BD
Berne Declaration
Déclaration de Berne
Erklärung von Bern

TWN
Third World Network

Dr. Gaudenz Silberschmidt
Head of International Affairs Division
Federal Office of Public Health
3003 Berne

Lausanne, le 02 décembre 2010

Contact: Patrick Durisch Téléphone: +41 (0)21 620 03 06 e-mail: durisch@ladb.ch

Pandemic Influenza Preparedness (PIP): sharing of influenza viruses and access to vaccines & other benefits

Dear Sir,

We are writing to you with regard to the above-mentioned matter in view of the recently concluded negotiations on the Access and Benefit Sharing (ABS) Protocol and the upcoming WHO negotiations on the subject that will take place in Geneva from 13-17 December 2010.

The ABS Protocol negotiations have made clear that the scope of the Protocol and as such the Convention of Biological Diversity (CBD) extends to pathogens including influenza viruses being shared under the auspices of the World Health Organization.

One of the core objectives of the CBD is the fair and equitable sharing of benefits arising from the utilization of genetic resources. This objective is to be achieved through Article 15 of the CBD (elaborated upon by the Protocol) which explicitly states that access to genetic resources will be subject to prior informed consent and fair and equitable sharing of benefits arising from the commercial and other utilization of genetic resources. According to the CBD, both access and benefit sharing should be on “mutually agreed terms”.

It is generally accepted that these elements envisage a contractual access and benefit sharing agreement that would be binding on the provider and user of genetic resources.

However, in the context of the WHO PIP negotiations, we are concerned that while there is recognition of the need for sharing influenza viruses, there is little emphasis on achieving fair and equitable benefit-sharing as foreseen by the CBD. In particular, developed countries have been resisting calls by many developing countries to negotiate Standard Material Transfer Agreements (SMTA) that includes concrete benefit-sharing

obligations for sharing of influenza biological materials with the WHO Network laboratories, as well as with third party entities.

As a Party to the Convention, Switzerland is legally bound to ensure its implementation where access to genetic resources is provided in order to achieve the core objectives of the CBD, as mentioned above.

While access to influenza biological materials is a valid concern, achieving public health objectives also requires rapid sharing of benefits, particularly those arising from the use of the materials. A PIP Framework that stresses on sharing of influenza biological materials but that fails to obligate recipients of such materials to share fair and equitable benefits is inconsistent with CBD's objectives and Switzerland's obligations under the Convention. Such a Framework is also inequitable and will fail to deliver a sustainable predictable system for purposes of public health.

We would also highlight Article 6(b) of the recently adopted ABS Protocol, which stresses on "expeditious access to genetic resources" and on an equal footing also to "expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries" in cases of present or imminent emergencies.

Moreover, Article 3bis of the ABS Protocol requires "specialised access and benefit-sharing agreements" to be supportive of and "not run counter to the objectives of the Convention and this Protocol".

We are of the view that the approach of SMTAs that contains the "mutually agreed terms" for sharing of influenza biological materials as well as concrete benefit sharing obligations for recipients of influenza biological materials (be they commercial or non-commercial entities) is a minimum requirement for achieving the objectives of the CBD and the ABS Protocol, and those of public health.

SMTA will ensure legal certainty and predictability with regard to fair and equitable benefit sharing and thus incentivise timely sharing of influenza viruses.

Switzerland being a Party to the Convention needs to ensure that WHO negotiations build on the minimum standards and requirements established by the CBD.

We also request Switzerland to ensure that influenza biological materials and products/inventions developed using such materials are not appropriated through the use

of intellectual property rights. Just as access to influenza biological materials is stressed upon to enable measures to address public health, Switzerland must equally support the principle that claims to intellectual property rights by recipients of influenza biological materials be relinquished. This will ensure the availability of the Framework's resources and outputs for public health uses.

In this regard we are of the view that private intellectual property rights must also not obstruct the ability to take measures in situations that threaten human health.

Thanking you in advance for sharing with us as soon as possible the Swiss position with regard to the above-mentioned matters.

Sincerely,

For the Berne Declaration

Patrick Durisch
Health Programme Coordinator

For Third World Network

Sangeeta Shashikant
Legal advisor