Will we share the big part?

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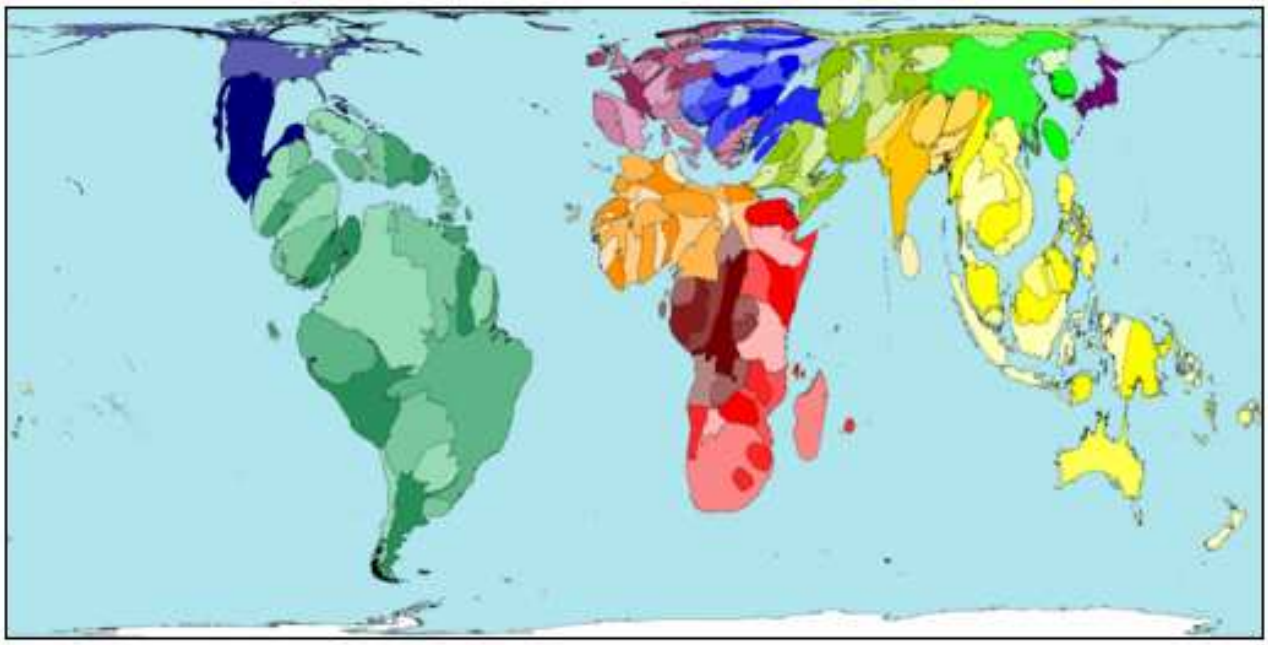
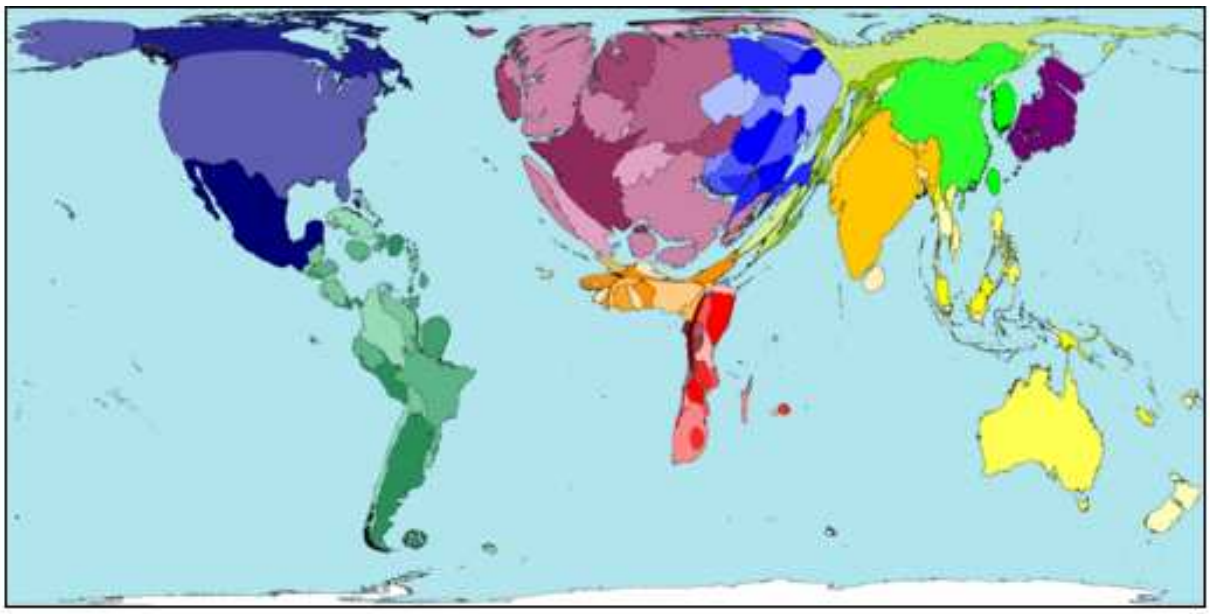
One of the main unresolved issues in the ABS Protocol negotiations are genetic resources held *ex-situ*. It is obvious that a major part of genetic resources has already been taken from the countries of origin during the past 400 years, and are now kept in botanical gardens (see fig.), research institutions, by genetic resource broker companies, companies for outsourced access, and even commodities on the shelves of supermarkets. The question remains: Will we share the benefits arising out of the utilization of these resources or will the new protocol legitimize the biopiracy which has occurred since the time of colonization.



Distribution of plant species



and of Botanical Gardens ! Source:www.worldmappers.org

Sharing nothing but the benefits for the utilization of genetic resources which were acquired *after* the entry into force of the protocol for a given country, means refusing to share the biggest part of the benefits. Users will examine ex-situ collections in their own country or in non-Parties or will check if the resource is available in the open market. If a user has illegally accessed a genetic resource in a country of origin, he will pretend that he legally found it ex-situ.

A recent case: The Nestlé Rooibos Patents

This case exemplifies how benefits to Northern corporations are derived from genetic resources first accessed long ago. Nestlé has newly applied patents on the use of Rooibos for cosmetic purposes. Rooibos is clearly an endemic plant to South Africa and, even now, only grown in certain areas of South Africa. It is also evident that everybody could find Roiboos tea in the shelves of his supermarket. Nobody will urge somebody who drinks Rooibos-Tea at home to ask for PIC of the South African Focal Point (as this is not falling under the common understanding of utilization, as was once again confirmed during this working group). But reading the Convention it should be evident that the benefits - for example out of the commercialization of the new use as cosmetics based on genetic resources – should be shared with the country of origin.

It is maybe one of the most widespread misunderstandings of CBD obligations that Benefits should only be shared when the genetic resource has been accessed under the rules of the Convention. This nowhere spelt out in the Convention text. On the contrary, Art. 15 clearly states that the "benefits arising from the commercial and other utilization of genetic resources" should be shared fair and equitably with the provider country.

Botanical Gardens show that it is possible.

The principles of Botanic Gardens Conservation International state "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."
Moreover, Botanical Gardens working together in the International Plant Exchange Network (IPEN), have agreed to use a material transfer agreement which includes the following para: *"By signing this Agreement the recipients commit themselves to act in compliance with the CBD and its agreed provisions on Access and Benefit-Sharing. This includes a new Prior Informed Consent (PIC) of the country of origin for any uses not covered by terms under which it has been acquired (such as commercialisation)."*

The International Treaty (ITPGRFA) also does not differentiate between genetic resources accessed by CGIAR-Centers (or other seed banks) before or after the coming into force of the CBD.

These examples show that it is possible to include all ex-situ accessions into future benefit-sharing agreements – irrespective of whether they have been accessed before or after the coming into force of the CBD. The emerging ABS Protocol should maintain this principle and implement best practice, not worst practice..

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