



International Chamber of Commerce

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Comments on the Brazilian draft bill on the collection of biological materials

Prepared by the Task Force on Access and Benefit Sharing

The present comments are submitted on behalf of the Task Force on Access and Benefit Sharing of the International Chamber of Commerce (ICC). ICC is the world business organization, with affiliates in over 130 countries. ICC members include thousands of companies of every size. They represent a broad cross-section of business activity including manufacturing, trade, and services.

The ICC Task Force on Access and Benefit Sharing welcomes the Brazilian Government's initiative to put new ABS regulations into place, and its attempt to improve the current ABS regime in Brazil. However, it has doubts about a number of the proposals made.

An important objective of the CBD is to promote sustainable uses of genetic resources together with equitable sharing of the resulting benefits. Sometimes known uses can be more widely applied, sometimes new uses will be developed. In either case private business is likely to be involved to a greater or lesser extent. Business welcomes these new opportunities. New products and uses can be both useful to society and a source of profit and new wealth, to be equitably shared in accordance with CBD principles.

Responsible businesses respect national and international laws. Laws properly restrict the activities of business for many vital reasons: obviously they should not be more restrictive than necessary to meet their goals. But it is also important that laws be clear. If they do not lay down clearly what is and is not to be done, there is confusion. Businesses need reasonable certainty, so that they can invest prudently. If the law is unclear, this will discourage investment, so that there are fewer new sustainable uses and fewer benefits to share.

There is much disagreement and confusion about the obligations imposed by the CBD. National sovereignty gives countries the right to control access to materials within their borders, but national legislation is vital to make clear whether and how this right will be exercised. For this reason, legislation is most welcome.

However, in the respectful submission of the ICC Task Force on Access and Benefit Sharing, the proposed law is less helpful than it might be: in part because it goes beyond what is necessary to meet its objectives, and in part because it is not clear. We are also greatly concerned about the patent provisions.

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Scope

The law seeks to control access to 'genetic resources', their 'derivatives' and 'associated traditional knowledge' (Article 1, paras II, IV), seemingly including all biological material originating in the territory of Brazil. 'Derivatives' are defined so as to be broadly equivalent to 'biological material' (compare Article 6, paras XXIII and XXVII). While there are some exceptions, noted in Article 3, the effect of including 'derivatives' is that an extremely wide range of biological materials is subject to the new regime. Under Article 11, licences to access and to transport all these materials are required. Unless the new Commission is able to progress a wide range of licences extremely rapidly, access to these materials – for normal commercial purposes, quite apart from genetic research - will be very substantially reduced.

Clarity

In a number of places the intention of the law, or its effect, or both, are not clear. For example, 'derivatives' of genetic resources, as noted, seems capable of including all biological materials. But, presumably, derivatives of exotic material are not covered. How is a user, encountering biological material, to be certain whether it derives from local genetic resources or an exotic? Will this promote the market for exotics, and imported biological material generally, at the expense of domestic produce? What is meant by “commercial products for agriculture resulting from the right to use varieties or lines” (Article 3, para. V)? This is further confused by the exclusion “except where its development involves access to a genetic resource”. All biological agricultural products involve access to genetic resources (which may or may not be of Brazilian origin). The definition of access to traditional knowledge (Article 3,I) is not clear. There may be no indication that knowledge, not received directly from a traditional source, is in fact traditional. Other instances could be given.

International Treaty on Plant Genetic Resources.

It is not clear that the law is consistent with the International Treaty on Plant Genetic Resources, to which Brazil subscribes. There are exceptions for agricultural resources, but they are not clear. There does not seem to be any distinction between crops covered by that treaty and those which are not.

Patent Provisions

The requirement to make a declaration concerning origin is of grave concern. If the declaration is incorrect, there are substantial penalties which may include confiscation of the patent. This is of particular concern when the law is not clear: innocent mistakes could be unjustly penalised. We oppose the use of the patent system to enforce access laws. The requirement to respect the rules of other countries of origin (Article 138) is also worrying, for a number of reasons. Such rules are very imperfectly defined; it will often be difficult to determine what the country of origin is; and it is not made clear what the penalty is for failure to respect these rules (it is not stated to be the same as for infringing Brazil's rules).

In our view, accordingly, the proposed law raises significant concerns, some of which are described above, and we hope that these will be carefully considered during the review of the current draft law.



Document n° 450/1035

28 February 2008

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