

## Equitable benefit-sharing or self-interest?

■ KRYSZYNA SWIDERSKA



*A legally binding protocol on access to genetic resources and benefit-sharing is to be adopted by the 193 governments that are party to the Convention on Biological Diversity in October 2010 in Nagoya, Japan. The protocol aims to ensure that the benefits derived from the use of genetic resources are shared fairly and equitably with biodiversity-rich but financially poor countries. This could help reverse the rapid loss of biodiversity and genetic resources. But unless governments make some major progress in their final negotiating session, the protocol will make little difference.*



### The importance of the new protocol

The UN Food and Agriculture Organization estimates that a third of all genetic resources for food and agriculture have already been lost in the last 100 years. And this year — the UN's International Year of Biodiversity — will see official confirmation that an intergovernmental target to reduce the loss of biodiversity has been badly missed.

The new protocol on access and benefit-sharing is important for a number of reasons. For millennia, communities around the world have nurtured the variety of life, including thousands of crops and medicinal plants that are vital for our agriculture, food security, health and nutrition. These resources take on new importance today because they provide options that will enable people to adapt to climate change by switching to flood- or drought-resistant crop varieties, for instance.

The private sector and consumers worldwide have benefited greatly from these riches. Corporations seek out genetic resources and associated local knowledge to develop and patent new medicines, seeds, foodstuffs and industrial products. But there is no system in place to ensure that the benefits from such 'bioprospecting' products are shared with the countries and communities from which they originated.

In 1992, governments adopted the Convention on Biological Diversity (CBD), which required access to genetic resources to be accompanied by equitable sharing of benefits derived from their use. Industrialised countries agreed to share the benefits with poor countries in return for their agreement to conserve biodiversity. But this North-South deal that lies at the heart of the CBD has yet to materialise. Developing countries and communities have received few benefits,

and there have been a number of cases of 'biopiracy', often involving patents<sup>1</sup>.

The protocol is potentially very important as it will, for the first time, legally bind industrialised countries where genetic resources are used, which are beyond the jurisdiction of national laws of provider countries. The benefits from genetic resource use can provide financial resources and incentives for conservation as well as new technologies. As much research shows, benefits for local communities are critical if biodiversity is to be conserved.

### Limiting the scope for benefit-sharing

Although some progress was made at the last negotiating session in July 2010, significant areas of disagreement remain. If the more powerful countries get their way, the protocol will deliver few benefits for conservation.

The EU has insisted that the protocol can only apply to genetic resources that are collected after it enters into force. This will significantly reduce the scope for benefit-sharing as many genetic resources have already been collected. The EU position is also that derivatives of genetic resources should be excluded, and left for negotiation in bilateral contracts. Developing countries want to ensure that derivatives such as naturally occurring biochemicals are included in the protocol, as these are often used for bioprospecting.

Another point of conflict is over the treatment of traditional knowledge in the protocol. Industrialised countries are arguing that traditional knowledge relating to genetic resources should be addressed by WIPO – the World Intellectual Property Organisation – instead of by the protocol. But leaving out traditional knowledge makes little sense as it is often used alongside genetic



Krystyna Swiderska is a senior researcher in the Natural Resources Group at IIED.

resources. And this would significantly reduce the benefits for developing countries and local communities. Furthermore, progress on traditional knowledge issues in WIPO has been extremely slow. WIPO is not the most appropriate forum for protecting traditional knowledge as it is composed mainly of intellectual property lawyers with limited participation of traditional knowledge holders. It also has no mandate to conserve biodiversity or promote indigenous peoples' wellbeing.

Industrialised countries also want the protocol to focus on compliance with national legislation instead of creating international regulations. But as only about 25 developing countries have legislation on access and benefit sharing in place<sup>2</sup>, this would further weaken the effectiveness of the protocol in promoting benefit-sharing.

## Marginalisation from access decisions

The protocol emphasises the sovereign rights of states over natural resources and their authority to determine access to genetic resources and grant prior informed consent. Thus it gives all rights and control of genetic resources to governments. It does not require the consent of communities for access to genetic resources, even if these are collected *in situ* from community lands, or if traditional knowledge relating to genetic resources is being accessed. This goes below the standards set by the widely respected Bonn Guidelines on access and benefit sharing. The protocol only requires countries to set out criteria or processes for obtaining prior informed consent or approval and involvement of communities 'where applicable and subject to national legislation'.

This undermines the CBD, which recognises the need to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices' (article 10c), as well as the UN Declaration on the Rights of indigenous peoples, 2007, which recognises the rights of indigenous peoples over their traditional knowledge, genetic resources, seeds and medicines.

## Weak protection of traditional knowledge

The protocol requires that Parties 'take legislative, administrative or policy measures' to ensure that traditional knowledge associated with genetic resources is accessed with the prior informed consent of indigenous and local communities. However, this legislation is not built into the protocol itself, and it may take years for all countries to introduce such measures. Traditional knowledge owes its existence to indigenous and local communities that have developed it over generations. It is integral to their identity, livelihoods and belief systems. It also plays an important role in conservation, but is fast disappearing. Prior informed consent of communities is important as it allows them to grant or deny access to traditional knowledge and

to ensure they receive equitable benefits. Communities may wish to deny access to sacred knowledge and resources used in rituals, for example; or to engage in equitable partnerships to derive benefits and incentives for sustaining traditional knowledge.

The requirement to support the development of community protocols (that is, rules) for access and benefit-sharing regarding traditional knowledge is welcome, but has been watered down to 'Parties shall endeavour to support, as appropriate'. Furthermore, the need to take into consideration any 'community level procedures' or 'indigenous and local community laws, customary laws, community protocols and procedures' is now contested.

Inclusion of publicly available traditional knowledge in the protocol is opposed by industrialised countries. This will significantly reduce the scope for benefit-sharing as much traditional knowledge has already been documented and is freely accessible. However, communities have not given their consent for it to be used commercially. A voluntary benefit-sharing mechanism is proposed, but is unlikely to deliver equitable benefit-sharing as it would allow business as usual.

My own research with indigenous communities in India, China, Peru, Panama and China shows the critical role that traditional farmers and healers play in sustaining and enhancing genetic resources. There is an urgent need to protect this collective bio-cultural heritage for global and local food security, and to enable people to adapt to climate change. The rapid loss of biodiversity and ecosystems is also increasing the impacts of climate change around the world, and so it affects us all.

## Next steps

In Montreal on September 18-21 and in Nagoya on October 18-29, negotiators need to commit to a protocol that has the widest possible scope for benefit-sharing and can be rigorously enforced at the global level. In particular, they need to include pre-protocol genetic resources, derivatives of genetic resources, and comprehensive protection of traditional knowledge associated with genetic resources.

The negotiators must also recognise the rights of indigenous and local communities to decide over access to genetic resources on their lands, which they customarily use (traditional crop varieties, for example). Access to the traditional knowledge of indigenous and local communities must be subject to their prior informed consent, whether or not it is publicly available.

Negotiators will need to put the interests of biodiversity first – above industry and economic interests. Otherwise, an important opportunity to tackle the loss of biodiversity will be missed.

The International Institute for Environment and Development (IIED) is an independent, nonprofit research institute working in the field of sustainable development. IIED provides expertise and leadership in researching and achieving sustainable development at local, national, regional and global levels. This opinion paper has been produced with the generous support of Danida (Denmark), DFID (UK), DGIS (the Netherlands), Irish Aid, Norad (Norway), SDC (Switzerland) and Sida (Sweden).

CONTACT: Krystyna Swiderska  
krystyna.swiderska@iied.org  
3 Endsleigh Street,  
London WC1H 0DD, UK  
Tel: +44 (0)20 7388 2117  
Fax: +44 (0)20 7388 2826  
Website: www.iied.org

## Sources

<sup>1</sup> Cabrera Medaglia, J. 2010. *The Political Economy of the International ABS Regime Negotiations*. ICTSD Issue Paper 2. International Centre for Trade and Sustainability. Geneva. ■ <sup>2</sup> Garforth, K. et al. 2005. *Overview of National and Regional Implementation of Access to Genetic Resources and Benefit-Sharing*. Centre for International Sustainable Development Law, Montreal.

