Sprouting Up...

Biodiversity Convention to develop *"regime"* on benefit sharing

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After a decade of delaying tactics from developed countries, the Parties to the Convention on Biological Diversity (CBD) will now attempt to implement the CBD's nearly forgotten objective of benefit sharing. Until now, the CBD has done little to bring about a *"fair and equitable sharing of the benefits arising out of the utilisation of genetic resources"*. A set of non-binding recommendations, called the Bonn Guidelines, was adopted by the Parties two years ago. Strongly focused on best practices for bilateral contracts between bioprospectors and developing countries, these guidelines carefully avoid the political underpinnings of benefit sharing.

This is where the issue would probably have remained for quite some time, had it not been for the World Summit on Sustainable Development held in Johannesburg in 2002. One outcome of the Summit was an outright order to the CBD to get back to work and negotiate *"an international regime"* on benefit sharing. At the recent CBD Conference of Parties (COP7) in Kuala Lumpur, this process was formally set in motion. A negotiating mandate was adopted and two negotiating meetings are now scheduled to take place before COP8 in 2006. The work will mainly be done by the CBD's Working Group on Access and Benefit Sharing, but in *"collaboration"* with the Working Group on Article 8(j) and Related Provisions, which is the CBD body dealing with *"indigenous and local communities embodying traditional lifestyles"*.

So what will be the content of this *"regime"*? Most observers expect it establish some kind of legally binding obligation on those who benefit from commercialisation of biodiversity to share the wealth created. But not even this is certain, much less what the criteria would be or who would be entitled to benefits, or indeed what *"an international regime"* is supposed to mean. The terms of refer ence (ToR) are extremely vague, saying it *"could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures, legally-binding and/or non-binding"*. On content, the ToR are even more hazy. It only provides a long non-exhaustive list of things that could be covered by the negotiation.

Developing country governments that have been fighting for concrete returns on access to genetic resources in their territories see simply starting the initiation of this negotiating process as an important victory. The inclusion of the benefit sharing objective in the Convention itself was the main reason that they accepted to join it and take on considerable responsibility for conservation and sustainable use, the two other CBD objectives. The attitude of the rich countries, that benefit sharing is sufficiently taken care of by commercial contracts with their biotech companies, has been a growing source of tension in CBD meetings.

Much of the regime negotiation is therefore bound to develop into another North-South fight. A major point of contention is likely to be on rules for *disclosure of origin* in patent applications involving biological materials, something developing countries have been demanding for years in many international fora. One of the reasons why the North has so fiercely resisted this idea – aside from the obvious one: that it would limit the freedom of their companies to profit from biopiracy – has been that it would introduce a foreign issue into patent law, which patent offices are not equipped to handle. This objection might be eliminated by a technical solution which has gradually grown more popular among governments North and South. Many developing countries are now advocating a *"Certificate of Legal Provenance"*, which would certify not only origin but also compliance with any relevant access and benefit-sharing legislation, including prior informed consent. This would be a self-standing document, not something built into patent legislation, meaning that all patent examiners would need to do is check whether there is a valid certificate or not.

Will this regime deliver anything of value for farmers, indigenous peoples and all other real world custodians of biodiversity? This depends on whether governments can be forced to address one of the major shortcomings of the CBD: that it does not create any rights for those who manage and develop biological resources in fields and forests, only for the governments who hold *"national sovereignty"* over them. The regime could improve on the CBD by clarifying that benefit-sharing also involves obligations to respect and reward the actual custodians. But it could just as well make things worse by strengthening governments' rights to expropriate the value created by their citizens and sell it to the highest bidding transnational company.

Numerous indigenous peoples' organisations present in Kuala Lumpur stressed that any benefit sharing regime must recognise their right to self-determination and to their territories, their right to free and prior informed consent and the collective custodianship, governed by customary law, that they have over biodiversity today. Others were so wary that they argued for not supporting the negotiation process at all.

Unless the regime can help strengthen local – rather than national – control over biodiversity and traditional knowledge it will be a failure also in terms of the CBD's two other objectives. Neither conservation nor sustainable use will happen in a world where biological resources are managed to satisfy the combined greed of governments and corporations.

GRAIN is preparing an in-depth briefing on the current politics of access and benefit sharing, to be published shortly. The CBD's document outlining the proposal for the international regime, is available at: www.biodiv.org/doc/meetings/cop/cop-07/official/cop-07-l-28-en.pdf