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Nagoya Protocol: a milestone - but still far from the finish line to stop biopiracy

Chee Yoke Ling, Third World Network

The *Convention on Biological Diversity* does not have the means for tracking the utilization of genetic resources and for preventing biopiracy, and for making its third objective a reality. National legislation in provider countries is not enough without user countries also having rigorous laws and measures. Hence a dedicated protocol to the CBD was needed.

The *Nagoya Protocol* is the result of a lengthy negotiation process but the most crucial aspects were hammered out in October 2010 at COP10 in an unfortunate process of closed-door negotiations of a few Parties. Thus it is too vague or weak on key points, especially user measures.

The original idea was to have an internationally recognised certificate confirming compliance with prior informed consent and mutually agreed terms. This would be obligatory for patent applications and market approvals as a minimum. What we have now are inadequate requirements for the certificate, and no mandatory checkpoints such as patent offices. Parties have to designate at least one checkpoint and we heard some Parties say in the negotiations that a focal point in the ministry of environment would be sufficient!

There is no explicit obligation for Parties to sanction or penalise biopirates. Users' interests are protected with no obligation for crucial information to be made public and the scope and standard for protection of "*confidential information*" is unclear. Lack of transparency would make it hard to fight biopiracy.

The Protocol privileges users and user countries, and at the same time disadvantages provider and provider countries, which now have additional obligations on granting access, over and above the CBD. The Nagoya Protocol was supposed to implement benefit sharing but developed countries and industry demanded access as a *quid pro quo*.

There was progress on a more explicit treatment of the rights of indigenous peoples and local communities. However, this was not translated to concrete implementation in the compliance provisions of the Protocol. The Nagoya Protocol leaves it to national laws to determine those rights. Canada held on to the very last days before allowing a mere mention of the *UN Declaration on the Rights of Indigenous Peoples* in the preamble.

The impact of the Protocol on the fight against biopiracy and to ensure benefit sharing with provider countries and Indigenous and Local Communities (ILCs) to a large extent depends on a thorough implementation of well-designed user measures in user countries. Because the Protocol provides for minimum standards, the achievement of the ultimate objective of fair and equitable benefit sharing still depends on the political will and good faith of user countries. In this respect, the European Union legislation is very disappointing, and in crucial parts even against the Protocol.

Therefore, provider countries will need to have strong national *access and benefit sharing* (ABS) laws and clear measures when there is non-compliance. In this case - since the Protocol provides only for minimum standards - provider countries can take stronger action and close gaps in their national laws. For example, one CBD Party has already proposed that access applications can be rejected if there are no effective compliance systems in the user countries concerned.

A big gap in the Protocol is benefit sharing from publicly available traditional knowledge that is not held by ILCs. Countries such as China, India, Malaysia and Thailand worked hard to get this in the Protocol but in the final non-negotiated trade-off the operative provision was dropped. This unique body of knowledge, from which research and commercialisation of products are very

rampant, is acknowledged in the Protocol's preamble. Our research shows many cases of biopiracy of such traditional knowledge.

The Protocol requires new *Prior Informed Consent* (PIC) and *Mutually Agreed Terms* (MAT) when previously collected *ex situ* genetic resources are put to new use. This is positive.

Thus the Nagoya Protocol is a milestone rather than a finish line. There is still a lot of work to do, be it in na-

tional implementation or in the further development of international law. From an NGO perspective, the litmus test is what contributes to stop biopiracy and promote equity – and what does not.

For more details please see the background and analysis of the Nagoya Protocol by Berne Declaration, Bread for the World, ECOROPA, Tebtebba Foundation and Third World Network (available in English, Spanish and Chinese): www.twn.my

The Business Of Looking After Business Interests

Helena Paul, Econexus

Sunday 12th October marked the coming into force of the Nagoya Protocol. It also saw the beginning of an event called *Mainstreaming Biodiversity: Innovative Opportunities for Business*, organised for COP12 by the *Business and Biodiversity Forum*. For those who have had not had the time to realise it was happening: this consists of three days of events to 'help and encourage' businesses to engage with biodiversity, organised by the Secretariat.

It runs in parallel to the opening today of the first negotiations on the Nagoya Protocol. We already have a very crowded agenda at COP12, as everyone knows. Parties and civil society, especially those from the global south with few resources, are stretched between many obligations. But this is only one of the issues that trouble members of the CBD Alliance.

While everyone else has frozen in tents over the past days, except when in contact groups, people attending the business event have been able to meet in the convention centre itself, in very comfortable conditions. They have also been fed and watered extremely well. We wonder who is paying for all this: if the Secretariat, we are a bit puzzled about this use of resources, when apparently there is no funding, for example, for new secretariat positions. We would also like to ask why other observers have not been offered the opportunity to use the convention centre in view of the uncomfortable conditions in the tents.

Must we conclude that business has to be offered incentives to engage with biodiversity? Considering that more than one person attending the events stated that business really does not understand what biodiversity is, or why it is important, it seems likely that they do have to be persuaded to give it their attention. Unfortunately, as the *Global Biodiversity Outlook* among others makes clear, there is not much time left to take action to stem the loss of biodiversity. But instead we are told we must go for economic growth even though we know we are racing towards planetary boundaries. And in this vision of the world, biodiversity is reduced to *natural capital*, a term which of course is easier for business to understand.

We have to go beyond a situation where attention to biodiversity is merely an add-on, or a means to greenwash ever-accelerating exploitation. It is also questionable whether we can address the loss of biodiversity while we have our current development model in which economic interests always trump ecology, community and biodiversity.

Dodo Award

Each COP, Civil Society gives a very special prize to the one party which most contributes to blocking the process, denying social justice, or promoting extinction of species: the DODO award.

Throughout the week nominations for this award will be put forward, and the first nominations are:

Canada, Brazil, Australia & New Zealand for obstructing attempts to have an international, transparent, regulatory framework for synthetic biology;

EU for not recognizing the relevance of the *UN Declaration on the Rights of Indigenous Peoples* for the implementation of the Strategic Plan;

UK for obstructing action on synthetic biology within the EU delegation, in order to promote its aim to take a leading position in developing synthetic biology to promote economic growth.

Global Multilateral Benefit Sharing Mechanism still stuck at “need” debate

Edward Hammond, Prickly Research

Article 10 of the Nagoya Protocol states that “Parties shall consider the need for and modalities of” a GMBSM, which would provide for benefit sharing from use of genetic resources in cases where prior informed consent (PIC) and mutually agreed terms (MAT) were not possible.

For instance, if established, the GMBSM might be used in cases of new use of old botanical garden samples whose country of origin has been lost and can no longer be determined.

Article 10 is the result of a last-minute compromise between very few countries back in 2010. Africa was the strongest proponent of a GMBSM, which it sought as an integral part of the Protocol, while developed countries resisted. This resulted in the Article’s language to “consider the need for and modalities of” a GMBSM.

The non-negotiated Article effectively postponed resolution of the GMBSM discussion until after the Protocol’s adoption. Thus, the Pyeongchang INCP 3 in February 2014 was the first formal discussion.

A September 2013 expert meeting elaborated a list of items for further consideration. These included the important issues of genetic resources in ex situ collections (e.g. botanical gardens, herbaria, agricultural collections not covered by the Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture or ITPGRFA), genetic resources with associated traditional knowledge that is publicly available and for which PIC cannot be obtained, transboundary situations, genetic resources from Antarctica and those beyond any national jurisdiction.

Unfortunately most developed countries do not want to see progress in this issue. The European Union, Japan and Canada are prevaricating.

The Africa Group argues that the Protocol cannot be effectively implemented without a GMBSM. Africa’s view is that all utilization of genetic resources and associated traditional knowledge triggers a benefit sharing obliga-

tion, and that the GMBSM could receive a share in cases where PIC cannot be obtained.

India wants to see situations of ex situ collections and new use of genetic resources acquired before the Protocol to be addressed. Malaysia argues that it is “imperative that the user [of genetic resources] not escape from benefit sharing by claiming they couldn’t find the provider or get PIC.” A GMBSM is for cases where it is impossible to get PIC, where the provider of a genetic resource could not be identified. This was not a retroactive application of the Protocol, according to Malaysia, because the problem of genetic resources for which PIC cannot be obtained is not one that will cease to exist with the Protocol’s entry into force.

In the debate on a study to be commissioned by the CBD Secretariat, the Philippines proposed studying “applications and commercialization of genetic resources accessed from ex situ collections relevant to Article 10.” In considering experiences from other multilateral benefit sharing systems, the Philippines also asked for inclusion of the WHO Pandemic Influenza Preparedness Framework for the sharing of influenza viruses for sharing of vaccines and other benefits.

There being no consensus at the ICNP, a bracketed proposal is on the table for COP-MOP1 for a study to be conducted and an expert group to be held.

The draft decision on the study reads:

“... Requests the Executive Secretary to: [...]

(b) Commission a study [, subject to the availability of funds,] on: (i) the experiences gained with the development and implementation of the Nagoya Protocol and other multilateral mechanisms; and (ii) the potential relevance of ongoing work undertaken by other processes, including case studies in relation to ex situ and in situ genetic resources [as defined by Article 2 of the Convention on Biological Diversity, traditional knowledge associated with genetic resources, and transboundary situations.] ...”

Who is steering the bus?

Delegates to the CBD trust that chairs are impartial, will listen to all parties equally and will fully put aside national negotiating instructions when taking up the chairs role. This is particularly important if the very topic they are entrusted to lead is one that their country has been consistently hostile to even discussing.

While all this seems obvious, it was worrying to hear from delegates in the corridors that issues had arisen at one of Friday night's contact groups, apparently leading one delegate to complain in the group itself that they had huge issues with the process of the Contact Group. Apparently they complained that "a lot" of their interventions had not been taken into account in the working texts, while interventions by others were swiftly written up .

Does a contact group chair really have the liberty to ignore direct requests by parties for text changes? (Let alone "a lot" of them?)

Doesn't a chair - as facilitator and enabler - have a particular responsibility to pay attention to comments from those who are already disadvantaged in a contact-group setting? (Such as less developed countries and delegates who are not native English speakers.)

At the same Friday night session the working group chair reportedly compared his role to a bus driver trying to keep his passengers on a bus. he was joking of course but metaphors can be illuminating: A bus driver steers passengers along a predetermined route while in negotiations a good chair lets the parties set the course. To stay willingly on the bus all the parties must feel comfortable with the direction. How would it undermine trust and goodwill to have a bus driver who steers the wheel only to the destination where rich passengers want to go and refuses to hear the howl of poor passengers who want go elsewhere.

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Submissions

are welcome from all civil society groups.

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Sendenyu - A Success Story of Indigenous Community Initiative towards Conservation

Gwasinlo Thong

Sendenyu village in Nagaland, North-east India, has a population of 3500 spread over 72 km². Agriculture is the main occupation, including shifting cultivation for rice. For time immemorial, the rich biodiversity of the sub-Himalayan deciduous forests and it's fauna has been the source of shelter and food for the community maintaining ecological balance. However, with increase in population and advent of marketing opportunities, and introduction of modern hunting equipment, this biodiversity is seriously threatened.

It was in the late 1990s, the community people realised the need for drastic action. They banned hunting during breeding season, and total prohibited killing threatened wild animals. Actual conservation measures were formally launched in 2001, where a Committee called the *Sendenyu Community Biodiversity & Wild Protection Committee* was set up, and a *Community Biodiversity and Wild Protection Act* was enacted using the state's Village Council Act. Initially an area of about 12 km² of village community land (donated by land owners) was declared as *Sendenyu Community Biodiversity Reserve*, where hunting, fishing, and collection of forest produce is totally banned. Hunting in general area of Sendenyu also was banned from 2012 onwards. In addition to this, use of chemicals for fishing and herbicides for agricultural activity are also banned. As a result of community efforts, there has been a big increase in wildlife.

These efforts faced serious challenges, with hunting being part of traditional culture and a source of food and income. The Government was not able to overcome these challenges, but the community has managed. There was also dilemmas regarding traditional shifting cultivation which may in current situations be unsustainable, and adopting more environmental friendly methods of farming such as horticulture, wet terrace cultivation, fisheries. Now more than 90% of the people have adopted such practices. But another challenge is intensified crop damage by the increasing wildlife, leading to possible reduction in community support for conservation. Sendenyu needs help in dealing with this.

Sendenyu is one of many villages in Nagaland revived or started new conservation measures. But the state has 1249 villges, and it is our sincere hope that Sendenyu's initiative can encourage other villages to take up similar efforts.