued discussions of the fifth meeting of the Working Group at Montreal in October 2007.

The Working Group has been mandated to elaborate and negotiate an international regime for the fair and equitable sharing of benefits arising out of the utilisation of genetic resources with the aim of adopting an instrument or instruments to, amongst others, effectively implement the provisions of Article 15 and Article 8(j) of the Convention.

This was the last substantive meeting of the Working Group before the ninth Conference of the Parties (COP) to the CBD.

At a press briefing on 25 January, Francois Meienberg of the Swiss-based NGO Berne Declaration said that access and benefit-sharing (ABS) is one of the three pillars of the CBD, the others being conservation and sustainable use.

"It is quite clear that without this ABS, or to say in other words, without justice, the whole house could not stand," he said, adding that "we need justice and we need access and benefit-sharing".

He noted that since the CBD came into force in 1993, benefit-sharing has not been implemented. There is nothing going from the user countries – from pharmaceutical companies and so on – to the providers of genetic resources, who are in most cases in the global South.

Citing the adoption of voluntary guidelines on ABS in 2002 (the Bonn Guidelines), he said that it was quite clear that this cannot be the solution. Voluntary guidelines have not worked, he said, adding that the only way to solve the problem of non-implementation of access and benefit-sharing is to have something really binding.

He also noted that while the Working Group has been working on a regime on ABS, it must be recognised that nearly nothing has happened (with regard to a text).

He blamed certain Northern countries – especially Australia, New Zealand, Canada and Japan – for blocking the process. These countries have said that they are not ready to negotiate a legally binding regime on ABS.

At the eighth meeting of the COP in Curitiba in 2006, the Working Group was requested to complete its work at the earliest possible time before the tenth meeting of the COP, to be held in 2010.

Meienberg was of the view that it would seem to be very difficult to reach this target.

Gladman Chibememe from the African region indigenous and local community caucus highlighted the issue of capacity-building in Africa. A major issue for indigenous and local communities from Africa is related to traditional knowledge (TK) and capacity-building.

"We identify TK as a very essential component of our livelihood and our being and this TK should become an integral part of the regime," he said.

"If TK is included in the regime, we will have a real stake in the regime because TK is the only mechanism in the regime which may not be manipulated by technology," he added, unlike genetic resources which could be manipulated by genetic engineering.

On capacity-building, he emphasised the need to have a sustainable financial mechanism in which local communities would have resources channelled directly to them. He also raised the need to have a bottom-up approach in terms of establishing institutions.

"We are calling for a legally binding ABS regime ... which should have provisions that identify indigenous and local communities as real and meaningful beneficiaries of the whole process," he said.

Sangeeta Shashikant from Third World Network highlighted the link between the discussions on an ABS regime and discussions taking place at the World Health Organisation (WHO) on the issue of influenza virus-sharing and benefit-sharing.

Providing some background to the issue of avian influenza virus-sharing, Shashikant noted that world attention had focussed on the problem when Indonesia publicly announced that it would no longer provide avian influenza viruses to the WHO Global Influenza Surveillance Network (GISN), as the system was unfair to the interests and needs of developing countries.

Shashikant pointed out that vaccines developed from candidate vaccine viruses obtained from influenza viruses from affected countries are often too costly and unavailable to affected developing countries that need them, while developed countries have entered into advance purchase agreements to book vaccines in the event of a pandemic.

She also noted that the system does not really provide capacity-building for developing countries so that they can also in the future do their own risk assessment as well as get access to required technology.

Shashikant said that one set of clear winners from the WHO system is the commercial vaccine developers which have already obtained contracts from developed countries and have a system where they can get viruses.

Developed countries are the other set of winners because they can afford these vaccines, as they are already signing contracts (with vaccine developers) and are getting free access to the viruses. On the other hand, she said, developing countries have not gained much from this scheme.

The issue of fair and equitable benefit-sharing is at the heart of the ABS debate at the CBD. The concrete case of virus-sharing and benefit-sharing is one aspect that has to be looked at in the CBD negotiations, she said, adding that some of the crucial issues are the same, such as sovereign rights over biological resources and prior informed consent.

Debra Harry from the Indigenous Peoples Council on Bio-Colonialism said that indigenous peoples hold inherent and paramount rights over much of the subject matter, specifically genetic resources and indigenous knowledge, under negotiation in the CBD, and such rights have been recognised in international human rights law, which Parties are obliged to uphold.

Such rights have been clearly articulated in the United Nations Declaration on the Rights of Indigenous Peoples. It is time for the CBD to advance from 1992 (when the Convention was adopted) to 2008, she said, adding that the CBD must be interpreted and implemented in accordance with this body of international human rights law.

Carmen Ramirez from Colombia, representing the Latin American indigenous caucus, cited an example in her country where a forest law was recently declared unconstitutional in the Constitutional Court as it did not take into account the prior informed consent of indigenous communities.

This was a very important example in a country like Colombia which was approving and ratifying all conventions and customary international law but which had not applied them in internal laws, she said.

CBD group makes some progress on access-benefit talks

Lim Li Lin

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A MEETING of a working group under the Convention on Biological Diversity (CBD) has made progress in developing an international regime for the fair and equitable sharing of benefits arising out of the utilisation of genetic resources.

Although the progress was "slow and painful", as one delegate put it, there was nevertheless a positive movement forward, following a series of very disappointing meetings since the negotiations on the international regime started in 2005.

The ABS Working Group, which is mandated to complete its work by 2010, held its sixth meeting in Geneva on 21-25 January.

Two documents were adopted at the end of the meeting: a draft decision on the group's future work [to be transmitted to the ninth meeting of the Conference of the Parties to the CBD (COP 9)]; and an annex to this containing options on the objective, scope, nature and main components of the international regime. Both documents contained square brackets and other "markers" that denote the many areas of disagreement among the members, mainly on North-South lines.

Towards the end of the meeting, the progress that had been achieved was threatened by serious disagreement between the European Union and developing countries on a specific issue. A last-minute deal secured agreement, and the outcome of the Working Group was finally adopted.

The disagreement centred around the discussion on the development of tools to enforce compliance with the international regime, which include dispute settlement mechanisms, and remedies and sanctions. The EU wanted "international access standards" to be included under this heading of "compliance". The developing countries, led by Malaysia speaking on behalf of the Group of Like-Minded Megadiverse Countries (LMMC), argued that this was not a tool to enforce compliance, and was already listed in the "access to genetic resources" section.

Negotiations on the international regime for the fair and equitable sharing of benefits arising out of the utilisation of genetic resources have been underway since 2005. The talks have been dogged by deep divisions and disagreements between developed and developing countries.

Observers and delegates had been keenly watching to see if the position of Australia would be different after the country's recent change of government. Unfortunately, this was not the case, even though some reports have indicated that Australia may reverse its position on the United Nations Declaration on the Rights of Indigenous Peoples. Australia, together with the US, Canada and New Zealand, were the only four countries to vote against its adoption at the UN General Assembly.

The developing countries have been struggling in the Working Group meetings to get the developed countries to start engaging in actual negotiations, rather than to simply continue to discuss the issues and to work on gap analyses, indicators, etc.

At the fourth meeting of the Working Group in Granada in 2006, a "Granada text" was produced which compiled all the different text options of the elements of the international regime into one document. Developing countries have been insisting since then, to no avail, that the Granada text is the basis for the negotiations of the international regime.

Developed countries, particularly Australia, Canada, New Zealand and Japan, have refused to allow the Granada text to be the basis of the work, and to allow the process to take the form of actual negotiations. The US is not a Party to the CBD but holds similar positions.

At the fifth meeting of the Working Group in Montreal in October 2007, two documents – a paper containing the Co-Chairs' reflections on areas of potential convergence, options, possible tools and concepts for clarification, and another paper which contained a compilation of key concrete proposals from the 17-member LMMC group and bullet points from other CBD Parties – were produced.

(The LMMC countries, all Parties to the CBD, are Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela. They hold the majority of the Earth's species.)

The initial proposal of the two Co-Chairs (Fernando Casas from Colombia and Tim Hodges from Canada) had been to annex their two documents to the report of the Montreal meeting, which would be adopted on the final day. This would then be passed on to the Geneva meeting as the Co-Chairs' text. However, this met with strong opposition from Australia, Canada, New Zealand and Japan. In the end, the documents were downgraded to information documents which could not be used directly as a stepping stone for the negotiations.

During the meeting in Geneva, the Working Group developed two documents, both of which (containing square brackets, denoting differences) were adopted on 25 January:

- a draft decision for COP 9 on the "roadmap" or the process for the future work on developing the ABS regime until COP 10 in 2010, when the work is to be completed; and

• an annex to the draft decision, which contains options on the objective, scope and nature of the international regime. This document also contains the main components of the international regime – fair and equitable benefit-sharing, access to genetic resources, compliance, traditional knowledge associated with genetic resources, and capacity are included in the form of either "bullets" or "bricks".

The draft decision has numerous options in square brackets and will be further negotiated at COP 9 in May 2008 in Bonn.

Negotiations on developing the annex, which is in effect the substantive elements and content of the regime, took up a large part of the meeting. The discussions on various items were held in a "contact group".

On the nature and scope of the international regime, the contact group had only limited discussions. Thus, the texts on these items merely reflect a compilation of different options submitted by Parties and regional and negotiating groups. A footnote on these two sections reads: "These proposals were neither discussed, negotiated nor agreed."

On the section on "Objectives", the text is a synthesised compilation (reflected in square brackets) of various options submitted by Parties, regional and negotiating groups, and indigenous and local communities. Whether text submitted by observers could be included in the options had been a sticky issue. This was resolved when the Philippines and later Haiti supported the inclusion of submissions from the indigenous and local communities.

A footnote on this section reads: "These proposals were neither negotiated nor agreed." This footnote was inserted at the proposal of Australia, responding to objections raised by Japan in the final plenary to including the sections on objective, scope and nature of the international regime in the annex. Japan had suggested deleting these sections altogether. Australia then proposed including the footnote in the section on objectives, and placing these sections into a separate document. The proposal to move these sections into a separate document was not adopted.

The section on the "Main Components" was the main focus of the week's meeting. The two Co-Chairs of the contact group, Pierre du Plessis from Namibia and Rene Lefeber from the Netherlands, had instructed the group to indicate which items listed under each section (i.e., fair and equitable benefit-sharing, access to genetic resources, compliance, traditional knowledge associated with genetic resources, and capacity) of the main components could be regarded as a "brick" and which a "bullet."

Denoting an item as a "brick" meant that it had consensus among the Parties to be included as a component of the international regime. An item denoted as a "bullet" did not have such consensus and would need further discussion.

It was made clear that marking anything as a "bullet" meant that it was a component for further discussion, and did not mean that it was no longer considered a component of the international regime.

This process proceeded relatively quickly under the sections on capacity and traditional knowledge associated with genetic resources. The components compiled by the Co-Chairs of the contact group were based on the submissions by Parties, regional and negotiating groups, and indigenous and local communities.

Under compliance, the first item to be discussed was "international access standards" under the sub-section on "development of tools to enforce compliance". The African Group and the LMMC did not agree that this item should be a "brick". The EU then insisted that all the other tools to enforce compliance would automatically have to be "bullets".

This was greeted with protests and objections by the African Group, GRULAC (the group of Latin American and Caribbean countries) and the LMMC, which argued that this ran counter to the spirit and the process of the work they were engaging in. Namibia, speaking on behalf of the African Group, suggested that the contact group should discuss each item one by one on its merits, as was the case with the other sections.

The EU was adamant, however, and could only explain its position by indicating that if there were no clear international access standards, then it would be difficult for courts in the EU countries to enforce compliance.

It was clear, however, that the strict position of the EU is to ensure that the international regime contains international access standards, and that it was linking the two issues together as a bargaining chip in the negotiations. Developing countries are very strongly in favour of measures to enforce compliance, as even if they have strict domestic access and benefit-sharing laws, ensuring compliance in user countries is very difficult.

Malaysia, on behalf of the LMMC, also argued that the item was wrongly placed, as international access standards are not a tool to enforce compliance. In fact, it was already listed as a component under the

section on access to genetic resources. There was no special link between international access standards and compliance, and no reason why it should be the only substantive item to be linked to compliance. Many other issues relating to fair and equitable benefit-sharing and which are close to developing countries' hearts could similarly be listed under compliance if this were the case.

No agreement could be reached in the contact group on this issue despite numerous arguments put forward by developing countries and proposals for ways forward. The EU was simply adamant, even though Malaysia and Brazil acknowledged the right of the EU to use this as a bargaining chip in the negotiations but pleaded as a matter of principle that international access standards should be placed only in its correct place – under the section on access to genetic resources.

The Co-Chair from the Netherlands also explained that the EU's submission had not actually placed "international access standards" under the section on compliance, and that this was placed there in the drafting exercise by the Co-Chairs of the contact group.

The Co-Chair from the Netherlands wanted to resolve the issue by simply "bulleting" all of the items under "development of tools to enforce compliance" to indicate that all of the items required further consideration, but this solution failed to address the fact that the item was misplaced under the section on compliance. This solution was also the preferred outcome of the EU, as it would mean keeping this issue alive in the compliance section.

Informal consultations to resolve this issue were then conducted in order to bring a resolution to the final plenary. The contact group completed its work on the sections on access to genetic resources and fair and equitable benefit-sharing.

In the final plenary to adopt the report of the Working Group, Malaysia, speaking on behalf of the LMMC, announced that the developing countries had made a proposal to the EU as a compromise, and the EU subsequently confirmed that it had agreed to the proposal.

This compromise was to remove "international access standards" from the section on "development of tools to enforce compliance" and place it instead as a "bullet" under "development of tools to encourage compliance". Language to the effect that the African Group, GRULAC and LMMC were of the view that international access standards did not belong under compliance and that they had only agreed to its inclusion under that sub-section as a compromise, was to be included in the report of the Working Group.

The EU however continued to explain that it reserved the right to move that "bullet" at a subsequent stage of the negotiations. Malaysia responded with incredulity to this as this had not been articulated nor agreed to in the informal consultations. There was a clear understanding that items could be moved from "bullets" to "bricks" but not moved around into different sections.

Malawi threw its support behind Malaysia, and the EU subsequently relented. Some delegates later spoke of last-minute telephone calls to the French government, which was the last EU country to agree to the compromise.

The text had also been amended to read "international access standards (that do not require harmonisation of domestic access legislation) to support compliance across jurisdictions", to be consistent with the text included under the section on access to genetic resources.

Importantly, a paragraph in the final report of the Working Group was included that states "the annex to this report will form the basis for further elaboration and negotiation of the international regime". The annex is the document that contains the different options on objectives, scope and nature, and the main components of the international regime.

Despite the difficulties, there was optimism at the close of the Geneva meeting, as there was a palpable sense among many delegations that the negotiations of the international regime had finally begun.

Before the meeting, the negotiations had failed to move forward despite the work done in Granada at the fourth Working Group meeting to develop the Granada text, the work in Curitiba at the eighth COP to preserve the Granada text and the work in Montreal at the fifth Working Group meeting to make some progress.

However, as the Executive Secretary of the CBD stated in his closing remarks: "Here in Geneva the negotiations of [the] international regime started indeed."

The next step will take place at COP 9 in Bonn in May 2008, which will discuss the draft decision drawn up in Geneva and make a decision on the work of the Working Group for the coming years until COP 10 in 2010, when the work on the international regime on access and benefit-sharing is to be completed.

9th meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 9)

Bonn, Germany
19-30 May 2008

CBD meeting dominated by talks on access and benefit-sharing regime

Chee Yoke Ling

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NEGOTIATIONS on an international regime on access and benefit-sharing (ABS) are taking centrestage while continuing to show a divide along North-South lines at the current meeting of the Conference of the Parties to the UN Convention on Biological Diversity (CBD) which started in Bonn on 19 May.

The Informal Consultative Group on ABS was established on 21 May for the duration of the Bonn meeting to kickstart progress on the ABS regime. Chaired by Fernando Casas of Colombia and Tim Hodges of Canada, the Informal Consultative Group is open to all Parties, non-Parties and observers to the COP. A mandate from COP 9 is expected to be agreed upon by 30 May that will chart the course of negotiations for the next two years.

So far, there is agreement in the Informal Consultative Group on the following: the annex of the report from the 6th meeting of the ABS Working Group will form the basis for future negotiation of the international regime; the ABS Working Group will meet three times prior to COP 10 and each meeting will be preceded by two days of informal consultations; and the terms of reference for three inter-sessional technical experts meetings.

A Small ABS Group chaired by Sem Shikongo of Namibia was set up in the first week of COP 9 to work on the terms of reference for the three technical experts meetings that will give technical and legal advice on a list of questions developed in Bonn to assist in the ongoing negotiations of the international regime. The questions deal with three topics: compliance (with national ABS laws); concepts, terms, working definitions and sectoral approaches; as well as traditional knowledge associated with genetic resources. On 26 May, agreement was reached on the terms of reference for these three meetings after long-drawn discussions and debates.

A proposal by the EU to include "international access standards" for the work of the technical experts met with strong objections from the Group of Like-Minded Megadiverse Countries (LMMC), which has been at the forefront of the demand for a legally binding international regime on ABS for many years.

Gurdial Nijar of Malaysia, speaking for the LMMC, said that this is not a technical issue but a political one that can only be resolved in the negotiations of the ABS Working Group. While developing countries have initiated the international regime to ensure that there is fair and equitable benefit-sharing to meet the third objective of the CBD, developed countries insist that there should be an international obligation to provide access to genetic resources.

Throughout the first week of COP 9, the EU insisted on including the issue of international access standards, supported by Canada, Australia, Japan and Switzerland. The question that was proposed for inclusion in the experts meeting was: "Identify how the international access standards for further consideration might contribute to addressing the compliance challenges that have been identified."

Developing countries' frustration at this move was evident. Fernando Coimbra, the lead negotiator of Brazil, said: "We are beginning to seriously question the legitimacy of this exercise, we are beginning to question seriously if we are on the right path."

At the height of the debate over the 24-25 May weekend, Tewolde Egziabher of Ethiopia said: "I don't know what access standards actually mean, it's another delaying tactic, it's been pushed and pushed and pushed ad nauseam ... Please, let us be serious."

The EU eventually withdrew its proposal on international access standards. Accepting the withdrawal, Antigua and Barbuda, the G77 and China Chair, said: "We will, however, watch the process carefully to ensure that the sometimes unbalanced expertise between developed and developing countries is not used to advance the agenda of any one Party or group."

The drawn-out discussions on the five-page list of questions had detracted the entire negotiations of the international regime from taking up substantive issues at the COP when the Parties actually have the authority to deal with them, especially on key issues such as the objectives, nature and scope of the international regime.

The G77 and China spokesperson added that "as the Expert Group is to feed into the negotiating process of the Working Group on ABS, we predicate our decision for the acceptance of the Expert Group on a firm commitment by us all that we are working towards a legally binding regime on the basis of China's proposal. Otherwise, we feel it would be a waste of money, time and resources."

China's proposal deals with the disagreement between developed and developing countries on whether the international regime should be legally binding. China has proposed that COP 9 instruct the ABS Working Group to determine which components of the international regime will be binding and non-binding. The proposal leaves some room for the international provisions to be binding and non-binding, not just one or the other. Negotiations on this issue are expected to be raised to the ministerial level when the COP 9 High Level Segment begins on 28 May.

The international regime negotiations have been protracted and difficult since the negotiating mandate was hard fought for in 2004. Since then, the Ad Hoc Open-ended Working Group on ABS has met four times, and in the last COP in Curitiba, Brazil, developing countries pushed extremely hard for the decision to "continue the elaboration and negotiation of the international regime". COP 8 instructed the ABS Working Group "to complete its work at the earliest possible time before the tenth meeting of the Conference of the Parties" in 2010.

In Bonn, developing countries are also pressing for an agreement that the international regime will be ready for adoption at COP 10 but developed countries continue to resist this too.

For many months prior to COP 9, the Parties could not even agree on which documents should form the basis for negotiations. This was largely due to developed countries' reluctance to commit to a legally binding agreement on ABS. Australia, Canada, Japan and New Zealand have been vocal in delaying and even objecting to a range of issues, including questioning the need for the international regime. The United States, though not a Party to the CBD, shares the same position. The EU sees itself as providing a bridge among the positions, but it falls significantly short of what the majority of developing countries want and need.

The main force for a legally binding international regime is the LMMC. The African Group is the other active set of countries in support of a legally binding regime.

On 23 May, Germany's Environment Minister Sigmar Gabriel, who is chair of COP 9, expressed cautious optimism following the first week of negotiations. "We still have a very long way to go, but we have clearly succeeded in generating a motivating and constructive atmosphere for COP 9 which helps us to move forward in our difficult negotiations," said Gabriel. "With 191 Parties under pressure to reach unanimity, it is natural that results can only be achieved after a long and hard struggle," said Gabriel, who considered it positive that the ABS talks have for the first time entered a concrete phase.

"For me, it is essential to have a clear roadmap for the ABS negotiations," said Gabriel. In his opening speech when COP 9 formally commenced on 19 May, Gabriel had committed himself to doing his "utmost" to achieve progress in this issue, asking for a clear Bonn mandate because a regime "has to be in place in 2010". "Developing countries rightly describe it as biopiracy when industrialised countries help themselves to genetic resources in rainforests, produce medicines from these resources, but do not pay a single cent back in return," said Gabriel.

"We need equitable benefit-sharing. The countries of origin – in which the majority of our planet biodiversity can be found – want to get something back ... in my view, the financial volume is not even the priority aspect here. It is a matter of principle. The industrialised world has to recognise that the yields from biological resources have to be shared with those who have safeguarded them to this day for mankind."

With protected areas as another key issue for decision-making at the Bonn meeting, the Minister was also quick to point out that "the CBD is not a nature conservation convention. It is much more than that. It is about how to organise our life on earth. It is about protection of nature, about the sustainable use of biodiversity and not the least about the access to and the fair sharing of benefits that arise out of genetic resources".

In a meeting with NGOs on 22 May, the head of the German delegation, Astrid Klug, reiterated the importance of ABS. She called it a "turning point for the CBD that will make or break the Convention".

According to another senior German official at the NGO meeting, there was "hectic telephoning" by some delegates back to their capital cities at the Minister's statement on benefit-sharing. He also said that Minister Gabriel's opening statement was supported by German Chancellor Angela Merkel.

The importance of the international regime negotiations is also underscored by the fact that COP 8 designated Casas and Hodges as Co-Chairs of the ABS Working Group to steer the negotiations to their completion. This four-year term is unusual as the common practice is to appoint chairpersons at every COP meeting. (The last time this was done was when Veit Koester of Denmark was designated to chair the negotiations of another historic agreement under the CBD, the Cartagena Protocol on Biosafety.)

During the opening plenary, Casas said, "While difficult, the COP 8 mandate is by no means unattainable. No one is underestimating the obstacles, but significant progress has been made."

Both the chairpersons stressed that honest differences are healthy and that a roadmap and clear milestones are essential to take the process towards concrete options, then to text, to a consolidation of options and to the final international regime.

Hodges stressed that there is a genuine chance to reach agreement on the international regime, and sufficient financial resources as well as political commitment are needed.

Agreed roadmap to complete access/benefit-sharing regime

Third World Network

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THE roadmap which outlines the next steps to be undertaken to complete the negotiations for the international regime on access and benefit-sharing in 2010 has been agreed upon by Parties to the Convention on Biological Diversity (CBD).

The 9th meeting of the Conference of the Parties (COP 9) to the CBD is ongoing in Bonn from 19 to 30 May. The Informal Consultative Group on Access and Benefit-Sharing (ABS) was established on 21 May to try to make progress in Bonn on difficult negotiations that began in 2005.

The Ad Hoc Open-ended Working Group on ABS that is responsible for the international regime negotiations has met four times since 2005 on this issue. Under the roadmap, there will be three more negotiation meetings, with the next (7th) meeting of the Working Group to be held in the first quarter of 2009.

Three meetings of technical experts will also be held to provide options and scenarios for the negotiators of the Working Group. The experts will work on the list of questions developed in the Bonn meeting as part of the agreed terms of reference.

The nature of the international regime has been one of the most contentious issues so far.

Prevention of biopiracy and setting in place a legally binding international system to ensure the fair and equitable sharing of benefits from the use of genetic resources and associated traditional knowledge are the objectives consistently promoted by developing countries, especially the Group of Like-Minded Megadiverse Countries (LMMC) and the African Group.

Developed countries such as Canada, Australia, Japan and New Zealand have been strongly opposing a legally binding regime all along. The European Union, though reluctant, was not as vocal.

At the Bonn meeting, China proposed a compromise that envisaged both legally and non-legally binding measures. This was accepted by the LMMC (of which China is a member) and tabled to the delegates in the Informal Consultative Group.

There was subdued applause across the room late in the night of 27 May when Malaysia, speaking for the G77 and China, read out the compromise text that it hammered out with Canada, the lone delegation that resisted references to any legally binding instrument on the international regime. This resistance nearly threatened to unravel the growing consensus on the draft decision regarding the process or roadmap that will lead to the adoption of the international regime in 2010.

The compromise text that was finally accepted by Canada reads as follows:

[The Conference of the Parties] "Further instructs the Working Group on Access and Benefit-Sharing, after the negotiation of comprehensive operational text at its seventh meeting, to start its eighth meeting by negotiating on nature, followed by clearly identifying the components of the international regime that should be addressed through legally binding measures, non-legally binding measures or a mix of the two and to draft these provisions accordingly."

With this achieved, the G77 and China agreed to remove the bracketed text in paragraph 11 of the draft decision on the roadmap concerning the establishment of the technical experts group, the subject of negotiations over the last few days.

The bracketed text that refers to the open-ended and intergovernmental nature of the expert group was earlier inserted by Ethiopia when there was uncertainty on 27 May afternoon over the draft decision caused by Canada's insistence that they cannot make any more compromises on any references to the legally binding nature of the ABS instrument.

As it stands, the decision means that a defined number of experts can now be convened by the Executive Secretary of the CBD to give options and scenarios on the list of questions developed in Bonn on three topics: compliance; concepts, terms, working definitions and sectoral approaches; and traditional knowledge associated with genetic resources.

The Bonn roadmap also sets out the composition of the technical experts groups.

For the issue of compliance, there will be 30 regionally balanced experts (six experts per region) who will be nominated by the Parties, and 10 observers, three of whom will come from indigenous and local communities.

For the issue of concepts, terms, working definitions and sectoral approaches, there will be the same number of 30 experts coming from the five regions of the world and 15 observers spread out among the different sectors using genetic resources, including three observers representing the indigenous and local communities and the remaining balance coming from international organisations and agreements as well as non-government organisations.

For the issue of traditional knowledge associated with genetic resources, again there will be 30 regionally balanced experts with 15 observers, seven of whom will be from the seven regions where indigenous and local communities will be coming from, with the possibility of indigenous and local communities being nominated also by the Parties as experts.

The logic is that as experts nominated by Parties, these indigenous and local communities can then speak and make recommendations on the issue of traditional knowledge associated with genetic resources.

However, the representatives of indigenous and local communities in the small group meeting in Bonn that negotiated this issue were not too keen on this idea, saying that this is a highly political process which may result in them not being able to fully ventilate their concerns if they are made an integral part of the delegations from governments who will speak as experts on traditional knowledge associated with genetic resources.

There was considerable debate, too, on the duration of each of the three meetings of the Working Group on ABS. The EU insisted that each of the future meetings be limited to five working days, despite the consensus of everyone in the room that it should be seven consecutive days.

The EU said that its position is due to budget concerns – it believes that financial resources are not sufficient for the number of meetings envisioned in the roadmap. The EU was concerned about the proliferation of ad hoc technical experts groups being considered in so many decisions of the CBD, from agrofuels and monitoring and assessment to forest biodiversity and even dry and sub-humid lands, in addition to the three expert groups for ABS. This was also the question raised by Japan.

However, the ABS Working Group Co-Chair Fernando Casas of Colombia said that it is not for the budget group to solve substantive problems, such as the number of days of meetings of groups established to deal with issues identified by Parties. Instead, this has to be set by the Parties themselves and it is for the budget group to find the means within which to implement such policy directions.

The final agreement was that the next three meetings of the Working Group on ABS would be held, "subject to the availability of funds", over seven consecutive days. This means that the meetings will be funded not from the core budget of the CBD but will rely on voluntary commitments from donors.

Some donors came forward on 28 May, with Sweden announcing 180,000 euros for the Working Group meeting and another 60,000 euros for the experts group meeting on traditional knowledge. Spain said it will provide funds to the next meeting.

Namibia announced its intention to host the meeting of the experts group on concepts, terms, working definitions and sectoral approaches, which Canada said it will help fund.

The Secretary of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), Shakeel Bhatti, announced an offer to be the venue of the next Working Group meeting (Rome). Norway wanted language which emphasises the "close links between the Convention and the ITPGRFA" aside from welcoming the experiences of the ITPGRFA on access and benefit-sharing.

This language, however, was opposed by the Philippines, who said that such language in the draft decision is unbalanced as the efforts of others who have also expressed their interest to support the work of the ABS Working Group will then have to be reflected in the decision, which will eventually make the discussion on this time-consuming and difficult.

Canada offered a way out, suggesting that such kinds of efforts will just have to be reflected in the COP 9 report on this agenda item.

With one working day remaining, the Small Group chaired by Namibia that had worked on the terms of reference for the technical experts groups will discuss the main components of the international regime.

7th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Paris, France
2-8 April 2009

Negotiations finally begin on access and benefit-sharing

Chee Yoke Ling

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THE Ad-Hoc Open-ended Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity (CBD) began its seventh session on 2 April in Paris to finally start negotiating an international instrument to deal with the problem of biopiracy and to ensure that countries benefit from the use of their biodiversity.

The phenomenon of biopiracy, that is, the misappropriation of biological resources and associated traditional knowledge, is particularly affecting the developing world. After almost five years of exchanges of views and clarifications of positions, the Working Group's Co-Chairs Fernando Casas and Tim Hodges pressed Parties to make "concrete progress" and get to work on actual operational text.

"We have 21 days of work left," said Hodges, referring to the current and next two Working Group meetings before the deadline of 2010 for adoption of the international regime on access and benefit-sharing (ABS).

A round of plenary discussions on 2-3 April collected operational text from Parties and revisions of text already submitted over the last few months.

During the first day's plenary discussion on the international regime's scope (one of the topics of deep differences between developing countries and most developed countries), the possible exclusion of "pathogenic" organisms was raised for the first time by the European Union and Japan. ("Pathogenic" means the ability to cause disease.)

The Czech Republic delegate, speaking on behalf of the EU, announced that the issue of excluding "particular pathogens" from the scope of the international regime was still being discussed, indicating that there is no consensus yet to do so among the EU member states.

Japan said that some "specific consideration" should be given to genetic resources under discussion in the World Health Organisation (WHO) for public health.

"Interestingly, when Parties sent in proposals for operative text of the international ABS regime over the last few months, all of them had been clear that pathogens will not be excluded from the regime," said Francois Meienberg of the Berne Declaration, a Swiss NGO that monitors biopiracy and the role of the pharmaceutical industry.

The position of industry on scope is clearly for the exclusion of "human, plant and animal pathogens". This is found in the written submissions from the Access and Benefit Sharing Alliance, Biotechnology Industry Organisation, Intellectual Property Owners Association, the International Chamber of Commerce and the European Seed Association.

(Submissions from stakeholders are included in the compilation of proposed text, and such text will be part of the negotiation document if it is supported by a Party.)

"Industry's arguments based on pathogenicity are unacceptable," said Dr. Christine von Weizsacker of the Federation of German Scientists. "The same microorganisms under different environmental circumstances or through evolutionary processes can be pathogenic, occasionally pathogenic or not pathogenic. Classification of 'human, plant and animal pathogens' would thus be an elusive exercise."

She stressed that it is the use of an organism that triggers benefit-sharing and gave the example of selected influenza viruses from which vaccines are derived.

The focus on pathogenic microorganisms is caused by the ongoing ABS negotiations at WHO concerning influenza viruses and vaccines derived from those viruses.

The 17-member Group of Like-Minded Megadiverse Countries (LMMC) announced during the scope discussion that it will present a declaration later in the meeting on the ongoing negotiations at WHO on the "Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits".

According to Brazil, the LMMC Group's Chair, "We believe this is an issue directly related to issues being discussed here [at the Working Group on ABS]."

Even as the CBD Working Group meets in Paris, an informal consultation had started on 30 March in Montreaux, Switzerland (and to end on 4 April) to develop the details of the WHO Framework and a draft standard material transfer agreement. Some delegates expressed concern that this may prejudice the CBD ABS negotiations.

The WHO talks were sparked by Indonesia's realisation in 2006 that its unconditional contribution of avian influenza viruses to the WHO network of laboratories (almost all in developed countries such as the US, the 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.

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.

In May 2007, WHO's World Health Assembly in Resolution 60.28 recognised the sovereign rights of member states and stressed the importance of effective and transparent international mechanisms aimed at ensuring fair and equitable sharing of benefits. The Resolution also mandated the formulation of standard terms and conditions for virus-sharing.

The Intergovernmental Meeting (IGM) process was set up to reform the Global Influenza Surveillance Network that deals with the sharing of seasonal viruses and viruses with pandemic potential.

The IGM has met twice, in November 2007 and in December 2008. The plan is to reach as much consensus as possible in the ongoing informal consultations in Montreaux and to complete the negotiations by May 2009 when the World Health Assembly convenes.

A number of developing-country delegates at the Paris meeting said that the industry submissions are linked to the ongoing WHO negotiations.

"The Access and Benefit Sharing Alliance (ABSA) submission is misleading in describing that 'human, plant and animal pathogens' are 'currently the subject of unrelated benefit-sharing negotiations' in WHO," said Third World Network's representative at the Paris meeting.

"The WHO negotiations are not as broad as claimed by ABSA, and it is a purely subjective stance to say the negotiations are 'unrelated' to the work in the CBD," she said.

The Biotechnology Industry Organisation (BIO), which has among its members leading global pharmaceutical and agriculture corporate giants, argues that "human, plant and animal pathogens, including viruses", are not within the scope of the CBD.

BIO, the Intellectual Property Owners Association and the International Chamber of Commerce all argue that inclusion of these organisms would contradict the CBD's conservation objective.

Dr. von Weizsacker pointed out that the definition of "biological resources" in the CBD is clearly inclusive of all organisms, including pathogenic ones. She said that biologists and ecologists know how crucial microorganisms are for biodiversity and ecosystem balance, and that there is no biodiversity without pathogenic organisms.

"Oddly enough, the ones who do conserve pathogens (perhaps more than anyone else) are the pharmaceutical and biotechnology industry itself," said Meienberg.

Looking at the industry submissions, he said, "one cannot help but conclude that the only reason to exclude pathogenic organisms is an unwillingness to share benefits, the third CBD objective".

Other proposed exclusions from the scope of the international regime include human genetic resources (though the increasing number of patents on human DNA has created unease among some delegations),

genetic resources acquired before the entry into force of the CBD, the genetic resources covered by the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, genetic resources beyond national jurisdiction, and genetic resources located in the Antarctic Treaty Area.

Some developed-country Parties go further and propose the exclusion of genetic resources that are addressed in other existing treaties even though it is not evident that those treaties have any relation to ABS. Most developed-country Parties also want to exclude derivatives and products while the LMMC Group includes derivatives of genetic resources. The African Group includes genetic resources/biological resources, derivatives and products.

Argentina stressed that derivatives should be included only if the definition of the term is clear and agreed upon.

A Contact Group chaired by Norway and Uganda started work on 3 April afternoon on two documents, that is, a compilation of the operational text of the different proposals of Parties on objective and on scope. A second Contact Group on compliance will begin its negotiations work on 4 April.

8th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Montreal, Canada
9-15 November 2009

International negotiations to prevent biopiracy resume

Chee Yoke Ling

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MEMBER countries of the United Nations Convention on Biological Diversity (CBD) are meeting in Montreal from 9 to 15 November to resume negotiations on the international regime on access and benefit-sharing, with prevention of biopiracy as a major goal.

There is a growing sense of urgency as there will be only one more week of negotiations in March 2010 before the Conference of the Parties (COP) to the CBD meets in October 2010 to adopt the international regime that aims at ensuring the fair and equitable sharing of benefits arising from the use of biological resources.

These negotiations were launched at the insistence of developing countries because of the continued lack of implementation of the CBD's third objective, i.e., the fair and equitable sharing of benefits arising from the use of biological resources. On the contrary, concerns over biopiracy have grown since the CBD entered into force in 1993.

After some five years of talks and several expert group meetings, there is still no agreement on the nature of the international regime (legally binding or non-legally binding or a mix of the two; one single instrument or a number of instruments).

Developing countries (the 17-member Group of Like-Minded Megadiverse Countries or LMMC, the African Group and the Group of Latin American and Caribbean States, GRULAC) want to have a single legally binding instrument under the CBD. The LMMC explicitly calls it a protocol.

At the 10 November plenary, a new grouping of like-minded Asia-Pacific countries announced its formation, and they too support a single legally binding instrument.

"Thus far, countries from the Asia-Pacific region have been functioning under an official UN grouping – the Asia-Pacific Group, a large group which is rather unique in that it consists of both developed and developing countries. We are now entering a crucial stage of the negotiations and developing countries from the Asia-Pacific region wish to play an active role in these negotiations. Hence, they have felt the imperative need to discuss and address their commonality of interests through this newly created Like-Minded Asia-Pacific Group," said Gurdial Singh Nijar of Malaysia, who spoke for the new group.

He added that the group will "work closely with other developing countries organised as the LMMC, GRULAC and the African Group".

(The regional Asia-Pacific Group has not been an active collective participant in the negotiations due to fundamental differences between developing and developed countries, especially Japan.)

Developed countries have been resistant to a single legally binding instrument and while some countries now indicate that they may consider some form of legally binding nature, views differ in terms of one single instrument or a number of instruments (including existing ones). Some developed countries have indicated a willingness to consider a combination of binding and non-binding components.

Canada, Japan and New Zealand still display basic reluctance to accept a legally binding instrument.

In the opening plenary of the 8th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing on 9 November, Co-Chair Tim Hodges of Canada said that from the perspective of the Co-

Chairs (himself and Fernando Casas of Colombia), this meeting is "the most important meeting in the history of this Working Group".

In a scenario note dated 28 October for the Montreal meeting, the Co-Chairs reaffirmed their "commitment made at the outset of our tenure to transparency, openness, predictability and responsiveness".

The mandate to negotiate the international ABS regime was adopted by CBD Parties in 2004 and the regime is scheduled to be adopted in Nagoya, Japan in October 2010.

"This is an extraordinary meeting; it is not just a meeting, it is the meeting where postponing action is not an option," said Jochen Flasbarth of Germany, current President of the Conference of the Parties.

(The Conference of the Parties is the highest decision-making body of the CBD, and convenes every two years to adopt decisions. There is almost universal UN membership of the CBD except for the United States, Andorra and the Holy See that are not Parties.)

The week's work will focus on the negotiation of operative text on traditional knowledge associated with genetic resources, capacity-building, compliance (with the regime), fair and equitable benefit-sharing (arising from the use of genetic resources), as well as access to genetic resources. These are components of the international regime to be negotiated in a related but distinct step from the nature of the regime.

The Paris session of the Working Group produced a heavily bracketed negotiation text, indicating lack of consensus, on the issues of objective, scope, fair and equitable benefit-sharing, access and compliance. The current Montreal meeting will receive additional proposals building on the Paris text, for actual negotiations.

Meanwhile, on 10 November, two non-papers covering operative text submitted by Parties and compiled for the first time, on traditional knowledge associated with genetic resources and on capacity-building, were the basis for work in two separate contact groups.

On the exercise of clarifying the nature of the international regime, Co-Chairs Casas and Hodges will prepare a text reflecting the views expressed at the 9 November plenary and this will be included in the report of the Montreal meeting. The nature of the international regime will be negotiated in the final session in March 2010.

Namibia, speaking for the African Group, said that the international regime should be a comprehensive legally binding instrument, containing a set of principles, norms and rules and compliance and enforcement measures.

Mexico, speaking for GRULAC, stated its consensus position that it wants a binding instrument.

Brazil, on behalf of the LMMC, wants the instrument to be a single legally binding instrument, a protocol to the CBD.

Cuba, Indonesia, Bangladesh, Argentina, Tunisia and Liberia also supported a single legally binding instrument.

Norway's position is that the international regime should be composed of, but not limited to, a single legally binding instrument and this instrument should be a protocol to the CBD further developed from the Bonn Guidelines on ABS, with binding and non-legally binding provisions. It said that compliance is a core legally binding element.

Japan said that it is not in a position to accept a legally binding regime unconditionally though it is open to having some binding provisions on awareness-raising. Its view is that that the nature of the instrument can be determined after discussing the various elements of the international regime.

Thailand supports the development of the international regime, especially consisting of one or more legally binding and/or non-legally binding instruments within a set of principles, norms, rules and procedures.

New Zealand said that any legally binding element of the international regime should make legal sense and be workable, which means it is able to be implemented. If the instrument will have to be legally binding, it asked, what would that legally binding provision be in New Zealand and how shall it be implemented? A legally binding instrument should be implementable nationally and internationally, it said.

Switzerland supports a legally binding instrument that contains principles, norms, rules and procedures that may be legally and/or non-legally binding. It is also important that this instrument should be implemented in harmony with other ABS agreements and be flexible to allow the adoption of more specialised instruments that are in harmony with the CBD.

The European Union said it adheres to the "form follows function" principle in the negotiations, and that for its part, the international regime should include international access standards linked to compliance support measures that could constitute a mix of legally and non-legally binding measures.

Canada said that the nature of the regime should not be considered in a vacuum and that content determines the nature. It said the international regime should include existing voluntary instruments and, depending on the COP decision, can have binding, non-legally binding or a mix of binding and non-legally binding outcomes.

Costa Rica spoke about its experience in applying ABS measures and said that the international regime should be a legally binding instrument.

Serbia, on behalf of Eastern and Central Europe, said that the international regime could be either a single legally binding instrument or a combination of legally and non-legally binding instruments.

Jordan is for a binding instrument that has a number of measures, particularly on compliance and implementation.

The International Indigenous Forum on Biodiversity said that the international regime must have legally binding elements protecting the traditional knowledge and genetic resources of indigenous peoples in accordance with relevant international instruments that affirm indigenous peoples' rights.

Francois Meienberg, speaking for the civil society groups present in the Montreal meeting, reiterated that a meaningful and effective implementation of the ABS provisions of the CBD can only be reached through an international legally binding instrument. He said that voluntary agreements, like the Bonn Guidelines, have failed to protect and enforce the rights of provider countries and the various providers, as well as to establish compliance mechanisms in user countries. This can only be achieved through a comprehensive international regime on ABS that needs to be a protocol to the CBD.

He added that a meaningful and effective system can only be built up if the ABS protocol recognises and supports the UN Declaration on the Rights of Indigenous Peoples. The NGO statement called upon all CBD member States to support a legally binding international regime, and urged those that cannot at the present time envisage ratifying an ABS protocol, to not block other countries who seek to achieve a meaningful protocol.

The recurring problem of difficulties in obtaining visas to travel to Canada, host to the CBD Secretariat, was raised again in the 9 November plenary. The African Group stated its unhappiness as a delegate from Zambia had been denied a visa to Canada to attend the meeting of the Working Group.

The African Group sentiment was shared by GRULAC, Argentina and Mexico.

The Philippines also expressed the same experience, saying it has been "victimised" by the change in procedures in the Canadian embassy (in Manila), though it hoped it will not ever happen again in succeeding meetings of the CBD.

Canadian officials at the meeting said informally that they have nothing to do with the changes in the visa-processing procedures in developing countries.

Progress in shaping protocol on access and benefit-sharing

Chee Yoke Ling

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PROSPECTS seem encouraging for a new international agreement to prevent biopiracy and to ensure fair and equitable benefit-sharing from the use of biological resources and associated traditional knowledge.

Parties to the Convention on Biological Diversity (CBD) and observers ended a week's meeting (9-15 November) in Montreal with a consolidated text that will be negotiated and hopefully finalised in March 2010 in Cali, Colombia before the result is sent on to the 10th meeting of the Conference of the Parties (COP) in Nagoya, Japan, for formal adoption.

The Co-Chairs of the negotiating process said, at the closing plenary session on 15 November, that there was a "preponderant understanding" in the ABS Working Group that the "negotiations of the international regime aim at finalising a draft protocol under the CBD".

For many years, developed countries have been resistant to the calls of developing countries for a single legally binding international agreement to deal with access and benefit-sharing. Their preferences ranged from voluntary guidelines to an international regime comprising legally binding and non-legally binding instruments (but not a single agreement).

It was thus noteworthy that Japan, initially among the most resistant, said in the closing plenary session that it was "very supportive of the Co-Chairs' assessment of the preponderance of views" in the Working Group. Its head of delegation, Masayoshi Mizuno, said, "This Working Group will continuously and relentlessly aim to adopt a protocol in Japan."

He also clarified his statement on 9 November on this item, where he said Japan would not exclude a legally binding regime and that the nature would be determined after discussions on the substance. Pending that discussion, Japan was not in a position to accept a legally binding international regime "at this stage", indicating that it was prepared to do so under certain conditions.

Most delegates at the meeting regarded this as a significant shift in Japan's position. Japan will host the next biennial and tenth meeting of the Conference of the Parties (COP 10) in October 2010 in Nagoya.

The Ad Hoc Open-ended Working Group on Access and Benefit-Sharing has been instructed by the COP "to complete the elaboration and negotiation of the international regime on access and benefit-sharing at the earliest possible time before" COP 10.

These negotiations were launched in 2004 at the insistence of developing countries because of the continued lack of implementation of the CBD's third objective, i.e., the fair and equitable sharing of benefits arising from the use of biological resources. The Working Group is co-chaired by Fernando Casas (Colombia) and Tim Hodges (Canada), who have been designated by the COP to steer the process until its completion.

The Group of Like-Minded Megadiverse Countries (LMMC), with 17 members from Africa, Asia and South America and currently chaired by Brazil, and the African Group have been providing significant impetus to the negotiations. With the newly formed Like-Minded Asia-Pacific Group (that also consists of LMMC members), developing countries are expected to provide further momentum.

After six meetings, the Working Group was able to arrive at a 57-page draft of the international regime that contains the consolidated proposals and options submitted by Parties over the past year. The final round of negotiations will be from 22 to 28 March 2010 in Cali, Colombia.

At the Montreal meeting, the Working Group adopted the following package: (i) the report of the meeting; (ii) Annex I to the report, a consolidated draft of the international regime to be called the "Montreal Annex"; and (iii) Annex II to the report, "Proposals for operational texts left in abeyance for consideration at the next meeting of the Working Group". The two annexes form an integral part of the report and will go to the next and last meeting of the Working Group next March.

There are five main components in the Montreal Annex: (i) fair and equitable benefit-sharing; (ii) access to genetic resources; (iii) compliance; (iv) traditional knowledge associated with genetic resources; and (v) capacity-building. In addition, there is a section on Objective and another on Scope.

Work to produce one streamlined and consolidated document with options in several key issues and brackets around words and paragraphs (signifying divergent positions and lack of agreement), from a set of collated proposals submitted by Parties and observers, started at the 7th meeting of the Working Group (2-8 April) in Paris. That meeting focused on compliance, fair and equitable benefit-sharing, and access.

The Paris meeting also consolidated text on the objective and scope of the international regime, issues that remain contentious as seen from the numerous brackets and divergent options. Developing countries want a comprehensive scope that covers all biological resources, derivatives and products. On the other hand, developed countries in varying degrees seek to have a narrower scope by referring to genetic resources and not biological resources, with many not accepting derivatives or products. The European Union wants to exclude "specific uses of pathogens", regarded by some as reflecting the interests of the pharmaceutical sector. These two topics were not further discussed in Montreal and will be negotiated in Cali.

At the Montreal meeting, Parties could add new text to the three main components in the Paris Annex.

In the first part of the week, there was considerable disagreement and discussion over how to deal with preambular paragraphs and principles, definitions, and institutional and implementing provisions and final clauses that would complete the international regime text. These are now part of Annex II of the Montreal report. Participants and observers can submit new text for these topics at least 60 days before the last Working Group meeting.

The Co-Chairs ruled that no new submissions would be allowed for the five main components, as "the door had to be closed" for the finalisation of the international regime in Cali. However, Hodges said that text that could assist in achieving consensus on the existing text would be welcomed.

Not surprisingly, the discussions on compliance were among the most difficult, as this component is widely acknowledged as central to the effectiveness of a legally binding instrument or protocol. Of the 57 pages, more than 30 were on compliance, containing the most brackets and featuring a wide range of options.

Key issues that will need to be resolved include the use of an internationally recognised certificate to track and monitor genetic/biological resources; derivatives and products; disclosure requirements in patent applications (of prior informed consent and compliance with domestic laws in the country of origin or country providing the resource); the types of checkpoints for this tracking (e.g., patent offices and research funding agencies); access to justice to enforce ABS arrangements; tools to ensure compliance; codes of conduct; etc.

The Montreal meeting moved surprisingly quickly, after a slow start, to streamline and consolidate text on the other two main components: traditional knowledge associated with genetic resources, and capacity-building.

Considerable progress was made in the consolidation of the component on traditional knowledge associated with genetic resources. The previous week's negotiations in the Article 8(j) Working Group (2-6 November) had been quite successful and contributed to the relatively smooth consolidation of the text in the international regime.

The African Group took an active role with the cooperation of the International Indigenous Forum on Biodiversity (representatives of indigenous peoples' organisations) to reduce the amount of text without losing the substance. The high degree of direct participation by the indigenous peoples' groups in the ABS talks is unique among all environmental treaties.

Most brackets were removed and, according to the Contact Group co-chair Damaso Luna (Mexico), most of the remaining brackets would likely be removed when the scope of the regime was decided. For example, there is no agreement yet on whether derivatives and products of genetic resources/biological resources should be included, so all such references are bracketed. Also, where references to "prior informed consent" are found in several provisions, Canada has proposed the addition of "or approval and involvement".

A matter of concern for developing countries was the attempt of most developed countries to shift matters related to traditional knowledge to the World Intellectual Property Organisation (WIPO). The recently renewed mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was not to prejudge or prejudice the work on the international regime on ABS under the CBD. Thus, the LMMC, GRULAC and Like-Minded Asia-Pacific Group in Montreal objected to removing or diluting the substantive links between traditional knowledge and ABS in the international regime.

Nature

The issue of the nature of the international regime was formally addressed in the opening plenary session of the Montreal meeting. The Working Group Co-Chairs Casas and Hodges then conducted consultations with the governmental regional groups as well as the IIFB and civil society organisations at the meeting on the matter.

The Co-Chairs presented their "reflection" on the nature of the international regime at the closing plenary session on 15 November and read the following statement on the delicate issue of nature:

"Having reflected on the statements made in plenary on this item and having discussed the matter with all regions and with a range of representatives of indigenous and local communities and with stakeholders, it is the Co-Chairs' view that the Working Group shares the preponderant understanding that, for the purposes of completing its mandate at the earliest possible time and subject to agreement that the regime would include inter alia one or more legally binding provisions, negotiations of the international regime aim at finalising a draft protocol under the CBD. The Co-Chairs confirm that this view is without prejudice to a decision by the Conference of the Parties at its tenth meeting on adoption of such a protocol.

"For the record, the Co-Chairs confirmed that this view in no way alters the COP 9 decision or alters the positions of delegations on this matter as expressed on Monday [9 November] in plenary."

This will form part of the meeting's report and it is expected that informal consultations led by the Co-Chairs will be continued into the Cali Working Group session.

Inter-sessional work

Given that the formal negotiations of the Montreal Annex will only take place next March, and the document contains 57 pages with thousands of brackets, the Working Group agreed to hold two informal inter-sessional meetings before it reconvenes in Cali.

The Co-Chairs presented the outline of the inter-sessional work on 14 November afternoon, following informal discussions with Parties over the week. There will be two distinct meetings. The first will be a 3- to 5-day meeting of "Friends of the Co-Chairs" in late January or early February 2010 that Canada offered to host.

("Friends of the Chair" is a United Nations practice whereby, in cases where the views and positions of countries are diverse and divergent, the chair of a negotiation group may select a much smaller group of negotiators who have been active, to informally meet for discussions or negotiations. The aim is to facilitate more in-depth and frank exchanges so that there can be a better understanding of positions and solutions sought to arrive at a consensus when formal negotiations resume.)

This meeting will comprise: (i) 18 representatives from CBD Parties selected by the Co-Chairs; and (ii) two representatives each from indigenous and local communities, civil society and industry. In addition, there will be one representative each from the ninth and tenth Presidencies of the COP (i.e., Germany and Japan respectively).

The purpose of the meeting is to work on defining possible solutions on key issues in the negotiation of the international regime. Key issues for discussion would be provided in advance by the Co-Chairs. The expected outcome is a report by the Co-Chairs on possible solutions for those key issues.

The second meeting will be an inter-regional informal consultation to be held prior to the ninth meeting of the Working Group, composed of: (i) 25 participants designated by Parties from within the five regional groups recognised by the UN (five per region); (ii) 10 observers (advisors) (two per region) could also be present in the meeting at any one time (others can be outside the meeting room and there can be a rotation of advisors as decided by the Parties concerned); (iii) two representatives each from indigenous and local communities, civil society and industry; and (iv) one representative each from the ninth and tenth Presidencies of the COP.

This group will discuss preambular text, definitions and provisions relevant to the consolidation of operative text of the international regime. It is expected that the outcome of the meeting will facilitate and accelerate the negotiations at the ninth meeting of the Working Group.

The group would work on the basis of the report of the meeting of the Friends of the Co-Chairs, the two annexes to the report of the eighth meeting of the Working Group as well as pre-session documents prepared for the ninth meeting of the Working Group.

The three-day meeting would be held on 16-18 March 2010 in Cali, followed by the customary informal consultations between the Co-Chairs and regional groups on 20-21 March, and then by the Working Group meeting itself on 22-28 March.

The Namibian delegate, on behalf of the African Group, said that after internal consultations the Group agreed to the Co-Chairs' process. However, it proposed that for the meeting of the Friends of the Co-Chairs the number of representatives should be increased from three to four per region, and for the second meeting, from five to six per region. It also called for observers (advisors) to be increased from two to four per region.

(In the previous day's late afternoon plenary, Namibia, speaking on behalf of the African Group, expressed concerns the Group had over fair and equitable representation in the inter-sessional meetings. It was also concerned over the status of the outcome of the second meeting and how it would help the last Working Group meeting advance work negotiating the international regime.)

Malawi said that the African Group wanted only one meeting and gave in to two. It now wanted more balance.

The final decision of the Co-Chairs will be communicated to Parties and observers within the next few weeks.

Co-Chair Casas said in his closing plenary statement that the way the Working Group had worked to achieve such positive results in Montreal was very inspiring. "The good spirit and atmosphere fills us with hope that the mandate that this group and Co-Chairs have will play out, and that in Nagoya we have a result that we will be very proud of for the Convention," he said.

He emphasised that the process will be always transparent without surprises and they will continue along these lines until the final stretch.

He added, "The growing wave and sharing of like-minded vision is so welcome."

This was in reference to announcements of the formation of two "like-minded" groupings. The first was at the opening plenary when Gurdial Singh Nijar of Malaysia announced the creation of the Like-Minded Asia-Pacific Group (of developing countries) for the purposes of the negotiations of the international regime.

The second announcement came in the closing ceremony when New Zealand's delegate introduced the "Like-Minded in spirit Group of Women" composed of some women delegates at the Working Group meeting seeking gender balance, including from Cameroon, South Africa, Malawi, Lesotho, Mozambique, Thailand, Singapore, Cook Islands, Federated States of Micronesia, Norway, Australia, New Zealand, Austria and the Netherlands.

9th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Cali, Colombia
22-28 March 2010

Optimism for a new treaty to combat biopiracy

Chee Yoke Ling

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POLITICAL momentum from developing and developed countries grows for a new United Nations treaty that promises to combat biopiracy and ensure that developing countries get their fair and equitable share of benefits from the use of biodiversity and associated traditional knowledge.

The Ad Hoc Open-ended Working Group on Access and Benefit-Sharing set up under the Convention on Biological Diversity (CBD) will work intensively in its last negotiation session that begins on 22 March in the Colombian city of Cali. It has been working on developing an international regime on access and benefit-sharing since 2004.

The Working Group in its 9th meeting (22-28 March) will finalise the text of the treaty that is expected to be adopted at the biennial meeting of the Conference of the Parties (COP) to the CBD in October in Nagoya, Aichi Prefecture, Japan.

(Under UN rules, a draft treaty must be formally submitted to the UN headquarters six months before the COP convenes. There are 193 Parties to the CBD, with the notable exception of the United States.)

Ahead of the important meeting in Cali, political momentum for the treaty has grown significantly. Ministerial declarations and positions have emerged from meetings of African ministers, the Group of Like-Minded Megadiverse Countries and the European Union's Council of Environment Ministers.

African environment ministers and senior officials from more than 43 countries met in Windhoek, Namibia from 8 to 10 March on the international regime on access and benefit-sharing. In his opening speech, President Hifikepunye Pohamba of Namibia said, "There would be no better gift to the people of the world in this International Year of Biodiversity than an agreement on a fair and equitable international regime on access and benefit-sharing."

The meeting reaffirmed the African Group's position that there should be a single comprehensive legally binding international regime to ensure the fair and equitable sharing of benefits arising from the utilisation of biological resources and/or genetic resources and associated traditional knowledge in accordance with the relevant CBD provisions.

It restated the African Group position that: (1) access to biological/genetic resources is subject to national legislation, and is linked to mandatory prior informed consent and mutually agreed terms; and (2) the international regime should specify minimum standards for benefit-sharing.

The meeting reaffirmed the importance of the rights of indigenous and local communities under the international regime; the need for a strong compliance system at national, regional and international levels including laws in user and provider countries; tools for monitoring and tracking of resources that leave national bodies; technology transfer; and capacity-building.

The African ministers also called for the inclusion of *ex situ* collections of biological resources in the scope of the international regime and proposed that these shall include continued and new uses of pre-CBD accessions of biological resources and associated traditional knowledge. This is in recognition of the evolving science in using such resources.

The meeting called on all the African ministers of environment to fully participate in the COP meeting in Nagoya in October 2010 in order to push for the adoption of an international binding protocol to the CBD on access and benefit-sharing.

The 17-member Group of Like-Minded Megadiverse Countries, in whose territories are located the bulk of the world's biodiversity and traditional knowledge of indigenous peoples and local communities, adopted the Brasilia Ministerial Declaration on 12 March at a meeting in the Brazilian capital, with a strong focus on the international regime.

They resolved to "join efforts as a Group for the urgent and effective conclusion of the negotiations for the Protocol/legally binding instrument on Access and Benefit-sharing … containing legally binding provisions and mechanisms to prevent biopiracy, especially when genetic resources and associated traditional knowledge leave the boundaries of the country of origin and to ensure fair and equitable sharing of all the benefits arising out of the commercial and other utilisation of all the genetic resources covered by the CBD and associated traditional knowledge".

They also resolved "to adopt at the tenth meeting of the Conference of the Parties to be held in October 2010, the legally binding Protocol/legally binding instrument on Access and Benefit-sharing for effective implementation of the threefold objectives of the CBD that would contribute to the eradication of poverty, promotion of human well being and alleviating socio-economic condition of our people".

The meeting agreed "to ensure that the Protocol/legally binding instrument includes, as a cross cutting issue, provisions for the fair and equitable sharing of benefits derived from the utilisation of traditional knowledge, innovations and practices associated with biological and genetic resources".

The Group stated that it will "also ensure that the Protocol/legally binding instrument includes comprehensive provisions for compliance with the aim of ensuring the effective fulfilment of the rights and obligations of Parties regarding access to genetic resources and fair and equitable sharing of benefits arising from the utilisation of these resources. These provisions shall include, among others: prior informed consent from countries of origin and, as appropriate, indigenous and local communities with mutually agreed terms, certificate of compliance, check points, disclosure requirements, measures in user countries, clearing house mechanism, information sharing and cooperation between competent national authorities in order to ensure the enforcement of national laws and conditions under which access was granted, as well as the provisions of the Protocol/legally binding instrument".

The Group further reaffirmed the need to ensure that patents and other intellectual property rights are supportive of and do not run counter to the CBD and the Protocol/legally binding instrument on access and benefit-sharing. [Such a provision on the interface between intellectual property rights and the CBD is already in Article 16(5) of the CBD.]

It wants the Protocol/legally binding instrument "to provide for the development of human resources and capacities in the developing countries, including especial measures for indigenous and local communities, for the effective implementation of the Protocol/legally binding instrument, including the establishment of a financial mechanism to support capacity-building programmes".

The Group also reaffirmed "the obligations of developed country Parties to provide new and additional financial resources and transfer of benign technologies to developing countries, in accordance with the provisions of the CBD, and stated that the new treaty should provide for additional obligations binding on developed countries to provide new and additional financial resources and technology transfer on concessional and preferential terms, as required by developing country Parties".

Referring to the fact that various international fora deal with related issues, the Group resolved to continue consultations among themselves "for developing consensus and common understandings on matters which may have an impact on conservation and sustainable use of the biological diversity, under the CBD and other multilateral fora, such as the TRIPS Council of the WTO, WIPO and FAO".

Although developed countries had earlier been resistant to a new legally binding treaty on access and benefit-sharing, hence delaying the negotiations for several years, a gradual shift has taken place since the last meeting of the ABS Working Group.

The European Union's Environment Council (of ministers) adopted conclusions on "EU and global vision and targets and international access and benefit sharing regime" on 15 March in Brussels, including one that "reconfirms the commitment of the EU to the successful conclusion of negotiations on the international ABS regime at COP 10 of the CBD and calls upon all Parties to continue providing constructive contributions with the aim of reaching consensus".

The Council expressed its view "that the United Nations Year of Biodiversity offers the political momentum to strengthen implementation of all three objectives of the CBD". (The three objectives are: biodiversity conservation, sustainable use, and fair and equitable benefit-sharing from that use.)

The EU Council reiterated "the need for transparency, legal certainty and predictability when accessing genetic resources and fairly and equitably sharing the benefits arising from the utilisation of genetic resources and traditional knowledge associated with genetic resources".

It stressed therefore that "the international ABS regime should establish a transparent regulatory framework through a Protocol to the CBD with legally binding and non-binding provisions".

The EU also wants such a protocol to include international standards on national access law and practice linked to compliance.

In a press release dated 18 March, Ahmed Djoghlaf, Executive Secretary of the CBD, said, "The time for talk is over. The time for action is now. Cali is the right place to demonstrate the required political will and display the necessary spirit of compromise by all stakeholders. Cali is the right place and the right opportunity to offer to the children of the world as a gift to the celebration of this year the International Year of Biodiversity the draft Aichi-Nagoya Protocol on access and benefit sharing."

The Co-Chairs of the Working Group, Timothy Hodges of Canada and Fernando Casas of Colombia, said, "The prospects for finalising the text of the international regime have never been better and the stakes have never been higher. There is no doubt that a lot of hard work will be needed in Cali over the next seven days in order for the negotiators to fulfil their mandate from the Conference of the Parties. But a new spirit of cooperation has emerged and there is a growing appreciation that this regime represents a win-win situation for all countries."

"The international regime is about seizing opportunity, together. After all, every one of us relies on genetic resources for food, health and social well-being. We have a lot in common and now is the time to recognise and build on this simple fact," they added.

To facilitate the negotiations that have limited time to be completed, the Working Group at its last meeting in Montreal in November had mandated two inter-sessional meetings under the guidance of the Co-Chairs. A "Friends of the Co-Chairs" meeting was held on 26-29 January, while a Co-Chairs' Informal Inter-regional Consultation was held on 16-18 March in Cali. Parties to the CBD agreed to these meetings as the 57-page text with numerous options and many brackets (indicating lack of consensus) before them presented enormous challenges.

The purpose of the Friends of the Co-Chairs' meeting in January was to work on defining possible solutions on key issues in the negotiation of the international regime. The Co-Chairs' "Paper on Selected Key Issues" was provided for the discussion and this was also posted on the CBD website.

The participants in that meeting included 18 representatives from Parties; one representative each from the Presidencies of the 9th and 10th meetings of the CBD COP (current and next Presidencies); and two representatives each from the indigenous and local communities, civil society, industry and the research community.

The Co-Chairs' Informal Inter-regional Consultation in Cali was mandated to consult on preambular text, definitions and provisions relevant to the consolidation of operative text of the international regime, and to identify concrete solutions in order to facilitate and accelerate the negotiations at the 9th meeting of the Working Group. There were 40 participants from Parties, 12 from indigenous and local communities, industry, research institutions and civil society, and one representative of the current and next Presidencies of the COP.

A "Co-Chairs' Guidance Note" was provided in advance (also posted on the CBD website). The purpose of the Note was to provide the Co-Chairs' guidance in the streamlining, consolidation and finalisation of the text of the international regime. It is clearly stated in the document that it "has no formal status and is not intended for negotiation".

From informal reports of the two meetings, a high level of common understanding has been reached on many critical key issues that delegates say bode well for the week ahead.

Access and benefit-sharing protocol gaining shape

Chee Yoke Ling

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DETAILED work is underway to craft a treaty to prevent biopiracy and to ensure the fair and equitable sharing of benefits from sustainable use of biodiversity.

The 9th session of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing under the Convention on Biological Diversity (CBD) is meeting in Cali, Colombia from 22 to 28 March.

At the opening plenary on 22 March, the Working Group Co-Chairs, Timothy Hodges of Canada and Fernando Casas of Colombia, strongly urged Parties to the CBD to produce a "credible and meaningful" treaty. They called on Parties to build on the productive work done in regional meetings of Parties and two informal meetings under the auspices of the Co-Chairs over the last few months since the last formal meeting of the Working Group in November 2009.

They stressed that delegates should maximise the seven days left in the current and last negotiation session to meet the mandate of the Working Group to finalise the text of the international regime so that a protocol to the CBD can be adopted at the biennial meeting of the Conference of the Parties (COP) to the CBD in Nagoya, Aichi Prefecture, Japan in October.

The Working Group decided at the 22 March plenary that the week's negotiations will be based on three documents. First is a streamlined 15-page "non-paper" prepared by the Co-Chairs at the request of regional representatives who participated in the Co-Chairs' Informal Inter-regional Consultation held on 16-18 March in Cali. This is the "Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation".

The second is another "non-paper" that is a draft decision of the Conference of the Parties to the CBD to adopt the protocol that also contains a work programme to prepare for the entry into force of the protocol.

The third document is the Montreal Annex that contains all the proposals and options of Parties and this will remain on the table for the negotiations.

In addition, the Co-Chairs provided a guidance note that contains their understanding of points of convergence of Parties gleaned from all the regional meetings, the two inter-sessional meetings and bilateral consultations over the past few months.

(In the UN, "non-papers" have no formal status and can include positions/views circulated by negotiating parties or text prepared by the chairperson to assist in moving negotiations forward by identifying areas of potential consensus.)

The 22 March plenary heard almost all the Parties confirm that they will work to produce a single legally binding instrument that will be a protocol under the CBD, expected to be adopted in October.

The exception was Canada, which said that it wants to keep options open on whether the final outcome would be one legally binding protocol. It returned to the 2008 instruction by the COP to the Working Group "to finalise the international regime and to submit for consideration and adoption by the Conference of the Parties at its tenth meeting an instrument/instruments".

The COP referred to "instrument/instruments" and left open the legal nature of the international regime because there was no agreement then on this issue. Since then, all other Parties have taken decisions at the political level to work on a single legally binding protocol.

Malaysia spoke on behalf of all the developing countries comprising the Group of Latin American and Caribbean States (GRULAC), the Asia-Pacific Group, the African Group, as well as the 17-member Like-Minded Megadiverse Countries (LMMC).

Spokesperson Gurdial Singh Nijar said, "Together, we collectively harbour the overwhelming majority of the remaining biodiversity on the planet. Our indigenous and local communities hold unique ancestral knowledge for biodiversity and for the sustenance of life itself. We thus hold a sacred responsibility to realise the use of resources and knowledge for the future of mankind, for the eradication of poverty and for the improvement of the livelihood of our populations.

"As we in the developing world are rather painfully aware, it was only after a long and sustained struggle that we finally reclaimed through the CBD sovereign rights over our biological resources and with this, our right to determine conditions for their access. This was meant to address the historical inequity

whereby our resources were taken for free, even misappropriated, with no fair benefits in return. Regrettably, this misappropriation and the non-sharing of benefits continues. Till now, the third objective of the CBD remains an illusory and empty promise – largely unfulfilled in all its essential facets."

He added, "The Co-Chairs' Guidance Note makes clear that compliance is at the core of this Protocol. We appeal to our partners – please do not roll back the Bonn roadmap for the negotiations. In particular, the mandate requires us to negotiate an instrument with one or more binding components. This means a binding protocol. Therefore, the question of the nature of the instrument is not a subject of negotiation. Any roll back would have dire consequences for the fate of this Protocol."

(The Bonn roadmap refers to the decision of the 2008 meeting of the Conference of the Parties in Bonn instructing the Working Group "to finalise the international regime and to submit for consideration and adoption by the Conference of the Parties at its tenth meeting" in 2010.)

Brazil, on behalf of the LMMC, said that "our goal is to produce the final draft of the ABS Protocol here in Cali. The LMMC supports a single and comprehensive draft Protocol with the understanding that compliance will be at the core of the Protocol".

The LMMC's key issues for the protocol included: derivatives of genetic resources; an adequate treatment of issues related to traditional knowledge (such as prior informed consent and mutually agreed terms); recognition of the country of origin concept; provisions on non-Parties; clear obligations ensuring access to and transfer of technology and better provisions regarding financial resources and mechanisms and capacity; and mechanisms to monitor compliance and international certificate, which are at the heart of the protocol.

Mexico, on behalf of GRULAC, added the region's support for using the Co-Chairs' draft text as a basis for negotiations. Spokesperson Damaso Luna also said that "compliance is the very heart of the Protocol". Other important issues included derivatives from genetic resources, country of origin, prior informed consent of indigenous and local communities on traditional knowledge to be assured at all cost, finance and technology transfer.

Malawi, speaking on behalf of the African Group, focussed on advances in science and technology since the CBD went into force on 29 December 1993, noting that in practice all benefits are derived from almost all elements of biological diversity and associated traditional knowledge – ecosystems; biological resources; genetic resources, including biological extracts, organisms, parts thereof, derivatives, genes, DNA, molecules, and genetic information.

"We believe this reality and understanding applies to all regions and sectors, and Africa calls upon this meeting to address the issue of benefits from a holistic approach, which is rooted in the principles of use or utilisation and value-adding, as well as transfer of appropriate technologies and funding," said Malawi.

The African Group also provided a list of their issues and concerns that were not adequately reflected in the draft protocol but reiterated that they will work on the basis of the Co-Chairs' text.

Cook Islands, on behalf of the Asia-Pacific Group, said derivatives must be included and that the financial mechanism must be distinct from financial resources in the protocol. Access to and transfer of technology should be adequately addressed. And there should be provisions on non-Parties.

All the developing countries stressed the need to have provisions that deal with the obligations of non-Parties. A main reason for this is the fact that the United States is not a CBD Party and, as such, will not be able to be a Party to a protocol under the CBD. However, its public and private sector entities constitute a high proportion of users of biological resources from developing countries.

Spain, on behalf of the European Union, said that the EU Council of Ministers had in the previous week approved conclusions that sent some very powerful messages to this meeting. One of the conclusions centre on the international regime on ABS. The spokesperson said that he was very proud and satisfied that following a lengthy process of negotiations, the EU ministers now recognise and clearly support the development of a protocol on ABS. Consistent with that, the EU could accept the Co-Chairs' streamlined paper as the basis of negotiations for this week.

Serbia, on behalf of the Central and Eastern European States, Korea, Norway, Australia and New Zealand spoke in support of the Co-Chairs' draft as well.

New Zealand's spokesperson said that her government supports a legally binding protocol depending on it being implementable and making legal sense.

Japan said that as host country of the 10th Conference of the Parties meeting, "we are aware of the huge responsibility that we should continue from the last two years. As we hear opinions of other delegates, the task ahead is very huge bearing in mind that we spare no effort in discussion so we all make great

progress in the next seven days. We strongly support the efforts of the Co-Chairs in streamlining the text and preparing the documents".

The International Indigenous Forum on Biodiversity expressed its disappointment that the draft protocol did not reflect its concerns and issues. "We are deeply disappointed … that the draft protocol does not include our rights and interests that had been supported in the Montreal annex," it said in a plenary statement.

It added, "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."

It listed the following minimum and necessary requirements:

- The protocol shall state in the preamble that the rights of indigenous peoples and local communities are respected.
- 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.
- The preamble to the protocol shall recognise the rights of indigenous peoples and local communities to genetic resources.
- The importance and relevance of traditional knowledge shall be fully integrated throughout the protocol, especially in the compliance section.
- The protocol shall recognise the existence and role of customary laws of indigenous peoples and local communities.

NGO representatives at the plenary stressed the importance of the rights of indigenous peoples and local communities, a comprehensive and broad scope, strong compliance especially in relation to user countries, tracking and monitoring, and the need to deal with non-Parties, as well as users and providers in the territories of non-Parties.

Rocky road still ahead for ABS protocol

Chee Yoke Ling

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GOVERNMENTS at a meeting of the Convention on Biological Diversity adopted a document containing the text of a draft protocol on access and benefit-sharing (ABS) on 28 March but actual negotiations on this new treaty will only take place a few months later.

Although almost all the 193 Parties to the CBD have agreed to a single legally binding treaty, there remains deep division over the content, primarily, the balance of obligations between users and providers of biological resources. The rights of indigenous peoples and local communities are also a contentious issue.

The Ad Hoc Open-ended Working Group on Access and Benefit-Sharing set up under the CBD was mandated to finalise the text of the treaty at its 9th meeting (22-28 March) in Cali, Colombia so that formal adoption can take place at the biennial meeting of the Conference of the Parties (COP) to the CBD in October in Nagoya, Aichi Prefecture, Japan. The Co-Chairs of the Working Group are Fernando Casas of Colombia and Tim Hodges of Canada.

The impetus for the treaty came from developing countries, culminating in the call by heads of state at the 2002 World Summit on Sustainable Development "to negotiate within the framework of the CBD ... an international regime to promote and safeguard the fair and equitable sharing of benefits arising from the utilisation of genetic resources". This call was the result of deep concerns over past and continuing biopiracy of the biological resources of developing countries and the traditional knowledge of their indigenous peoples and local communities.

By the end of the Cali meeting, after more than five years of work, developed countries agreed to document L.2 that contains the 16-page "Revised Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity", on condition that the following footnote was inserted:

"This document, which was not negotiated, reflects the efforts by the Co-Chairs to elaborate the elements of a draft Protocol, and is without prejudice to the rights of Parties to make further amendments and additions to the text. This document should be read in conjunction with the main body of the report, which reflects the views of the Parties during the ninth meeting of the Working Group on Access and Benefit-sharing, which took place in Cali, Colombia."

The meeting was adjourned and will resume at the end of June (to be confirmed) for another seven days, focussing solely on negotiating the text of the draft protocol.

(The Working Group also adopted document L.1, which is the report of the first part of its 9th meeting, and document L.3, which is a draft decision of the COP submitted by the Co-Chairs for adoption of the protocol in Nagoya. A similar footnote as in document L.2 is also in the draft decision document.)

At its 9th meeting in 2008, the COP instructed the Working Group "to finalise the international regime and to submit for consideration and adoption by the Conference of the Parties at its tenth meeting [in 2010] an instrument/instruments".

Therefore, there was pressure for the Working Group to submit a draft protocol to the United Nations headquarters for circulation to all Parties by 18 April. Under UN rules, a draft treaty must be circulated six months before it is formally adopted. In this case, the next COP meeting of the CBD begins on 18 October.

For many years, developed countries have been resistant to the calls of developing countries for a single legally binding international agreement to deal with access and benefit-sharing. Their preferences ranged from voluntary guidelines to an "international regime" comprising legally binding and non-legally binding instruments (but not a single agreement).

By the time of the Cali meeting, almost all Parties in the Working Group had affirmed that the international regime is a single legally binding protocol under the CBD. The exception was Canada, which explicitly stated its position: the international regime comprises existing international instruments and processes dealing with access and benefit-sharing, future international agreements and a protocol.

Deep divisions prevail

All Parties agree that compliance is at the core of the protocol in order to prevent biopiracy of biological resources and associated traditional knowledge, and to ensure fair and equitable benefit-sharing with the countries of origin/provider countries and their indigenous and local communities.

All Parties agree that there is a need for legal certainty and transparency in the national and international mechanisms and measures to ensure that the third objective of the CBD is achieved. (The CBD has three objectives: biodiversity conservation, the sustainable use of components of biodiversity, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.)

However, there is no agreement on key issues, including the following:

- Scope of the protocol (whether it should be comprehensive in setting access and benefit-sharing norms for other international agreements and processes that address this issue; whether it should cover derivatives of biological resources and continued/new uses of biological resources acquired before the CBD entered into force and now held in public and private *ex situ* collections such as botanical gardens, gene banks and seed banks; whether it should cover genetic resources in Antarctica);
- Standards for granting access to genetic resources (developed countries want internationally binding standards to secure access while developing countries say that access is a matter of national legislation and the primary objective of the protocol is benefit-sharing to correct past and continuing injustice);
- Obligations for monitoring, tracking and reporting of the use of biological resources (developing countries want mandatory disclosure requirements and checkpoints such as user countries' regulatory authority, publicly funded research institutions, research publishers, intellectual property examination offices and product approval authorities; and an internationally recognised certificate as evidence of compliance with national law on prior informed consent and mutually agreed terms – disclosure requirements shall be met when a user provides this certificate. Developed countries prefer "flexibility" and discretion to put in place the list of measures);
- Traditional knowledge (TK) of indigenous peoples and local communities (TK associated with biological resources has emerged as a crucial central issue, with developing countries, Norway, indigenous peoples' representatives and NGOs supporting the inclusion of TK as a cross-cutting issue in the protocol. The European Union prefers to deal with TK in a separate section. Canada and New Zealand cite domestic circumstances for diluting provisions related to TK and in particular do not support compliance measures

to protect TK. Many developed countries promote the World Intellectual Property Organisation for TK protection, but this is opposed by developing countries. The International Indigenous Forum on Biodiversity stated in Cali that it does not trust WIPO and prefers the protocol under the CBD where the structure, capacity and information for compliance are being established);

- Technology transfer and cooperation (technology transfer is an obligation under the CBD that has not been implemented and developing countries are concerned that developed countries seek to dilute this obligation);
- Financial mechanism (developed countries want the Global Environment Facility, which is also the CBD financial mechanism, while developing countries want an independent financial mechanism under the protocol itself);
- Relationship between the protocol and other international instruments and processes (developing countries want other instruments and processes to be consistent with the CBD but a number of developed countries favour "specialised" agreements and arrangements that developing countries fear may "drain the protocol of meaning" and at the same time fail to ensure benefit-sharing).

Canada has proposed to include a provision on non-discrimination and national treatment with regard to the grant of access to genetic resources for local and foreign entities and among foreign entities. This is also the position of other developed countries such as Japan. Developing countries reject this, stressing that the CBD and its protocols are not trade agreements.

Delegates had spent the Cali week in intense discussions to arrive at "common understandings" over a list of key issues as a precursor to textual negotiation based on a 15-page draft protocol prepared by the Working Group Co-Chairs.

The CBD Parties at the 8th meeting of the Working Group in Montreal last November had produced a 57-page text called the Montreal Annex, a compilation of numerous options with some 2,000 brackets (indicating lack of consensus). With only one more session of seven days in Cali, the Montreal Annex was acknowledged by Parties to be unworkable.

Negotiations on text had not taken place because major developed countries resisted the idea of a single legally binding treaty and this caused a delay, with the compilation text emerging only in November 2009.

The Working Group decided at the opening plenary on 22 March to work on the basis of a streamlined 15-page "non-paper" prepared by the Co-Chairs at the request of regional representatives who participated in a Co-Chairs' Informal Inter-regional Consultation (CIIC) held on 16-18 March in Cali. This was the "Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation".

The Co-Chairs' draft draws from the Montreal Annex, regional consultations and two informal meetings convened by the Co-Chairs, all of which took place between November 2009 and March 2010. Throughout the Cali meeting the Co-Chairs reminded delegates that their draft text is a "balanced package" and that delegates should take a "holistic" approach and in their negotiations based on the text they should try to maintain the "integrity and balance" of the package.

From 23 to 25 March night, the Working Group split into four Contact Groups in a smaller, more informal setting in order to have more interactive discussions to seek common understanding and solutions to a list of key issues over which Parties have divergent views.

When the four Contact Groups were set up on 23 March morning, Co-Chair Hodges urged the delegates to be "efficient, focussed and solution-based" in their work. He said that the Co-Chairs' intention was for the Contact Groups to understand what each specific issue means and, importantly, how it should be addressed and to arrive at solutions. The Contact Groups were also asked to deal with issues that have not been discussed yet.

Parties could decide to maintain text in the draft protocol, amend the original text or bring in new text to the relevant part of the original text.

Hodges stressed that delegates should not bracket any text but instead work together and reach "common understanding" so that there could be a holistic integrated text by 28 March, at which point Parties may insert brackets if necessary. The Working Group agreed to this.

(Bracketing text in UN negotiations indicates a lack of consensus, but at this late stage of the ABS protocol negotiations, the Co-Chairs were concerned that brackets would delay the finalisation of the treaty.)

Contact Group 1, co-chaired by Johan Bodegard (Sweden) and Jose Luis Sutera (Argentina), discussed the relationship with other instruments and processes; temporal and geographical application; flexibility for sectoral approaches; non-Parties; and financial mechanism/financial resources.

Contact Group 2, co-chaired by Rene Lefeber (the Netherlands) and Ricardo Torres (Colombia), discussed monitoring, reporting and tracking, including disclosure requirements and checkpoints; dispute settlement and access to justice; country of origin; and instances of no prior informed consent or mutually agreed terms. (Mutually agreed terms relate to conditions for accessing genetic resources and the terms of benefit-sharing when such resources are utilised.)

Contact Group 3, co-chaired by Cosima Hufler (Austria) and Pierre du Plessis (Namibia), discussed utilisation of genetic resources/derivatives/benefit-sharing; benefit-sharing obligation including access to and transfer of technology; as well as biodiversity-related research, access requirements, and Parties who determine that access is not subject to prior informed consent.

Contact Group 4, co-chaired by Tone Solhaug (Norway) and Damaso Luna (Mexico), focussed on traditional knowledge and discussing TK-related issues: the appropriate recognition of the relationship between access and benefit-sharing activities and TK associated with genetic resources; diversity of national circumstances; and recognition of customary law by Parties.

Progress was made with respect to some issues, especially TK-related issues. However, there was frustration among developing countries that understandings appeared to be reached on some critical issues only to have some developed-country delegates retract from such understandings. This was particularly so in the case of discussions on the relationship between the future protocol and other international instruments and processes.

A revised draft protocol was issued late in the night of 25 March and this was to be negotiated on 26 and 27 March. In an effort to facilitate focussed negotiations while maintaining transparency and inclusiveness, the Co-Chairs proposed and the Working Group agreed to convene as an Inter-regional Group and to work in a "Cartagena-Vienna Plus" setting. Johan Bodegard (Sweden) and Jose Luis Sutera (Argentina) co-chaired this Inter-regional Group.

(This was a modification of a setting introduced by Colombia's then environment minister Juan Mayr during the negotiations of the Cartagena Protocol on Biosafety in 1999/2000 whereby each grouping of countries selected its specified number of representatives who would sit around a table to negotiate, assisted by other members of their respective groupings. All Parties and observers were also in the room to ensure transparency and inclusiveness. In the Cali meeting, two representatives each of indigenous peoples, civil society, research institutions and business were also at the table with five representatives each from the five UN regions.)

Regardless of the novelty of the process, it was clear by 26 March afternoon that there were deep divisions between developing and developed countries, with Norway providing middle ground.

Days of circular debates on intellectual property (IP) offices as a checkpoint for disclosure of country of origin, prior informed consent and mutually agreed terms for benefit-sharing reached a frustrating level for developing countries on 26 March night when Australia yet again said that it did not support this checkpoint because it was "complex". Australia said again that the CBD was not the proper forum and that the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was developing an international instrument.

Susanna Chung of South Africa (also a negotiator at WIPO), representing the African Group, said, "I hear statements again and again about WIPO and I have to speak again and again. Please stop saying here that the CBD has no mandate to discuss IP."

She reiterated what she had said earlier in the Contact Group discussing compliance, that the WIPO process was a "talkshop" for years and developing countries' pressure led to a mandate in 2009 to have text-based negotiations but these are still being stalled by developed countries.

"If I can have [Australia's] statement in writing for May [when the WIPO committee meets], it would be good. Please do not falsify a process that is going badly. Please use clear facts about other processes. We are only starting [in WIPO], still arguing over process, including whether to use a screen with text," she said.

She added that there are flexibilities in international IP law that allow countries to change their national law and this can be done for disclosure requirements in patent applications.

Peru, on behalf of GRULAC, said that developing countries are only asking for disclosure and not interfering with the IPR system.

Spokesperson Monica Roselle said that checkpoints play a key role. "It is mostly impossible and costly to track a resource – in the absence of checkpoints what will we do? Proposals for disclosure and consequences of non-disclosure are watered down already. We now have a very basic and general notion of disclosure for transparency purposes, where a certificate of compliance is required. This does not impinge on IPR and is about transparency and good governance regarding genetic resources," she stressed.

Roselle said that Peru has had a disclosure requirement in its patent law and plant variety protection law – affirmed by WIPO and UPOV – and enforced for 10 years.

Malaysia, on behalf of the Like-Minded Asia-Pacific countries, said, "We have run into this argument many times. We don't know how we can do anything more. This is very frustrating. Are we serious that compliance is at the core of the protocol? I am asking you [developed-country Parties] honestly – you talk of indicative list, discretionary, and dismantling [the draft protocol text] – what is the manner of checking?"

"If you are not serious, don't waste our time. There was the COP 6 decision (2002) followed by studies by WIPO and UNCTAD on disclosure, the Bonn Guidelines on access and benefit-sharing ... WIPO did nothing and suddenly WIPO is the solution," lamented Malaysia's Gurdial Singh Nijar.

At this point, the European Commission, on behalf of the EU, called for a point of order and told the Malaysian delegate to not give a "lecture".

Malaysia responded that "this is not a lecture, this is a plea".

Namibia, on behalf of the African Group, emphasised that Article 16(5) of the CBD gives Parties the mandate to deal with IP.

[Article 16(5) provides that CBD Parties, "recognising that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives".]

When there was no response from developed countries and New Zealand proceeded to propose using a database and the EU proposed that information be placed in the CBD Clearinghouse Mechanism (instead of mandatory checkpoints), Malaysia said, "We are not sure this is serious or sincere if after nine working group meetings, we are at this stage. We made a plea – we are begging. But not heeded. It is very late and it is purposeless to go on ... we see a lack of genuine commitment."

(The frustration was also aggravated by the behaviour of some developed-country delegates that many delegates and observers saw throughout the day and night as a display of lack of seriousness.)

GRULAC joined the call for a suspension of the talks.

The African Group requested time for consultations and when the Inter-regional Group reconvened past midnight, Namibia's Sem Shikongo spoke on behalf of the African Group.

"This is a process for all of us and it can definitely not continue with half of the world walking out and there are many reasons why more than half the world wants to walk out. We share the view that good faith is not there, despite lip service paid to good faith," he said.

He called on developed-country Parties to get instructions from their capitals, and said, "These issues have been discussed for many years. We have said our views again and again and again. Tomorrow, come back to us and tell us whether you are willing, whether you are serious and have the good faith to negotiate."

The African Group also called for the Working Group Co-Chairs to present a revised draft protocol that captured progress made in the past few days.

Talks were suspended and the Working Group Co-Chairs conducted bilateral meetings with the five regional groups the next morning (27 March) and bilateral discussions also took place between the groups themselves.

At lunchtime, an initiative to break the impasse was discussed among representatives from the Like-Minded Asia-Pacific Group, African Group and GRULAC. This was presented by Namibia when the plenary was convened in the afternoon. The proposal was that representatives of the five regional groups meet "in camera" with the Co-Chairs to seek a solution for the next steps, since negotiations did not look possible given the divergent "red lines" in Parties' positions.

Developing countries, Norway and the Central and Eastern European countries supported the Co-Chairs' text as a reasonable balance and said that the integrity of that text should be maintained.

Moving forward

During the closing plenary on 28 March, the Working Group did a stock-take of the progress made in Cali on the draft protocol to be adopted at the COP meeting in Nagoya, and considered the roadmap between Cali and Nagoya.

Co-Chair Casas, in his opening remarks, said that "there were moments of enthusiasm and stress, and these are normal in any multilateral negotiations but we must overcome them to fulfil our mandate".

"There are many issues pending and much work is needed, so this document [the draft protocol] represents work in progress. We want this to be very clear to everyone," he stressed.

The Working Group then adopted document L.2 (called the Cali Annex to the meeting report, containing the revised draft protocol) as the basis of negotiation at the next meeting, with the footnote that it has not been negotiated, and that Parties retain their right to submit further text. Additional text from developing- and developed-country Parties was then formally submitted and these will be part of the official report of the Cali meeting.

Masayoshi Mizuno of Japan announced at the closing plenary that his government will finance the resumed session of the 9th meeting of the Working Group. This will take place over seven days in Montreal, Canada and there will be two days of regional consultations immediately before that. Hopefully, actual negotiations will take place with the fresh political will called for by so many.

At that resumed meeting, the Working Group will also consider if it is necessary to convene at least two more informal meetings – a Friends of the Co-Chairs consultation and a Co-Chairs' Informal Inter-regional Consultation as had been done prior to the Cali meeting – to review the work plan from Montreal to Nagoya.

In a 28 March press release by the CBD Secretariat, Ahmed Djoghlaf, Executive Secretary to the CBD, said, "For its first United Nations meeting, Cali has fulfilled its mandate and entered history as the birthplace of the draft Nagoya Protocol on access and benefit-sharing."

Jochen Flasbarth, President of the German Environment Agency and current President of the CBD COP, said, "Cali marks a major breakthrough to fully implement the [CBD]. 18 years after the Earth Summit we have opened the opportunity for the fair and equitable sharing of the benefits provided by the biodiversity of our one planet. Germany remains committed to the process and will work hard to have the Protocol adopted in Nagoya."

The Vice Minister of Business Development, Ricardo Duarte, speaking for the government of Colombia, said "the result of this ninth meeting is a working document that will help to establish the basis for agreement on a comprehensive and balanced instrument that represents the interest of all the Parties". He added that "we have moved to a light text, easy to understand, that will open the way to the culmination of the negotiation of the Protocol".

Resumed 9th meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Montreal, Canada
10-16 July 2010

Benefit-sharing protocol text negotiations finally start

Chee Yoke Ling

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GOVERNMENTS that are Parties to the United Nations Convention on Biological Diversity (CBD) finally started to negotiate the text of a draft protocol on access and benefit-sharing (ABS) in Montreal on 10 July, after more than five years of protracted discussion and debate.

The new treaty is aimed at stopping biopiracy and to ensure that developing countries that constitute the bulk of providers of biological resources get their fair and equitable share of benefits from the use of their biodiversity and the associated traditional knowledge of their indigenous peoples and local communities.

With the entry into force of the CBD since 1993, there are legal obligations for users of genetic resources or associated traditional knowledge to fairly and equitably share the benefits of such use with the countries of origin or countries that provide the resources, as well as the relevant indigenous and local communities. However, developed countries and their research institutions and industries have not fulfilled this objective.

(The CBD has three objectives: biodiversity conservation; sustainable use of biodiversity components; and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.)

The CBD's Ad Hoc Open-ended Working Group on ABS was mandated to finalise the treaty at its 9th meeting (22-28 March) in Cali, Colombia so that formal adoption can take place at the October 2010 meeting of the Conference of the Parties (COP) in Nagoya, Japan.

Almost all the 193 Parties to the CBD have agreed to a single legally binding treaty (the US is not a Party but its research institutions and private sector are major bioprospectors of the world's biodiversity).

However, there remains deep division over the content: developed countries want to also prioritise access to genetic resources in the protocol while developing countries strongly stress that the third CBD objective of fair and equitable benefit-sharing is the protocol's primary goal to correct the injustice of biopiracy that has been going on for a long time and continues despite the CBD.

Developing countries want to have a comprehensive scope for the protocol with a strong and effective compliance system because transboundary enforcement in user countries is a crucial element. On the other hand, almost all developed countries seek a limited scope and prefer to leave benefit-sharing to be largely dealt with in "mutually agreed terms" – the language in the CBD that they interpret to be contractual agreements.

The rights of indigenous peoples and local communities are also a contentious issue. Norway stands out as being closer to the position of developing countries.

The Cali meeting began with an unwieldy document that contained a wide range of options submitted by CBD Parties and almost 2,000 brackets (indicating lack of consensus).

The meeting failed to even begin negotiations and was suspended, but Parties accepted a streamlined 16-page draft ABS protocol with 31 articles and two annexes, prepared by the Working Group Co-Chairs Tim Hodges of Canada and Fernando Casas of Colombia, as the basis for negotiations at the ongoing resumed meeting in Montreal (10-16 July).

At the opening plenary session on 10 July, the Co-Chairs strongly told the Parties that this week is the last opportunity to finalise the protocol and this being the International Year of Biodiversity, "we must not fail in our task".

The world's leaders will meet in September at the annual UN General Assembly meeting in New York where there will be a special session on biodiversity. Failure to finish work on the protocol would have a negative impact on that and the Nagoya meetings.

To help the negotiations move faster, the Parties established the Inter-regional Negotiating Group (ING) at the plenary. This consists of five spokespersons self-selected from among the Parties from each of the five UN regions, two representatives each from indigenous and local communities, civil society, research institutions and private sector, as well as the current (Germany) and incoming (Japan) COP Presidents.

These representatives can be replaced, as needed, by each grouping. All other Parties and observers are also in the room to ensure transparency of the proceedings. Observers at the table can provide "guidance" on the items being negotiated while textual inputs are the prerogative of the Parties.

(At the request of the International Indigenous Forum on Biodiversity on 11 July, it was later decided that representatives of the indigenous and local communities can also provide text proposals but these will then have to be supported by at least one Party to be considered in the negotiations. This was because the issues of traditional knowledge, prior informed consent and benefit-sharing with these communities are integral parts of the protocol.)

Co-Chair Casas explained the "rules of engagement" at the opening plenary. The ING will negotiate article by article. An article will be considered agreed if there are no objections, bearing in mind that nothing is agreed until everything is agreed.

He urged Parties to "exercise maximum restraint" and "avoid insertions that only reflect your positions". Any proposed text should improve the draft protocol and "accommodate the views of others". If there is no agreed compromise, there can be brackets on the text, which will be considered again later.

The ING will deal with Articles 1-19, except for Article 2 (Use of Terms), in the first three days. A plenary will be held on 13 July to assess progress. The ING will then continue to negotiate the preamble, use of terms and final clauses (Articles 20-31).

As of 11 July, the ING had negotiated three articles on Objective, Scope and Fair and Equitable Benefit-Sharing. They agreed to include a new article on the relationship between the protocol and other international instruments and started negotiations on this too.

By the end of the first day, Article 1 on Objective of the protocol was agreed: "The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components."

The words "to ensure" fair and equitable benefit-sharing were not acceptable to several, including Canada.

"Facilitated access" was proposed by the EU, South Korea and Japan but this was opposed by developing countries that stressed the absence of such a concept in the CBD. The agreed language in the CBD's Article 1 on Objectives that relates to benefit-sharing was finally accepted by all Parties.

Discussions then took place on Article 3 (Scope) but there was deep disagreement, with developing countries wanting a comprehensive scope and most developed countries preferring a much narrower coverage.

The Group of Latin American and Caribbean States, the Group of Like-Minded Megadiverse Countries, the Like-Minded Group of Asia-Pacific countries (LMGAP) and the Central and Eastern European Group proposed the addition of "derivatives" of genetic resources (GR).

Developed countries did not agree to this except for Norway that said these would be included by using the words "This Protocol shall apply ... to the benefits arising from ANY utilisation" of GR. Malaysia, on behalf of LMGAP, stressed that without derivatives, "we empty the protocol of any meaningful benefits to be shared".

Canada proposed the exclusion of human GR; GR beyond national jurisdiction; GR that fall under Annex I of the International Treaty on Plant Genetic Resources for Food and Agriculture for CBD Parties that are Parties to that treaty; GR when "utilised solely as a commodity"; and traditional knowledge associated with GR acquired prior to the protocol's entry into force.

The COP at its second meeting in 1995 had decided that "human genetic resources are not included within the framework of the Convention". Several Parties proposed that if these are to be included in the protocol, there should be another COP decision.

Australia proposed the exclusion of "human pathogens".

(There is huge commercial interest in medically relevant microorganisms, including pathogenic organisms, and the pharmaceutical industry is keen to see the carving out of pathogens from the protocol.)

The EU proposed that the protocol apply to GR acquired after the protocol's entry into force, and the exclusion of GR outside national jurisdiction and Antarctica. Japan and New Zealand opposed retroactive application of the protocol.

The African Group, LMGAP and Peru said that benefit-sharing begins from the entry into force of the CBD. The African Group proposed the inclusion of new and continuing uses in order to fairly capture the benefits for developing countries.

Namibia, on behalf of the African Group, said that exclusion of GR beyond national jurisdiction would amount to the "privatisation of global commons" and depriving developing countries of their share of the benefits.

A new article on the relationship between the protocol and other treaties will be added as a possible solution to deal with some of the exclusions. A small group of Parties was assigned to work on compromise text that would maintain the integrity of the protocol when other fora deal with access and benefit-sharing related to specific genetic resources or associated traditional knowledge.

Except for an afternoon break for the final match of the FIFA World Cup football tournament, Parties negotiated the article on Fair and Equitable Benefit-Sharing through the second day (11 July) into the night. The issue of "derivatives" of genetic resources was one of the contentious issues in this set of negotiations and another small group worked for three hours that night.

Access and benefit-sharing protocol negotiations resume in September

Chee Yoke Ling

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WITH the core issues still unresolved, negotiations on a new international treaty to prevent biopiracy are to resume for another week from 18 to 21 September in Montreal.

The 193 Parties to the Convention on Biological Diversity (CBD) have mandated the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing (ABS) to finalise the protocol under the CBD in time for adoption when the Parties convene their biennial meeting in October 2010 in Nagoya, Japan.

The Working Group was to have completed its work at its ninth meeting in Cali, Colombia (22-28 March) but continuing deep divisions delayed negotiations and the meeting was suspended. It was only at the resumed session in Montreal (10-16 July) that actual negotiations finally began after years of debate with most developed countries reluctant to have a legally binding treaty on ABS. Parties unanimously agreed that the basis of the negotiations would be the streamlined 16-page draft protocol prepared, with the consent of Parties in Cali, by the Working Group Co-Chairs Tim Hodges of Canada and Fernando Casas of Colombia.

The Working Group established the Inter-regional Negotiating Group (ING) at its opening plenary session on 10 July for this purpose. Three out of 31 articles of the draft protocol were agreed to by the end of the Montreal meeting. These relate to the Objective of the protocol; Contribution to Conservation and Sustainable Use; and Transboundary Cooperation. However, consensus on the substantive core of the draft protocol is still far from secured.

The significant progress made in Montreal was that there is now a text of a draft protocol that is "owned" by the CBD Parties and for which they are responsible, after over five years of the Working Group's work and, before that, another 10 years of discussion culminating in a mandate to develop an "international regime on ABS".

While further "understanding" was reached on the core of the protocol dealing with the substantive issues of benefit-sharing, access and compliance, it was also clear that almost all developed-country Parties (except Norway) seek to have a protocol with generally "soft" obligations. Thus, for example, in the negotiations on benefit-sharing with countries providing genetic resources (in particular countries of origin), on traditional knowledge associated with genetic resources and the rights of indigenous and local communities, on compliance with national ABS laws of provider countries, and on transboundary monitoring, tracking

and reporting of potential biopiracy, words such as "endeavour to", "with the aim to", "where appropriate" and "where applicable" were liberally inserted into the various articles.

The International Indigenous Forum on Biodiversity that plays an active part in the ABS protocol process expressed deep disappointment throughout the week, that a number of important provisions in the draft text related to the rights of indigenous peoples that had undergone extensive negotiations in Cali were rapidly diluted at the Montreal meeting.

Contested scope: relationship with other instruments and "derivatives" of genetic resources

The scope of the protocol emerged as a central contentious issue, with many developed-country Parties seeking to exclude crucial sectors from the application of the protocol or to effectively subordinate the protocol to other international instruments and processes. Almost all developed countries preferred to prioritise intellectual property rights obligations while developing countries pointed to the CBD's own provision [Article 16(5)] calling for IPRs to be "supportive of and … not run counter to [the CBD] objectives".

The temporal scope of the protocol (i.e., whether benefits from the use of genetic resources acquired before the entry into force of the protocol should be included, especially those in *ex situ* gene banks and botanical gardens in developed countries) and the geographical scope (i.e., developed countries object to benefit-sharing coverage with regard to areas beyond national jurisdiction such as the Antarctica area) are also unresolved issues.

The issue of pathogens was heatedly debated in Montreal, with the European Union being the most vociferous in arguing that the World Health Organisation is the appropriate forum for ABS related to pathogens of human health interest and that "immediate access" should be given for such genetic resources.

During that debate, Malaysia (on behalf of the Like-Minded Asia-Pacific Group) and New Zealand both said that they found the EU proposal "startling" as its call for immediate access applied regardless of whether there was an emergency situation. The EU proposal also covers plant and animal pathogens.

South Africa (on behalf of the African Group) questioned the basis upon which health pandemics are assessed, emphasising how African countries had no access to the relevant vaccines when the recent H1N1 ("swine") influenza pandemic was declared by WHO. Benefit-sharing according to the CBD objectives and principles was therefore crucial.

Australia has inserted text to explicitly exclude human pathogens from the scope of the protocol.

Against the backdrop of the ongoing debate, a small group in Montreal produced the following "relationship provision" which pertains to the relationship of the protocol with other international instruments and agreements, with consensus on most parts except for those with brackets to indicate the areas with no consensus:

"Article 3 *bis*

[1.The provisions of this Protocol shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biodiversity.

This paragraph is not intended to subordinate the Protocol to other international instruments.]

2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialised access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.

3. This Protocol and other international instruments relevant to this Protocol shall be implemented in a mutually supportive manner[[without prejudice to][bearing in mind] ongoing work or practices under relevant international organisations and conventions].

4. This Protocol is the instrument for the implementation of access and benefit-sharing provisions of the Convention. Where a specialised international access and benefit-sharing instrument applies that is consistent with, and does not run counter to, the objectives of the Convention and of this Protocol, this Protocol does not apply for the Contracting Party or Parties to the specialised instrument in respect of the specific genetic resource covered by and for the purpose of the specialised instrument."

Related to scope is the issue of "derivatives" of genetic resources. All along most developed-country Parties and their industries have argued against inclusion of derivatives for the purposes of ensuring compliance with benefit-sharing terms and prior informed consent. They prefer that benefit-sharing of derivatives be

dealt with in bilateral contracts ("mutually agreed terms" as stated in the CBD) between users and providers, without the government having an important role.

Some developed countries lack political commitment

With only seven days left, Parties at the Montreal meeting were under pressure to make significant progress although there was widespread concern that a fully agreed text would not be possible, as it was evident from the start that some developed countries' negotiators did not have authority from their government to make the compromises necessary for consensus.

Japan, as the next President of the Conference of the Parties (COP) to the CBD and host to the next COP meeting, showed a shift in some of its positions, assuming a bridging role. It also provided the funds for the resumed negotiations in Montreal.

In an unexpected move, during the first reading of the draft articles on institutional issues of the protocol, the EU proposed that there was no need to establish a separate governance structure for the ABS protocol. It said that implementation of the protocol can be included as an item in the agenda and work programme of the CBD's Conference of the Parties. The usual practice is that the COP of a main treaty acts as the "Meeting of the Parties" (MOP) of a protocol that has been developed under that treaty and the MOP is legally separate and distinctive.

The EU argued that ABS is an issue that is addressed by the CBD as well and therefore the CBD COP can address all ABS issues in the same forum.

This proposal provoked strong reactions from developing countries, with the various groups' spokespersons presenting counter-arguments to the EU proposal. They argued that if the protocol were to be subsumed into another item in a CBD COP agenda, it would not result in the effective implementation of the benefit-sharing objective of the CBD.

Unlocking the impasse: the "ABC" of ABS

The core issues of the protocol had been identified earlier in Cali by the Co-Chairs, who called them "the ABC of ABS", i.e., access, benefit-sharing and compliance. The ING focused on these issues in the first part of the week's negotiations.

In explaining the "rules of engagement" at the opening plenary, Co-Chair Casas urged Parties to "exercise maximum restraint" and "avoid insertions that only reflect your positions". Any proposed text should improve the draft protocol and "accommodate the views of others". He stressed that Parties should try to accommodate each other's concerns while ensuring their own interests were reflected in a balanced manner, bearing in mind that the protocol is to implement the CBD's third objective of fair and equitable benefit-sharing.

The ING went through the substantive parts of the draft text contained in Articles 1-19 by 12 July, except for Article 2 (Use of Terms) that will be left till the end of the process. These articles include provisions dealing with: Objective, Scope, Fair and Equitable Benefit-Sharing, Access to Genetic Resources, Access to Traditional Knowledge Associated with Genetic Resources, Considerations relevant to Research and Emergency Situations, Transboundary Cooperation, Compliance with National ABS Legislation, Monitoring, Tracking and Reporting the Utilisation of Genetic Resources, Non-Compliance with Mandatory Disclosure Requirements, Compliance with Mutually Agreed Terms, International ABS Ombudsperson, Model Contractual Clauses, Codes of Conduct, Guidelines and Best Practice Standards, Awareness Building, Capacity, Technology Transfer and Cooperation, Non-Parties, and Financial Mechanism and Resources.

A second reading of the bulk of the revised draft of these articles was conducted after the plenary held on 13 July to assess progress. The Co-Chairs assigned small groups of key negotiators from the various Parties' groupings with specific issues to resolve, and these informal meetings were open to other interested Parties.

The text of two clusters of issues were given to two small groups to try to arrive at a consensus: (i) the relationship between the protocol and other instruments (resolving this would hopefully deal with the list of exclusions and reservations currently in the article on Scope); and (ii) institutional and final clauses.

Another small group was tasked with trying to reach a common understanding of "derivatives" and the concept of utilisation of genetic resources in the context of benefit-sharing. This group facilitated by Canada produced a paragraph on "any utilisation of genetic resources" without agreement on some parts of the final wording. This text was not formally presented to the ING; determined not to lose the progress made on reaching a significant level of understanding, Peru (on behalf of the Group of Latin American and Caribbean

States – GRULAC) at the ING meeting on 15 July insisted that the text be inserted in Article 4.2 on benefit-sharing. This was supported by the Like-Minded Asia-Pacific Group.

The Co-Chairs then reconvened this small group (this time under the facilitation of Switzerland) and at the closing plenary of the Working Group an agreed solution was presented whereby the paragraph was removed from the article and placed as a footnote with explanation. In this way the work done in reaching a degree of common understanding on "any utilisation of genetic resources" was formally captured.

[Article 15(7) of the CBD obliges Parties to take legislative, administrative or policy measures, as appropriate, 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 utilisation of genetic resources with the Party providing such resources. "Commercial and other utilisation" is interpreted by developing countries to mean "any utilisation".]

The agreed footnote reads as follows:

"The following language is the outcome of discussion by a small group set up by the ING to explore a common understanding on what constitutes 'utilisation of genetic resources/derivatives' as they appear in the draft Protocol. The small group also recognised that the potential use and placement of this language will depend on its context within the draft Protocol. The language is to provide an input for the negotiation of the Protocol.

'Utilisation of genetic resources includes/means the conduct of research and development, on the genetic and biochemical makeup/composition of genetic material/biological resources, including through the application of biotechnology as defined in Article 2 of the Convention on Biological Diversity, as well as subsequent applications and commercialisation.'"

Yet another small group was tasked to deal with the inter-linkages among the protocol provisions that the Co-Chairs said are the "core of the core" that will unlock the other provisions of the draft protocol. This met on 15 July night and on 16 July until the closing plenary of the Working Group in the afternoon. It identified three issues that, to all Parties in the room, would be the key for consensus to be achieved.

The ING also conducted a first reading of the preamble, with Parties adding numerous paragraphs to safeguard their respective positions on a range of issues that still remained contentious in the main body of the draft protocol. Most of them relate to the relationship of the protocol with other international instruments. A simple list of preambular paragraphs that was a little more than a page in the original Co-Chairs' draft has been expanded to more than three pages. Negotiations on these will be in the next resumed session in September.

A first reading was also made of the articles dealing with institutional issues and the usual treaty-establishing provisions (Articles 20 to 31).

The three agreed articles

The Montreal meeting agreed in full to the following:

Article 1 on Objective: *"The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components."*

Article 7 on Contribution to Conservation and Sustainable Use: *"Parties shall encourage users and providers to direct benefits arising from the utilisation of genetic resources towards the conservation and sustainable use of biodiversity in support of the CBD objectives."*

Article 8 on Transboundary Cooperation, paragraph 1: *"In instances where the same genetic resources are found in situ within the territory of more than one Party, those Parties shall endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this Protocol."*

The same provision is made in paragraph 2 for traditional knowledge associated with genetic resources that is shared by one or more indigenous and local communities in several countries.

Rocky road still ahead

However, the EU, Australia and Canada, in particular, have put in text that has significantly weakened the original Co-Chairs' draft that was considered by many to be quite balanced.

Late on 12 July night, after an extensive rewriting by the EU of the compliance provisions, the groupings of Asia-Pacific, African and Latin American and Caribbean countries complained in exasperation. The Co-Chairs were also visibly frustrated because the result was a text that had lost the original balance with many points of disagreement.

At the plenary session held on 13 July afternoon for negotiators to conduct a "self-assessment" on the status of their work, the Co-Chairs told negotiators that they had made "considerable real progress" but they still had a way to go.

Hodges said, "Finalising the protocol is within your grasp. But the time is passing. We need to finish by Friday [16 July]."

The Namibian delegate, speaking for the African Group, expressed strong frustration during the assessment discussion. He said Africa has always called for a comprehensive protocol that will leave no loopholes and that does not satisfy special and vested interests. He said that the 2010 target to significantly reduce the rate of biodiversity loss has not been met, and biodiversity's contribution to poverty reduction remains a dream. He warned that if the right thing is not done there will be no biodiversity left, and that putting the interest of intellectual property rights above the interest of biodiversity will be unforgivable.

Although African ministers have given their negotiators a political mandate to obtain a strong protocol, in the spirit of reaching an agreement "we have compromised and compromised but we do not see any from our partners – we have provided bridges but our partners are not crossing these bridges".

The representative of Japan said some of the issues for the Working Group are very difficult. He especially acknowledged the concerns of the African Group and said that it is the domestic political situation and not the negotiators themselves (from developed countries) that is making the ongoing negotiations difficult in some issues.

Many Parties and observers are concerned that Canada has emerged as an obstacle to a strong protocol. In the Montreal closing plenary, Canada expressed satisfaction with the results of the resumed session and requested reflecting in the protocol (in a footnote) the following observations: (i) the draft protocol is no longer a Co-Chairs' text, but a text negotiated by Parties; (ii) there is balance in the draft; and (iii) nothing is agreed until everything is agreed. Including this in the draft protocol text would have been a strong negative signal on the prospect of finalising and adopting a protocol in October. When the plenary hall clearly sent signals of objection to such a footnote, Canada requested that these observations be included in the report of the meeting.

In the same plenary Malaysia proposed another resumed meeting, in order to fulfil the mandate of the Working Group to finalise the draft protocol. Thailand was suggested and the delegation of Thailand said it would confirm in the coming days its country's offer to host the additional days of negotiation. (Since then, no formal offer was made by any country to host the resumed meeting and so it will be held in Montreal, the location of the CBD Secretariat.)

Speaking on behalf of the 14 small island developing states of the Asia-Pacific and in the interest of countries without ABS legislation, the Philippines called for their concerns to be reflected in the text of the protocol according to what the Philippines had formulated from way back in Cali.

Co-Chair Hodges assured the delegation that this request will be reflected in the report of the meeting.

The ABS Working Group Co-Chairs promised to work with the CBD Executive Secretary to find the necessary resources in order to fund the meeting and maintain its inclusiveness, meaning that as many countries as possible should be funded to be able to attend the meeting, notwithstanding the fact that the actual negotiations are done by a limited number of countries sitting in the Inter-regional Negotiating Group.

Japan expressed its commitment to contributing to such resources, and has now confirmed its support. The July meeting was also made possible by Japan's financial contribution, with travel support from a few other donors. Japan urged other donor countries to make further contributions to ensure that the September meeting will be held.

Africa expressed its concern that the delegates coming to the further resumed 9th meeting of the Working Group will have done the necessary consultations and possess the necessary political mandate to finalise the negotiations and that not more than 10 minutes would be necessary to adopt the protocol in Nagoya in October 2010.

Meeting of the Inter-regional Negotiating Group (ING) of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Montreal, Canada
18-21 September 2010

Biodiversity treaty implementation at stake

Chee Yoke Ling

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HOPES have been dashed that the annual gathering of the world's leaders at the United Nations General Assembly would be presented with a new impetus to implement the Convention on Biological Diversity (CBD).

Efforts to complete by 21 September a new treaty that is aimed at preventing biopiracy and that was to be adopted in October, have reached another impasse.

Negotiators from more than 100 countries that are Party to the CBD embarked on a marathon in Montreal from 18 to 21 September in a race to finalise the text of a protocol to ensure the fair and equitable sharing of benefits from the utilisation of genetic resources.

After more than five years of difficult negotiations with strong resistance from the biotechnology, pharmaceutical and agribusiness sectors, some developed countries (especially Canada and the European Union) finally maintained their stance to not have a comprehensive treaty with an effective compliance system.

There are 193 Parties to the CBD, with the notable exception of the United States. However, the US administration and US industry are present in the negotiation sessions and active in promoting their views, including at the country level in several developing and developed countries before each session.

An Inter-regional Negotiating Group (ING) was set up by the CBD's Ad Hoc Open-ended Working Group on Access and Benefit-Sharing in July to negotiate the protocol text.

The ING concluded its second meeting at lunchtime on 21 September, with remaining deep divisions over key parts of the draft protocol text and no clear indication as to whether it will meet again before the Working Group formally reconvenes on 16 October in Nagoya, Japan. The 10th meeting of the Conference of the Parties to the CBD (COP 10) will then meet on 18 to 29 October to make major decisions on the further implementation of the CBD.

The proposal by Co-Chair Tim Hodges of Canada to have another three-day session on 13-15 October, even with a clear commitment of support from Japan that will host COP 10, was met with a refusal by the EU representative. Other developed countries such as Canada, Switzerland and Australia did not make any statement at all on this suggestion.

Finding no support for such a reconvening of the ING, Hodges then adjourned the meeting, telling ING participants "see you on the 16th", and hurriedly left, as the other Co-Chair, Fernando Casas of Colombia, was already on his way to the airport to proceed to the ongoing UN General Assembly meeting in New York where both of them are to brief ministers on the state of play of the protocol negotiations.

The shadow of the failed Montreal talks was cast over the High-Level Meeting of the UN General Assembly commemorating the International Year of Biodiversity, held on 22 September morning at the UN headquarters in New York.

Heads of state and government, ministers and senior officials attended a three-day summit on the Millennium Development Goals on 20-22 September and among the events was a panel discussion on "The way forward in achieving the three objectives of the CBD, and the internationally agreed goals and targets".

With COP 10 just a few weeks ahead, most of the statements stressed the need for a successful outcome at that crucial meeting.

(The goal "to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth" set almost 10 years ago has failed to materialise. Effective implementation of the CBD has thus become a central challenge.)

Biodiversity-rich countries made it clear that an ABS protocol is part of an "indivisible package" of the international biodiversity regime of the CBD. While there were some positive political signals from some developed countries' ministers, there was also silence from others.

Brazil's Minister of the Environment, Izabella Teixeira, made a statement on behalf of the Group of Like-Minded Megadiverse Countries, saying that the fundamental issue for the International Year of Biodiversity is that "we have not met the 2010 biodiversity target".

(The Group comprises Bolivia, Brazil, China, Colombia, Costa Rica, the Democratic Republic of the Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela. These countries collectively hold almost 80% of the world's biodiversity.)

She stressed that for the Group, the CBD COP 10 meeting is about "three important elements that constitute an indivisible package of the international biodiversity regime: the Protocol on Access and Benefit-sharing, the Strategic Plan for the post-2010 period and the New Strategy for Resource Mobilisation".

"We recognise the primacy of the CBD in setting the global biodiversity agenda. A balanced and enhanced implementation of the three objectives of the Convention – conservation of biodiversity, its sustainable use and the fair and equitable sharing of the benefits arising from such use – is a sine qua non condition for the reversal of the loss of biodiversity," Teixeira emphasised.

She added that decisions on these three elements will pave the way forward and, by reshaping the future of the CBD, will define the future of biodiversity itself, just when States do not seem committed enough, and climate change can bring about a whole new level of imbalance to ecosystems.

She pointed out that the success of any post-2010 international arrangement rests on implementing international norms and effective tools that: (i) recognise the value of biological resources and associated traditional knowledge, and the rights of indigenous and local communities over such knowledge; (ii) ensure fair and equitable sharing of benefits arising from the use of such resources and associated traditional knowledge through financial and non-financial mechanisms; and (iii) harmonise levels of ambition of targets for biodiversity and for financial cooperation between developed and developing countries.

(In the Montreal negotiations, Brazil, on behalf of the Group, also warned that failure to reach agreement on the ABS protocol would undermine the whole CBD.)

Argentina's Secretary for the Environment and Sustainable Development, Dr. Homero Maximo Bibiloni, said that of the three CBD objectives, progress on the access and equitable benefit-sharing objective "has been clearly insufficient". He said that Argentina firmly promotes the adoption of a protocol on access and benefit-sharing in Nagoya, in conformity with the mandate of the CBD (COP).

He said that the design and implementation of biodiversity conservation measures should not generate protectionist barriers that may result in additional burdens to developing countries.

Bibiloni called for the creation of an international cooperation scheme that fully respects the principle of common responsibilities of States in environmental matters, but differentiated depending on the relative capacities of States.

Janez Potocnik, European Commissioner for the Environment, made the statement on behalf of the EU, saying that in addition to the Strategic Plan, "it will also be essential that we conclude negotiations on the Protocol on Access and Benefit-Sharing. Now is the time to deliver".

He added that "this meeting should send to Nagoya a message of hope and determination".

Joke Schauvliege, Belgium's Minister for the Environment, Nature and Culture and Chair of the EU's Environment Council, said that "we are all committed to successful negotiations in Nagoya" and that "a successful outcome in Nagoya will also depend on the results of the negotiations on the international ABS regime". He called upon CBD Parties "to demonstrate conviction to come to an agreement".

He also joined other speakers to reiterate that biodiversity plays a critical role in overall sustainable development and poverty eradication. He said that though the EU and global biodiversity 2010 target have not been met, still, it remains essential to set a strong and ambitious goal (in the new Strategic Plan) to generate actions.

Denmark's Minister for the Environment, Karen Elleman, stressed that because the global 2010 target has not been achieved, the "time has come for us to act" and at COP 10, "we must stand up to our responsibilities as leaders ... and we must deliver the deal that will set the world back on track".

She shared her personal view, emphasising that "a legally binding protocol on access and benefit-sharing must be part of the outcome from COP 10".

"A clear, fair and effective ABS protocol is a very key feature in our collective efforts to address the biodiversity challenge. We need an ABS protocol to motivate conservation and sustainable use of the genetic resources. And to provide for fair and equitable benefit-sharing," she said.

She also said that "we need the protocol to enhance legal certainty and transparency for both providers and users" of genetic resources and that it will benefit all stakeholders involved.

She equally stressed the importance of a Strategic Plan setting out targets for 2020 that are "clear, concrete, measurable and communicable".

In marked contrast, Canada's Minister of the Environment, Jim Prentice, made a very short statement with no mention of the ABS protocol. In addition to listing Canada's domestic conservation achievements, he merely said that "the upcoming meeting of the [CBD] provides an ideal opportunity to advance our global commitment to conservation and the sustainable use of biodiversity".

Canada is the most visible obstacle in the ABS protocol negotiations.

On 23 September, the ABS Working Group Co-Chairs, Tim Hodges of Canada and Fernando Casas of Colombia, will brief a large group of ministers on the state of the protocol negotiations.

Postscript: *Following the consultations between the ABS Working Group Co-Chairs and the ministers on the side of the UN General Assembly meeting in New York, it was decided that the negotiations would resume on 13-15 October in Nagoya, prior to the 10th meeting of the Conference of the Parties, in the hope that a protocol will be adopted by the end of that meeting.*

Meeting of the Inter-regional Negotiating Group (ING) of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing

Nagoya, Japan
13-15 October 2010

Last attempt to conclude access and benefit-sharing treaty

Chee Yoke Ling and Christine von Weizsacker

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PARTIES to the Convention on Biological Diversity started meeting in an Inter-regional Negotiating Group (ING) format in Nagoya, Japan on 13 October to resume their final negotiations on the text of the Access and Benefit-Sharing Protocol that they hope to adopt at the closing of the Conference of the Parties on 29 October.

"The time is now to finish this negotiation ... there will not be another time," said Tim Hodges of Canada, Co-Chair of the ING, when he opened the session at around 12 noon. The other Co-Chair is Fernando Casas of Colombia.

They are also the Co-Chairs of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing set up under the Convention that is mandated to negotiate a new international regime to prevent biopiracy and to ensure the fair and equitable sharing of benefits from the utilisation of biological resources and associated traditional knowledge.

Hodges stressed that this was the last ING meeting (13-15 October). "We have the last task of submitting text to the meeting of the Working Group on ABS on Saturday [16 October]. You are responsible to governments and stakeholders, and also for the future generations on the globe. You have to draft the Protocol text. The Working Group will reconvene on Saturday only for a short time. The work plan and implementation of the Protocol on ABS is then the task of COP [the Conference of the Parties that will meet for its 10th session from 18 to 29 October]," he said.

Following the short opening where the media was also present, the ING moved quickly to work. The Co-Chairs said that they expect an Informal Negotiation Group to be established by the COP that will continue to negotiate through the COP meeting, but this will be a new group, and not the setting used so far in the Working Group on ABS.

Casas proceeded to explain the Co-Chairs' scenario note that they had prepared (as in previous meetings) to facilitate the negotiations. Delegates were given a preview of what will happen in the three days of the ING meeting, with various issues under the Protocol that are expected to be taken up each day.

In the scenario note, the Co-Chairs stated, "We are convinced that the goal of adopting the ABS protocol in Nagoya is fully tenable. In order to achieve this goal, the ING must now deliver on its responsibilities to the Working Group. Given insufficient progress in the Montreal ING session (18-21 September), there is no alternative but to make real progress, confirmed in treaty language, during this crucial ING meeting."

They reminded delegates that "while there will be some time available for ABS during COP 10, there are many other issues on the COP agenda. Furthermore, solely in the context of ABS, there are many other undone tasks (e.g., the draft decision, interim arrangements, work programme, budget, strategic plan) that must be completed and considered by the COP".

The basis of the ING work in Nagoya is the draft "Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation to the Convention on Biological Diversity", annexed to the report of the ING that met in Montreal on 18-21 September (UNEP/CBD/WG-ABS/9/ING/1).

Co-chair Hodges emphasised that while the pace of negotiations will speed up, the exception was the issue of "pathogens" where delegates were allowed to have an exchange of views aimed at a better understanding of the negotiation positions. (This is one of the most contentious issues in the negotiations so far, with several developed countries such as Australia and the European Union seeking to narrow the scope of the Protocol by excluding certain types or uses of pathogens.)

After some time given for informal consultations among the various delegations, an open-ended (open to accredited observers) small group met on "pathogens" in the afternoon of 13 October and this was chaired by Namibia and Australia who later reported back to the ING at 6 pm.

A night session that went on until 9 pm then addressed text on "utilisation" of genetic resources (Articles 2 and specific references in 4, 5 and 12 of the draft Protocol text), as well as on compliance (Articles 12, 13, 13*bis*, 14 and 14*bis*).

The other central issues to be negotiated in the following two days include: traditional knowledge (Articles 5*bis* and 9, and specific references in 4, 5 and 14); benefit-sharing (Article 4); access (Article 5); institutional arrangements relating to the COP serving as the Meeting of Parties to the ABS Protocol (Article 20); scope and relationship with other instruments (Articles 3, 3*bis* and 6); use of terms (Article 2); and the preamble.

Pathogens debate to move into negotiations mode

The Co-Chairs of the small group on pathogens summarised the afternoon's discussions to the ING, indicating the following points:

- The issue being addressed here (in Article 6 concerning pathogens) is how to reconcile an environmental agreement (the CBD) and its relationship with health policy and other international arrangements in plant and animal health;
- There is a need for clarity on what kinds of pathogens are being talked about here and whether they should be included or excluded in the Protocol;
- There is a need to clarify which genetic resources should be covered by this Protocol, including the circumstances in which these genetic resources are accessed and how benefit-sharing works under these circumstances;
- There is also the need to clarify how other specialised instruments can be appropriately described in this Protocol;
- There are also some technical issues that need to be addressed, on what are emergencies or non-emergencies, including the coverage of what kinds of pathogens dealt with here, whether they are of the human, animal or plant type.

The small group Co-Chair Sem Shikongo of Namibia added that it is not only access (to pathogens) that is an issue, and that benefit-sharing should also be addressed.

The four textual approaches that are contained in the current draft Protocol text include the following:

- The ABS Working Group Co-Chairs' proposal in the "Cali text" that was prepared by them at the request of the Working Group at its 9th meeting held on 22-28 March 2010 in Cali, Colombia:
  Article 6
  In the development and implementation of their national legislation on access and benefit-sharing, Parties shall:
  ... [(b) [Pay due regard to emergency situations including serious threats to public health, food security or biological diversity, according to national legislation;]

- The EU proposal tabled in the resumed 9th meeting of the ABS Working Group on 10-16 July 2010 in Montreal and modified by other Parties currently reads:
  Article 6
  In the development and implementation of their national legislation on access and benefit-sharing, Parties shall:
  ... [(b) ... [Provide immediate access to [pathogens][genetic resources] falling also under the scope of relevant international organisations and conventions, such as the World Health Organisation, the International Plant Protection Convention, or the World Animal Health Organisation, and which are

of particular public concern for the health of humans, animals or plants, in ways and for uses provided for in existing and future rules, procedures or practices on the sharing of pathogens and related benefits established under those international organisations and conventions[, taking into consideration [the legal, structural and/or administrative obstacles to the optimal implementation of] the World Trade Organisation paragraph 6 system]];]

- Australia's approach in Article 3 (to exclude "human pathogens" explicitly from the Protocol scope or genetic resources that are covered by emergency measures by other specialised agencies)

- Norway's proposal for an Article 3*bis* to address the issue in a more generic way through provisions on the relationship between the Protocol and other instruments, which underwent intense negotiations in a small group in the July 2010 meeting of the ABS Working Group, with consensus on most parts, and which now reads:
  *Article 3*bis
  [1. The provisions of this Protocol shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biodiversity.
  This paragraph is not intended to [create a hierarchy between this][subordinate the] Protocol [and][to] other international instruments.]
  2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialised access and benefit sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.
  3. This Protocol and other international instruments relevant to this Protocol shall be implemented in a mutually supportive manner, [[without prejudice to][bearing in mind] ongoing work or practices under relevant international organisations and conventions.]
  4. This Protocol is the instrument for the implementation of the access and benefit sharing provisions of the Convention. Where a specialised international access and benefit sharing instrument applies that is consistent with, and does not run counter to, the objectives of the Convention and of this Protocol, this Protocol does not apply for the Contracting Party or Parties to the specialised instrument in respect of the specific genetic resource covered by and for the purpose of the specialised instrument.

Developing countries maintain that the Protocol should have a comprehensive scope and that provisions on the relationship between the Protocol and other instruments can provide solutions to the concerns raised by developed countries.

(Observers at the negotiations point to the interests of the pharmaceutical industry of developed countries that play a clear role in shaping the position of the developed-country Parties.)

"Utilisation" and "derivatives" of genetic resources

The ING then moved on in the night session to negotiate on and resolve the issue of "utilisation", reviewing the various provisions of the draft ABS Protocol where it appears, including the decision on what to do with "derivatives". These have been contentious too over the years, with developed countries seeking to narrow the scope to genetic resources only (arguing also that there is no consensus on what is a derivative).

On the other hand, developing countries insist that derivatives must be included for otherwise the Protocol would be emptied of meaning and fail to meet the CBD third objective of fair and equitable sharing arising from the utilisation of genetic resources.

It was thus agreed that a solution lies in reaching agreement on the term "utilisation of genetic resources". Article 15(7) of the CBD obliges sharing of the "results of research and development and the benefits arising from the commercial and other utilisation of genetic resources".

The African Group and the Group of Latin American and Caribbean States (GRULAC) continue to maintain that "derivatives" still need to be included for legal clarity.

The current draft Protocol text reads as follows:

Article 2 [on "Use of Terms"]

... [(c) "Utilisation of genetic resources" means to conduct research and development on the genetic and biochemical composition of genetic material/biological resources/genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention.

"Derivative" means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if they do not contain functional units of heredity. ...]

ING Co-Chair Hodges said that progress had been made in Montreal (in September) but there had been no final conclusion. Parties needed to go back to capitals and consult.

The EU said it was glad to report that it can work on the basis of the draft Protocol text, with some minor changes, also in light of emerging agreement on other Articles.

Namibia, speaking on behalf of the African Group, said the Group is happy with the utilisation approach, requesting a minor change: "genetic or biochemical composition" (instead of "and").

Canada requested the bracketing of the whole text on utilisation. It explained its position, saying it is pleased with the development of the text in Article 2(c), is comfortable with the approach and as it goes through (the rest of the text), it will be able to remove brackets from "utilisation" and also deal with "products thereof" in light of changes of text in other Articles. (But in the meantime, it wanted the paragraph to be bracketed.)

After this short round of discussions, the work was taken to a small group that met until 9 pm.

By the day's end, there was tentative agreement to remove the brackets on the definition of "utilisation" and "derivatives". However, Canada and the EU wanted to keep the brackets for the meantime, preferring to see how it will come out in the end, while saying that they are in favour of the approach being made in going through all of the provisions of the Protocol where the said words appear.

The same thing happened in relation to Article 4 on the "Fair and Equitable Sharing of Benefits", where brackets were maintained, though in the pending Article 5*bis* relating to traditional knowledge, the brackets on utilisation were removed.

In Article 5 on "Access to Genetic Resources", brackets were removed on utilisation. In paragraph 4 dealing with what kind of information needs to be relayed to the ABS clearing-house mechanism, there was argument over whether "derivatives" needs to be retained.

GRULAC, through Peru, argued that it should remain to give legal clarity to the provision. It said that it makes no sense to remove "derivatives" here; for the sake of legal clarity "derivatives" is needed. It added that it is the sovereign right of Parties to grant access to derivatives and "we are not waiving our right to give access to derivatives".

On the other hand, the EU, Canada and Switzerland insisted that, given the agreement to retain "utilisation" in various parts of the Protocol, the word "derivative" should go (from the substantive provisions on access and benefit-sharing), only to remain in Article 2 on "Use of Terms". The Central and Eastern European countries also support its inclusion in the "Use of Terms".

The ING decided not to resolve this for the meantime and moved on to Article 7 on "Contribution to Conservation and Sustainable Use", where the brackets on "utilisation" were removed.

Further consideration on whether brackets on utilisation will be removed, including the decision on whether "derivatives" will be deleted, was withheld for the meantime when discussion moved to the provisions on compliance in Articles 12, 13 and 14 including in Article 18*ter* on "Non-Parties".

Compliance measures

The other crucial issue that was discussed on 13 October night related to compliance provisions in Article 13 on "Monitoring and Tracking of Genetic Resources". ING Co-Chair Casas said that Parties, in order to monitor compliance, need to establish checkpoints and focus on identification, and that this is the essence of paragraph 1(a), while paragraphs 3 and 4 contain details of an internationally recognised certificate of compliance.

Casas proposed a simplification of the heavily bracketed text in the chapeau (opening part) of Article 13(1) in this manner: "Parties shall take measures to monitor the utilisation of genetic resources to support compliance. Such measures shall include: ..."

This would replace the following: "Parties shall take measures, as appropriate, to monitor[, track and report] the [utilisation] of genetic resources[, its derivatives and associated traditional knowledge] to support, inter alia, [the requirement to obtain prior informed consent and mutually agreed terms][compliance [with prior informed consent requirements and mutually agreed terms][with domestic access and benefit-sharing legislation and regulatory requirements] [to support implementation] [under Article 12(1)] [in order to enhance transparency [and build trust between providers and users]]]. Such measures [could][shall] include: ..."

In response to the Co-Chairs' proposed text of one line, India wanted further specification on what kind of compliance needs to be supported and suggested that it should be compliance with PIC ("prior informed consent" regarding access) and MAT ("mutually agreed terms" regarding benefit-sharing).

The EU insisted that the purpose of supporting compliance is to "enhance transparency".

Switzerland wanted to add "inter alia" to the Co-Chairs' text while Japan, supporting the earlier Canadian and EU suggestion, wanted to add "as appropriate" to the obligatory thrust of the provision that Parties shall take measures on this matter. Korea also supported "as appropriate". [This would allow Parties to choose monitoring measures from the lists in Article 13(1) rather than take mandatory measures.]

The African Group said it needs the Protocol to create incentives for conservation and sustainable use; it needs a minimum agreement on a compliance system that will work. It said that it has to be a "shall" (mandatory); this is the main legal obligation and "we need legal certainty for all people involved and a level playing field; we cannot accept 'as appropriate'".

The Group stressed that all the progress in other parts is 100% dependent on the compliance system, and "if we do not move on compliance we are going round and round in circles".

Malaysia, on behalf of the Like-Minded Asia-Pacific Group, said, "We entered into this international exercise because we are dealing with international biopiracy. Now, if you have to take user measures, do it and do not talk about 'enhanced transparency'. If you are not willing to ensure 'user measures', we are right out of the negotiations; the essence is measures to ensure compliance with PIC and MAT; it has to be 'shall'."

The EU said it has agreed on clear user obligations in Article 12 (on "Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-Sharing"). It said however that how to do it needs national flexibility, and referred to European stakeholder meetings, including 16 sectors, that showed that it needs to choose the most effective measures.

Norway disagreed with "as appropriate", and said that some elements may be "shall", while others should be "could".

New Zealand said it made a strong commitment in Article 12 but it needs flexibility in the how, reiterating its strong commitment to the international ABS regime.

Malaysia said that developing countries already gave concessions in Article 5 (on access) and there the obligations on access were without qualification but here the obligation to monitor is being made flexible.

The EU responded that they have already made concessions in Article 12 and Article 13 is a different matter altogether.

Malaysia then said that removing qualifiers in Article 13 would ensure that Article 12 is not an empty promise.

Japan suggested deferring consideration of this proposed text of the Co-Chairs, saying that discussions need to move on to the list of what kinds of measures or checkpoints need to be taken up before Japan will make up its mind on whether to go along with the kind of obligation in the first paragraph of Article 13.

Casas nevertheless appealed to the delegates to consider the simple formulation proposed by the Co-Chairs.

The ING adjourned for the night, and will resume meeting at 9 am on 14 October.

Developed countries reject mandatory disclosure requirements

Christine von Weizsacker and Chee Yoke Ling

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DEVELOPED countries continue to reject a list of mandatory checkpoints to detect potential biopiracy by users of genetic resources and associated traditional knowledge within their jurisdiction.

In a final attempt to forge a new treaty under the Convention on Biological Diversity that would implement its third objective of fair and equitable sharing of benefits arising from the utilisation of genetic resources, deep divergence remains between developed and developing countries after more than five years of discussion and debate.

The deadline for completion of the "Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation" is the 10th meeting of the CBD Conference of the Parties to be held in Nagoya from 18 to 29 October, where adoption of the new treaty is scheduled.

The Inter-regional Negotiating Group (ING) constituted by the CBD Ad Hoc Open-ended Working Group on Access and Benefit-Sharing is meeting for the last time in Nagoya from 13-15 October.

One of the central issues related to the compliance system under the Protocol is disclosure requirements at specific checkpoints after materials and traditional knowledge that have been accessed leave a country of origin or a country that provides such materials and knowledge. Such disclosure includes disclosure of prior informed consent and evidence of fair and equitable benefit-sharing arrangements between the user (such as researchers, private enterprises and bio-prospecting brokers) and the community or country from where the materials and knowledge are sourced.

The long-awaited substantive discussion on disclosure requirements took place late in the night of 14 October, but the interventions of developed countries showed an unwillingness to even consider a mandatory list of various checkpoints, one prominent example of which are intellectual property offices. The exception is Norway, which accepts some mandatory checkpoints though not all in the current draft Protocol text. Norway's own national patent law has been amended to require disclosure of the source of genetic materials in patent applications.

Co-Chair of the ING, Tim Hodges of Canada, started discussion on this issue by asking the question: Would anyone disagree with the inclusion of intellectual property (IP) offices in the list of checkpoints, such list containing the following, with the brackets in the list showing lack of consensus on the wording in Article 13(1)(a)?

Article 13: Monitoring[, tracking] and reporting the [utilisation] of genetic resources [and associated traditional knowledge]

1. Parties shall take measures, as appropriate, ... Such measures [could][shall] include:

(a) The identification and establishment of [effective][mandatory compliance] check points [[and [mandatory] [transparency][disclosure][information] requirements][to [disclose][provide] pertinent information] [at[, for example]:

(i) Competent national authority in the user country;

(ii) Research institutions subject to public funding;

(iii) Entities publishing research results relating to the [utilisation] of genetic resources;

(iv) [Intellectual property examination][Patent and plant variety] offices; and

(v) Authorities providing regulatory or marketing approval of products [derived from genetic resources][resulting from the use of genetic resources or its derivatives];]

(v bis*) [Indigenous and local communities, including their relevant competent authorities, that may grant access to traditional knowledge associated with genetic resources.]*

Australia said it does not support the inclusion of a list of checkpoints. In response to Hodges' question on what checkpoints Australia has in mind, the reply was possibly research institutions subject to public funding, possibly ethics councils, but finally it said that it did not have a mandate for the inclusion of a list.

Hodges said that an indicative list could be used, and additional and even more effective checkpoints may be found in the future as experience is gained, adding that it is important to retain an indicative list.

Australia said that it cannot accept an indicative list at this stage.

Peru, on behalf of the Group of Latin American and Caribbean States (GRULAC), said it is lost in the discussions. It said that a "no" would not be acceptable and emphasised that these checkpoints have the task of checking for the existence of certificates (of compliance), as these are measures to support compliance. Peru said it would like to know from those who oppose this list if they have alternatives and whether there can be a signal that the word "could" introducing the list might become "shall".

Japan said that the list may be indicative or exhaustive or something where it can be made less prescriptive, but the important thing to do is to examine each checkpoint to see if it is feasible and implementable. It said that its government found it especially difficult to implement IP offices (as a checkpoint) but also had difficulty with "research institutions subject to public funding" and "entities publishing research results". Japan said it may be easier to deal with this issue if it is an indicative list.

Hodges said that indeed the Japanese government has done a study to assess the feasibility of these checkpoints but what is important is some flexibility at the national level to find where these checkpoints may be set up and there may be some validity in indicating a range of options here. Governments may come

to different conclusions regarding feasibility in different countries, but they "shall" establish checkpoints, with flexibility to choose which ones.

Malaysia said that in Article 12 (on "Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-Sharing"), it has been agreed that Parties "shall" take effective measures, and checkpoints are a means to implement Article 12.

It said that the criterion is to choose "effective" checkpoints and IP offices are an appropriate checkpoint and the existing system of IP offices can already be used. In any event, there is disclosure already (referring to studies already made); thus there will be no added costs involved. The patent offices of the United States, Europe and Japan cooperate to harmonise their procedures, so they are already harmonising internationally, Malaysia added.

It also said that for other countries this may not be an effective checkpoint; then they have to consider what other checkpoint would be equally effective. It stressed the need to find a way that is effective at the national level, but also to cooperate as a community, and to learn what works and what does not.

India said it is also an importer and it has research and development (in genetic resources). It has already identified four possible and feasible checkpoints and said that checkpoints at patent offices are not against innovation, citing its experiences in establishing a prior-art database (Traditional Knowledge Digital Library) that was submitted to the EU and US (under memoranda of understanding). It added that in the past it had litigation but now patents are turned down where there is prior art that can be proved with its database.

It said that there is a need to look for several checkpoints, and patent offices are the most appropriate and should be mandatory for compliance because patents are at the point of the direct transition into commercialisation and benefit generation.

India also said that the whole exercise is about benefit-sharing and if patent offices are not included, then this shows a lack of seriousness about compliance.

Canada said a list is not needed and that it wanted flexibility and nothing mandatory. Since the paragraph begins with "as appropriate", it asked why a list is needed. It emphasised the need to try to build in flexibility for certain jurisdictions; for example, in the list on the marketing approval of certain products, this would mean that Canada has to amend various laws relating to the regulatory approval of certain products sold in the market, which will be difficult.

Canada, however, is amenable to the idea of checkpoints and this could be discussed in detail in a smaller group. It said perhaps a review mechanism can be included within the Protocol to make it effective.

At this point, Japan repeated that it supports the identification and establishment of checkpoints but not the list of checkpoints.

The EU said that the discussion on an indicative list relates to levels since the item in Article 13(1)(a) showing the five items is just part of what may be considered as monitoring mechanisms and there are still other ways of doing it as shown by paragraphs (b) to (d).

It said that what may ultimately be needed is experience on how it will work, and some pertinent information could be sent back to the providers to enable them to make a judgment if activities in the past would show that their rules on access (prior informed consent and mutually agreed terms) are still respected.

The EU further said that India's citation of the practices in the European Patent Office using the Indian Traditional Knowledge Digital Library may not be on point, as they are trying to establish the "novelty" of the inventions whereas in this case (the ABS Protocol) it is about prior informed consent and mutually agreed terms.

Co-Chair Hodges tried to reflect the discussion in the text and proposed the following: "The identification and establishment of checkpoints [which may include][including] ..."

As it was already way past 11 pm, Hodges then suspended consideration of this item, to be resumed on 15 October. On the remaining speakers' list were Australia, GRULAC, Malaysia, the African Group and Switzerland.

Meanwhile, in the afternoon, a small group worked on the review of the issue of "utilisation" of genetic resources across the whole draft Protocol text. The main issue causing difficulty is the requirement of prior informed consent for access to "derivatives" of genetic resources. Developed countries say there is no need for such consent while the developing countries say that this is key to the entire discussion on benefit-sharing. An observer described the proceedings as "completely stuck".

In his report to the ING, the small group Co-Chair, Ben Phillips of Australia, said that already at the beginning some Parties said there was no more progress to be made. The contentious issue was "access to derivatives"; some Parties viewed this as impossible to have under the Protocol and "we came to a stalemate".

In the pathogens small group that also met in the afternoon, a drafting group was formed to discuss a collection of suggested text from the delegates, thus going away from the developing-country position that this issue is already taken care of by Article 3*bis* on the relationship of the Protocol with other specialised international instruments or in Article 3 on scope.

10th meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 10)

Nagoya, Japan
18-29 October 2010

Access and benefit-sharing treaty enters critical stage

Chee Yoke Ling

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WITH time running out, the pressure increases on negotiators from more than 180 countries that are Party to the Convention on Biological Diversity to conclude a new treaty on access and benefit-sharing related to genetic resources and associated traditional knowledge.

The deep divisions between developing and developed countries over the key issues are now starkly on the table, with a crisis point reached on 25 October even as ministers descend upon Nagoya, Japan where the 10th meeting of the Conference of the Parties (COP) is being held.

The European Union, after days (and many nights) of negotiations on the compliance provisions of the protocol on access and benefit-sharing (ABS), refused to proceed on one of the key components for compliance on 25 October night, i.e., checkpoints in user countries to monitor potential biopiracy.

It is agreed now that compliance is at the heart of the protocol that is being forged. Therefore the most time has been allocated for this topic by the Co-Chairs of the Informal Consultative Group (ICG) set up by the COP on 18 October to finalise the protocol for adoption by the end of this week.

A legally binding treaty without an effective compliance system would frustrate the CBD's third objective of fair and equitable sharing of benefits arising from the utilisation of genetic resources, and allow biopiracy to continue. The other, interlinked objectives are conservation and sustainable use of biological diversity.

Developing countries have all along proposed a list of mandatory checkpoints that would require mandatory disclosure of specific information by users of genetic resources, their derivatives and associated traditional knowledge. These checkpoints would be the responsibility of user countries. (Developing countries themselves would also have to take similar actions since they are also users, though the majority of them are net providers or countries of origin of those resources and knowledge.)

On the other hand, developed countries are against a listing of mandatory checkpoints in the protocol, preferring the freedom to choose their own checkpoints. They are against even an indicative list. They are also against any requirement of mandatory disclosure of information. The exception is Norway, which accepts a list that includes some mandatory checkpoints and some voluntary ones. Its own national patent law already requires mandatory disclosure of the source of genetic resources and associated traditional knowledge and prior informed consent if required in the providing country.

At this point of the negotiations it has been agreed in Article 13(1) of the draft protocol text that, "To support compliance, Parties shall take measures, as appropriate," to monitor the utilisation of genetic resources (there is no agreement yet to include derivatives and there is no agreement on what is meant by "utilisation", both of which are the subject of continuous work by a small group of Parties).

Article 13(1) then goes on to state the following (with the brackets indicating lack of consensus):

"… Such measures [could][shall] include:

(a) The designation of one or more checkpoints, which would collect or receive, as appropriate, relevant information related to prior informed consent, to the source of the genetic resource[, its derivatives and associated traditional knowledge], to the establishment of mutually agreed terms and/or to the [utilisation] of genetic resources, [their derivatives and associated traditional knowledge], as appropriate."

The contested indicative list of designated checkpoints that is in brackets includes: competent national authority in the user country (referring to the authority responsible for ABS); research institutions subject to public funding; entities publishing research results relating to the utilisation of genetic resources; intellectual property examination or patent and plant variety offices; authorities providing regulatory or marketing approval of products; and indigenous and local communities, including their relevant competent authorities, that may grant access to traditional knowledge associated with genetic resources.

The ICG set up a small group on compliance, open to Parties, and this has been working for a few days with little progress under the co-chairmanship of Sem Shikongo of Namibia and Alejandro Lago of Spain. On 25 October a selected group from that small group of Parties (Africa, Australia, Canada, the EU, India, Malaysia and the Republic of Korea) was assigned to work informally and their discussion focused on the issue of the criteria for checkpoints.

Developing countries want agreed criteria that would ensure that the checkpoints would be effective and would cover the entire value chain from research to product development. They support intellectual property offices as a mandatory checkpoint, given the many cases of patents being granted in developed countries for gene sequences and active ingredients of genetic resources that belong to developing countries, and for products developed from traditional knowledge of indigenous peoples and local communities.

While developed countries finally agreed to engage in text on criteria for effective checkpoints, they maintained their rejection of intellectual property offices as a mandatory checkpoint. India, supported by China, Malaysia (on behalf of the Like-Minded Asia-Pacific Group) and Peru (on behalf of the Group of Latin American and Caribbean States), insisted on this. By late 25 October night, developed countries, with the exception of the EU, agreed to work on finding a solution to this issue. Raising procedural objections, the EU refused to do so.

The small group Co-Chairs reported to the ICG late on 25 October night that the compliance negotiations were in a crisis, to which ICG Co-Chair Fernando Casas of Colombia said that "we are not afraid of crisis, we are ready to face the crisis" and that in crisis are opportunities.

Japan's chief negotiator Masayoshi Mizuno said "we are in a very close and final stage. If we overcome this very difficult stage we can see the outcome. At this final moment everyone has difficulty crossing the line." Japan reaffirmed its commitment to finalising the protocol. (As the COP President, Japan is naturally seeking to have a successful meeting that would yield results, of which the ABS protocol is the political centrepiece.)

The ICG then adjourned for informal consultations conducted by Casas and his Co-Chair Tim Hodges of Canada with Parties on the next steps. A decision was then made to have the compliance small group Co-Chairs spend 26 October listening to "confessionals" with the key negotiators where negotiators frankly put their bottom line and flexibility on the table.

Meanwhile the plenary of the COP has further extended the deadline for the ICG – the first deadline was 24 October night and the second was 26 October night. With the high-level segment beginning on 28 October to be attended by 120 ministers and five heads of state, pressures are growing.

However, several developing-country negotiators said in the corridors that it is at such a stage of negotiations that great care must be taken to not compromise to the point of making the protocol weak or even empty of real content.

The ICG Co-Chairs emphasised on 26 October that "we do not want an empty protocol" but rather a "coherent, meaningful and implementable" one.

A small group of Parties will work late into the night on the highly contentious and long-drawn issue of the definition of "utilisation of genetic resources" and how to deal with "derivatives", which will have major implications for the scope of the protocol and hence the scope of benefit-sharing. A second small group is working in parallel on outstanding issues related to provisions on traditional knowledge associated with genetic resources, and related to that are the rights of indigenous peoples and local communities.

The "confessionals" on compliance will continue into the night as well, with the small group Co-Chairs Shikongo and Lago mandated to propose a textual solution on mandatory disclosure requirements and checkpoints on 27 October morning.

Biodiversity Convention adopts landmark decisions

Chee Yoke Ling

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THE tenth meeting of the Conference of the Parties (COP 10) to the UN Convention on Biological Diversity (CBD) held in Nagoya ended at about 3 am on 30 October. The "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation" was adopted in the early hours of the morning after almost six years of negotiations that culminated in an intense two and a half weeks of marathon sessions. This is the second treaty developed under the CBD, the first being the Cartagena Protocol on Biosafety that entered into force in September 2003.

The Nagoya meeting had three major inter-linked components: the Nagoya Protocol on Access and Benefit-Sharing (ABS); the revised and updated Strategic Plan to guide international and national efforts to meet the CBD objectives including a revised biodiversity target for the period 2011-2020; and the implementation plan for the Strategy for Resource Mobilisation in support of the achievement of the three CBD objectives adopted by COP 9 in 2008.

(The three CBD objectives are: conservation of biodiversity, sustainable use of the components of biodiversity, and the fair and equitable sharing of benefits arising from the utilisation of such components.)

The President of COP 10, the Minister of the Environment of Japan, Ryu Matsumoto, said in a press release dated 29 October, "The outcome of this meeting is the result of hard work, the willingness to compromise, and a concern for the future of our planet. With this strong outcome, we can begin the process of building a relationship of harmony with our world, into the future."

Until the final hours there was still no clear signal that the package of three main decisions would be adopted unanimously as one financial resource mobilisation draft decision was sent to plenary with many brackets (signifying lack of consensus).

Delegates at COP 10 were shadowed by a possible "Copenhagen collapse" – the 2009 COP of the UN Framework Convention on Climate Change in the Danish capital had ended in disarray and disillusionment. There was also growing concern that if Nagoya failed to deliver a positive outcome, the multilateral system as a whole would suffer another blow.

Matsumoto was visibly relieved when his gavel came down to adopt the three decisions after more than two hours of post-midnight plenary discussion.

In an unprecedented move in the CBD's history, the COP did not adopt a draft decision that was tabled before it at the final plenary. The controversial draft decision on "Policy Options Concerning Innovative Financial Mechanisms" sought to introduce, at the behest of developed countries, a range of new and untested market-based mechanisms. The developing-country Group of 77 (G77) and China expressed serious reservations, with Bolivia on behalf of the member countries of the Bolivarian Alliance for the Peoples of Our America (ALBA) taking on the strongest objections.

COP 10 adopted the Nagoya Protocol on ABS and established an Open-ended Intergovernmental Committee to prepare for the first meeting of the Parties to the Protocol. The Committee will meet on 6-10 June 2011 and 23-27 April 2012. The Protocol will be open for signature by governments at the UN headquarters in New York from 2 February 2011 to 1 February 2012. Fifty ratifications are needed for the Protocol to enter into force.

Bolivia, Cuba, Ecuador and Venezuela expressed their deep disappointment over the ABS Protocol and put on record their rejection of the document even though they decided not to block its adoption.

The COP also adopted the updated and revised Strategic Plan that had the original goal of "achiev[ing] by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth".

The 2010 goal has failed to be realised and the third edition of the *Global Biodiversity Outlook* report presented to COP 10 was a bleak one.

There was thus a heightened sense of urgency in adopting a revised plan with new goals and targets. Developed countries, especially the European Union, wanted ambitious numerical targets for biodiversity conservation areas.

On the other hand, developing countries were extremely concerned that since its entry into force in 1993, the means of implementation of the CBD, especially financial resources, have been highly inadequate. They therefore wanted COP 10 to adopt numerical targets for financial flows and provide clear terms of reference for a thorough fourth review of the CBD's financial mechanism, as well as provide additional guidance to the Global Environment Facility (GEF) that is the institutional structure operating the mechanism. One of the points of dissatisfaction of developing countries is that even though the GEF is guided by the CBD COP through regular COP decisions, it has its own governance and accordingly the CBD still does not have an effective financial mechanism.

Bernarditas Muller of the Philippines, who represented the G77 and China at the Nagoya finance negotiations, pointed out that the average cycle for a project to be prepared and approved and funds disbursed by the GEF is about six years. "It is no wonder that that 2010 goal was missed," she said.

Another reason for the failure to meet the 2010 goal, according to developing countries, is the failure of the third CBD objective and hence the conclusion of a meaningful ABS Protocol was essential. In retaining a fair and equitable share of the benefits (monetary and non-monetary) from the utilisation of their genetic resources and associated traditional knowledge, developing countries would be better placed to meet the other two CBD objectives of conservation and sustainable use within the framework of poverty eradication and sustainable development.

Meanwhile, the 131 members of the G77 and China adopted a Multi-Year Plan of Action on South-South Cooperation on Biodiversity for Development on 17 October on the margins of COP 10. The COP welcomed this in a formal decision, as an important contribution to the CBD Strategic Plan for 2011-2020.

Strategic Plan and targets (2011-2020)

COP 10 adopted the updated and revised Strategic Plan that includes a shared vision, a mission and 20 targets, organised under five strategic goals that address the underlying causes of biodiversity loss, reduce the pressures on biodiversity, safeguard biodiversity at all levels, enhance the benefits provided by biodiversity, and provide for capacity-building.

The vision is a world of "Living in harmony with nature" where "By 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people."

The mission was agreed upon only in the final hours of the last day:

"Take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication.

"To ensure this, pressures on biodiversity are reduced, ecosystems are restored, biological resources are sustainably used and benefits arising out of utilisation of genetic resources are shared in a fair and equitable manner; adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach."

The contentious point was whether to include the phrase "tipping points are avoided" in the second paragraph above, with most developed countries wanting to include it and developing countries concerned as to how "tipping points" could be determined and doubtful that the means to do so are available.

Parties debated the necessity to take into account the diversity of national circumstances, and accordingly the Strategic Plan is a "flexible framework" that will apply to the entire UN system.

Under the section on "Strategic Goals and the 2020 Headline Targets", Parties are invited "to set their own targets within this flexible framework, taking into account national needs and priorities, while also bearing in mind national contributions to the achievement of the global targets. Not all countries necessarily need to develop a national target for each and every global target. For some countries, the global threshold set through certain targets may already have been achieved. Other targets may not be relevant in the country context."

Parties agreed to translate this overarching international framework into national biodiversity strategy and action plans within two years.

Among the 20 targets, Parties agreed to, by 2020:

- Eliminate, phase out or reform incentives, including subsidies, harmful to biodiversity, and develop and apply positive incentives consistent with the CBD and other international obligations, taking into account national socio-economic conditions;
- (With business and stakeholders) take steps to achieve or implement plans for sustainable production and consumption and keep the impacts of use of natural resources well within safe ecological limits;
- At least halve and where feasible bring close to zero the rate of loss of natural habitats including forests, and to significantly reduce degradation and fragmentation of those habitats;
- Identify and prioritise invasive alien species and pathways, control or eradicate these, and to put measures to prevent their introduction and establishment;
- Establish a conservation target of at least 17% of terrestrial and inland water areas and 10% of marine and coastal areas;
- Enhance ecosystem resilience and the contribution of biodiversity to carbon stocks through conservation and restoration, and restore at least 15% of degraded areas, thereby contributing to climate change mitigation and adaptation and to combating desertification;
- Respect the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, and fully integrate and reflect this in the implementation of the CBD with the full and effective participation of indigenous and local communities.

An earlier target year of 2015 was agreed for special efforts on coral reefs so as "to minimise multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification, so as to maintain their integrity and functioning".

Target 16 aims at the Nagoya Protocol on ABS to be "in force and operational" by 2015. The original year was 2020 and Brazil requested that this be changed at the final plenary.

Parties also agreed in the last target, Target 20, that "the mobilisation of financial resources for effectively implementing the [Strategic Plan] from all sources and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilisation should increase substantially from the current levels. This target shall be subject to changes contingent to resources needs assessments to be developed and reported by Parties."

Battle over finance mobilisation

One of the most heated and longest negotiations at COP 10 centred on the mobilisation of financial resources to support achievement of the CBD objectives.

The G77 and China led by the Philippines, Brazil, Bolivia and Kenya strongly represented the interests of developing countries. They insisted in particular on specific targets for financial flows on the basis of the legal obligation of developed countries to provide new and additional finance for agreed full incremental costs under Article 20 of the CBD.

Considerable time was spent on the COP decision related to "Concrete activities and initiatives including measurable targets and/or indicators to achieve the strategic goals contained in the strategy for resource mobilisation and on indicators to monitor the implementation of the Strategy". The Strategy was adopted by COP 9 in 2008. The preamble of the adopted decision states that "any new and innovative funding mechanisms are supplementary and do not replace the financial mechanisms established under the provisions of Article 21 of the Convention".

Parties adopted 15 indicators for monitoring the implementation of the Strategy for Resource Mobilisation, based on its mission and eight goals. These included:

- Aggregated financial flows, in the amount and where relevant percentage, of biodiversity-related funding, per annum, for achieving the Convention's three objectives, in a manner that avoids double counting, both in total and in categories including official development assistance (ODA), domestic budgets, private sector, NGOs and foundations, UN system, non-ODA public funding, South-South initiatives etc.;
- Number of countries;

- Amount of funding provided through the Global Environment Facility and allocated to biodiversity focal area;
- Level of CBD and Parties' support to other financial institutions that promote replication and scaling-up of relevant successful financial mechanisms and instruments;
- Number of international financing institutions, UN organisations, funds and programmes, and the development agencies that report to the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD/DAC), with biodiversity and associated ecosystem services as a cross-cutting policy;
- Number of South-South cooperation initiatives conducted by developing-country Parties and those that may be supported by other Parties and relevant partners, as a complement to necessary North-South cooperation;
- Amount of financial resources from all sources from developed countries to developing countries to contribute to achieving the Convention's objectives;
- Amount of financial resources from all sources from developed countries to developing countries towards the implementation of the 2011-2020 Strategic Plan of the Convention;
- Resources mobilised from the removal, reform or phaseout of incentives, including subsidies, harmful to biodiversity, which could be used for the promotion of positive incentives, including but not limited to innovative financial mechanisms, that are consistent and in harmony with the Convention and other international obligations, taking into account national social and economic conditions.

There was no agreement to establish specific targets for resource mobilisation even though the G77 and China had proposed specific figures with timelines. The European Union proposed instead to develop a methodology for assessing needs. Parties finally agreed to apply the methodology during 2011-2012 to measure gaps and needs as well as progress in the increase in, and mobilisation of, resources against the adopted indicators, most of which were proposed by developing countries.

When asked by the G77 and China spokesperson whether COP 11 in 2012 will see developed countries agree to numerical financial targets, the EU responded that this would depend on the outcome of the methodological study.

"Innovative financial mechanisms" rejected

Bolivia on behalf of the ALBA countries (including also Ecuador, Venezuela and Cuba) was particularly focused on the policy options concerning innovative financial mechanisms that are mostly private-sector-oriented and market-based. This was originally section B of the first draft of the COP decision on the Strategy for Resource Mobilisation.

The proposals put forth by developed countries essentially emerged from the International Workshop on Innovative Financial Mechanisms organised by the CBD secretariat in collaboration with the Economics of Ecosystems and Biodiversity secretariat (UNEP-TEEB) and financed by the German government, which observers said was "dominated by OECD participants". These were so contentious that they were separated into another draft decision.

At the COP 10 negotiations Bolivia inserted safeguards stating that the innovative financial mechanisms:

- Must not provoke financial speculation;
- Must not provoke commodification of nature;
- Must not result from actions that could undermine the achieving of the CBD's three objectives;
- Must incorporate the rights of indigenous peoples and local communities, including their full and effective participation;
- Must not provoke any additional burden for developing-country Parties.

There was no time to discuss this draft decision that was ridden with brackets and delegates were taken by surprise when Damaso Luna of Mexico, the chair of Working Group II that was responsible for this issue, recommended to the COP to withdraw the document. With no one objecting, the contentious document was withdrawn.

Finance in support of implementation of the Convention was announced. The Prime Minister of Japan, Naoto Kan, announced $2 billion in financing, while the Japanese Environment Minister announced the establishment of a Japan Biodiversity Fund.

Additional financial resources were announced by France, the EU and Norway. About $110 million was pledged in support of projects under the CBD LifeWeb Initiative aimed at enhancing the protected-area agenda (this was launched at COP 9 in Bonn, Germany).

Several developing-country delegates remarked that the pledged funds were aimed at conservation projects and that there continues to be a bias by developed countries towards the first CBD objective. There was a large number of conservation organisations lobbying at the COP 10 meeting.

The high-level segment of the Nagoya COP was held with the participation of 122 ministers and five heads of state and government, including the President of Gabon, the President of Guinea-Bissau, the Prime Minister of Yemen representing the G77 and China, as well as Prince Albert of Monaco.

The next COP in 2012 will be held in India.

Mixed reactions on new access and benefit-sharing treaty

Chee Yoke Ling

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AFTER almost six years of work launched officially in 2004 and a marathon negotiation session lasting 15 days and most nights prior to (13-15 October) and during the 10th meeting of the CBD Conference of Parties (18-29 October) in Nagoya, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation was adopted.

The objective is "the fair and equitable sharing of the benefits arising from the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components".

Most government delegates said that the Protocol is imperfect but that they could "live with it". Bolivia, Cuba, Ecuador and Venezuela, representing the views of the regional Bolivarian Alliance for the Peoples of Our America (ALBA), put on record that they could not accept a Protocol that failed to meet the minimum requirements of preventing biopiracy. However, they did not stand in the way of all the other Parties that agreed to adopt the Protocol.

COP 10 adopted the Nagoya Protocol on ABS and established an Open-ended Intergovernmental Committee to prepare for the first meeting of the Parties to the Protocol. The Committee will meet on 6-10 June 2011 and 23-27 April 2012. The Protocol will be open for signature by governments at the UN headquarters in New York from 2 February 2011 to 1 February 2012. Fifty ratifications are needed for the Protocol to enter into force.

Fernando Casas (Colombia) and Timothy Hodges (Canada), the Co-Chairs of the Open-ended Working Group on ABS that was mandated by COP 7 in 2004 to negotiate the treaty, were nominated by Argentina and supported by the COP to also co-chair the new Committee. Argentina will be chair of the Group of 77 developing countries in 2011.

However, at the closing plenary past midnight into 30 October, Bolivia, Cuba, Ecuador and Venezuela expressed their deep disappointment over the ABS Protocol and put on record their rejection of the document even though they decided not to block its adoption.

Venezuela, on behalf of ALBA, said that eight years ago (when heads of state decided on an international regime on ABS at the Johannesburg Summit) there were expectations of an ABS document that would stop the "scourge of biopiracy". However, it said that the negotiated document has suffered many changes and does not contain what is needed.

Bolivia's Aldo Claure Banegas said that the Protocol does not fully reflect the views of all Parties and it could not accept the document. It added that in implementing the CBD, Parties should take into account the intrinsic value of biodiversity, and the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components, as this is stipulated in the preamble to the CBD. Throughout the two weeks, Bolivia consistently opposed what it saw as the commodification of nature in the various draft decisions under negotiation.

(Among the decisions that were finally adopted, one relates to "Engagement with Business" and there were several side events with corporations involved, including a few co-organised with the CBD secretariat and the Global Environment Facility.)

Cuba said that the years of work to help poor countries have been diminished, and though it also did not agree with the document, it did not stand in the way of consensus.

Brazil's Luiz Machado said that it did not want to stand in the way since it was a "delicately balanced" document. Brazil is also the current chair of the 17-member Group of Like-Minded Megadiverse Countries (LMMC) that has been a key player throughout the years of negotiations, being the grouping that strongly promoted the interests of countries of origin of biological resources.

Namibia, on behalf of the African Group, said that after all this time the Protocol is not the best of documents "but we can live with it and more importantly, there is Article [31] on review [of the Protocol]. When it is implemented we can see how it is – what we want is the best for Africa". It also wanted its statement to go into the record of the conference.

In an interview with Third World Network, the chief negotiator of Malaysia, Gurdial Singh Nijar, emphasised that a detailed analysis of the Protocol needs to be done before developing countries sign on to the new treaty. What was unacceptable, he said, was that negotiators who worked hard for almost six years did not get to finish their work and ultimately the Protocol as it stands was imposed on Parties, as the text of the final and most contentious issues were essentially determined by a handful of people in a non-transparent and non-participatory manner. Many negotiators were prepared to continue working, and if needed, an extension of time could have been agreed on, with adoption later at an Extraordinary COP meeting in 2011.

(This happened with the CBD's first protocol, the Cartagena Protocol on Biosafety, which failed to be concluded at the Cartagena COP meeting and was later adopted in an Extraordinary COP session in Montreal.)

Marathon negotiations and contentious issues

Prior to the COP 10 meeting, the Inter-regional Negotiating Group (ING) convened for a three-day meeting on 13-15 October that extended into the morning of the fourth day. This Group was set up by the Open-ended Working Group on ABS earlier this year to enter into full negotiations. The mandate of the Open-ended Working Group and with it the ING ended on 16 October.

The opening COP 10 plenary on 18 October proceeded to establish the Informal Consultative Group (ICG) that was to complete its work to finalise the ABS Protocol by 22 October and this was further extended twice due to the wide divergence between developing and developed countries on key issues of the Protocol.

On 25 October, the Co-Chairs reported to the COP 10 plenary on progress made and the outstanding unresolved issues. Yet another deadline of 28 October was given but negotiations reached a deadlock.

At this point, the COP 10 Presidency convened a "facilitating group". The European Union, Namibia (for the African Group), Brazil (recognised for its role as the LMMC chair and a key regional spokesperson) and Norway (representing a bridging viewpoint) were invited to be part of this facilitating group. The Like-Minded Asia-Pacific countries were noticeably unrepresented even though they were among the most active players throughout the negotiations.

On 28 October, the second-last day of COP 10, negotiations went off the public track, with many negotiators themselves at a loss as to what was happening. Frustration and speculation abounded in the corridors. Compromise text was floated on the unresolved issues of scope and compliance but this was again not successful.

On the last day, 29 October, the COP 10 Presidency took over the negotiations, taking them to a ministerial level. However, the chief negotiators of the countries concerned were in attendance, according to those involved.

The unresolved issues were essentially about the scope of the Protocol and the strength and effectiveness of the compliance mechanism, and a "balance" was finally struck by the COP 10 Presidency (Japan) largely with the participation of the European Commission negotiators. The resulting President's draft Protocol was distributed on 29 October morning and regional groups met with the Japanese Minister Ryu Matsumoto who basically persuaded all Parties to accept his text.

It should be noted that by this time, a considerable part of the Protocol had already been agreed to by Parties in the intergovernmental setting, and the compromise presented by the COP 10 President worked with the language that was in brackets. The new addition was the multilateral fund proposed by the African Group.

However, all negotiators (as is the UN practice) worked on the understanding that "nothing is agreed until everything is agreed"; this is to allow them to consider a treaty in its entirety when all provisions have been individually agreed to.

In this case, the provisions on access had been resolved first except for a few aspects, under which developing-country Parties assume additional obligations to those found in the CBD (see the following article "Access obligations increased"). With the final weak compliance provisions and critical aspects of traditional knowledge left out of the Protocol, the overall implications for developing countries need careful analysis.

Scope

On scope, there were several aspects.

Firstly, the definition of the terms "utilisation of genetic resources" (the CBD requires benefit-sharing for the commercial and other utilisation of genetic resources) and "derivatives" of genetic resources took up considerable time over the past year. Developed countries wanted a narrow definition and developing countries the opposite. The final definition is open to interpretation.

According to Hartmut Meyer, a scientist who participated in the ABS negotiations for the past five years and was also a participant at the experts' workshop convened by the CBD secretariat on concepts, terms and definitions of the Protocol in 2009, it would seem that access to purified extracts that do not contain DNA any longer is not under the Protocol.

However, Meyer said that access to extracts that contain DNA and to any other biological material for research and development purposes using all molecules of the material is under the Protocol. All these extracts are important for the Protocol because at least 90% of all known biopiracy cases involve these substances (see box "Legal definitions can create loophole").

Secondly, China, India, Malaysia, Nepal and the Philippines especially argued strongly for benefit-sharing from the use of traditional knowledge that is publicly available and not identifiable with any specific indigenous or local community and thus belongs to the state. China, India and Nepal are particularly affected as they have ancient traditional knowledge that is widespread but well documented relating especially to medicinal formulations and treatments. Such knowledge continues to be freely accessed and the long-available

Legal definitions can create loophole

Hartmut Meyer

ONE major problem in developing a comprehensive international anti-biopiracy law is that the CBD defines "genetic material" and "genetic resources" through the term "containing functional units of heredity", which is essentially DNA.

This means that where substances or products do not contain DNA, it may be argued by some that these are outside the CBD scope.

Some real-world examples are as follows:

(a) Leaves – contain DNA

(b) Liquid extract of leaves – contains some DNA, but is not used widely because biochemicals tend to degrade in water

(c) Alcohol extract of leaves – does not contain DNA (DNA does not dissolve in alcohol), and is widely used because biochemicals are well preserved in alcohol.

The situation covered in (c) is, for example, seen in the InBio model in Costa Rica, the often-cited example of a good ABS practice. InBio, a Costa Rican research institution, obtains genetic resources from the country's national forests, makes extracts, cleans these extracts, and then offers them for access by institutions from other countries. So the access is to "non-genetic resources" as a result of the definition of the relevant terms in the CBD.

At the same time the InBio model of increasing scientific and technological capacity in Costa Rica is regarded as a positive model. So in the end, while the scientific capacity of a developing country may increase in some way, the definitional trick can result in shifting the regulation of access to "genetic resources" (and consequently benefit-sharing) out of the ABS Protocol.

This is the reason why almost all national ABS laws cover access to "biological resources", which include these DNA-free extracts and even purified substances from biological origin. – Third World Resurgence *(No. 242-243, October-November 2010)*

therapeutic formulations and consequential products are regularly patented in developed countries as "inventions" with "novelty" value.

This was in Article 9.5 of the draft Protocol until late 28 October, but did not make it to the final document. A final attempt by China to offer compromise language for Article 9.5 was rejected by developed countries.

However, the preamble to the Protocol does recognise "the unique circumstances where traditional knowledge associated with genetic resources is held in countries, which may be oral, documented or in other forms, reflecting a rich cultural heritage relevant for conservation and sustainable use of biological diversity".

Thirdly, the acquisition and use of genetic resources before the entry into force of the new ABS Protocol was also debated. Developing countries argued for benefit-sharing of continuing and new uses of such genetic resources even though the genetic resources were obtained prior to the entry into force of the Protocol and now reside in public and private *ex situ* collections mostly in developed countries. (See the article "Will we share the biggest part of the benefits?" on pp. 95-96.)

Fourthly, another major subject of discussion centred on benefits derived from resources collected in areas outside national jurisdiction such as the high seas and the Antarctica region. The African Group in particular argued that while access cannot be regulated in these situations, no one should be allowed to benefit from these resources without sharing with the rest of the world.

The African Group proposed a multilateral fund for the benefits that cannot be linked to a specific country of origin or providing country under the CBD. The Protocol now contains the following provision in Article 10: "Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilisation of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally."

However, the provision is for a "mechanism" and it is not clear if this means an actual fund. Secondly, the mandate is to "consider the need for and modalities of" such a mechanism. Such formulation for a biosafety protocol in Article 19(3) of the CBD led to several years of debate on the "need for" before actual work on a protocol commenced. There is also no timeframe for this to be established; the issue will be taken up at the second meeting of the preparatory Intergovernmental Committee for the Protocol in April 2012. The question, therefore, is whether this global benefit-sharing promise is illusory.

Fifthly, pathogens (viruses) used to develop vaccines and diagnostic kits were another highly contentious issue. Developed countries to various degrees wanted all these to be excluded from the Protocol, which according to developing countries would result in an empty and meaningless Protocol.

The final compromise is in Article 8(b): "[In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall:] Pay due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally. Parties may take into consideration the need for expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries."

A preambular paragraph in the Protocol that was not negotiated but objected to in the first reading by developing countries is as follows: "Mindful of the International Health Regulations (2005) of the World Health Organisation [WHO] and the importance of ensuring access to human pathogens for public health preparedness and response purposes, ..."

These Regulations are interpreted by developed countries at WHO as requiring mandatory sharing of viruses, for influenza viruses of a pandemic nature, currently being negotiated in a WHO ABS system. Such an interpretation is disputed by developing countries.

Compliance

The other highly contentious issue was the question of compliance that Co-Chairs Casas and Hodges constantly underlined as the "core of the core" of the Protocol.

The impasse was over the requirement of mandatory checkpoints to monitor biopiracy resulting from non-compliance with the national ABS laws of a country of origin/provider country of genetic resources. In addition was the mandatory disclosure of information related to prior informed consent of a government and/or that of an indigenous or local community.

The final text requires one or more "effective" checkpoints to be designated but leaves it to a Party to choose what that may be. Developing countries had insisted that patent and other intellectual property offices be the minimal mandatory checkpoint, and this was highly resisted by developed countries except for Norway.

An indicative list of checkpoints to guide Parties in national implementation of the Protocol was also resisted and this list no longer features in the adopted Protocol. The contested and now deleted non-exhaustive list was as follows:

- Competent national authority in the user country;
- Research institutions subject to public funding;
- Entities publishing research results relating to the utilisation of genetic resources;
- Intellectual property examination/patent and plant variety offices;
- Authorities providing regulatory or marketing approval of products derived from genetic resources/ resulting from the use of genetic resources or derivatives;
- Indigenous and local communities, including their relevant competent authorities, that may grant access to traditional knowledge associated with genetic resources.

Although traditional knowledge and the rights of indigenous and local communities have been given stronger recognition in the Protocol compared to the CBD provisions, the compliance provisions on checkpoints do not cover traditional knowledge.

Many provisions are qualified with "as appropriate" and "where applicable", leaving much to be interpreted at the national implementation level.

The future of the Protocol and its impact in preventing biopiracy and ensuring that the CBD objective of fair and equitable benefit-sharing is met will continue to be fought out in the coming years.

Access obligations increased

Chee Yoke Ling

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THE CBD clearly reaffirms the sovereign rights of states over their natural resources, and so Article 15(1) provides that "the authority to determine access to genetic resources rests with the national governments and is subject to national legislation".

No one has the right to freely access a country's genetic resources. The obligation under the CBD is that each Party "shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses" by other Parties and "not to impose restrictions that run counter to the objectives" of the CBD.

The concept of "countries of origin" is recognised and so at the initiative of Mexico in 2002, 12 countries with high biodiversity organised themselves into the Like-Minded Megadiverse Countries Group (LMMC). There are now 17 members: Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of the Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, the Philippines, South Africa and Venezuela. The LMMC was at the forefront of safeguarding the interests of countries of origin in the ABS negotiations.

The CBD covers access provided by Parties that are countries of origin or by the Parties that have acquired the genetic resources concerned in accordance with the CBD.

Access, where granted, shall be on mutually agreed terms, and subject to prior informed consent (PIC) of the Party providing such resources. A Party can choose to not require PIC – the European Union stressed that this is something its member states will do.

The quid pro quo for access is benefit-sharing and this is in Article 5(7) that requires each CBD Party to take "legislative, administrative or policy measures, as appropriate … 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 utilisation of genetic resources" with the Party providing such resources. Such sharing shall be upon mutually agreed terms, and includes the sharing of technology.

The lack of implementation of the third CBD objective of fair and equitable benefit-sharing was worsened by more and more reports of biopiracy, largely exposed by non-governmental organisations (NGOs). At the insistence of developed countries, CBD Parties only developed voluntary Bonn Guidelines on ABS, and not a legally binding protocol. This led to the LMMC (supported by the Group of 77 developing countries) succeeding in getting the 2002 Johannesburg Summit on Sustainable Development to call for an international benefit-sharing regime under the CBD.

At the COP 7 meeting in 2004 in Kuala Lumpur, Malaysia, the LMMC urged Parties to convene a working group to begin negotiations. The EU, Australia, Canada and Switzerland favoured the Bonn Guidelines and wanted to defer any new negotiations. They also insisted that any regime must be about access as well. The African Group supported a legally binding regime that balanced access with benefit-sharing concerns, and that included technology transfer. The mandate was finally to negotiate an international regime on ABS.

Throughout the negotiations until the Nagoya COP meeting, developing countries (especially the Like-Minded Asia-Pacific Group formed in November 2009 at the 8th meeting of the ABS Working Group) stressed again and again that the question is not about balance between access and benefit-sharing within the protocol, but rather that the protocol seeks to correct the deep imbalance since the colonial period when developing countries' biological resources have been taken freely and most often without permission. Therefore, the core and focus of the protocol has to be about benefit-sharing obligations and an effective compliance system.

As negotiations finally got going on text in 2010, it was clear that most developed countries wanted to take the opportunity to ensure access for their corporations and researchers. The EU wanted minimum access standards to be included; Japan raised questions on the integrity of national ABS laws and argued also for international access conditions if it were to enforce compliance with the laws of other Parties.

The most extreme was Canada which insisted that "national treatment" be given by Parties requiring PIC for access to genetic resources: "Provide for equal treatment in applications for access to genetic resources between similar domestic and foreign applicants and between similar foreign applicants of different Parties." This was vehemently rejected by developing countries and several developed countries also said this was too much.

The adopted Nagoya Protocol saw the deletion of the Canadian proposal and the inclusion of this option in Article 6 on Access to Genetic Resources: "Provide for fair and non-arbitrary rules and procedures on accessing genetic resources".

Parties now have to also take appropriate measures to provide for:

- Legal certainty, clarity and transparency of their domestic ABS legislation or regulatory requirements;
- Information on how to apply for prior informed consent;
- A clear and transparent written decision by a competent national authority, in a cost-effective manner and within a reasonable period of time;
- The issuance at the time of access of a permit or its equivalent as evidence of the decision to grant PIC and of the establishment of mutually agreed terms (relating to access), and notify the Access and Benefit-sharing Clearing-House accordingly;
- Where applicable, and subject to domestic legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources.

Parties must also establish clear rules and procedures for requiring and establishing written mutually agreed terms for access that may include, inter alia:

- A dispute settlement clause;
- Terms on benefit-sharing, including in relation to intellectual property rights;
- Terms on subsequent third-party use, if any; and
- Terms on changes of intent, where applicable.

On access to traditional knowledge associated with genetic resources that is held by indigenous and local communities, Parties shall take appropriate measures in accordance with domestic law "with the aim of ensuring" that such knowledge "is accessed with the prior and informed consent or approval and

involvement of these indigenous and local communities, and that mutually agreed terms have been established".

"Special considerations" are set out in Article 8 of the Protocol when Parties develop and implement their ABS legislation or regulatory requirements:

- "Create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through *simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research*." (emphasis added)
  Though there were no brackets around this paragraph in the last version of the draft Protocol that was openly negotiated by Parties (as of noon of 27 October), there was some uncertainty surrounding its finality.
- "Pay due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally. Parties may take into consideration the need for *expeditious access to genetic resources* and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries." (emphasis added)
  This was a very controversial issue and remained unresolved and heatedly debated till the last hours when the open negotiations by Parties were terminated. The EU wanted immediate access and, with other developed countries such as Australia, also sought to expand the situations to "pre-emergencies" – all of which were considered by developing countries and observers as an indirect way of excluding pathogens for vaccine development from PIC requirements. Though "expeditious" benefit-sharing is also in the paragraph, a senior German health official, in a meeting with some NGOs including Third World Network in Nagoya, admitted that his government would not be able to ensure that German pharmaceutical companies indeed share such benefits. The final text was formulated by a small group under the auspices of the Japanese COP Presidency, whose members are not officially known.
- "Consider the importance of genetic resources for food and agriculture and their special role for food security."

Some progress on the rights of indigenous peoples and local communities

Chee Yoke Ling

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REPRESENTATIVES of indigenous peoples' groups were very active throughout the years of negotiations of the Protocol on Access and Benefit-Sharing. The International Indigenous Forum on Biodiversity (IIFB) is the platform that is officially recognised by Parties and the secretariat of the CBD.

While the participation of indigenous and local communities (the constituency contained in the CBD) has been unprecedented among multilateral treaty processes, the IIFB nevertheless registered its strong disappointment with many aspects of the final Protocol text. As with many government Parties and civil society organisations, they were also critical of the lack of transparency and participation in the last 48 hours of the Nagoya COP negotiations.

While the Protocol goes further in spelling out the rights of indigenous and local communities relating to access and benefit-sharing, it failed in some critical aspects. The most glaring is the removal of traditional knowledge from Article 17 on compliance measures such as checkpoints to be designated by user-country governments to prevent biopiracy and ensure that there has been prior informed consent and benefit-sharing agreements, among others, related to the use of genetic resources.

Until the final stages, developing countries insisted that the compliance measures to be taken must cover traditional knowledge associated with genetic resources. All such references were in brackets due to objections from almost all developed countries.

These measures were to support user-country Parties' compliance obligations under Article 16 by monitoring and enhancing transparency on the utilisation of genetic resources. (Article 16 is about compliance

by users with the domestic ABS legislation or regulatory requirements of countries from where the traditional knowledge is accessed and used, such as those related to prior informed consent of indigenous and local communities, and benefit-sharing terms involving traditional knowledge associated with genetic resources.)

The adopted Protocol now does not oblige the compliance measures listed in Article 17 to be applied to such traditional knowledge. They apply only to utilisation of genetic resources.

Indigenous rights declaration

Paragraph 26 of the Protocol's preamble, which notes the United Nations Declaration on the Rights of Indigenous Peoples, was heavily contested by several developed countries, especially Canada which still has not signed on to the 2007 UN Declaration that has been endorsed by almost all UN member states.

At one point the various options appeared as follows with many qualifications: "[*Taking into account*] [*Affirming*] [any established] [the existing] rights [in national law] of [individuals,] indigenous and local communities [and countries] to genetic resources and associated traditional knowledge[, subject to national legislation where applicable [and, where appropriate, the United Nations Declaration on the Rights of Indigenous Peoples]]."

At the closing hours of the Nagoya COP meeting, Canada agreed to the weak compromise of just "noting" the Declaration.

However, preambular paragraph 27 affirms that "nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities".

(The preamble of a treaty guides the interpretation of the operational provisions contained in the various Articles.)

Rights – and qualifications

The scope of the Protocol applies to traditional knowledge associated with genetic resources within the scope of the CBD and to the benefits arising from the utilisation of such knowledge.

Although the Protocol goes further than the CBD in spelling out the rights of indigenous peoples and local communities, the provisions are heavy with qualifications leaving much to the discretion of national governments. These qualifications (see text in italics below) were put in by both developed and some developing countries.

Article 5 on Fair and Equitable Benefit-Sharing states in paragraph 2, "Each Party shall take legislative, administrative or policy measures, *as appropriate, with the aim of ensuring* that benefits arising from the utilisation of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms."

Article 6 on Access to Genetic Resources states in paragraph 2, "In accordance with domestic law, each Party shall take measures, *as appropriate, with the aim of ensuring* that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources."

A separate Article 7 deals with Access to Traditional Knowledge Associated with Genetic Resources: "In accordance with domestic law, each Party shall take measures, *as appropriate, with the aim of ensuring* that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established."

Article 12, which is on Traditional Knowledge Associated with Genetic Resources, requires domestic law implementing the Protocol to "take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources".

The effective participation of indigenous and local communities is required when Parties establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations.

Parties, in their implementation of the Protocol, "shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention".

Women's role in ABS recognised

Chee Yoke Ling

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THE CBD preamble recognises "the vital role that women play in the conservation and sustainable use of biological diversity and affirm[s] the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation".

Accordingly the ABS Protocol preamble in paragraph 11 recognises "the vital role that women play in access and benefit-sharing" and affirms "the need for the full participation of women at all levels of policy-making and implementation for biodiversity conservation".

Although the substantive operational provisions are qualified (as are all substantive provisions related to indigenous peoples and local communities), these are nevertheless a step forward. Women in rural societies across the developing world often have significant roles in relation to biodiversity conservation and sustainable use, but market economies and 'modernisation' inevitably result in policies and the conferment of resource rights in ways that marginalise and even deny women their rightful place.

In Article 12 of the Protocol dealing with Traditional Knowledge Associated with Genetic Resources, paragraph 3 states that "Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:

(a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilisation of such knowledge;
(b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilisation of traditional knowledge associated with genetic resources; and
(c) Model contractual clauses for benefit-sharing arising from the utilisation of traditional knowledge associated with genetic resources."

Despite the qualified obligation, this is a substantive requirement that enhances the role of women in deciding on community-level procedures for prior informed consent and terms of access and benefit-sharing.

In the provisions related to Capacity in Article 22, paragraph 3 states, "As a basis for appropriate measures in relation to the implementation of this Protocol, developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition should identify their national capacity needs and priorities through national capacity self-assessments. In doing so, such Parties should support the capacity needs and priorities of indigenous and local communities and relevant stakeholders, as identified by them, emphasising the capacity needs and priorities of women."

Paragraph 5 specifically provides that all the capacity-building development measures set out in Article 22 may include "special measures to increase the capacity of indigenous and local communities with emphasis on enhancing the capacity of women within those communities in relation to access to genetic resources and/or traditional knowledge associated with genetic resources".

On financing related to such capacity-building and development, the CBD Conference of Parties acting as the Meeting of Parties to the Protocol shall provide guidance to the financial mechanism (in this case the Global Environment Facility). Such guidance, according to Article 25(3), "shall take into account the need of developing country Parties, in particular the least developed countries and small island developing States among them, and of Parties with economies in transition, for financial resources, as well as the capacity needs and priorities of indigenous and local communities, including women within these communities."

The definitions in the ABS Protocol: Key issue for stopping biopiracy

This is the text of a briefing released by the non-governmental organisations ***Berne Declaration****,* ***Ecoropa****,* ***EED (Church Development Service)*** *and* ***Third World Network****.*

ONE of the driving forces leading to the creation of the CBD was the notion that biodiversity serves as raw material for the development of medicines and other useful products. Biodiversity as a source for medicines has been used by humankind since time immemorial. Pharmaceutical companies develop modern drugs using biochemical compounds resulting from metabolism derived from plants, microbes and other organisms. They also produce phyto-pharmaceuticals using multi-compound extracts, in most cases based on traditional knowledge. Furthermore, numerous dietary supplements, functional foods and cosmetics based on the use of biochemical compounds resulting from metabolism including traditional knowledge are developed and marketed worldwide.

The point of departure in the CBD debate is that any ABS system has to cover and reward the utilisation of genetic resources in all non-profit- and profit-making fields such as medicine, cosmetics, food supplements, industrial processes, breeding, crop protection and horticulture. As a general rule, two groups of industries use different biochemical compounds of genetic resources. While medicine, cosmetics and food supplements use biochemical compounds resulting from metabolism, many industrial processes and the breeding sector use the genes as such or biochemical compounds resulting from gene expression (for example enzymes = proteins).

If an ABS regime would only cover the use of the genes and proteins and leave out the use of the biochemical components resulting from metabolism, such a regime will exclude the majority of typical uses from its rules. The overwhelming number of bioprospecting cases that have emerged during the history of the CBD have been based on the use of biochemical components resulting from metabolism and only very few on the use of biochemical components resulting from gene expression.

The following citations show that prominent actors in the field have always understood an ABS regime to include both the use of genes and biochemical compounds of genetic resources. Therefore, this understanding has to be kept in mind during the course of the negotiations, particularly when dealing with the definition of "utilisation of genetic resources" and "derivatives".

Our suggestion for Article 2(c): "'Utilisation of genetic resources' means to conduct research and development on genetic and biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention." Otherwise 90% of all known biopiracy cases would not be covered by the ABS Protocol.

The adopted definition reads: "'Utilisation of genetic resources' means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention."

* * * * * * * * *

"Novo Nordisk uses a broad variety of natural resources in its research and development programmes for new pharmaceuticals and industrial enzymes. [...] No microbial strain or natural material obtained without proper prior informed consent from the country of origin will be included in screening; All materials screened should be covered by contracts and/or material transfer agreements; [...]" – Novo Nordisk: Environment & Bioethics Report, 1998

"Many believe the potential of bio-resources has barely been tapped, and that traditional knowledge about the medicinal properties of plants, for instance, still has valuable secrets to offer. Apart from drugs from plants known locally through traditional knowledge, disease-resistant or hardy crops are examples of the kind of resources that might become available through biotech inventions. The biodiversity of the rainforest is a resource as real as any precious metal." – EU Trade Commissioner Pascal Lamy: "As precious as gold", 6 February 2002

"Mr Toepfer said the wealth of animal and plant life nurtured by indigenous, tribal and local peoples 'for generations, for ages' amounted to a treasure trove of potentially promising new drugs, crops and industrial products for the 21st century." – UN Environment Programme (UNEP) Executive Director Klaus Toepfer: "Big development projects need cultural impact assessments", 18 November 2002

"Genetic resources are materials of plant, animal or microbial origin. [...] They are of fundamental importance to many areas of scientific research, like plant breeding for agriculture and horticulture, and for a wide range of industrial sectors, including biotechnology, pharmaceuticals, medicine, and cosmetics. For example, various plants have cosmetic applications: cinnamon has essential oils with antiseptic properties, green tea has a free radical scavenging property and horse chestnut is an astringent." – European Commission: "Commission encourages international solidarity when utilising exotic plants", Press Release IP/04/21, 7 January 2004

"Biodiversity, the result of over three billion years of evolution, is a natural heritage and a vital resource for mankind. We draw from it directly our food, shelter, medicine, raw materials, recreation and culture." – CBD Executive Secretary Ahmed Djoghlaf: "Winning the battle for life on earth: Fulfilling the 2010 biodiversity promise of the Heads of State", *Gincana* Magazine, 2006

"Many top selling drugs, such as penicillin, cyclosporine and the anticancer drug Taxol, have been derived from nature; and traditional medical knowledge can point the way to new drug development. Future drugs, industrial products and genes for improved crops are being sought from plants and animals, particularly in the genetically rich developing world. [...] Establishing effective and fair rules, in which companies and local communities share in these profits and other non-monetary benefits that arise from the use of the biological resources, will not only help fight poverty in developing countries but will also create sustainable development on a broader base. It should also generate incentives for local people to conserve their biodiversity and reduce the threat of overexploitation." – UNEP: "Study takes critical look at benefit sharing of genetic resources and traditional knowledge", 10 February 2004

"Forests play a vital role in fighting poverty and in promoting medicine and food security, UN Secretary-General Kofi Annan told Central African leaders this week. [...] Their capacity to retain water offers safeguards against flooding and erosion, and the genetic resources found in them are the basis for many advances in medicine and food security, he added." – UN Secretary-General Kofi Annan: "Annan calls for cooperation to save Central Africa's forests", 11 February 2005

"Biodiversity is a prerequisite for the traditional medicine that much of the world relies on as well as many pharmaceutical products. Natural resources represent an important source of potential new drugs for patients, hence the preservation of biodiversity is essential in our efforts to cure diseases and save lives. Bioprospecting, or tapping into the vast molecular diversity occurring in nature to help create innovative new medicines, provides a complementary alternative to synthetic approaches to new drug development." – Novartis: Position Paper Biodiversity/Bioprospecting, November 2005

"As the CBD definition also includes the potential value of such resources, almost all genetic material falls under the provisions of the ABS system. Furthermore, the valuable information need not be exclusively genetic, for example, it may also be associated with the biochemical information contained in the material." – Swiss Academy of Sciences: "ABS – Good practice for academic research", 2006

Will we share the biggest part of the benefits?

François Meienberg and Christine von Weizsäcker

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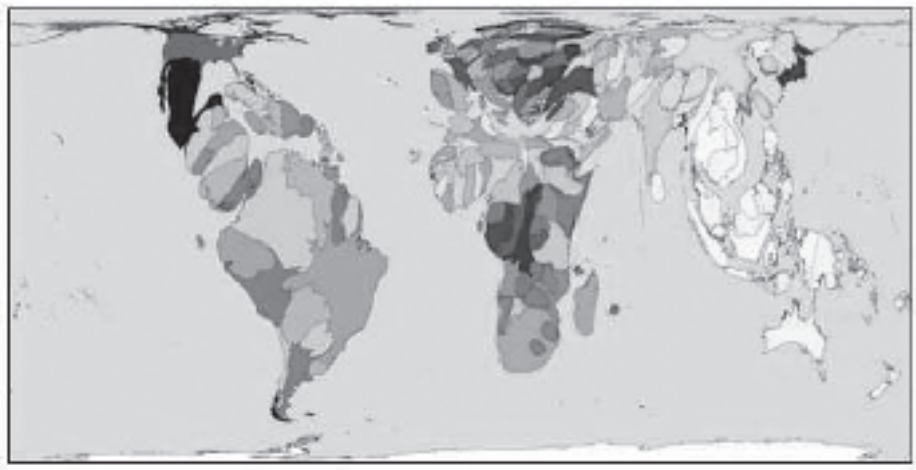
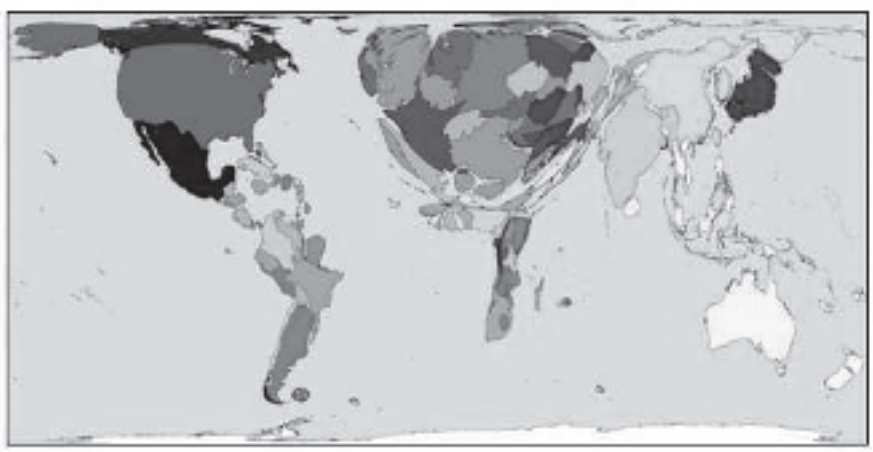
ONE of the main issues in the ABS Protocol negotiations was genetic resources held *ex situ*. It is obvious that a major part of genetic resources has already been taken from the countries of origin during the past 400 years, and are now kept in botanical gardens (see figure), research institutions, by genetic resource broker companies, companies for outsourced access, and even commodities on the shelves of supermarkets. It was thus a crucial question: Will we share the benefits arising out of the utilisation of these resources or will the new Protocol legitimise the biopiracy which has occurred since the time of colonisation?

Sharing nothing but the benefits from the utilisation of genetic resources acquired *after* the entry into force of the Protocol for a given country, would mean refusing to share the biggest part of the benefits. Users would be able to examine *ex situ* collections in their own country or in non-Parties or check if the resource is available in the open market. If a user has illegally accessed a genetic resource in a country of origin, he would be able to pretend that he legally found it *ex situ*.



Most plant species are concentrated in the South (above map)...



...while most botanical gardens are in the North. Source: www.worldmappers.org

A recent case: The Nestle rooibos patents

This case exemplifies how benefits to Northern corporations are derived from genetic resources first accessed long ago. Nestle has newly applied patents on the use of rooibos for cosmetic purposes. Rooibos is clearly an endemic plant to South Africa and, even now, only grown in certain areas of South Africa. It is also evident that everybody can find roiboos tea on the shelves of his neighbourhood supermarket. Nobody will urge somebody who drinks rooibos tea at home to ask for prior informed consent of the South African Focal Point (as this does not fall under the common understanding of utilisation, as was once again confirmed during the ABS working group negotiations). But reading the CBD, it should be evident that the benefits – for example, out of the commercialisation of the new use as cosmetics based on genetic resources – should be shared with the country of origin.

It is maybe one of the most widespread misunderstandings of CBD obligations that benefits should only be shared when the genetic resource has been accessed under the rules of the Convention. This is nowhere spelt out in the Convention text. On the contrary, Article 15 clearly states that the "benefits arising from the commercial and other utilisation of genetic resources" should be shared fairly and equitably with the provider country.

Botanical gardens show that it is possible

The principles of Botanic Gardens Conservation International state, "Share benefits arising from the use of genetic resources acquired prior to the entry into force of the CBD, as far as possible, in the same manner as for those acquired thereafter."

Moreover, botanical gardens working together in the International Plant Exchange Network (IPEN) have agreed to use a material transfer agreement which includes the following paragraph: "By signing this Agreement the recipients commit themselves to act in compliance with the CBD and its agreed provisions on Access and Benefit-Sharing. This includes a new Prior Informed Consent (PIC) of the country of origin

for any uses not covered by terms under which it has been acquired (such as commercialisation)."

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) also does not differentiate between genetic resources accessed by CGIAR (Consultative Group on International Agricultural Research) centres (or other seed banks) before or after the coming into force of the CBD.

These examples show that it is state of the art to include *ex situ* accessions into future benefit-sharing agreements – irrespective of whether they have been accessed before or after the coming into force of the CBD.

Fortunately, in the final version of the recently adopted Nagoya Protocol on ABS, all wording which would have restricted the scope of the Protocol to genetic resources and the associated traditional knowledge acquired after the entry into force of the Protocol, has been deleted.

Therefore new utilisations of genetic resources held *ex situ* are part of the Protocol. In addition, the Protocol now also includes a mechanism to share benefits of genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. Article 10 reads as follows:

"Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilisation of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally."

One possible case under such a mechanism would be that of a genetic resource which left the country of origin a long time ago and is now kept in a botanical garden – but where the origin is not identifiable anymore.

However, no timeframe is given for the setting up of this mechanism. This will only be looked into at the second meeting of the preparatory Intergovernmental Committee for the Protocol in April 2012.

Appendix
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity

The Parties to this Protocol,

Being Parties to the Convention on Biological Diversity, hereinafter referred to as "the Convention",

Recalling that the fair and equitable sharing of benefits arising from the utilization of genetic resources is one of three core objectives of the Convention, and recognizing that this Protocol pursues the implementation of this objective within the Convention,

Reaffirming the sovereign rights of States over their natural resources and according to the provisions of the Convention,

Recalling further Article 15 of the Convention,

Recognizing the important contribution to sustainable development made by technology transfer and cooperation to build research and innovation capacities for adding value to genetic resources in developing countries, in accordance with Articles 16 and 19 of the Convention,

Recognizing that public awareness of the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components,

Acknowledging the potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability and thereby contributing to achieving the Millennium Development Goals,

Acknowledging the linkage between access to genetic resources and the fair and equitable sharing of benefits arising from the utilization of such resources,

Recognizing the importance of providing legal certainty with respect to access to genetic resources and the fair and equitable sharing of benefits arising from their utilization,

Further recognizing the importance of promoting equity and fairness in negotiation of mutually agreed terms between providers and users of genetic resources,

Recognizing also the vital role that women play in access and benefit-sharing and affirming the need for the full participation of women at all levels of policy-making and implementation for biodiversity conservation,

Determined to further support the effective implementation of the access and benefit-sharing provisions of the Convention,

Recognizing that an innovative solution is required to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent,

Recognizing the importance of genetic resources to food security, public health, biodiversity conservation, and the mitigation of and adaptation to climate change,

Recognizing the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions,

Recognizing the interdependence of all countries with regard to genetic resources for food and agriculture as well as their special nature and importance for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change and acknowledging the fundamental role of the International Treaty on Plant Genetic Resources for Food and Agriculture and the FAO Commission on Genetic Resources for Food and Agriculture in this regard,

Mindful of the International Health Regulations (2005) of the World Health Organization and the importance of ensuring access to human pathogens for public health preparedness and response purposes,

Acknowledging ongoing work in other international forums relating to access and benefit-sharing,

Recalling the Multilateral System of Access and Benefit-sharing established under the International Treaty on Plant Genetic Resources for Food and Agriculture developed in harmony with the Convention,

Recognizing that international instruments related to access and benefit-sharing should be mutually supportive with a view to achieving the objectives of the Convention,

Recalling the relevance of Article 8(j) of the Convention as it relates to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge,

Noting the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities,

Recognizing the diversity of circumstances in which traditional knowledge associated with genetic resources is held or owned by indigenous and local communities,

Mindful that it is the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities,

Further recognizing the unique circumstances where traditional knowledge associated with genetic resources is held in countries, which may be oral, documented or in other forms, reflecting a rich cultural heritage relevant for conservation and sustainable use of biological diversity,

Noting the United Nations Declaration on the Rights of Indigenous Peoples, and

Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities,

Have agreed as follows:

Article 1. Objective

The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

Article 2. Use of Terms

The terms defined in Article 2 of the Convention shall apply to this Protocol. In addition, for the purposes of this Protocol:

(a) "Conference of the Parties" means the Conference of the Parties to the Convention;

(b) "Convention" means the Convention on Biological Diversity;

(c) "Utilization of genetic resources" means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention;

(d) "Biotechnology" as defined in Article 2 of the Convention means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use;

(e) "Derivative" means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

Article 3. Scope

This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources. This Protocol shall also apply to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.

Article 4. Relationship with International Agreements and Instruments

1. The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.
2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.
3. This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.

4. This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.

Article 5. Fair and Equitable Benefit-sharing

1. In accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms.
2. Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.
3. To implement paragraph 1 above, each Party shall take legislative, administrative or policy measures, as appropriate.
4. Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex.
5. Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.

Article 6. Access to Genetic Resources

1. In the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.
2. In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.
3. Pursuant to paragraph 1 above, each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:
   (a) Provide for legal certainty, clarity and transparency of their domestic access and benefit-sharing legislation or regulatory requirements;
   (b) Provide for fair and non-arbitrary rules and procedures on accessing genetic resources;
   (c) Provide information on how to apply for prior informed consent;
   (d) Provide for a clear and transparent written decision by a competent national authority, in a cost-effective manner and within a reasonable period of time;
   (e) Provide for the issuance at the time of access of a permit or its equivalent as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms, and notify the Access and Benefit-sharing Clearing-House accordingly;
   (f) Where applicable, and subject to domestic legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources; and
   (g) Establish clear rules and procedures for requiring and establishing mutually agreed terms. Such terms shall be set out in writing and may include, *inter alia*:
      (i) A dispute settlement clause;
      (ii) Terms on benefit-sharing, including in relation to intellectual property rights;
      (iii) Terms on subsequent third-party use, if any; and
      (iv) Terms on changes of intent, where applicable.

Article 7. Access to Traditional Knowledge Associated with Genetic Resources

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

Article 8. Special Considerations

In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall:

(a) Create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research;

(b) Pay due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally. Parties may take into consideration the need for expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries;

(c) Consider the importance of genetic resources for food and agriculture and their special role for food security.

Article 9. Contribution to Conservation and Sustainable Use

The Parties shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components.

Article 10. Global Multilateral Benefit-sharing Mechanism

Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.

Article 11. Transboundary Cooperation

1. In instances where the same genetic resources are found *in situ* within the territory of more than one Party, those Parties shall endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this Protocol.
2. Where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties, those Parties shall endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objective of this Protocol.

Article 12. Traditional Knowledge Associated with Genetic Resources

1. In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.
2. Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.
3. Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:
   (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;

(b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and
(c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.

4. Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.

Article 13. National Focal Points and Competent National Authorities

1. Each Party shall designate a national focal point on access and benefit-sharing. The national focal point shall make information available as follows:
(a) For applicants seeking access to genetic resources, information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing;
(b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of indigenous and local communities and establishing mutually agreed terms including benefit-sharing; and
(c) Information on competent national authorities, relevant indigenous and local communities and relevant stakeholders.
The national focal point shall be responsible for liaison with the Secretariat.
2. Each Party shall designate one or more competent national authorities on access and benefit-sharing. Competent national authorities shall, in accordance with applicable national legislative, administrative or policy measures, be responsible for granting access or, as applicable, issuing written evidence that access requirements have been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.
3. A Party may designate a single entity to fulfil the functions of both focal point and competent national authority.
4. Each Party shall, no later than the date of entry into force of this Protocol for it, notify the Secretariat of the contact information of its national focal point and its competent national authority or authorities. Where a Party designates more than one competent national authority, it shall convey to the Secretariat, with its notification thereof, relevant information on the respective responsibilities of those authorities. Where applicable, such information shall, at a minimum, specify which competent authority is responsible for the genetic resources sought. Each Party shall forthwith notify the Secretariat of any changes in the designation of its national focal point or in the contact information or responsibilities of its competent national authority or authorities.
5. The Secretariat shall make information received pursuant to paragraph 4 above available through the Access and Benefit-sharing Clearing-House.

Article 14. The Access and Benefit-sharing Clearing-House and Information Sharing

1. An Access and Benefit-sharing Clearing-House is hereby established as part of the clearing-house mechanism under Article 18, paragraph 3, of the Convention. It shall serve as a means for sharing of information related to access and benefit-sharing. In particular, it shall provide access to information made available by each Party relevant to the implementation of this Protocol.
2. Without prejudice to the protection of confidential information, each Party shall make available to the Access and Benefit-sharing Clearing-House any information required by this Protocol, as well as information required pursuant to the decisions taken by the Conference of the Parties serving as the meeting of the Parties to this Protocol. The information shall include:
(a) Legislative, administrative and policy measures on access and benefit-sharing;
(b) Information on the national focal point and competent national authority or authorities; and
(c) Permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.
3. Additional information, if available and as appropriate, may include:
(a) Relevant competent authorities of indigenous and local communities, and information as so decided;
(b) Model contractual clauses;
(c) Methods and tools developed to monitor genetic resources; and
(d) Codes of conduct and best practices.

4. The modalities of the operation of the Access and Benefit-sharing Clearing-House, including reports on its activities, shall be considered and decided upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first meeting, and kept under review thereafter.

Article 15. Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-sharing

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.
2. Parties shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.
3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.

Article 16. Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-sharing for Traditional Knowledge Associated with Genetic Resources

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.
2. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.
3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.

Article 17. Monitoring the Utilization of Genetic Resources

1. To support compliance, each Party shall take measures, as appropriate, to monitor and to enhance transparency about the utilization of genetic resources. Such measures shall include:
   (a) The designation of one or more checkpoints, as follows:
      (i) Designated checkpoints would collect or receive, as appropriate, relevant information related to prior informed consent, to the source of the genetic resource, to the establishment of mutually agreed terms, and/or to the utilization of genetic resources, as appropriate;
      (ii) Each Party shall, as appropriate and depending on the particular characteristics of a designated checkpoint, require users of genetic resources to provide the information specified in the above paragraph at a designated checkpoint. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance;
      (iii) Such information, including from internationally recognized certificates of compliance where they are available, will, without prejudice to the protection of confidential information, be provided to relevant national authorities, to the Party providing prior informed consent and to the Access and Benefit-sharing Clearing-House, as appropriate;
      (iv) Checkpoints must be effective and should have functions relevant to implementation of this subparagraph (a). They should be relevant to the utilization of genetic resources, or to the collection of relevant information at, *inter alia*, any stage of research, development, innovation, pre-commercialization or commercialization.
   (b) Encouraging users and providers of genetic resources to include provisions in mutually agreed terms to share information on the implementation of such terms, including through reporting requirements; and
   (c) Encouraging the use of cost-effective communication tools and systems.
2. A permit or its equivalent issued in accordance with Article 6, paragraph 3 (e) and made available to the Access and Benefit-sharing Clearing-House, shall constitute an internationally recognized certificate of compliance.
3. An internationally recognized certificate of compliance shall serve as evidence that the genetic resource which it covers has been accessed in accordance with prior informed consent and that mutually agreed

terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the Party providing prior informed consent.

4. The internationally recognized certificate of compliance shall contain the following minimum information when it is not confidential:
   (a) Issuing authority;
   (b) Date of issuance;
   (c) The provider;
   (d) Unique identifier of the certificate;
   (e) The person or entity to whom prior informed consent was granted;
   (f) Subject-matter or genetic resources covered by the certificate;
   (g) Confirmation that mutually agreed terms were established;
   (h) Confirmation that prior informed consent was obtained; and
   (i) Commercial and/or non-commercial use.

Article 18. Compliance with Mutually Agreed Terms

1. In the implementation of Article 6, paragraph 3 (g) (i) and Article 7, each Party shall encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:
   (a) The jurisdiction to which they will subject any dispute resolution processes;
   (b) The applicable law; and/or
   (c) Options for alternative dispute resolution, such as mediation or arbitration.
2. Each Party shall ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms.
3. Each Party shall take effective measures, as appropriate, regarding:
   (a) Access to justice; and
   (b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.
4. The effectiveness of this article shall be reviewed by the Conference of the Parties serving as the meeting of the Parties to this Protocol in accordance with Article 31 of this Protocol.

Article 19. Model Contractual Clauses

1. Each Party shall encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for mutually agreed terms.
2. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically take stock of the use of sectoral and cross-sectoral model contractual clauses.

Article 20. Codes of Conduct, Guidelines, and Best Practices and/or Standards

1. Each Party shall encourage, as appropriate, the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing.
2. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically take stock of the use of voluntary codes of conduct, guidelines and best practices and/or standards and consider the adoption of specific codes of conduct, guidelines and best practices and/or standards.

Article 21. Awareness-raising

Each Party shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. Such measures may include, *inter alia*:

(a) Promotion of this Protocol, including its objective;
(b) Organization of meetings of indigenous and local communities and relevant stakeholders;
(c) Establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders;
(d) Information dissemination through a national clearing-house;
(e) Promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders;

(f) Promotion of, as appropriate, domestic, regional and international exchanges of experience;
(g) Education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit-sharing obligations;
(h) Involvement of indigenous and local communities and relevant stakeholders in the implementation of this Protocol; and
(i) Awareness-raising of community protocols and procedures of indigenous and local communities.

Article 22. Capacity

1. The Parties shall cooperate in the capacity-building, capacity development and strengthening of human resources and institutional capacities to effectively implement this Protocol in developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition, including through existing global, regional, subregional and national institutions and organizations. In this context, Parties should facilitate the involvement of indigenous and local communities and relevant stakeholders, including non-governmental organizations and the private sector.
2. The need of developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition for financial resources in accordance with the relevant provisions of the Convention shall be taken fully into account for capacity-building and development to implement this Protocol.
3. As a basis for appropriate measures in relation to the implementation of this Protocol, developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition should identify their national capacity needs and priorities through national capacity self-assessments. In doing so, such Parties should support the capacity needs and priorities of indigenous and local communities and relevant stakeholders, as identified by them, emphasizing the capacity needs and priorities of women.
4. In support of the implementation of this Protocol, capacity-building and development may address, *inter alia*, the following key areas:
   (a) Capacity to implement, and to comply with the obligations of, this Protocol;
   (b) Capacity to negotiate mutually agreed terms;
   (c) Capacity to develop, implement and enforce domestic legislative, administrative or policy measures on access and benefit-sharing; and
   (d) Capacity of countries to develop their endogenous research capabilities to add value to their own genetic resources.
5. Measures in accordance with paragraphs 1 to 4 above may include, *inter alia*:
   (a) Legal and institutional development;
   (b) Promotion of equity and fairness in negotiations, such as training to negotiate mutually agreed terms;
   (c) The monitoring and enforcement of compliance;
   (d) Employment of best available communication tools and Internet-based systems for access and benefit-sharing activities;
   (e) Development and use of valuation methods;
   (f) Bioprospecting, associated research and taxonomic studies;
   (g) Technology transfer, and infrastructure and technical capacity to make such technology transfer sustainable;
   (h) Enhancement of the contribution of access and benefit-sharing activities to the conservation of biological diversity and the sustainable use of its components;
   (i) Special measures to increase the capacity of relevant stakeholders in relation to access and benefit-sharing; and
   (j) Special measures to increase the capacity of indigenous and local communities with emphasis on enhancing the capacity of women within those communities in relation to access to genetic resources and/or traditional knowledge associated with genetic resources.
6. Information on capacity-building and development initiatives at national, regional and international levels, undertaken in accordance with paragraphs 1 to 5 above, should be provided to the Access and Benefit-sharing Clearing-House with a view to promoting synergy and coordination on capacity-building and development for access and benefit-sharing.

Article 23. Technology Transfer, Collaboration and Cooperation

In accordance with Articles 15, 16, 18 and 19 of the Convention, the Parties shall collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities,

as a means to achieve the objective of this Protocol. The Parties undertake to promote and encourage access to technology by, and transfer of technology to, developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition, in order to enable the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the Convention and this Protocol. Where possible and appropriate such collaborative activities shall take place in and with a Party or the Parties providing genetic resources that is the country or are the countries of origin of such resources or a Party or Parties that have acquired the genetic resources in accordance with the Convention.

Article 24. Non-Parties

The Parties shall encourage non-Parties to adhere to this Protocol and to contribute appropriate information to the Access and Benefit-sharing Clearing-House.

Article 25. Financial Mechanism and Resources

1. In considering financial resources for the implementation of this Protocol, the Parties shall take into account the provisions of Article 20 of the Convention.
2. The financial mechanism of the Convention shall be the financial mechanism for this Protocol.
3. Regarding the capacity-building and development referred to in Article 22 of this Protocol, the Conference of the Parties serving as the meeting of the Parties to this Protocol, in providing guidance with respect to the financial mechanism referred to in paragraph 2 above, for consideration by the Conference of the Parties, shall take into account the need of developing country Parties, in particular the least developed countries and small island developing States among them, and of Parties with economies in transition, for financial resources, as well as the capacity needs and priorities of indigenous and local communities, including women within these communities.
4. In the context of paragraph 1 above, the Parties shall also take into account the needs of the developing country Parties, in particular the least developed countries and small island developing States among them, and of the Parties with economies in transition, in their efforts to identify and implement their capacity-building and development requirements for the purposes of the implementation of this Protocol.
5. The guidance to the financial mechanism of the Convention in relevant decisions of the Conference of the Parties, including those agreed before the adoption of this Protocol, shall apply, *mutatis mutandis*, to the provisions of this Article.
6. The developed country Parties may also provide, and the developing country Parties and the Parties with economies in transition avail themselves of, financial and other resources for the implementation of the provisions of this Protocol through bilateral, regional and multilateral channels.

Article 26. Conference of the Parties Serving as the Meeting of the Parties to this Protocol

1. The Conference of the Parties shall serve as the meeting of the Parties to this Protocol.
2. Parties to the Convention that are not Parties to this Protocol may participate as observers in the proceedings of any meeting of the Conference of the Parties serving as the meeting of the Parties to this Protocol. When the Conference of the Parties serves as the meeting of the Parties to this Protocol, decisions under this Protocol shall be taken only by those that are Parties to it.
3. When the Conference of the Parties serves as the meeting of the Parties to this Protocol, any member of the Bureau of the Conference of the Parties representing a Party to the Convention but, at that time, not a Party to this Protocol, shall be substituted by a member to be elected by and from among the Parties to this Protocol.
4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Protocol and shall:
   (a) Make recommendations on any matters necessary for the implementation of this Protocol;
   (b) Establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol;
   (c) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies;
   (d) Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 29 of this Protocol and consider such information as well as reports submitted by any subsidiary body;

(e) Consider and adopt, as required, amendments to this Protocol and its Annex, as well as any additional annexes to this Protocol, that are deemed necessary for the implementation of this Protocol; and
(f) Exercise such other functions as may be required for the implementation of this Protocol.

5. The rules of procedure of the Conference of the Parties and financial rules of the Convention shall be applied, *mutatis mutandis*, under this Protocol, except as may be otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Protocol.
6. The first meeting of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be convened by the Secretariat and held concurrently with the first meeting of the Conference of the Parties that is scheduled after the date of the entry into force of this Protocol. Subsequent ordinary meetings of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held concurrently with ordinary meetings of the Conference of the Parties, unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Protocol.
7. Extraordinary meetings of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held at such other times as may be deemed necessary by the Conference of the Parties serving as the meeting of the Parties to this Protocol, or at the written request of any Party, provided that, within six months of the request being communicated to the Parties by the Secretariat, it is supported by at least one third of the Parties.
8. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not party to the Convention, may be represented as observers at meetings of the Conference of the Parties serving as the meeting of the Parties to this Protocol. Any body or agency, whether national or international, governmental or non-governmental, that is qualified in matters covered by this Protocol and that has informed the Secretariat of its wish to be represented at a meeting of the Conference of the Parties serving as a meeting of the Parties to this Protocol as an observer, may be so admitted, unless at least one third of the Parties present object. Except as otherwise provided in this Article, the admission and participation of observers shall be subject to the rules of procedure, as referred to in paragraph 5 above.

Article 27. Subsidiary Bodies

1. Any subsidiary body established by or under the Convention may serve this Protocol, including upon a decision of the Conference of the Parties serving as the meeting of the Parties to this Protocol. Any such decision shall specify the tasks to be undertaken.
2. Parties to the Convention that are not Parties to this Protocol may participate as observers in the proceedings of any meeting of any such subsidiary bodies. When a subsidiary body of the Convention serves as a subsidiary body to this Protocol, decisions under this Protocol shall be taken only by Parties to this Protocol.
3. When a subsidiary body of the Convention exercises its functions with regard to matters concerning this Protocol, any member of the bureau of that subsidiary body representing a Party to the Convention but, at that time, not a Party to this Protocol, shall be substituted by a member to be elected by and from among the Parties to this Protocol.

Article 28. Secretariat

1. The Secretariat established by Article 24 of the Convention shall serve as the secretariat to this Protocol.
2. Article 24, paragraph 1, of the Convention on the functions of the Secretariat shall apply, *mutatis mutandis*, to this Protocol.
3. To the extent that they are distinct, the costs of the secretariat services for this Protocol shall be met by the Parties hereto. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, decide on the necessary budgetary arrangements to this end.

Article 29. Monitoring and Reporting

Each Party shall monitor the implementation of its obligations under this Protocol, and shall, at intervals and in the format to be determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, report to the Conference of the Parties serving as the meeting of the Parties to this Protocol on measures that it has taken to implement this Protocol.

Article 30. Procedures and Mechanisms to Promote Compliance with this Protocol

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms under Article 27 of the Convention.

Article 31. Assessment and Review

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, four years after the entry into force of this Protocol and thereafter at intervals determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, an evaluation of the effectiveness of this Protocol.

Article 32. Signature

This Protocol shall be open for signature by Parties to the Convention at the United Nations Headquarters in New York, from 2 February 2011 to 1 February 2012.

Article 33. Entry Into Force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention.
2. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after the deposit of the fiftieth instrument as referred to in paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later.
3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article 34. Reservations

No reservations may be made to this Protocol.

Article 35. Withdrawal

1. At any time after two years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.

Article 36. Authentic Text

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Protocol on the dates indicated.

DONE at Nagoya on this twenty-ninth day of October, two thousand and ten.

Annex. Monetary and Non-monetary Benefits

1. Monetary benefits may include, but not be limited to:
   (a) Access fees/fee per sample collected or otherwise acquired;

(b) Up-front payments;
(c) Milestone payments;
(d) Payment of royalties;
(e) Licence fees in case of commercialization;
(f) Special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;
(g) Salaries and preferential terms where mutually agreed;
(h) Research funding;
(i) Joint ventures;
(j) Joint ownership of relevant intellectual property rights.

2. Non-monetary benefits may include, but not be limited to:
(a) Sharing of research and development results;
(b) Collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the Party providing genetic resources;
(c) Participation in product development;
(d) Collaboration, cooperation and contribution in education and training;
(e) Admittance to *ex situ* facilities of genetic resources and to databases;
(f) Transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;
(g) Strengthening capacities for technology transfer;
(h) Institutional capacity-building;
(i) Human and material resources to strengthen the capacities for the administration and enforcement of access regulations;
(j) Training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries;
(k) Access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;
(l) Contributions to the local economy;
(m) Research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources;
(n) Institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities;
(o) Food and livelihood security benefits;
(p) Social recognition;
(q) Joint ownership of relevant intellectual property rights.

Almost six years of negotiations held under the aegis of the United Nations Convention on Biological Diversity (CBD) culminated in the adoption in Nagoya, Japan in October 2010 of an international treaty that seeks to prevent biopiracy, or the misappropriation of genetic resources and associated traditional knowledge of indigenous peoples and local communities.

A compilation of articles from Third World Network publications, *The Road to an Anti-Biopiracy Agreement* follows the difficult progress of the CBD negotiations, which were riven by major differences among countries that are CBD Parties over ways to regulate access to genetic resources and ensure the fair and equitable distribution of benefits stemming from their use. This updated second edition contains reports on the decisive round of talks in Nagoya which finally approved the Nagoya Protocol on access and benefit-sharing. Also included are some preliminary analyses of the Protocol and the extent to which it can effectively combat the serious threat of biopiracy.

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