

Position Paper on Access to Genetic Sources: Favoring who and what for?

The seeds, biotech and agribusiness industry requires access to. genetic and biochemical resources in order to develop their products. This industrial sector has successfully convinced governments to advocate their interests in international forums concerning access to genetic resources. Negotiations on this issue have thus gained momentum since 1999 within the Convention on Biological Diversity (CBD), which established an ad hoc Working Group on Access and Benefit Sharing (WG ABS). This group met in Costa Rica, Canada, Nigeria, Germany and The Netherlands. In 2002, it produced a set of voluntary guidelines (the Bonn Guidelines) on access and benefit sharing. These guidelines, which were adopted by the Conference of the Parties to the CBD, were seen by many as a legitimization of existing biopiracy practices.

Less than half a year later, the World Summit on Sustainable Development adopted a recommendation that an international regime on benefit sharing should be developed. An intersessional meeting under the CBD in March 2003, subsequently recommended that the same working group that had developed the above-mentioned voluntary guidelines, the WG ABS, was to further elaborate an international regime on *access and* benefit sharing (emphasis added).

The last meeting of the WG ABS took place in Canada in December 2003 and one of its main conclusions was to further elaborate the proposal for an international regime on access and benefit sharing. These negotiations are to be based on the CBD objective which states that there shall be fair and equitable sharing of the benefits arising out of 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.

Up to now, experience has demonstrated that while access has been greatly enhanced by those countries which in theory hold sovereign rights to those resources, in reality, fair and equitable benefit sharing is no more than an appealing concept that remainsmere illusion. Without the political will to implement it far less to enforce it, the world has witnessed little benefit sharing, while he subsequent rise in biopiracy at a global level has added to the mounting ecological debt that the North owes the South.

Access to genetic resources takes place within determined geographical territories where local communities and indigenous peoples have coexisted with nature in conditions favourable to the preservation and evolution of biodiversity. These local communities and indigenous peoples therefore have collective and historical rights to biodiversity based on their culture, tradition and practices and constitute third generation human rights. In theory, granting access to genetic resources should not only respect the collective rights to which the indigenous peoples and the local communities are entitled as the primary curators of biological diversity, but should also ensure fair and equitable benefit sharing derived from its use. However, these collective rights of solidarity do not constitute the right to property nor do they guarantee exclusive rights.

From the documents that formed the basis of the December 2003 discussions, together with the main conclusions reached by the working group at that meeting, it is clear that the proposed international regime on access and benefit sharing is unlikely to respect and build upon the above-mentioned collective rights. Instead, the recommendations of the WG ABS tend to legitimize the exclusive model, disrespectful of human rights, that has prevailed until now. This model allows

large biotechnology companies to "buy" the genetic resources and associated traditional knowledge of Indigenous Peoples and local communities and even patent those genes and knowledge, thus blocking the access of those communities to their own resources and knowledge. This model has not only lead to the privatization and commercialization of resources and knowledge which form part of the common heritage of communities and Peoples, it has also lead to a further marginalization of these communities. While some ABS agreements have been more unfair than others, it is rather naïve to imagine that a bilateral agreement between a multi-million biotechnology company and a small rural community will ever be fair and equitable.

Analyzing the recommendations that the December 2003 meeting produced, it is clear that the great majority of working group members still favors the above-mentioned model. To mention a few examples:

- The use of terms, definitions: The group discussed options to develop a glossary and/or definitions of concepts such as access to genetic resources, participation in benefits, commercialization, derivates, supplier, user, interested parties, ex situ collection and volunteer character. Unfortunately the indications are that these definitions may be formulated in a way that fails to respect fundamental collective rights to common resources, and instead legitimizes a system of privatization and commercialization of such resources and associated traditional knowledge. Such definitions would also prejudice the discussions on the desirability of an international regime.
- other approaches to access and benefit sharing. These additional approaches refer to regional juridical frameworks (such as the Andean Community of Nations Regime, and similar projects in Central America, Asia and Africa); to other international regimes (such as the FAO International Treaty on Plant Genetic Resources), as well as to some voluntary guidelines coming from institutions interested in being granted access, such as botanical gardens and other private enterprises. These additional approaches are seen as complementary to the Bonn guidelines and as tools that could help the CBD Parties and other interested parties with the implementation of the provisions on access to genetic sources and benefit sharing. However, all of these additional approaches explicitly or implicitly legitimize the primacy of intellectual property rights over life forms granted in treaties such as the WTO TRIPS Agreement, instead of calling this issue into question.
- ❖ Certificates of origin and other user measures. The international certificates of origin are an instrument that seeks to provide information about the origin of the genetic resources or the traditional knowledge to which access is being granted, ensuring prior informed consent. Whether this certificate should become a requirement for patenting, and whether it should be therefore subject to the rules of the WTO TRIPS Agreement is currently under discussion. Under this proposal the origin of traditional knowledge should be indicated. This also implies that, certain aspects and details of such knowledge that might be considered sacred for certain indigenous peoples could be made public. Moreover, such a clause would favor the commoditization of traditional knowledge and biological diversity given that it all revolves around the issue of patenting, which is in the end the key issue for those industries seeking access, These industries claim that they cannot invest unless they are guaranteed monopoly rights through intellectual property rights, but the crucial issue here is who will have control of genetic resources.
- ❖ Measures to promote prior informed consent. Prior informed consent has been presented as an instrument to enforce the rights to information and participation in decision making; however,, under the WG ABS proposals, prior informed consent is made subject to intellectual property rights, and there is no reference to existing mechanisms such as the consultations required pursuant to article VI of the International Labour Organisation's Convention (No. 169) concerning Indigenous and Tribal Peoples. Prior informed consent is an issue that needs to be discussed more thoroughly, particularly amongst indigenous peoples and local communities, so that they can conceptualize its meaning according to

their own cultural practices,. The procedure as proposed in the official documents legitimizes patenting practices, very much in the same manner as described above in relation to the certificate of origin. When an instrument designed to provide for the informed participation of local communities and indigenous peoples, is subordinated to the economic interests of private actors, it is clear who the real benefactors will be.

❖ Capacity building for the implementation of the Guidelines. Clearly, this programme element favors the flawed model of the Bonn Guidelines on Access and Benefit Sharing. As such, it facilitates biopiracy, instead of building countries' capacity to halt it.

Conclusions

The debate on access and benefit sharing should not be centered on whether to continue with the current situation of bilateral agreements guided by the voluntary Bonn guidelines, or to instead establish a legally binding international regime that builds upon these guidelines. Both the current situation and an international regime based on the Bonn Guidelines run counter to sustainability. They facilitate the missappropriation of biological diversity and associated traditional knowledge, either through patents or other intellectual property rights.

The proposed international regime will continue to promote biopiracy, an activity that violates the collective rights of Indigenous Peoples and local communities over biological diversity. It will be a tool for more injustice and inequity and for the increase of the ecological debt.

Friends of the Earth International questions any regime that is based on, or incorporates clauses such as those analyzed above, that favor intellectual property over life and associated knowledge and which weaken or undermine citizens' participation and community control over resources. We foresee a rapid escalation in the process of privatization of life and the commons if such a regime is established. Therefore we cannot accept it and we will fight against it.

We reaffirm our commitment to continue fighting:

- 1. against any new international regime that legitimizes biopiracy, patents on life and associated knowledge, and the privatization and commercialization of cultural and biological diversity;
- 2. against patents and other intellectual property rights and technologies that privatize biodiversity;
- 3. for community management and control over biodiversity;
- 4. for the construction and conceptualization of collective rights by local communities and Indigenous Peoples, whether or not such rights are recognized not by States;
- 5. for environmental justice for all:
- 6. for the recognition and repayment of the ecological debt that has been accumulated by centuries of biopiracy and other predatory practices.

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