

Big holes in the air – or something real?

François Meienberg and Chee Yoke Ling

Sometimes it is helpful to know the strategy of the “other side” – in this case, the strategy of some Parties who want to prevent a legally binding and effective regime against biopiracy.

After four days of negotiations to streamline text (i.e. weeding out duplications, merging similar proposals and withdrawal of some proposals) to produce documents that will be the basis for further negotiations at WGABS 7 and beyond, the main strategies of the friends of biopirates become clearer.

1. *Creating an updated version of the Bonn Guidelines – still voluntary and toothless*

During the contact group on the regime’s objective at least two developed country Parties revealed their desire to effectively neutralise or simply delete compliance provisions that matter. Although the regime’s “nature” (i.e. legally binding or not) is not discussed during this working group meeting, the rejection of language to secure compliance is a clear statement towards a non-binding regime. Securing compliance in user countries will be one of the essential parts of the upcoming protocol, as the lack of this is one of the main reasons of ongoing biopiracy. Therefore any attempt to remove the compliance clause from the objective has to be countered.

2. *Creating an empty Regime*

All negotiators have a fallback position, when their first scenario is not successful. The fallback

position of the friends-of-biopirates group could already be seen in the Saturday night negotiations on scope. In the event they lose out in the discussion on the nature of the regime, they will do whatever they can to carve out as many exemptions and exclusions as possible from the regime’s scope. Therefore, during the upcoming discussion on scope, special attention has to be given to the attempts to gouge holes in the future protocol.

A special danger is the attempt to allow other “international agreements” to exclude themselves from the ABS obligations under the CBD. We still remember the torturous hours of debate over a “gap analysis” when the friends-of-biopirates tried to convince everyone that benefit sharing is already taken care of by existing agreements and measures. That gap analysis affirmed that there is indeed a big gap – nothing exists

that deals with the international dimension of biopiracy.

Sadly, by the time the first round of discussions on scope ended we left cross-eyed at the long list of exclusions and special considerations – reading the list one would think that there are numerous ABS instruments all over.

Reminder: the International Treaty on Plant Genetic Resources for Food and Agriculture is the result of more than 100 governments’ decision in a Resolution that was made when the CBD was signed. It can be said to be a sub-set of the CBD.

If other organizations are mentioned because they have a role in the implementation of ABS, this should – at the very least – be based on a decision of the Parties to the future protocol and under a clear mandate. Only in this way will we avoid a sell-out of the ABS protocol.

The ‘art’ of supporting something that does not exist anymore

Party A: We withdraw our proposed operative text.

Party B: We would like to support the operative text of Party A

Party C: We also would like to support the Text of Party A

Party D: A text which is not on the table cannot be supported, neither by Party B, nor by Party C. Therefore the previous text of Party A can only be supported, if it is tabled by Party B or C. Will Party B or C do this?

Party C: We are happy to support Party B, if they propose the previous text of Party A as their own text.

Party B: Hmmm. We cannot table the text of Party A as it does not reflect our position. Nevertheless we would like to support it.

Party D: But there is nothing that can be supported!

Party B: But there was!

Party D: But it’s not anymore.

HUH?

Subject to National Legislation: Directive or Shield in the Implementation of the CBD?

Preston Hardison

Over a decade ago, I sat down with Arthur H. Campeau in a bar in Bratislava, Slovakia where we spent a leisurely hour talking about the history of the Convention on Biological Diversity and particularly Article 8(j). Arthur had been appointed the first Ambassador of Environment and Sustainable Development under Prime Minister Brian Mulroney, and served as a special advisor to the Canadian Delegation at the Intergovernmental Negotiating Committee. At the time, Canada had taken the position of trying to have a wide diversity of views represented on its delegation, with the Minister of the Environment Jean Charest and the opposition critic, Paul Martin both heading parts of the delegation. Canada was also the first delegation to include NGO representatives.

Arthur was one of the architects of what became Article 8(j) and related articles of the Convention. [I had followed the negotiations at the prep-coms on Eco-Net, a socially progressive computer network that had been supported by UNEP to carry the news and information of the INC at a time when they lacked the capacity to carry it themselves. I first attended a CBD meeting at COP3 in Buenos Aires, Argentina as a technical assistant to some indigenous colleagues from Canada.

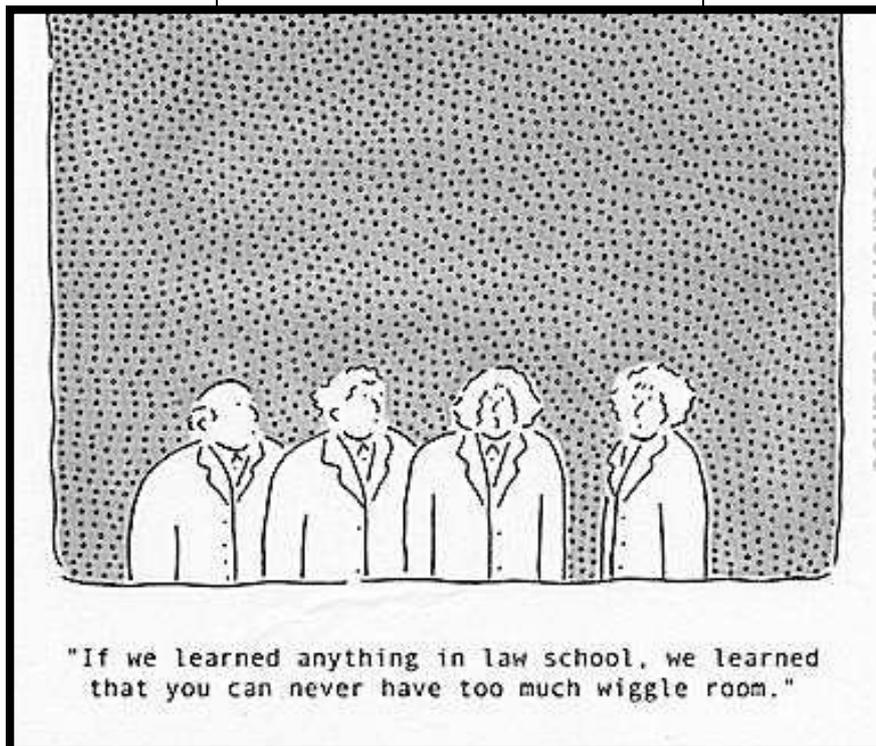
As with many newcomers to this Convention, I was interested in talking to Arthur about the history and meaning of the CBD, and in particular Article 8(j) and related articles. I asked him specifically about the phrase

"subject to national legislation". Arthur said that his understanding, and the understanding of the delegates, was that "subject to national legislation" was meant clearly as a directive of the Convention. Indeed, *it would be out of the spirit of the Convention to establish international norms on the conservation and sustainable use of biological diversity if language suggested that the principles were voluntary.* "Subject to national legislation" did not mean that parties were free to ignore implementation if it was contrary or inconvenient in domestic legislation. In other words, it was not a "get out of jail free" game card to be used to circumvent the intentions of the CBD.

Rather, the phrase was meant to give governments flexibility in determining how the principles of the Convention, and here in particular the provisions of Article 8(j), are implemented. He believed it to be clear that it did not imply that the phrase could be interpreted as to whether the provisions could be implemented. In this interpretation, parties are free to determine levels and instruments by which the provisions are implemented - through

Constitutional articles, legislation, policy directives, administrative measures, incentives, etc. [Note to Secretariat: now that we are approaching the second decade of the CBD, perhaps it would be a good project to establish an oral history section of the CBD through the Clearinghouse Mechanism in order to capture some of this history through the eyes of negotiators, civil society, and Indigenous peoples and local community organizations]

This interpretation is supported in an early decision of the Conference of the Parties at Buenos Aires. Decision 4.14.1 on the Implementation of Article 8 (j) "Requests those Parties that have not yet done so to develop national legislation and corresponding strategies for the implementation of Article 8 (j) in consultation particularly with representatives of their indigenous and local communities". Furthermore, Decision 3.14.2 "Urges Parties to supply information about the implementation of Article 8 (j) and related articles, for example, national legislation and administrative and incentive measures, and to include such information in national reports".



Unfortunately, a number of parties today seem to be using the phrase as a shield against implementing these provisions, and fully recognizing the rights of Indigenous peoples and local communities. While recognizing the principle of progressive implementation, in which soft law provisions over time move from voluntary measures

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to binding commitments, this must be interpreted by the straightforward meaning of "progressive" and "implementation". "Progressive" means that the Convention must be ratcheted to prevent backsliding from higher standards to lower standards. "Implementation" means that there should be effective national implementation.

In addition, the Convention needs to respond to new technical and legal developments that have occurred since its entry into force. In the ABS discussions, debates are occurring on whether or not to include derivatives and products into the scope of the international regime. Technical advances and gaps in the original concept of what constitutes a "genetic resource" should be fully considered in the elaboration of this regime, or leave it at risk of being yet another empty legal document.

The Parties should also take the United Declaration on the Rights of Indigenous Peoples fully into account

in the interpretation of the phrase "subject to national legislation". In 1992, international discussions on the rights of Indigenous peoples were only about a decade old. At the time, few states formally recognized even the existence of Indigenous peoples, arguing over the use of the letter "s" to refer to them as distinct, collective entities. I am personally reminded that at one time chattel slavery was recognized as a valid legal concept, in which various economic and political arguments could validly be advanced to justify the ownership of human beings.

The Universal Declaration on Human Rights put an end to these discussions, saying in effect that human freedom and dignity were not a matter of national prerogative, but fundamental limits on the exercise of sovereignty binding on all nations. All citizens of the world possess these rights, no matter what national context they find themselves in, and no argument based on national expediency can be mounted to violate these rights.

Indigenous peoples have the right to exist as distinct peoples. This is now recognized as a fundamental human right, and cannot be "subject to national legislation", except in the sense that states may find the appropriate measures to implement this fundamental right within their national situations. Indigenous peoples are threatened from many directions, from land use change, natural disasters, and climate change. The full and effective implementation of the CBD will be central to the realization of indigenous rights, as biodiversity lies at the core of their identity and cultural survival.

Perhaps it would be more salient to some parties if, during negotiations, one were to set up a screen visible to the negotiators, that could calculate the number of hectares of forest lost, of water resources degraded, of soil eroded, of persons dying of harms related to biodiversity loss, and many other indicators of the failures of these negotiations to secure the health of our planet and the future of our children.

Big Applause for Australia

Les Malezer

Last week, Australia was given spontaneous applause following the announcement that Australia has supported the Declaration on the Rights of Indigenous Peoples.

In acknowledging Australia's position on the Declaration, Mr Mattias Ahren, the chairperson of the Saami Council of Arctic and northern Europe region, expressed the view that the stance of the government represented not only a significant benefit for the Aboriginal people and Torres Strait Islander people of Australia, but *all* Indigenous Peoples of the world.

He said Indigenous Peoples welcomed the decision of the government and thanked the government of Australia for its positive change in international policy.

The brief announcement, made during the morning discussions, drew immediate and prolonged applause from the 600 participants at the meeting, including governments, environmental groups, industry and Indigenous Peoples.

ECO is published by civil society at many International Environmental Convention negotiations. It is currently being published at the 7th Working Group on Access and Benefit Sharing to the Convention on Biological Diversity in Paris, France, coordinated by the CBD Alliance. The opinions, commentaries, and articles printed in ECO are the sole opinion of the individual authors or organisations, unless otherwise expressed.

SUBMISSIONS: Welcome from all civil society groups. Email to reachmiriam@earthlink.net and jdempsey@interchange.ubc.ca
ECO thanks Swedbio and Hivos-Oxfam Novib Biodiversity Fund.

!Le mort de Bracketeet [The Death of Bracketeet]!

Mr. Chairpersons [our dearest crepe suzettes]

We regret to inform you that in a deeply unfortunate accident Dr. N.D. Bracketeet has been [whacked/topped/offed/done in/toasted] turned into plant food. It is our understanding that his fragmentary remains have now been handed to the [somewhat astonished] Brazilian delegation by persons unknown. Brazil intends to ensure that Dr. Bracketeet's biodegradable remnants serve the outstanding prison sentence for biopiracy and associated hotel toiletry theft in Curitiba gaol incurred following COP8.

As you may dimly recall Mr. Chairpersons, Dr. Bracketeet's biofuelled parrot assisted escape from Curitiba gaol in 2008 made him a hero throughout the *favelas* of Brazil and a major invasive biopiracy pest for the authorities. In an object lesson for all biopirates/serial misappropriationists, Brazil will later use the miscreant bracketeet's remains as fertilizer for a GM soya field at an undisclosed location in the Amazon. In this way Brazil hopes to avoid the otherwise inevitable creation of a shrine to the immensely popular scarlet bracketeet.

The details are sketchy but Dr. Bracketeet's last words were reportedly "industry, get a sense of humour!" before being sighted attempting to rapidly learn to fly in the vicinity of the appropriately named Ei[~~f~~]fell Tower. Rumours that he was heard to declare "je ne regrette rien... with the possible exception of not learning to fly/parachute/paraglide/speak french/have lots of kinky sex....earlier" on the way down are apocryphal but consistent with his inability to avoid having the last word.

His equally dubious associate, Professor I.M. [an] Awesome [sex machine], has arranged to bury a signed copy of the best selling "A life-long contact group" containing a lock of Dr. Bracketeet's hair at Jim Morrison's grave in Père Lachaise. The gorgeous ladies of ABS have been invited to a fashionable three minute funeral followed by a prolonged Awesome *soiree* at a swish cocktail bar in the vicinity. Prof I.M. Awesome has also replenished his

stock of combined Lucozade Guarana Viagra tablets in a fevered ferment of fervent anticipation that he will finally get to learn the basics of human reproduction from a source other than his heavily thumbed biology textbook. A considerably higher brow exposition on l'art de bracketisme will be held at l'Orangerie later this month and has already sold out. French intellectuals have also suspended ancient hostilities to prepare the heavily bracketed six volume *Bracketologie* available for pre-order from Amazon France for a mere 99,000 Euros.

French police remain baffled as to the motive for the apparent mafia involvement in the demise of the famed bracketologist. However, occasional neanderthal grunts of satisfaction from ABS industry lobbyists provide the tiniest unattributable and strictly speculative hint of a potential underlying conspiracy. Dr. Bracketeet's extensive but chaotic, and mostly anarchic, writings/ramblings/memoirs/meanderings may reveal further clues to the perpetrators of this heinous crime.

Mr. Chairpersons, Dr. Bracketeet leaves behind a legally non-disclosable number of wives in cities wherever the CBD travels, two complete football teams of children with plenty left for the reserves, and a giant collection of medicinal plants and hotel bathrobes.

The Secretariat of the Not Always Entirely Like-Minded Mega Mega Diverse Orchestra profoundly laments the loss of their delirious leader. We have already transmitted what we are certain will be our collective condolences to his extended menagerie/family. As we approach Easter the members of the Secretariat draw comfort from the respectfully edited Christian message 'I am the resurrection and the bracketeet' and will shortly convene for quiet reflection/engorgement at a nearby patisserie. Vive la Bracketeet! Vive la crème brûlée!

The Secretariat
Not Always Entirely Like-Minded Mega Mega Diverse Orchestra
The Broom Cupboard
UNESCO
Paris

