

Access and benefit-sharing negotiations: an update for botanic gardens

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The Convention on Biological Diversity's third objective, the fair and equitable sharing of benefits arising from the use of genetic resources, remains a globally contentious and challenging topic. Currently Parties to the CBD are swept up in a new round of negotiations, to develop an 'international regime' on access and benefit-sharing (ABS). Many countries are waiting for such a regime to be established before they develop their national ABS legislation and policy based on the regime, while others are stepping up their efforts to design their own laws and policies first. Botanic gardens are likely to be significantly affected by any such regime and national legislation, as they are perceived to be important intermediaries between 'providers' in the countries where genetic resources are found *in situ* and 'users' in academia and industry. It is thus very important for botanic gardens to engage with and provide input to the designers of the regime, so that the result is something that works and that helps to deliver benefits rather than prevent access and use. In order for this input to be accepted, gardens need to show they can be trusted, and to continue to demonstrate their vital contribution to all three of the CBD's objectives.

The call for a new international regime on benefit-sharing under the auspices of the CBD regime came from the World Summit on Sustainable Development in Johannesburg, (2002). At the following CBD Conference of the Parties (COP7) in 2004, Parties agreed to negotiate an international regime on access and benefit-sharing, and gave the mandate for negotiation to the Ad hoc Open- Ended Working Group on Access and Benefit-Sharing (WG-ABS). Talks started in 2005, and at COP8 (2006), Parties instructed the WG-ABS 'to complete its work at the earliest possible time before' COP10 in 2010 (UNEP 2006).

There are some very differing ideas as to what form the regime could take and what the 2010 deadline wording means. Some countries consider that a new legally-binding regime – perhaps a new protocol or other treaty – should be designed, and ideally that it would be in place and implementation started by 2010. Other countries take the line that negotiations should finish by 2010, but that an entirely new instrument may not be necessary or desirable. The 'regime' might instead refer to a collection of already-existing agreements, laws, organisations and voluntary codes of conduct. The gaps in the coverage of existing measures are being analysed, and some mixture of pre-existing instruments and new measures, both voluntary and legally-binding, is perhaps the most predictable outcome at this stage.

The Bonn Guidelines, adopted at COP6 (UNEP 2002), are likely to constitute an important baseline for the regime: they provide voluntary guidance for governments and other stakeholders on the development of domestic legislation and steps in the negotiation of ABS contracts, and provide some useful clarification of terms such as Prior Informed Consent and Mutually Agreed Terms. Valuably for botanic gardens and research institutions, they set out examples of non-monetary as well as monetary benefit-sharing, as well as reminders to governments about the importance of granting access for taxonomic work.

Why is a new regime being negotiated? The temperature of ABS debates is rising with the many accusations of 'biopiracy', or the misappropriation of genetic resources, which vary widely in substance but are increasingly well-publicised (see examples in McGown 2006 and an analysis in IUCN-Canada 2006). Several issues underlie the call for the regime, but the primary grievance that is aired is that users of genetic resources are not complying with the laws of provider countries or the CBD's provisions on ABS, and benefits are not being shared. The Bonn Guidelines are voluntary, so countries with users under their jurisdiction (often shortened to 'user

countries') are not obliged to set up new laws to enforce compliance with other countries' national laws, and indeed many developed countries have yet to take significant action on ABS, while many biodiverse provider countries are working on their legislation. There is also a wish among some countries to go further than the Bonn Guidelines, and indeed extend the scope of the proposed regime beyond the coverage of the CBD, for example to cover derivatives of genetic resources, or new uses of resources collected before the CBD came into force.

ABS negotiators are discussing what 'user measures' could be developed in order to promote and enforce compliance with providers' national laws especially after resources have left the provider country. Because most countries appear most concerned about the sharing of financial benefits from commercial use, and examples of 'biopiracy' usually involve bad patents, particular attention is being paid to intellectual property rights (IPR) systems. A number of countries are working on proposals in the CBD and other fora to amend such systems so that applicants for IPRs have to declare the origin or source of the genetic resources involved (if known).

One potential user measure that is currently being closely considered by negotiators is a system of internationally-recognised certificates of origin (or source, or legal provenance – the term has not been decided). The original idea was that certificates could be a useful tool to prove the origin of genetic resources to patent examiners, if there was a requirement to disclose this information in IPR applications. Now certificates are being considered for a broader purpose, in essence as a way to keep the link with the original providers (and terms of access) as genetic resources are used in different ways and by different users, from collection to a (usually-presumed) commercial end-point. The theoretical concept is attractive to many policymakers, but until recently there was very little idea of how certificates might work in practice – for example what exactly they would cover, who would issue them, who would check them, how they could travel with genetic resources and whether or not the implementation, transaction and other costs associated with such a scheme would outweigh any benefits gained.

A meeting of technical experts from different countries and sectors was convened in Peru earlier this year to consider various options for how such a certificate might function, and the feasibility, practicality and cost of the options. The group came up with several variations on a basic scheme of (a) certificates issued at the time of access to show compliance with national laws (possibly with one certificate to cover all resources collected at a given area/time with the same prior informed consent and mutually agreed terms), (b) an alphanumeric code unique to each certificate that would travel with the resources as they change form, uses and users, to keep the link to the certificate and the original providers and terms, (c) a system of 'checkpoints' at different points of use, such as at patent offices, where the certificate code would be expected (if applicable), and (d) an international clearinghouse of some kind to keep track of the codes, checkpoints and different national certificate requirements. Nothing is set in stone at this stage. The discussions were preliminary and relatively non-political, and the meeting results (UNEP 2007) will be considered by the next meeting of the WG-ABS in October 2007. The negotiators may or may not eventually decide that the regime needs a certificate system, but regardless of that outcome, it is possible that some countries may decide to set up a national certificate system.

Botanic gardens have much at stake in the regime negotiations and the development of new national laws and certificate systems, and so it is vitally important that they engage with their governments to provide practical advice and information, at an early a stage as possible. As well as having an interest in working with new collections, they are major holders of pre-CBD collections, and they are involved in the creation and transfer of derivatives directly or through links with other research institutions, and so would be affected by new laws on derivatives or pre-CBD material. It is possible that there will be different, possibly facilitating, measures for resources collected for non-commercial versus commercial use. However this line is increasingly difficult to define, especially where gardens are linked to university departments, which in turn may have research links to industry sectors. It is essential for gardens to be clear about the scope of their activities and the terms on the material they hold in order for them to be trusted in the ABS process. Unfortunately botanic gardens have sometimes been implicated in the chain of use in some of the cases of alleged 'biopiracy', accusations that are

difficult to defend against once a story is disseminated. With the negative atmosphere of mistrust and increasingly restrictive laws, botanic gardens need to ensure that positive messages are transmitted to policymakers and the public about the importance (and existence) of their collaborative conservation, research and capacity-building activities.

How can botanic gardens participate in these debates? One means is via national CBD or ABS focal points (see list at www.biodiv.org/world/map.aspx); gardens can contact them to provide information on successful collaboration and benefit-sharing for national CBD reports, and to show how their work supports the CBD's Action Plan on capacity-building for ABS (UNEP 2004) on many levels. Botanic gardens should also encourage their collaborators to contact their focal points and contribute to national reports, so that messages are not heard from just one source. With better communication, more governments might actively involve botanic gardens in workshops associated with the regime negotiations (for a useful example see Feit et al 2005), or include a representative on the national delegation for ABS meetings. BGCI's ABS webpages (under development – www.bgci.org/abs) aim to provide a platform for botanic gardens to share practical information with each other and the wider public – including, potentially, policymakers – about their ABS policies and their collaborative work.

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