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WHITHER THE CONVENTION ON
BIOLOGICAL DIVERSITY?

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1

INTRODUCTION

When the Brazilian Minister for Environment Ms. Marina Silva gavelled the hammer at 1.10 a.m. in the wee hours of Saturday the 1 April 2006 at the Conference of Parties (CoP) meeting of Convention on Biological Diversity (CBD) at Curitiba, Brazil, it marked the beginning of a new era in the life of this convention. The CBD convention, which like many other conventions was conceived during the Earth Summit in 1992 and had not delivered much during its fourteen years existence, was showing some signs of virility and potency.

2

THE CURITIBA CALL

The CBD parties had assembled at the 8th CoP meeting to give shape to an International Regime on Access and Benefit Sharing (ABS), which is a concept cardinal to this convention. The developing countries have been clamoring for such a regime for a long time and a consensus was reached to have an international regime during the Kuala Lumpur meeting of CoP-7 in 2004.¹ The journey to this consensus has been an arduous one and not without acrimonious debate between developed and developing countries. Prior to this consensus, Parties had agreed in CoP-6 meeting in 2002 at Hague to try out Bonn guidelines which were voluntary in nature and called upon the Parties to develop their own legislative or other measures to regulate access to their biological resources and to ensure sharing of benefit arising out of the use of biological resources. It was generally felt by the developed countries that it was an easy way for Governments (of provider countries) to protect genetic resources. They can adopt national laws that delineate property rights to genetic resources and traditional knowledge and set rules on transfer of those rights.²

1 Decision VII/19 of 7th meeting of Conference of Parties of Convention on Biological Diversity, 2004.

2 Alen Oxley, *Retarding Development – Compulsory Disclosure in IP Law of Ownership and Use of Biological or Genetic Resources* (Melbourne: Australian Asia Pacific Economic Cooperation (APEC) Study Centre, 2006) available at <http://www.apec.org.au/authors2.asp?author-id=5>.

The fact that the Bonn guidelines were not uniformly owned by the North-South blocks was explicitly clear from the fact that even after the 2004 CoP-7 decision, the developed and the developing countries continued to defer on the sufficiency and adequacy of Bonn guidelines. While the developed countries continued to harp on the desirability of Bonn guidelines being first implemented by the developing countries, the Southern block steadfastly and categorically questioned Bonn guidelines and kept demanding an international regime on ABS. Also, even after two years of the decision, most of the countries, developed and developing alike, could not make much headway and could not even take initial steps for the formulation of their respective national legislation. Only two developed countries namely Switzerland and Australia and a few developing countries like Philippines, India, Brazil, and South Africa etc. could come out with either an act or guidelines on the subject.³ As a reason for this inaction, the developing countries expressed lack of capacity as the limiting factor but the developed countries could not cite any cogent reason for not being able to bring such a legislation. This resulted into all the efforts gone in to the framing of Bonn guidelines going waste and the developing countries were back on their usual rhetoric demanding an International Regime. During the CoP-7 meeting, in which the Working Group-II dealing with the ABS issue was Chaired by the author of this article, one could recollect countries after countries from the South taking on the North Block countries chiding them for not coming out with their national legislation on ABS. This eventually resulted into the famous CoP-7 decision of Kuala Lumpur to agree in principle on the need of an International Regime on Access and Benefit Sharing and start negotiation on its elements.⁴

3

BONN GUIDELINES VERSUS INTERNATIONAL REGIME

The demonstrated positions of both the blocks notwithstanding, advantages of an international regime

3 For details see Carlos M. Correa, *Implication of National Access Legislation for Germplasm Flows* (Rome: Global Forum Agricultural Research (GFAR), Doc. No. GFAR/00/17-04-01) available at <http://www.egfar.org/jsp/result.jsp?maxresults=20&query=carlos+correa>.

4 See Decision VII/19, note 1 above.

over the Bonn guidelines should not be lost to either the developing countries or developed countries. Irrespective of the fact that the national legislations alone may be competent to regulate access and ensure benefit sharing for the communities of the country concerned, harmonisation of national legislation of different countries is entirely necessary and a pre-requisite for the smooth conduct of business among different countries. The differences in the provisions of national legislation of provider countries are bound to be counter productive and not- easy- to- use for, more than the developing countries, the developed countries themselves. A developed country desirous of using bio-resources of different countries for their research and development purposes and subsequent commercialisation may find it difficult to deal with different legislations and different regulatory authorities of the provider countries. It is another matter that CoP-6 provided for generous support to the developing countries through its financial mechanism, that is, Global Environment Facility (GEF) to develop their national legislations. This, if used effectively, could have definitely helped in harmonisation of some procedural provisions, but the hard content of the legislation and the enforcement of provisions could have still remained country centric and nationalistic.

Further, the access, which is primary concern of the developed and technology rich countries, can not be smooth and facilitated unless the provisions for access are negotiated provisions between the providers and the users. It is from these perspectives that the international regime becomes a necessity to form as a proper tool of equity and fair play between developed and developing countries.

4 ACCESS

The access, which undeniably should be facilitated, would, it seems, need to have following necessary ingredients:

- It should be only up to the sustainable level and not at exploitative level;

- It should be accompanied by benefits either monetary or non-monetary (in the nature of technology transfer, etc.) or both.

Here could arise the question of defining the sustainable level, for which once again the trust will have to be placed in the provider countries. The provider countries, depending on the endemism, level of availability - near extinct, threatened or endangered or abundantly available, geographic distribution and several socio economic factors would decide as to what should be the sustainable level for each of the species. The levels will vary from sub-state to sub-state, from region to region and from one eco-system to another. The developed and the developing countries need to come to some agreement for defining guidelines to decide the sustainable level but, as has been said earlier, the provider countries will always have a final say in this.

The bigger challenge, however, is before the provider countries - the mega diverse and other developing countries, in terms of defining the parameters of benefit sharing. In this, there are two major problems which are likely to be faced, one the benefits could be so distinguished from time of access both in terms of time and space that it may be very difficult to fair guess the benefit at the time of access. Most of the research on the biological resources has been protracted and time consuming. Many times by the time a lead is obtained or pharmaceutical product is finally developed, the provider of bio-resources or the traditional knowledge may have either gone into oblivion or changed their vectors making it difficult to identify and locate them.

And then there is problem of quantification of benefit. The benefit may, because of time, space and distance constraints, be difficult to measure and quantify. This is one reason why many developing countries have opposed the proposition of the companies in the developed countries trying to negotiate directly with the communities in the provider country. They apprehend that due to the vast differences in the capacities of comprehension and visualisation of the benefits between the two parties such as bio-resource user company and bio-resource provider community the benefit sharing agreement could be eschewed and iniquitous.

The parties and the group of the countries negotiating International Regime on ABS will have to grapple with these issues before they could actually give a shape to the regime in flesh and blood.

5

BENEFIT SHARING

Once these matters are settled, the second part of the task would be equitable benefit sharing. Even this may not be easy, if not impossible.

For the developing countries, the pangs of birth of the newly conceived instrument are severe and painstaking. In their euphoria of newly acquired sovereign rights over the natural resources, these countries have chosen to avoid some of the difficult questions that they would have to face either today or tomorrow. Some of the questions that surround the concept of equitable benefit sharing and are relevant only to the developing countries are as follows:

- If all the developing countries especially those which are endemic for one particular type of species do not come out with their respective national legislations together during, by and large, the same period, it would provide a lever in the hands of user country to make preferential choices and play one provider country against the other. They would most likely access the biological resources from a country which still does not have an access legislation or has a more laidback and relaxed legislation in comparison to a country which has a strict, restrictive and demanding legislation. This in a way, may defeat the very purpose of benefit sharing concept and may undermine the spirit of 'sovereign right of states over their natural resource', a right rightfully conferred by CBD;⁵
- The gains of benefit sharing would also be impaired or unjustly distributed if there are huge differences in the access fee or benefit sharing formulae in the legislations of countries possessing a particular plant or species;
- Yet another contentious issue that remains to be settled is that of debate over country of origin and country providing genetic resources. During the CoP-8 meeting of CBD at Curitiba, Brazil, it was widely rumoured that the mega diverse countries have fallen apart on among many other issues, the issues surrounding country of origin and country of source. Most of the developing countries have been insisting about including the provision for disclosure of the country of origin in the patent application.⁶ However, the industry feels that the notions of 'origin' or 'country of origin' are far more obscure in their implied criteria. Even if the criteria are clarified, the relevant facts may well be impossible to ascertain with any degree of certainty in many circumstances.⁷ It has also been argued that the 'advocates of disclosure of origin have not made a convincing case that disclosure of origin will do anything to improve the social and economic conditions of developing countries or of their indigenous peoples. If it is merely a moral issue rather than an economic one, then this should be made clear';⁸
- The developing countries are also not on consensus as to whether the International Regime should be legally binding or non-binding or both. While most of the developing countries favour a legally binding regime, China has not been very enthusiastic about it and has suggested a cautious approach. A compromise, therefore, was reached in the mega diverse countries meeting held at Delhi in January 2005 that the regime could be legally binding and non-binding. The same approach was taken by the mega diverse

5 Convention on Biological Diversity, 1992, Article 3 and *see* International Chamber of Commerce, Access and Benefit Sharing: Special Disclosure Requirements in Patent Applications (Paris: International Chamber of Commerce, 25 May 2005) available at <http://www.icc.se/policy/statements/statements.htm>.

6 Brazil, South Africa and India's position in CBD and World Intellectual Property Organisation forum. For more details *see* Biswajeet Dhar, Multilateral Environment Agreements and the WTO Regime in the Doha Round (Delhi: Research and Information System for Developing Countries, December 2005).

7 *See* International Chamber of Commerce, note 5 above.

8 Graham Dutfield, Dialogue on Disclosure Requirements: Incorporating the CBD Principles in the TRIPS Agreement on the Road to Hong Kong WTO Public Symposium (Geneva: ICTSD/CIEL/IDDR/IUCN/QUNO, 21 April 2005).

countries in the first Ad-hoc Working Group meeting in Bangkok in February 2005 and the same was reflected in the text which was adopted by the Working Group. What it means is that some elements of the regime could be non binding while the core could be legally binding what remains to be decided is what would be the core and what would be the non core components. For, if most of it is going to be non-binding, the question would arise as what was the need for an International Regime as it might be argued, that 'there is already a form of international regime set out in the non-binding' Bonn guidelines on Access and Benefit Sharing of genetic Resources which have been developed by the CBD;⁹

- Then, there is an issue of sharing of benefits within the country when a biological resource or a traditional knowledge is held by more than one communities residing in one region or many other regions. Once the benefit is received by the developing / providing countries from a developed / user countries, the former may find it difficult to decide as to how this benefit would then be shared between the different communities;
- In respect of traditional knowledge, the problem is even more acute. The traditional knowledge by their very nature is in public domain and therefore, there could be many claimants for the ownership of a particular traditional knowledge. Further, as these traditional knowledge have generally evolved out of different uses of the biological resources, the same may be held by communities of different countries in the same eco-region. For example, Latin American countries, countries in the African Sub-Continent and countries like Pakistan, India, Bangladesh and China falling in the same eco-region share lot of biodiversity and consequently lot of traditional knowledge as well. Once the money starts flowing, sometimes substantial, out of the benefit sharing arrangement, such problems will crop up and would need immediate solutions.

6 THE ROAD AHEAD

The developing countries have so far chosen not to address these issues for, they understand the chink that these awkward questions can bring in their unity. However, these questions would need to be addressed sooner than later. Not that the answers to these questions do not exist. They exist but need to be explored. The developing countries need to find a mechanism both logistical and financial, to settle these issues. They will have to set up a forum where solutions to these questions could be invented and worked upon. In this respect, the CoP meeting at Curitiba, Brazil nominated two permanent co-chairs for the Adhoc Working Group on ABS who would, during the inter-sessional period, work upon the modalities of defining the contours of this international regime and try to arrive at an agreement between the developing and the developed countries. The two co-chairs representing the developed and developing countries respectively are Tim Hodges from Canada and Fernando Casas from Colombia. As a first step, Fernando has been trying to get a consensus between the developing countries and then he would pose this consensus to Tim for a broader agreement with developed countries. The first meeting of some of the key players among the developing countries was recently convened by Fernando at Kuala Lumpur on 12 and 13 August 2006. The Third World Network, Malaysia provided the right setting for this meeting apart from the generous financial support. However, it does not appear that much ground could be covered in this meeting. It is quite unlikely that the meetings of one or two days' durations would be able to settle these vexed issues and they would probably need to work more electronically and through e-conferences. What is obvious is that they cannot postpone addressing these questions any longer and will have to find the answers to the questions much sooner and in any case before 2010. The target year for reducing the rate of loss of biodiversity as fixed by World Summit on Sustainable Development (WSSD) is 2010 and so is the target for the finalisation of International Regime of Access in Benefit Sharing under CBD. Many would therefore, be watching arrival of the year 2010 with great anticipation and apprehension.

⁹ See Oxley, note 2 above.

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