

The International ABS Regime Negotiations: A Business Opportunity?

Timothy Hodges*
Fernando Casas**

Abstract: The growing trend in the pharmaceutical industry for developing plant based drugs triggered a major global debate on access to genetic resources and sharing of benefits from these initiatives. The World Summit for Sustainable Development (2002) has shifted the global debate from Bonn Guidelines to CBD where negotiations are on at the Ad Hoc Open-ended Working Group on Access and Benefit Sharing. There are several important challenges before this group on which lot of clarity is required.

Keywords: genetic resources, access and benefit sharing (ABS), biotechnology, Convention on Biological Diversity (CBD), biotechnology, Bonn Guidelines

Recent expert statements suggest that biotechnology is replacing pharmaceuticals as the driver for commercial research on genetic resources and, further, that this trend could accelerate in the future.¹

What is indisputably clear at this moment is the fact that genetic resources continue to fuel important process and product development in the biotechnology sector worldwide. Indeed, the potential value of genetic resources has not escaped the attention of some governments and companies. The search for new compounds in the wild, "bioprospecting" as some define it, could be worth US\$ 500 million by 2050.²

As the search for commercially promising genetic resources and their derivatives continues, the policy and regulatory environments

* Co-chair, *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, United Nations Convention on Biological Diversity, Canada. Email: tim.hodges@ec.gc.ca

** Co-chair, *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, United Nations Convention on Biological Diversity, Colombia. Email: fccasas@gmail.com

around access and benefit-sharing of genetic resources (ABS) are in a state of flux – with governments moving to protect their national interests in light of their international obligations under various Conventions, Agreements and processes. Much of the debate and energy on ABS is centered in the UN Convention on Biological Diversity (CBD).

The main provisions on ABS under the Convention are set out in Article 15. States have sovereign rights over their genetic resources, and so national governments have the authority to determine how material is accessed, but should facilitate access for environmentally-sound uses. Access should be granted only with the prior informed consent of providers and requires mutually agreed terms between providers and users. Research should be carried out with the full participation of, or carried out in, provider countries, and benefits from use should be shared fairly and equitably between the users and providers.

As with the rest of the CBD, individual governments decide how to interpret and implement the ABS provisions at the national level, as each country has its own legal systems, national authorities and stakeholders. Consequently, there is a wide variation in how countries are implementing ABS (and, it should be noted, potentially leading to confusion for both providers and users of genetic resources). To address this uncertainty, in part, a working group on ABS was set up in 2001 under the CBD, and in 2002 the Convention's Conference of the Parties adopted the voluntary Bonn Guidelines on access and benefit-sharing and the fair and equitable sharing of benefits arising from their utilisation. This tool provides guidance for governments and other stakeholders (such as institutions or companies) on the development of domestic laws and policies and steps in the negotiation of ABS contracts. The Guidelines provide some clarification on prior informed consent (including advice on a workable system, and information users should provide) and mutually agreed terms (what should be included, and examples of typical terms). The Bonn Guidelines also emphasise the need for ABS National Focal Points and Competent National Authorities to provide information on national procedures for access and benefit-sharing.

While a number of countries and companies are now using the Bonn Guidelines (and they appear as relevant today as when adopted in 2002), a new international regime on ABS under the CBD was called for in Johannesburg at the World Summit for Sustainable Development

in 2002. In response, negotiations on this regime are being out in the Ad Hoc Open-ended Working Group on ABS, which has a deadline of 2010 to complete its work on the elaboration and negotiation of the regime.

Myriad challenges are confronted and are to be resolved by the International Regime negotiators. Some of these challenges are highly complex and technical in nature, while others are largely political, but no less vexing. The following un-exhaustive list of questions will need answers in order to complete negotiations on the regime. What should the objectives of the international regime be? Should the Regime embrace both mandatory and voluntary measures? Are industry sectoral approaches tenable within the international regime? Should compliance be the principal focus of the regime? If and how should negotiators deal with traditional knowledge related to genetic resources? Is ABS ultimately about capacity needs and, if so, what is the role of the private sector in this regard? How to deal with intellectual property rights issues?

One of the greatest hurdles to be overcome in the international ABS talks is, in plain words, lack of awareness on the social, economic, legal and policy links within ABS. Upon our election as Co-chairs of the ABS Working Group in 2006 by the Conference of the Parties to the Convention on Biological Diversity in Curitiba, Brazil, we identified awareness building among the keys to “unlocking” the international regime talks. Awareness must be built within and amongst countries, and involve political leaders, government officials, stakeholders, indigenous and local communities and the general public. Industry engagement, including importantly the biotechnology sector, is a critical – not only in terms of improving understanding of national interest, but equally in terms of identifying practical options and concrete solutions to existing and proposed ABS-related policies.

In the past two years we have noted an encouraging trend toward greater industry involvement in the meetings of the ABS Working Group. Not only does the number of active industry participants appear to be increasing, industry representatives have risen to the universal challenge from the Co-chairs to the Working Group to engage concretely and constructively in the debate.

This is an important and encouraging step forward. But it is insufficient. The biotechnology sector, like other industry sectors, must further engage at both the national and international levels. As we all

know, good policy ideas and solutions, more often than not, are first generated at home.

In the longer term — beyond the participation of the biotechnology and other industrial sectors in the ABS negotiations themselves — are the role and core responsibilities of the private sector in implementing the international regime. Implementation will need to take place as a large-scale exercise with business acting in partnership with the public sector and the non-profit sector, and include investment in areas such as: (1) investing in R&D, often with public funding partnerships, in food security, public health, and the conservation of biodiversity; (2) promoting biotechnologies based on genetic resources and their adaptation to distinct local environments. This is an approach that recognizes the increasing role of businesses as repositories of the most advanced (bio) technologies and the most sophisticated management methods for large-scale influence in the fair and equitable distribution of benefits arising out of the environmentally sound use of genetic resources.

We continue to urge the biotechnology sector to further engage in ABS domestic and global ABS policymaking, both in the development of policy and rules and in their implementation. Biotechnology businesses have a critical role to play in ABS, both now and in the future.

The core issue in relation to ABS is the need for clarity in terms of do's and don't's for both providers and users of genetic resources. Unless this clarity is there, conservation actions will suffer with limited use of genetic resources by perspective users. With limited or no access to genetic resources, all debates on ABS are bound to yield no results.

Endnotes

- ¹ Geoff Burton, Commercialisation: Not Plain Sailing, Presentation to the United Nations Informal Consultative Process on Oceans and the Law of the Sea, 26 June 2007, (Jean Shannon & Assoc. Pty Ltd, Australia).
- ² Joshua Bishop et al, Building Biodiversity Business, (Shell International Ltd and International Union for the Conservation of Nature and Natural Resources; 2008), p.11.