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AD HOC OPEN-ENDED WORKING GROUP ON  
ACCESS AND BENEFIT-SHARING

Ninth meeting (resumed)  
Montreal, 10-16 July 2010

**POSITION PAPER SUBMITTED BY THE SWISS ACADEMY OF SCIENCES**

*Note by the Executive Secretary*

1. The Executive Secretary is circulating herewith for the information of participants in the resumed session of the ninth meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, a position statement by the Swiss Academy of Sciences on article 6 (a) of the revised draft protocol on access and benefit-sharing.
2. The paper is being submitted in the language and form in which it was received by the Convention Secretariat.

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## Non-commercial research

### Position statement of the Swiss Academy of Sciences on Art. 6 (a) of the Revised Draft Protocol on Access and Benefit Sharing.

#### Introduction

The Swiss Academy of Sciences (SCNAT) elaborated this position paper on the ABS system and non-commercial research because it is dedicated to contributing to a constructive process to finalize the ABS protocol to the CBD, and to supporting research that contributes to attain its goals, namely the conservation and ecologically safe use of the resources.

The position paper advocates a specific solution for non-commercial, academic research. To this end it provides reasons and arguments that result from the research executed within the SCNAT ABS-project. The paper is meant to thus contribute to a productive debate of the issue.

#### Swiss Academy of Sciences, SCNAT, Berne, Switzerland

For nearly 200 years the Swiss Academy of Sciences (SCNAT) has been committed to the establishment and development of sciences in Switzerland. It makes use of expert knowledge and promotes the dialogue between science and society.

Today the Swiss Academy of Sciences is an extensive network of over 35,000 scientists from all natural science disciplines. The Swiss Academy is organized in 6 platforms: Biology, Chemistry, Geosciences, 'Mathematics, Astronomy and Physics', 'Regional science expert societies', and 'Science & Policy'. The Academy focuses on the core tasks of horizon scanning, ethical aspects of sciences, the extensive dialogue with society and policy makers, and the central basic task of promoting sciences as a cultural asset. Three cross-cutting interdisciplinary fora within the «Platform Science and Policy» – the Swiss Biodiversity Forum, the Forum for Genetic Research and the Commission for Research Partnership with Developing Countries - allow for a differentiated and well funded debate in matters concerning science, society and policy.

#### Why we elaborated a statement

SCNAT is committed to promoting science and to contributing to the Convention on Biological Diversity (CBD). SCNAT believes that non-commercial biodiversity research contributes to the CBD objectives. Non-commercial research performed by public institutions is essential for the conservation and sustainable use of biodiversity, and it is closely aligned with the fair and equitable sharing of benefits derived from genetic resources.

SCNAT has been closely following the ABS International Regime for years, taking into account the concerns of the scientific sector and have actively raised awareness and built capacity among academia regarding the CBD and especially the ABS-principles.

## Our concerns

Our concerns are based on our experiences of the counterproductive effects of an overly restrictive ABS system for non-commercial public research and on the sense that the currently proposed wording in the Revised Draft Protocol<sup>1</sup> does not resolve this problem.

*Present wording of Art. 6 (a) states:*

*"In the development and implementation of their national legislation on access and benefit-sharing, Parties shall:*

*(a) Create conditions to facilitate, promote and encourage biodiversity-related research, important for the conservation of biological diversity and the sustainable use of its components..."*

Allegedly, the term "biodiversity-related research" covers all types of research, be it for non-commercial purposes in an academic context, be it preparatory research in an industrial setting. In our view, this solution does not sufficiently take the specifics of non-commercial academic research into consideration. Our concern is that the liaison with industrial preparatory research will lead to a solution of the "highest common denominator" and so not solve any problems for non-commercial, academic research.

We therefore submit that there is a need for the text of the Protocol to identify and define the specific conditions and needs of non-commercial, public research in honouring the two contributions of non-commercial research to the implementation of the CBD's goals, namely (1) the sharing of the benefits specific to this type of research, and (2) generation of essential knowledge for conservation and sustainable use of biological diversity.

## Interpretation of the present wording of Art. 6 (a)

The wording of Art. 6 (a) that research has to be "important for the conservation of biological diversity and the sustainable use of its components" is vague and raises more questions than it answers.

1. It links the term "research" to the language of Art. 1 of the CBD that defines the general goals of the Convention, being a) the conservation of biological diversity, and b) the sustainable use of its components.
  - 1.1. It is to be questioned what is meant by "sustainable use". According to general understanding, "sustainable use" implies all uses of the components of biological diversity that are not harmful to the environment and do not deplete the resource. This of course includes uses for economic, commercial purpose. From this we conclude that the language of Art. 6 (a) comprises the economic component of the CBD and clearly includes research executed by whatever stakeholders: public and/or private to whatever possible ends: purely scientific or commercial use, only narrowly limited by the sustainability requirement.  
This has the advantage that situations that are considered to be difficult to sort out (Public-private cooperation; cooperation between academic and university research institutes) are avoided. Yet, the question is whether this benefit values the detriments implied in the formulation.

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<sup>1</sup> Doc UNEP/CBD/WG-ABS/9/3 Annex I.

- 1.2. With regard to the acceptability of the wording, we fear that in particular provider countries will argue that this article does not resolve the problem; and accordingly strict measures will be applied in any case.
2. The terms “important for conservation and sustainable use” cannot be directly applied when a national ABS competent authority considers the terms of access to their genetic resources. Experiences in particular with the sustainable use-language show that the term is not clear at all and in great need of interpretation. The same is true for the criterion of “importance” for conservation etc.
  - 2.1. If the term is not detailed by the national legislator, the task to interpret the norm will stay with the national administrative authorities implementing ABS measures. The wide range of interpretation possibilities will lead to unpredictability and legal insecurity.
  - 2.2. The wording may indicate that only results that are applicable will qualify for benefiting. “Components” links the article to the derivative discussion in the ABS negotiations! We consider this to be very problematic indeed.

From this all we conclude that the language creates more questions than it resolves. To counteract this effect, text that is more operational is necessary.

1. Article 6 (a) speaks of “conditions to facilitate, promote and encourage” biodiversity-related research. We submit that – given the argument under 1. - there is no essential difference between this version and the wording of Art. 15.2 CBD that provides for “conditions to facilitate access to genetic resources for environmentally sound uses”. The difference here lies uniquely in “research” (instead of “access”) and the query to “promote and encourage” this research. Considering that “use of genetic resources” in the sense of the ABS principles is not possible without some preliminary research, Art. 6 of the Revised Draft Protocol does not offer a really novel perspective.

Given these (and perhaps other) difficulties of the present wording we are deeply concerned that the article does not achieve the intended and desirable goal to create simplified access regimes for non-commercial, public, academic research.

*We therefore strongly opt for wording that distinguishes between research executed by non-commercial, public institutions and by private commercially oriented entities.*

### **Suggested alternative wording for Art. 6.1 (a)**

Taking into account the above considerations, we advocate language that clearly differentiates between non-commercial research performed by public institutions and research aimed at economically valuable products. We propose to introduce the following wording into Art 6:

*Art. 6: Considerations relevant to research*

*1. In the development and implementation of their national legislation on access and benefit sharing, Parties shall:*

*(a) Create conditions to facilitate, promote and encourage public, non-commercial research on biological diversity:*

*(i) Provide for simple procedures for access to genetic resources for public non-commercial research on genetic resources.*

(ii) Encourage initiatives to create supportive instruments such as framework ABS contracts and certification schemes for public research institutions.

(iii) Implement measures to control the sharing of benefits resulting from non-commercial public research by its research institutions.

## Rationale

### Art. 6.1 (a) Create conditions to facilitate, promote and encourage public, non-commercial research on biological diversity:

1. Research provides the basic knowledge for conservation and sustainable use of biological diversity and innovation based on genetic resources. Without research, there will be neither monetary nor non-monetary benefits. We welcome the explicit mentioning of *research* in the text of the draft protocol.
2. Public non-commercial research typically aims at providing *public goods*; it supplies knowledge and information that is necessary for the conservation and sustainable use of biodiversity (taxonomy, systematic, ecology, evolution). Therefore it is an indispensable activity for the implementation of the CBD's goal to conserve biological diversity. In particular the CBD Global Taxonomy Initiative supports countries in fulfilling their CBD obligations; (Art. 7 CBD, Identification and Monitoring as basis for conservation and sustainable use (Arts 8-10 CBD).
3. Provider countries argue that an a priori distinction between research for non-commercial and commercial ends is not possible, given the eventualities of a flow of the resources through the value chain. It is true that no categorical difference can be made. Yet, analyses of the Swiss Academy of Sciences revealed that there are differences regarding the *probabilities* of a resource entering the commercial value chain. Differentiation is possible according to the resources used (dead or living) and types of research (Biodiversity inventories (e.g. research aiming at characterization & evaluation) vs. research aiming at investigating functionality, multiplication<sup>2</sup> & modification of biodiversity)<sup>3</sup>.
4. The Bonn workshop on Preserving International Access to Genetic Resources for Non-commercial Biodiversity Research<sup>4</sup> identified criteria that allow distinguishing between non-commercial and commercial research. Typical for non-commercial research is for instance the need to publish the results, (vs. restrictions on dissemination of research results); open access to and exchange of reference specimens (vs. restrictions on access to reference specimens). Another operative distinction is the source of origin of the resources used by a scientist, and funding through public grants, which normally include clear conditions to transfer the results (vs. the protection of the results of the research by trade secrets or patents).

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<sup>2</sup> The manipulation and multiplication of organisms or parts thereof requires more stringent ABS agreements for controlling and is thus considered a distinct category.

<sup>3</sup> Swiss Academy of Sciences, Report on initiatives and research regarding ABS for non-commercial research (forthcoming)

<sup>4</sup> UNEP/CBD/WG-ABS/8/INF/6.

**Art. 6.1 (a) (i) Provide for easy access and simple procedures for access to genetic resources for public non-commercial research on biological diversity.**

1. It is essential that research is not hampered by complicated access procedures. We appreciate the rationale of the draft article to create conditions to facilitate, promote and encourage research and the endorsement of CBD Art. 12 b.  
Yet, non-commercial research has reported that restrictions and problems for gaining access due to bureaucratic hurdles tend to increase. Scientists have to spend more and more time to obtain research licences and permits (1<sup>st</sup> to do the research, 2<sup>nd</sup> to sample, 3<sup>rd</sup> to export the material). Such factual problems caused by ABS requirements and procedures that are not adapted to the specifics of research by public institutes, hamper research.
2. There are *fundamental and ABS-relevant differences* between research performed by public versus research of private institutions. In order to achieve its goals, non-commercial public research needs transparent ABS conditions and simple, efficient procedures that nevertheless provide for legal security.
  - 2.1. Academic researchers as a rule work in a highly competitive environment, on a tight time-schedule and with restricted economic resources. They need to produce results within a given time-frame and with the means allocated. It must be avoided that the increasing difficulties compromise the success of the research project.
  - 2.2. Research patterns and cultures are different between public research and private research. Public research is transparent by its nature. It creates benefits that are predictable and directly linked to the on-going research. This leads to different approaches to benefit sharing. Non-commercial, public research as a rule leads to *non-monetary benefits* – such as capacity building at countries or origin, the development of research alliances, contributions to national collections, the access to research information to support the conservation and sustainable uses.<sup>5</sup> These benefits accrue *during* the execution of the research. Accordingly they are shared in parallel to – or integrated in the research. This means that the time-gap between research and the possible generation of benefits that is typical for commercial research does not exist. Consequently, the sharing of benefits can more easily be controlled by providers. Accordingly, public research (or non-commercial academic research) does not need as strict, tight conditions as might be deemed necessary for commercial research.

**Art. 6.1 (a) (ii) Encourage initiatives to create supportive instruments such as framework contracts and certification schemes.**

In our view on the background of the debate on simplified access for non-commercial, academic research lies in the problem of the providers to control the use made of the resources, once they are transported out of the country, and to monitor possible benefits resulting from the research. Yet, it is not possible to solve this problem by creating stricter access procedures. Lastly they will result in researchers refraining from seeking access in countries that have too burdening procedures.

We argue that the current lack of trust can be eased by measures aiming at creating transparency and confidence and by encouraging long-lasting partnerships between research institutes and providers. Therefore we submit that in parallel to the simplification of ABS regimes for non-

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<sup>5</sup> See Bonn Guidelines, xxx and UNEP/CBD/WG-ABS/9/3, Reviewed Draft Protocol, Annex 1, 2.

commercial research, measures to answer the *concerns of provider countries* are to be taken into account:

1. In the first instance, specific voluntary schemes to foster confidence, transparency and cooperative approaches must be further investigated. Ideas exist, such as the certification of user institutions<sup>6</sup>, or the option to allow for framework contracts between research institutes and governments in providing countries<sup>7</sup>.
2. We advocate the use of model ABS contracts developed for non-commercial research purposes<sup>8</sup>, especially in those situations where no national legislation is yet in place and to expedite non-commercial research.
3. Schemes for compensation in case of commercial benefits resulting from resources/information that – as a result of non-commercial, academic research - have been deposited in the public domain (such as ex situ resources in genebanks and microbial collections; publication of traditional knowledge TK) must be further investigated, taking account of and evaluating the experiences in other international instruments<sup>9</sup>. Collections and free access to collections for scientific and educational work are essential for the progress of science. Free access for these goals must be safeguarded. Yet, we fear that if no practical solution is found for the eventuality of the creation of a commercial product on the basis of a resource stored in a collection, collection for ex-situ storage will become impossible and the entire instrument for education and science will be in danger.

**Art. 6.1.(a)(iii) Implement measures to control the sharing of benefits resulting from non-commercial public research by its research institutions**

Taking account of the above argumentation on trust-building measures and under the aspect of equity of obligations, we argue that the simplification of access procedures for non-commercial public/academic research has to be balanced by adequate and practical control measures on the side of the users; that are adapted to the situation in the user country, and efficient without creating yet additional administrative costs/efforts. This has to be taken into account in the negotiations of the control-measures in the context of Art. 12 and 13 of the draft protocol.

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<sup>6</sup> Compare L. Glowka (2001) *Towards a certification system for bioprospecting activities*. Study commissioned by the State Secretariat for Economic Affairs, Swiss State Secretariat for Economic Affairs.

<sup>7</sup> Presentation of G. Nemoga Soto, Swiss-Colombian Side Event on Models of Contracts for non-commercial research at ABS WG 9 1 in Cali.

<sup>8</sup> The Swiss Academy of Sciences is currently elaborating ABS model contractual agreements for non-commercial research. The model contract includes optional clauses that allow bilateral agreements on all relevant research steps, uses, products, etc. The clauses are simple, yet they enable control over genetic resources, especially in those cases when the research work is complex and maybe even slanted towards potential commercial uses, including unexpected results. This tool has the potential to become a valuable tool for providers and users with non-commercial research intent especially in those cases where no national legislation is available. It will be made available to interested stakeholders free of charge and presented during a side-event at COP10 in Nagoya, Japan.

<sup>9</sup> For instance the International Treaty for Plant Genetic Resources for Food and Agriculture.