

Chapter

1

Access and Benefit-Sharing Agreements:

bridging the gap between scientific partnerships and The Convention on Biological Diversity



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Summary

The Millennium Seed Bank Project has been developed within the framework for international conservation collaborations agreed by the signatories to the Convention on Biological Diversity (CBD). Experience has shown that each partnership will be unique to maximise the mutual benefits from the collaboration. However, many common elements are found in all partnerships. These common elements are presented as model legal clauses against the Bonn Guidelines, more recently agreed at the sixth Conference of the Parties to the CBD.

Introduction

This paper is written against the background of the establishment of the Millennium Seed Bank Project (MSBP) by the Seed Conservation Department (SCD) of the Royal Botanic Gardens, Kew (RBG Kew). The MSBP was conceived in the early 1990s. Its development and implementation has therefore always been closely linked with the evolution of the Convention on Biological Diversity (CBD), which came into force on 29th December 1993. The CBD applies not just to the commercial exploitation of biological diversity, but also to not-for-profit seed banking conservation projects such as the MSBP. As a result, the MSBP has been at the forefront of practical implementation of the letter and spirit of the Convention; in particular, of Article 15. This Article recognises the sovereign right of States over their biological resources and declares that access to genetic resources, such as seeds, and associated fair and equitable benefit-sharing should be on “mutually agreed terms”. Many hours have been spent working with a wide range of partners, stakeholders and their governments to draft, negotiate and conclude mutually acceptable “Access and Benefit-Sharing Agreements” (ABSAs) that fairly reflect the essence of the MSBP in a particular country, the legal and cultural make-up of the partnership in question, together with the letter and spirit of the CBD. The learning curve has been steep and is on-going!

This chapter sets out the background to the ABSAs in question, and discusses some of the common practical issues that have arisen throughout the development of the MSBP by the SCD at RBG Kew and its many international partners.

The Convention on Biological Diversity

1. Introduction

The CBD, is an international treaty and a framework for action for the development, largely at a national level, of legal, policy and scientific initiatives on biological diversity. It is a relatively new Convention. It was opened for signature at the Rio Earth Summit (the United Nations Conference on Environment and Development) in June 1992 and came into force on 29th December 1993.

The CBD can be ratified by individual countries and by regional organisations. By January 2003, its membership consisted of 185 countries plus the European Union. In other words, in less than 10 years from the date on which it was first opened for signature, over 90% of the countries in the world have demonstrated a commitment to implementing the principles set out in the CBD. An up-to-date list of ratifications can be found on the website of the CBD Secretariat (<http://www.biodiv.org>).

The CBD marks a milestone in international treaties. Earlier treaties tended to deal with specific aspects of biological diversity. For instance, the 1973 Convention on International Trade in Endangered Species (“CITES”) relates to the trade in endangered species; the Ramsar Convention, to wetlands; and the Berne Convention to European wildlife and habitats. The scope of the CBD, however, is extremely broad, covering all components of biological diversity, from ecosystems and habitats, species and communities, to genomes and genes.

The objectives of the CBD are as follows:

“... the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” (CBD, Article 1)

The term “biological diversity”, often shortened to “biodiversity”, is used to describe the variability among living organisms from all sources and their interactions. Biologists often speak of three levels of diversity – species, genetic and ecosystem diversity. In effect, these levels cannot be separated and all are covered by the CBD.

However, certain aspects of the CBD, in particular the important provisions in Article 15 on “access” and “benefit-sharing”, only apply to “genetic resources.” “Genetic resources” are defined as genetic material of actual or potential value. “Genetic material” is defined as any material of plant, animal, microbial or other origin containing functional units of heredity: (CBD, Article 2).

The fundamental subject matter of the MSBP, the seed, is clearly both an integral component of biodiversity and a potential genetic resource; all those involved in seed banking in the 21st century ignore the implications of the CBD at their peril.

How is the CBD implemented? How can the threefold objectives of conservation, sustainable utilisation and sharing of benefits be met? Unlike other international environmental conventions, the CBD does not lay down a particular work programme or specific list of activities that, on signing, members become obliged to carry out. The CBD sets out a framework for action rather than a definitive statement of action. Its provisions are mostly expressed as overall goals and policies rather than precisely defined obligations. In the main, it is up to signatories to interpret these provisions according to the national situation in a particular country or region and to implement the Convention accordingly. Examples of national interpretations include: the development of national biodiversity action plans; national policies and guidelines; and/or national legislation regulating access to genetic resources, traditional knowledge and associated benefit-sharing.

What this has meant for the SCD at RBG Kew is that there has never been one world-wide ‘model project’. Every project, and therefore every Access and Benefit-Sharing Agreement reflecting the terms and conditions of the project partnership, has been individually designed to reflect not only the particular characteristics and needs of the partners themselves, but also the, often evolving, implementation of the CBD at a national level, in particular the development of a national position in relation to access to genetic resources and benefit-sharing. As stated earlier, the implementation of the MSBP has always been closely linked with the progress of the wide-ranging and ambitious global CBD. Consequently, the SCD at RBG Kew, working closely with its international partners, has had to maintain a high degree of flexibility and innovation throughout the development of each individual Access and Benefit-sharing Agreement.

2. Access to Genetic Resources and Benefit-Sharing under the CBD

Whilst other treaties refer to access to biological material, for example, CITES covers the import and export of certain listed species, the CBD is the only international treaty to specifically address and link “access” to genetic resources, that is, who may collect and use those resources, with associated fair and equitable “benefit-sharing.” Some people have called this the “grand bargain” at the heart of the CBD: the equitable exchange, on mutually agreed terms, of access to genetic resources in return for the fair and equitable sharing of benefits.

The key provisions relating to access to genetic resources are set out in Article 15 of the CBD. Article 15 seeks to strike a balance between a State’s authority to regulate access to genetic resources, on the one hand, and, on the other, its

Box 1.1 Summary of issues covered by Article 15 of the Convention on Biological Diversity: access to genetic resources

- Article 15(1)** Recognises the sovereign rights of States over their natural resources and that authority to determine access to genetic resources rests with national governments and is subject to national legislation.
- Article 15(2)** Contracting Parties shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of the Convention.
- Article 15(3)** For the purposes of Articles 15, 16 and 19 of the Convention, genetic resources means only those resources provided by the country of origin or by parties who have acquired the resources in accordance with the Convention.
- Article 15(4)** Access, where granted shall be on mutually agreed terms and subject to the provisions of this Article.
- Article 15(5)** Access to genetic resources shall be subject to the prior informed consent of the Contracting Party providing such resource, unless otherwise determined by that Party.
- Article 15(6)** Each Contracting Party shall endeavour to develop and carry out scientific research on genetic resources with the full participation of, and where possible in, the country of origin of the resource.
- Article 15(7)** Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources. Such sharing shall be on mutually agreed terms.

obligation to facilitate access to genetic resources for environmentally sound uses by other Parties to the CBD. Article 15 therefore recognises the sovereign right of states over their biological resources and the consequent authority of national governments to determine access to genetic resources. However, Contracting Parties, i.e., signatories to the CBD (usually a national government) are also obliged to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of the Convention. Finally, Article 15 states that access shall be subject to Contracting Parties' "prior informed consent" and on mutually agreed terms that record the fair and equitable sharing of benefits from the utilisation of those resources, whether those benefits are monetary or non-monetary.

The breadth of the issues covered by Article 15 can be seen in Box 1.1.

In practical terms, Article 15 means that, since 29th December 1993, all those wishing to acquire and use genetic resources, such as seeds and associated herbarium specimens, can no longer assume that such resources are the “common heritage of mankind”, freely available to all, but must follow national provisions on access. Furthermore, the terms of the access, together with the detail of all associated benefit-sharing, must be on “mutually agreed terms”. These “mutually agreed terms” are increasingly being recorded in a written contractual agreement.

Since the CBD came into force, it is therefore no longer appropriate simply to obtain permission to collect and use biological resources from a partner institution, such as a botanic garden or university in another country, unless that institution has clear government authority to give such permission. In the absence of such government authority, and in particular, in the absence of any clear national provisions on access, such as a nominated CBD focal point, “prior informed consent”, to initiate collaboration across national boundaries must be obtained from the government body, such as the Ministry of Environment or Ministry of Agriculture, with the responsibility for biological resources.

Finally, it is important to note that the access and benefit-sharing provisions of the CBD, not only Article 15, but also Articles 8(j), 16 and 19, are becoming a particular source of new national legislation. By January 2003, over 100 countries have either put in place or are designing national laws and regulations to regulate access to genetic resources, traditional knowledge and associated benefit-sharing. Keeping abreast of changes in national legislation has been an especial challenge to the MSBP since, clearly, every Access and Benefit-Sharing Agreement has to respect and comply with the national legal situation in force at the time that the ABSA is signed by all parties.

RBG Kew and Access and Benefit-Sharing under the CBD

The realisation of this so-called “grand bargain” and the recording of the “grand bargain” in a written contractual agreement has been an integral part of the development of the MSBP by the SCD of RBG Kew. It should be viewed against an equally strong institutional commitment by RBG Kew to the letter and spirit of the CBD.

In January 1998, RBG Kew became one of the first botanic gardens to adopt an institutional policy to implement the specific provisions of the CBD on access to genetic resources and benefit-sharing. In particular, this institutional policy stated that:

“RBG Kew will make reasonable efforts to clarify in a written agreement the respective roles, rights and responsibilities of RBG Kew, the source country, and relevant stakeholders in activities involving the collection of genetic resources and associated research, including prior informed consent. Where collecting permits do not clarify benefit-sharing or other obligations, RBG Kew may suggest that a material acquisition agreement (MAA) between the Supplier and RBG Kew be used to clarify the terms on which RBG Kew acquires the genetic resources from the Supplier.”

Having worked on a pilot project with 28 botanic gardens and herbaria from 21 countries, RBG Kew adopted the “Principles on Access to Genetic Resources and Benefit-Sharing” in January 2002 (see Annex 1). It thereby undertook, *inter alia*, to:

“Acquire genetic resources and supply genetic resources and derivatives using written agreements, where required by applicable law and best practice, setting out the terms and conditions under which the genetic resources may be acquired, used and supplied and resulting benefits shared.”

Accordingly, the Seed Conservation Department at RBG Kew has focused a considerable amount of time and energy in introducing the access and benefit-sharing provisions of the CBD to potential project partners and in agreeing mutually acceptable written terms of access and benefit-sharing. The MSBP calls such written agreements “Access and Benefit-Sharing Agreements”, with the aim of reflecting the fact that the MSBP is a global partnership of equals intended to respect and complement the letter and spirit of the CBD.

In April 2002, the international community further recognised the significance of such written agreements, when, at the sixth Conference of the Parties of the CBD (held in The Hague, The Netherlands), Member States to the CBD adopted the so-called “Bonn Guidelines” on Access to Genetic Resources and Benefit-Sharing. These voluntary, non-binding guidelines, which are not intended to be a substitute for national legislation, provide, *inter alia*, framework assistance to national governments, stakeholders, providers

and users of genetic resources on the terms that might be included in an access and benefit-sharing agreement. “Suggested Elements for Material Transfer Agreements” are set out in Appendix I to the Bonn Guidelines.

From the point of view of RBG Kew, Appendix I to the Bonn Guidelines is an extremely useful international standard by which the ABSAs entered into as part of the MSBP can be independently evaluated and verified. Such analysis (see below) shows that the vast majority of the clauses listed in Appendix I of the Bonn Guidelines have already been included in the agreements entered into by RBG Kew and its international partners to date. This suggests that the ABSAs of the MSBP are properly founded and remain examples of current best practice.

Drafting an Access and Benefit-Sharing Agreement

By January 2003, RBG Kew had entered into over ten Access and Benefit-Sharing Agreements, with a wide range of government bodies and/or project partners in a variety of different languages and different legal jurisdictions. Each agreement is unique and reflects the constitution and needs of the project partners; the political, legal and administrative requirements of the regional, national or local government in question; and the level of implementation of the CBD within a particular country or region.

The development of such agreements was, initially at least, a considerable uphill struggle. Politicians, lawyers and seed-banking experts rarely use the same vocabulary, even when speaking the same language! Furthermore, the text of the CBD is drafted in very wide terms and there are several key areas that are very vague when it comes to practical implementation. For instance, what amounts to adequate “prior informed consent?” A letter, a handshake, an oral agreement, a lengthy written contract? Who precisely has authority to give such consent? What amounts to a “fair and equitable” sharing of benefits? Who is the judge of this? Given that the MSBP has been developed at a time when many national governments were, and still are, grappling with these issues, the challenge to RBG Kew and its international partners of finding answers to these questions at the same time as developing, often complex, project partnerships and work programmes, has often been considerable.

However, over a period of several years, it is possible to identify some key terms and conditions that all MSBP partners and their respective governments have wished to include in an Access and Benefit-Sharing Agreement and some important lessons arising out of their drafting and negotiation that have been learnt. Many of these terms and conditions are listed as “Suggested elements for Material Transfer Agreements” in Appendix I of the recently adopted Bonn Guidelines.

Key Terms and Conditions in a MSBP ABSA

The following are examples of some of the key legal terms and conditions that partners may need to consider and discuss as part of the development of the MSBP in a particular country, together with some ideas as to possible solutions. These model clauses are not intended to be, and indeed never have served as, universally applicable tools. Every Access and Benefit Sharing Agreement (ABSA) has been individually drafted and negotiated to reflect the diversity of partners, governments and legal systems in question, and a variety of modifications have been made and additional clauses have been included to reflect this diversity: for instance, clauses on confidentiality; prior informed consent; and monitoring and evaluation mechanisms. However, the model clauses set out below have proved to be a very useful and tangible starting point when introducing the essence of the MSBP, including the close relationship of the MSBP with the letter and the spirit of the CBD, to partners and host governments world-wide.

1. Header to the Agreement

*Access and Benefit Sharing Agreement between [Host Government/
Government Ministry/Partner(s)] and the Board of Trustees of the Royal
Botanic Gardens, Kew, United Kingdom.*

*An AGREEMENT made the [date] day of [month] 200[year] between
[name and address of party(s)] (hereinafter referred to as "...") and the
Board of Trustees of the Royal Botanic Gardens, Kew, Richmond, Surrey,
TW9 3AB, United Kingdom (hereinafter referred to as "RBG Kew").*

The MSBP tends to call all its agreements, "Access and Benefit-Sharing Agreements" on the basis that such a title reflects the fact that the MSBP is a global partnership of equals intended to respect and complement the letter and spirit of the CBD. In practical terms, this is simply another title for a Material Transfer Agreement, or a Material Acquisition Agreement.

Another important aspect of the header is to ensure that the correct parties to the agreement are properly cited. For instance, the statutory right of RBG Kew to enter into a legally binding agreement is vested in the RBG Kew Board of Trustees, represented by its Director. Accordingly, the RBG Kew Board of Trustees can enter into an agreement its own right; it does not require an additional signature or authority from its sponsoring Government Ministry, the Department of Environment, Food and Rural Affairs (Defra).

However, each country, and every MSBP project partner, has different rules and regulations as to who has authority to bind that partner in a legally binding agreement, in particular, a legally binding agreement which involves the transfer of genetic resources internationally. Accordingly, one of the key tasks

of the MSBP International Seed Conservation Coordinators, when establishing a project partnership, has been to ascertain who has authority to give prior informed consent to the MSBP and, therefore, who may be the proper party(ies) to an agreement. The answer may not necessarily lead back to the project partner, but to a separate lead Government Agency or Ministry. Furthermore, once the appropriate Government Agency or Ministry has been determined, the coordinator and the project partner will need to determine whether it would be more appropriate for that Government representative to be a party to the agreement itself or simply to sign a separate letter of prior informed consent to the agreement and to the project as a whole. This process can take many months. However, given the potential sensitivity of the subject matter of the MSBP, it is very important to make the proper enquiries and ensure that the agreement is approved and signed by those with proper authority to do so.

2. Preamble

WHEREAS

The Parties recognise the sovereign rights of States over their own biological resources and that the authority to determine access to genetic resources rests with the national governments and is subject to national legislation;

The Parties are committed to implementing the letter and the spirit of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1992 Convention on Biological Diversity (CBD), regional and national laws and regulations concerning biodiversity including [country] laws on access to and the transfer of plant genetic resources;

[Partner] is [legal status and mission statement];

[RBG Kew] is [legal status and mission statement];

AND WHEREAS

[Partner] and RBG Kew have jointly developed a long-term collaborative project to enhance ex situ conservation and restoration of plants indigenous to [country or region] and are committed to implementing this project in accordance with relevant laws and regulations concerning biodiversity including access to and the transfer of plant genetic resources;

NOW THEREFORE [Partner] AND RBG KEW HAVE AGREED AS FOLLOWS:

A preamble is intended to be an uncontroversial statement of fact setting out the overall background to the parties and to the collaboration. It is for introductory purposes only and is not legally binding. The Parties may wish to use the preamble to clarify the broader national policy and legal context for the agreement and of the MSBP. For instance, the Parties may wish to refer to

the specific international, regional and national laws and regulations that apply to the agreement and to the Government permitting authority(ies) to whom the parties will need to submit an application for access permits, or to the relevant CBD national focal point. The parties may also wish to use the preamble to set out their legal status to contract and their mission statement. In some jurisdictions, it seems usual to confirm at this point that the signatory, such as the rector of a university, has authority to sign the contract on behalf of his or her institution. The Bonn Guidelines recommends a preambular reference to the CBD and also recommends that the preamble contains statements setting out the legal status and mandate of the provider and, where appropriate, the user of the genetic resources.

3. Definitions

In this Agreement the expressions set out below shall mean as follows:

“Agreement” shall mean and include this Access and Benefit-Sharing Agreement together with Annex 1 and Annex 2;

“Commercialise” and “Commercialisation” shall mean filing a patent application, obtaining, or transferring intellectual property rights or other tangible or intangible rights by sale or licence or in any other manner; commencement of product development; conducting market research and seeking pre-market approval and/or the sale of any resulting product;

“Genetic Resources” shall mean any biological material of plant, animal, microbial, fungal or other origin of actual or potential value containing functional units of heredity transferred to RBG Kew under this Agreement and its progeny and derivatives, including extracts and compounds obtained from genetic resources and analogues of those compounds;

“Herbarium Studies” shall mean the comparative observation, characterisation and analysis of plant material to better understand its identification and classification;

“Material” shall mean the duplicate seeds and herbarium specimens transferred to RBG Kew under this Agreement including the genetic resources contained therein and any other genetic resources inadvertently transferred to RBG Kew under this Agreement;

“Notification of transfer” shall mean the documentation recording the Material transferred to RBG Kew under this Agreement, a pro forma copy of which is attached at Annex 2 to this Agreement;

“Seed Studies” shall mean tests required to better understand seed storage requirements including post harvest seed handling, germination tests, moisture relation tests, seed dormancy tests and diagnostic characterisation;

“Third Party” shall mean any person or institute other than [partner] and RBG Kew.

It is extremely important to agree definitions of certain key words and phrases. Lack of clarity at this early stage in the project partnership could lead to later difficulties in implementation, monitoring and even enforcement. These are a few examples of some of the definitions that have been used in MSBP Access and Benefit-Sharing Agreements and are intended to clarify the scope of the biological and genetic material covered by the contract, together with the specific uses that may, or may not, be made of that material. The Bonn Guidelines recommends that a material transfer agreement includes a clause on definitions of terms.

4. Objective

The objective of this Agreement is to set out the terms and conditions under which [Partner] and RBG Kew will access, use and transfer the Material and will share fairly and equitably all resulting benefits.

It may be useful to include an objective clause right at the start of the agreement, largely to provide a clear focus to the document itself. It is often useful to re-visit the ‘objective’ clause as the negotiations proceed and to ensure that the body of the document and the ‘objective’ clause remain consistent.

5. Project Activities

Subject to the terms and conditions set out in this Agreement, [Partner] and RBG Kew will work together to collect, study and conserve the flora of [country] as is more fully set out in the Project synopsis at Annex 1 to the Agreement. Project activities will include but will not be limited to:

- (a) The collection of seeds, representative herbarium specimens and associated data to enhance ex situ conservation of plants indigenous to [country];*
- (b) Cleaning, processing, Seed Studies, storage and long-term conservation of the seed collections at the [partner] seed bank, with duplicates stored at the RBG Kew seed bank;*
- (c) Processing, Herbarium Studies, storage and long-term conservation of herbarium specimens at the [partner] herbarium, with duplicates stored at the RBG Kew herbarium;*
- (d) The generation and dissemination of appropriate scientific data and information in support of the conservation of the biodiversity of [country];*

Within the MSBP, partners will often choose to develop a lengthy and complex Project document, which describes in considerable detail the intended collecting, research and training plans, their timetables and their budgets. Since this Project document will inevitably be a working document, and will be amended on a regular basis as the project proceeds, partners are encouraged to draft a short Project synopsis to be attached to the ABSA. This Project

synopsis can set out the central, constant elements of the collaboration: for instance, it may identify the Project co-ordinators; their key roles and responsibilities; the target species; priority collecting areas; permitted uses of the material collected; specific benefit-sharing activities during the Project; overall budget; and annual project reporting procedures. This synopsis can also be an extremely useful and user friendly tool when explaining the nature of the MSBP to government ministries and other stakeholders. It also complies with the recommendation of the Bonn Guidelines that an agreement should clarify the permitted uses of the genetic resources.

6. Exchange

In consideration of the undertakings given by RBG Kew in this Agreement, [Partner] undertakes the following:

(a) [Partner] will collaborate with RBG, Kew in the activities described in Clause X above and in Annex 1; and

(b) [Partner] undertakes to help RBG Kew to obtain the prior informed consents, permissions and/or licences from the Government of [country] and any other relevant stakeholder(s) such as local or indigenous communities to enable [Partner] and RBG Kew to:

- i. enter the land where the Material is located;*
- ii. access the Material and, where relevant and appropriate, any associated traditional knowledge;*
- iii. obtain an export authorisation for scientific collections to enable the duplicate Material to be exported to the United Kingdom; and*
- iv. conduct the aforesaid Project activities in [country] and in the United Kingdom.*

For the avoidance of doubt, all associated traditional knowledge shall only be used as agreed by the relevant local or indigenous community and in accordance with applicable [country] legislation and the letter and spirit of Article 8(j) of the CBD.

In accordance with the letter and the spirit of the CBD, compliance with all relevant national provisions on access to genetic resources and associated traditional knowledge is important. The purpose of this clause is to ensure just that. The MSBP is not an ethno-botanical project. It does not seek to obtain traditional knowledge. However, many partners have wished to include a clause in the agreement clarifying the position in relation to traditional knowledge in order to reflect national priorities on traditional knowledge and the importance of Article 8(j) of the CBD.

7. Notification of Transfer

All Material collected by or sent to RBG Kew by [Partner] will be listed in a Notification of Transfer, a pro forma copy of which is at Annex 2. All Material listed in a Notification of Transfer will be transferred pursuant to the terms of this Agreement.

The signature of the Executive Director of [Partner] or of his/her authorised representative on a Notification of Transfer will confirm that the Material has been collected and is being transferred into the permanent collections at RBG Kew in accordance with all applicable national or state laws and regulations, permits, prior informed consents and/or licenses and that [Partner] is entitled to and does send the Material to RBG Kew on the terms set out in this Agreement

On each occasion that Material is transferred between the parties, the parties undertake to complete a “Notification of Transfer”. This short document lists all the material transferred (Date collected; Seed Collection Number; Family; Genus or Species; Number of Herbarium Duplicates) and confirms that all the necessary permits, consents and licences have been obtained; for instance, that the necessary acquisition permits, CITES permits and export permits have been acquired.

The purpose of the Notification of Transfer is to enable the parties to easily record and identify the material that has been transferred and the terms and conditions of that transfer. It is intended to aid the proper curation and tracking of the material. This procedure ties in with the recommendation made in the Bonn Guidelines that an agreement should include a clause describing the “genetic resources covered by the material transfer agreements, including accompanying information”.

8. Benefit-Sharing

[Partner] and RBG Kew agree to work together to share fairly and equitably any benefits that arise from the collection, study and conservation of the Material. In particular, [Partner] and RBG Kew agree to work together to support and strengthen institutional development through the provision and exchange of botanical information, technical expertise and through the training of [Partner] personnel as is more fully detailed in Annex 1.

This clause is essential to the validity of both the agreement and the partnership, in a broader sense. A key component of the CBD is the correlation between access to genetic resources and associated benefit-sharing. Accordingly, the parties should be fully in agreement as to the benefits that may arise and how those benefits may be shared fairly and equitably between the parties. The Bonn Guidelines recommends a clause setting out the terms of benefit-sharing.

This model clause has been drafted in general terms; the detail will be set out in the Project Synopsis at Annex 1, and will usually reflect the partners' own specific needs and desires, the legal and policy context of the partnership, as well as the individual project budget. It will also set out a specific time scale over which the defined benefits will be shared. In a not-for-profit project, such as the MSBP, the benefits will not be of a direct financial nature; that is, cash is not exchanged for access to plant specimens for scientific research. Benefits are invariably of an indirect financial nature and are expressed in terms of technology transfer and capacity building, in particular, education and training and shared research and publications.

9. Non-Commercialisation

RBG Kew will not Commercialise any Genetic Resources transferred under this Agreement.

Without prejudice to the above, any Commercialisation to which [partner] and RBG Kew may agree will be subject to a separate written agreement and will respect: the need to acquire new authorisations, permits, prior informed consents and licences to reflect the proposed change of use of the Material; and the letter and spirit of Article 8(j) of the CBD.

It is extremely important to clarify in any ABSA whether or not the genetic resources transferred, including their progeny or derivatives, may be used commercially and, if so, the terms of that commercialisation. The Bonn Guidelines recommends the inclusion of a clause setting out the permitted uses of the resources, including whether or not commercialisation may be permitted.

RBG Kew is a registered charity and the MSBP is a non-commercial project. Accordingly, commercialisation is always a defined term (see above) and this clause clarifies that RBG Kew will not unilaterally file a patent application, obtain, or transfer intellectual property rights or other tangible or intangible rights by sale or licence or in any other manner over the genetic resources transferred as part of the Project. This complies with the recommendation of the Bonn Guidelines that an agreement should clarify whether or not intellectual property rights may be sought and, if so, under what conditions.

This model clause does not, however, stop a partner commercialising any genetic resources collected from its country as part of the MSBP. Furthermore, the second part of this model clause leaves open the possibility of mutually agreed commercialisation. A separate written agreement must be agreed, and as part of this further agreement, permission for the change of use (from herbarium and seed studies to commercial use), including any additional benefit-sharing obligations, must be obtained from all those from whom the material was originally collected, including any relevant local

peoples and indigenous communities. Again, this clause complies with the recommendation of the Bonn Guidelines that an agreement should include a statement that “any change of use would require new prior informed consent and material transfer agreements”.

10. Loan and/or Supply of Material to a Third Party

RBG Kew may loan and/or supply the Material to a Third Party provided such Third Party signs a written agreement with RBG Kew, prohibiting, inter alia, Commercialisation of the Material by the Third Party and the further loan and/or supply of the Material by that Third Party, without permission.

It is standard practice for botanical institutions, such as RBG Kew, to send biological material to other scientific institutions world-wide, the so-called “third parties” for further scientific research, study and conservation. This clause has been drafted to ensure that this practice may continue, subject to the third party signing a written agreement with RBG Kew prohibiting, *inter alia*, commercialisation of that material and setting out the basis on which the material may be passed onto to other parties. The Bonn Guidelines recommends that a clause defining the terms of transfer to a third party should be included in a material transfer agreement.

11. Duration

This Agreement shall come into effect on the date of the last signature. It shall be valid for a term of [X] years after such date.

It can be renewed and extended for further fixed periods thereafter through mutual agreement expressed in writing signed on behalf of [partner] and RBG Kew.

It can be amended through mutual agreement expressed in writing signed on behalf of [partner] and RBG Kew.

For purposes of clarity, it is important to define the exact length of an agreement and how an agreement may be modified. In addition, parties ought to decide on an appropriate renewal mechanism that leaves no room for dispute or ambiguity once the agreement ends. Terms such as ‘this agreement shall extend for a term of [5 years] and will be considered automatically renewed unless the parties otherwise agree’, are unclear and should be avoided. A clause defining the duration of the agreement is recommended under the Bonn Guidelines.

12. Termination

Notwithstanding Clause [on duration] above, either party to this Agreement may give six (6) months written notice to the other party to terminate this Agreement.

The obligations and rights contained in Clauses [3.1b, 3.1c, 6, 7, 8, 11, 12, 13 and 16 inclusive] shall survive the expiration or other termination of this Agreement unless mutually agreed to the contrary in writing.

Good practice dictates that the parties should include a term specifically permitting either party to terminate the agreement, in writing, prior to the full contract term. This notice period should be realistic and reflect the length of the agreement and the activities that the parties have undertaken to carry out. It is a recommended clause under the Bonn Guidelines.

Parties also need to clarify which rights and obligations will continue even after an agreement has come to an end. For instance, if an agreement ends after ten years, parties to an ABSA will no doubt still wish to ensure that, in year eleven and beyond, the biological material transferred will remain properly curated and stored for research and conservation at the [partner] seed bank and the RBG Kew seed bank; that the parties will still have mutual access to such material; and that the material may not be freely commercialised or unconditionally transferred to third parties. The second sentence of this model clause is designed to avoid this situation. It means that obligations set out in the clauses expressly mentioned will continue to bind the parties even after the agreement has expired or terminated. This, too, is a recommended clause under the Bonn Guidelines.

13. Notice

Any notice or other document to be served under this Agreement must be delivered by hand or sent by registered mail or by international courier service to be served at the address below or at such other addresses as may have been notified to the other parties in accordance with this clause.

Any notice shall be marked for the attention of the person at the address indicated below:

[Partner: name and full postal address]

[RBG Kew: name and full postal address]

All notices or documents shall be deemed to have been served at the date and time of delivery of the said notices or documents to the recipient party.

For purposes of legal clarity, the parties should agree on a mechanism for determining the circumstances in which a legal notice or document may be served on the other party. It is a recommended clause under the Bonn Guidelines.

14. Force Majeure

Neither party shall be liable to the other party for any delay or non-performance of its obligations under this Agreement arising from any cause beyond its reasonable control, including, but not limited to, any of the following: Act of God, governmental act, war, fire, flood, explosion, civil commotion or industrial disputes of a Third Party.

The affected party must promptly notify the other party in writing of the cause and the likely duration of the cause. Such notice having been given, the performance of the affected party's obligations, to the extent affected by the cause, shall be suspended during the period the cause persists.

Without prejudice to the above, the affected party must take all reasonable measures to minimise the impact of any force majeure on the performance of its obligations under the Agreement and to ensure, as soon as possible, the resumption of normal performance of the obligations affected by the force majeure.

Force majeure literally means irresistible force or overwhelming power. This is a standard clause in most contracts and its inclusion is recommended by the Bonn Guidelines. It is intended to clarify the parties' rights and obligations under the agreement in the event of a disaster occurring, which is outside the control of either party. It also sets out what is expected from both parties in the event of such occurrence.

15. Dispute Resolution and Choice of Law

Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination (a "Dispute"), shall, to the extent possible, be resolved by good faith negotiation. For the purposes of this clause, "good faith" means in accordance with standards of honesty, sincerity or lawfulness of purpose.

In the event that the Dispute remains unresolved for more than three (3) months from the date when the Dispute is first notified in writing by either party to the other party, the Dispute shall be submitted, before any other means of recourse, to a conciliation procedure with a conciliator agreed between and appointed by the parties or, in default of Agreement within fifteen (15) days of either party receiving written notice of a request for conciliation, to be nominated by [...]. The language to be used in the conciliation shall be [...]. The conciliation shall take place at a venue to be agreed by the parties or failing Agreement in[...].

All Disputes arising out of or in connection with this Agreement which are not previously resolved by conciliation after three (3) months from the appointment of the conciliator shall be referred to and finally settled by an arbitrator to be agreed between the parties or, in default of Agreement within fifteen (15) days of either party receiving a written request for

arbitration, to be nominated in accordance with [...]. Unless the parties to the dispute otherwise agree or except as otherwise outlined in this Agreement, the applicable law of the Agreement shall be [...]; the arbitrator shall determine its own rules of procedure; and the arbitrator shall give its decision in accordance with fairness and equity and the provisions of relevant international law. The language to be used in the arbitration shall be [...]. The arbitration shall take place at a venue to be agreed by the parties or failing Agreement in [...].

MSBP partners share a common purpose that they wish to implement in good faith and in accordance with the letter and the spirit of the CBD. At the time of signing an ABSA, all partners fully expect the relationship to endure and, indeed, to strengthen over time. Nonetheless, given the potential complexities of the issues arising out of the collection and transfer of genetic resources, parties entering into an ABSA would be well advised to agree upon a suitable dispute resolution mechanism and an appropriate choice of law. The Bonn Guidelines recommends the inclusion of such clauses in a material transfer agreement.

Resolution of legal disputes can be extremely complex, expensive and time-consuming, especially where the parties to the dispute are based in different countries, as is invariably the case with the MSBP. Accordingly, the MSBP has designed a multi-tier dispute resolution mechanism, in the hope that most differences may be resolved at an early stage by “good faith” negotiation, as defined in the model clause. In the event of being unable to resolve the matter by good faith negotiation, the parties may seek to resolve a dispute by an agreed conciliation mechanism. Finally, and as a last resort, parties may seek to resolve a dispute by arbitration, whether by the arbitration laws of a particular country, or of a mutually agreed international system, such as the International Chamber of Commerce (ICC) in Paris, or the World Intellectual Property Organisation (WIPO) in Geneva.

16. Entire Agreement

The provisions of this Agreement constitute the entire Agreement between the parties relating to the subject matter and the parties do not make representations or warranties except those contained in the Agreement.

The parties may wish to include a clause stating that they are only legally bound by what is actually written down in the body of and the annexes to the agreement. If such a clause is included, the parties will not be legally bound by any oral exchanges prior to or after the signing of the agreement or by any documents that are not annexed to the agreement. The purpose of such a clause is legal certainty.

17. Assignment

This Agreement is specific to the parties and none of the rights or the obligations under this Agreement may be assigned or transferred without the prior written consent of the other party.

The parties may wish to include a clause stating that the original named parties to the agreement cannot pass on or transfer their obligations under the agreement unless they have the prior written agreement of the other party. As above, the purpose of this clause is legal certainty. If RBG Kew enters into an agreement with a specific partner institution it will not wish to find itself, without notice, subject to an agreement with a completely different institution. The Bonn Guidelines recommends the inclusion of such a clause in a material transfer agreement.

18. No Partnership in Law

Nothing contained in this Agreement shall constitute a partnership in law between [Partner] and RBG Kew or constitute either of them the agent of the other.

The word ‘partnership’ is a legal term and can be taken as meaning more than a general collaboration between contracting parties, in particular ‘carrying on a business with a view to a profit.’ The MSBP is a not-for-profit conservation initiative. Thus, the relationship formalised in the MSBP ABSAs is not a ‘partnership in law.’ Again, the purpose of this clause is legal certainty.

19. Signatures and Date of Signing

As a matter of good practice, each contracting party should retain an original of the agreement, as signed by the authorised representative(s) of the contracting parties. As stated above, the authorised representative of the Board of Trustees of RBG Kew is the RBG Kew Director. The agreement does not have to be signed by the parties at exactly the same time; what is important is that the parties must both sign the same copy(ies) of the agreement and indicate the date of signature. Ideally, the signatories would also initial each page of the agreement to show that they have read and understood the whole document.

20. Annexes to the Agreement

A Project Synopsis will usually be annexed to a MSBP Access and Benefit-Sharing Agreement, for the purposes of clarity and completeness. Other documents, such as the standard RBG Kew Material Supply Agreement, under which biological material may be transferred to third parties, and a *pro forma* copy of the Notification of Transfer listing the material transferred, may also be annexed.

Conclusion

The rules governing access to plant, animal and microbial genetic materials have changed dramatically during the last ten years. Previously, genetic resources were usually viewed as the “common heritage of humankind”, and access arrangements often were informal. With the advent of the Convention on Biological Diversity, the sovereign rights of States over their biological resources have been recognised. The authority to determine access to genetic resources now rests with national government, and arrangements for access and associated benefit-sharing are increasingly recorded in written contractual agreements.

The MSBP has made considerable efforts to reflect and to embrace these changes and to develop CBD-friendly Access and Benefit-Sharing Agreements that provide a transparent link between the implementation of the Millennium Seed Bank Project, and relevant international, regional and national laws, regulations and guidelines, such as the recently adopted Bonn Guidelines. Furthermore, to date, the MSBP experience has shown that the negotiation and drafting of CBD-friendly Access and Benefit-Sharing Agreements can be an effective step in the development of lasting scientific partnerships, in that it obliges all parties, from an early stage, to articulate and prioritise their objectives and strategies, whether they be scientific, managerial or budgetary, thereby building a stronger shared vision.

The model clauses mentioned above, represent the core of all MSBP agreements. Each and every clause has been modified at some stage to reflect national legal and policy objectives, individual partner needs and expectations and individual project priorities. Each Access and Benefit-Sharing Agreement will contain a variety of additional clauses that reflect the individual nature of the project partnership in question. Nonetheless, it is hoped that this paper has served as a positive and practical introduction to the Millennium Seed Bank Project, and to its desire to embrace the new challenges of biodiversity conservation, not just at a scientific level, but also at the increasingly challenging legal and policy level.

Annex 1

Principles on Access to Genetic Resources and Benefit-sharing for Participating Institutions (adopted by the Board of Trustees of RBG Kew in January 2002)

Participating Institutions endorse the following Principles on access to genetic resources and benefit-sharing:

Convention on Biological Diversity (CBD) and laws related to access to genetic resources and associated traditional knowledge and benefit-sharing

- Honour the letter and spirit of the CBD, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and laws relating to access and benefit-sharing, including those relating to traditional knowledge.

Acquisition of genetic resources

- In order to obtain prior informed consent, provide a full explanation of how the genetic resources will be acquired and used.
- When acquiring genetic resources from *in situ* conditions, obtain prior informed consent from the government of the country of origin and any other relevant Stakeholders, according to applicable law and best practice.
- When acquiring genetic resources from *ex situ* collections (such as botanic gardens), obtain prior informed consent from the body governing the *ex situ* collection and any additional consents required by that body.
- When acquiring genetic resources from *ex situ* sources, whether from *ex situ* collections, commercial sources or individuals, evaluate available documentation and, where necessary, take appropriate steps to ensure that the genetic resources were acquired in accordance with applicable law and best practice.

Use and supply of genetic resources

- Use and supply genetic resources and their derivatives on terms and conditions consistent with those under which they were acquired.

- Prepare a transparent policy on the commercialisation (including plant sales) of genetic resources acquired before and since the CBD entered into force and their derivatives, whether by the Participating Institution or a recipient third party.

Use of written agreements

- Acquire genetic resources and supply genetic resources and derivatives using written agreements, where required by applicable law and best practice, setting out the terms and conditions under which the genetic resources may be acquired, used and supplied and resulting benefits shared.

Benefit-sharing

- Share fairly and equitably with the country of origin and other Stakeholders, the benefits arising from the use of genetic resources and their derivatives including non-monetary, and, in the case of commercialisation, also monetary benefits.
- Share benefits arising from the use of genetic resources acquired prior to the entry into force of the CBD, as far as possible, in the same manner as for those acquired thereafter.

Curation

- In order to comply with these Principles, maintain records and mechanisms to:
 - record the terms and conditions under which genetic resources are acquired;
 - track the use in the Participating Institution and benefits arising from that use; and
 - record supply to third parties, including the terms and conditions of supply.

Prepare a policy

- Prepare, adopt and communicate an institutional policy setting out how the Participating Institution will implement these Principles.