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CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY
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The Hague, 7-19 April 2002
Item 23 of the provisional agenda*

ACCESS AND BENEFIT-SHARING AS RELATED TO GENETIC RESOURCES

Compilation of submissions by experts on the use of terms

Note by the Executive Secretary

1. At its meeting in Bonn, on 22-26 October 2001, the Ad Hoc Open-ended Working Group on Access and Benefit-sharing recommended *inter alia* that the Executive Secretary, in consultation with the Bureau of the Conference of the Parties, convene a group of ten experts nominated by Parties, having due regard to the principle of equitable geographical representation, to develop draft elements of a decision on the use of terms in paragraph 6 of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their utilization.

2. By notification dated 29 November 2001, the Executive Secretary invited interested Parties to nominate an expert and to communicate his/her name and curriculum vitae to the Secretariat no later than 31 December 2001. On 15 January 2002, the Executive Secretary sent a second notification reminding Parties of the request and extending the original deadline to 15 February 2002.

3. As of 22 February 2002, 25 nominations had been received by the Secretariat. On the basis of these nominations, the Secretariat has selected the 10 following experts, in consultation with the Bureau, on the basis of their expertise, the need to ensure equitable geographical distribution and with due regard to gender balance:

Dr. Dayuan XUE, China
Ms Emilia Lara Diaz, Cuba
Mr. Getachew Mengiste, Ethiopia
Dr. Almuth Ostermeyer-Schlöder, Germany
Dr. Sujata Arora, India
Dr. David Okali, Nigeria
Mr. Manuel Ruiz Muller, Peru
Dr. Wieslaw Podyma, Poland
Mr. Alwin Kopse, Switzerland
Mr. Sergei Leonidovich Mosyakin, Ukraine

* UNEP/CBD/COP/6/1 and Rev.1/Corr.1.

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4. Experts were invited to provide to the Secretariat their suggestions regarding elements which should be included in the use of the following terms included in paragraph 6 of the draft Bonn Guidelines:

(a) Access to genetic resources;

(b) Benefit-sharing;

(c) Commercialization;

(d) Derivatives;

(e) Provider;

(f) User;

(g) Stakeholder;

(h) *Ex situ* collection;

(i) Voluntary nature."

5. The submissions received by experts have been compiled by the Secretariat and are available in annex I for consideration by the Conference of Parties. Paragraph numbers have been added for ease of reference.

6. In order to assist experts in their work, a preliminary list of existing definitions of the terms listed in paragraph 6 of the draft Bonn Guidelines was compiled by the Secretariat. This list contains definitions taken from existing guidelines, codes of conduct, agreements and legislation, which address the issue of access to genetic resources and benefit-sharing. It should be noted that the list is not comprehensive and was only meant to assist in launching the process on the use of terms. The list is included in annex II.

Annex I

SUBMISSIONS BY EXPERTS ON THE USE OF TERMS IN PARAGRAPH 6 OF THE DRAFT BONN GUIDELINES

I. GENERAL COMMENTS

1. General comments regarding the use of terms in paragraph 6 of the draft Bonn Guidelines were provided by the experts from Ethiopia, Germany and Switzerland.

Ethiopia

2. Defining the terms is essential. It will help to clarify the concepts and ensure uniformity in national schemes that will be developed by member countries.

Germany

Some general remarks:

3. It is obvious that a basic common understanding of the use of certain terms must be reached in order to make the Guidelines applicable. However, it is not clear at this stage which terms really have to be defined in the guidelines and how detailed these definitions would have to be. It is important to note that many important terms are already defined in the Convention itself, as stated in para 5 of the draft Bonn Guidelines, which was agreed at the Working Group Meeting.

4. As experience in other processes shows, reaching a common understanding on the definitions of terms might lead to endless debates. It is important to reiterate that it would be extremely discouraging for the process of implementing the ABS provisions of the CBD if the great progress which had been made at the open-ended working group meeting last October is not supported by COP 6. The adoption of the draft Bonn Guidelines should certainly not be delayed even if a final agreement on definitions of terms is not reached before or at COP 6.

5. A comprehensive glossary of terms is not a prerequisite for the adoption of the Bonn Guidelines. The development of definitions or explanations of terms used in the Bonn Guidelines should be a process which could continue after the adoption of the Bonn Guidelines.

6. The possible development of a glossary should be part of the review process which is already foreseen in the draft Guidelines. One of the key features of the "Bonn Guidelines" is their evolutionary approach : Para I.A.4. (f) states that "the guidelines are intended to be reviewed and accordingly revised and improved as experience is gained in access and benefit-sharing". Our main objective should be to gain experience in the application of the guidelines as soon as possible. An assessment of the practicability of the Guidelines could be foreseen at the end of 2003 or at the beginning of 2004.

7. A workshop (30 experts) could be convened in early 2004 to discuss the experience gained with the application of the guidelines in particular with a view to identifying the possible need to develop more specific definitions of terms.

More specific comments

8. For the time being the following approach might be appropriate:

9. According to para I.A.4. (g) besides the above mentioned "evolutionary approach" another key feature of the Guidelines is flexibility. The Guidelines are "...to be useful across a range of sectors, users and national circumstances and jurisdictions". It is very important to make sure that any glossary of the use of terms is in line with this key feature. If definitions are too prescriptive the flexible approach and the desired broad applicability might be adversely affected. It is certainly necessary that the definitions of terms in the voluntary guidelines must accommodate existing definitions in already existing national or regional legislation. Otherwise these regions would be excluded from the application of the guidelines. The same is true for existing sectoral guidelines. Also the key feature could imply that it would be more

appropriate to include some definitions in the respective bilateral contractual arrangements on mutually agreed terms. These considerations might lead to the conviction that at this stage an Annex on "Use of terms", which would consist of a compendium of existing use of terms would be a pragmatic solution.

10. The paper the Secretariat has prepared for the Expert Group might be used as a starting point and could be redrafted and completed in the course of time. This paper could be merged with the existing appendix II, which gives examples for monetary and non-monetary benefits. This list of examples explains benefit sharing sufficiently and is therefore much more in line with the guidelines than a single definition of the term "benefit sharing" could be.

11. A list of typical possible stakeholder might also be more appropriate and more in line with the provision of the Guidelines on Stakeholder involvement, Part III Participation of Stakeholders: "... their appropriate involvement can only be determined on a case by case basis". By opting for this "example approach" it might be possible to accommodate as many specific situations as possible and create transparency for the users of the Guidelines. Of course this new Appendix or Annex on the use of terms should be a core part of the review process.

12. The consequence of this approach would be that the Conference of Parties may wish to consider to remove paragraph 6 of the Bonn Guidelines and to incorporate a reference to the above mentioned Appendix in paragraph 5. In addition a reference to the above mentioned review process might be included as well.

Specific comments on some terms:

13. If there should be a common understanding that definitions are needed the drafting of these definitions should be guided by the following principles:

(a) As few new definitions as possible should be created (for instance the term "voluntary nature" is sufficiently clear in the context of the provisions of the Guidelines and would therefore need no further elaboration),

(b) They should be as simple as possible,

(c) They should be as broad as possible,

(d) Existing definitions used in multilateral agreements on similar issues such as the International Treaty on Plant Genetic Resources for Food and Agriculture should be used as much as possible because they reflect a broad international consensus already (for instance definition of *"ex situ* collection" of the IT on PGRFA could be used if the wording is appropriately adapted).

14. A list of short, simple and broad definitions can be found in the Common Policy Guidelines of the Botanical Gardens, which also includes a very general definition of "derivatives". If derivatives will be mainly referred to in the context of benefit sharing comprehensive definitions of the term could be included in the specific contractual arrangement such as material transfer agreements.

Switzerland

General suggestions

15. The draft elements on the use of terms for the draft Bonn Guidelines, as the draft Bonn Guidelines themselves, are of voluntary nature. As an instrument of a voluntary nature, the Bonn Guidelines, once adopted, are not legally binding but are intended to provide guidance to governments in developing their national legislative, administrative, and policy measures for access to genetic resources and the sharing of benefits there from. Others involved in access and benefit-sharing may also find guidance in these guidelines.

16. During the Bonn meeting of the ad hoc open-ended Working Group on Access and Benefit-sharing the argument was made that the introduction of a provision on "Use of terms" might lead to a misunderstanding on the legal status of the terms included. As part of a voluntary instrument these terms enjoy the same status as such an instrument and their inclusion should aim at developing a common

understanding. In order to avoid any confusion, the Conference of the Parties may wish to consider the removal of paragraphs 5 and 6 of the draft Bonn Guidelines and to include them as an Annex of the Bonn guidelines under the heading of "Glossary of terms". The UNEP Biosafety Guidelines may serve as an example for such an annex.

17. The list of terms should be kept as short as possible and should make use of the existing terms as defined in the Convention of Biological Diversity. Several of the terms are sufficiently clear in the context of the provisions in which they are found or their ordinary meaning is used. Hence, the following terms do not require any further elaboration:

(a) *Ex situ* collection;

(b) Voluntary nature.

18. The term "derivatives" appears twice in the draft Bonn Guidelines as bracketed text. There has not been a common understanding either what meaning this term has nor whether or not to retain it in the text. It is, therefore, premature to suggest a definition of "derivatives". If the term is to be retained, the Conference of the Parties may need to consider how to proceed with the development of a definition. The possibly far reaching implications of the inclusion of derivatives may give reason for the constitution of a Technical Expert group or for holding another meeting of the ad hoc open-ended Working Group.

19. The draft Bonn Guidelines use the terms country, Party, and Contracting Party. It is not always clear whether there is a difference in the meaning of these terms and, should this be the case, what the consequences are. For example, paragraph 24(d) mentions the 'provider country' while paragraph 26 talks about 'Contracting Party providing such resources'. There may be a need to clarify the text regarding these terms.

20. There is a need to ensure that the Bonn Guidelines, once adopted, do not operate in cross purpose to the Global Taxonomic Initiative (GTI). There is a need to ensure that the use of terms does not have negative implications for this initiative. Due to time constraints it may be difficult to assess the terms used with regard to the GTI prior to COP 6. Therefore, paragraph 4(f) of the draft Bonn Guidelines should also include the review and eventual revision of the use of terms.

II. SUGGESTED ELEMENTS OF USE OF TERMS

21. The following includes submissions by experts on suggested elements to be included in the use of terms set out in paragraph 6 of the draft Bonn Guidelines.

A. Access to genetic resources

China

22. "Access" means the acquisition and use of genetic resources conserved in *ex situ, in situ* and other conditions, and of their derivatives or, as applicable, intangible components, for purposes of research, biological prospecting, conservation, industrial application or commercial use, among others.

Cuba

23. "Access to genetic resources" means acquiring an authorisation to obtain in any possible way and to use for any purpose, including its commercial exploitation, a genetic resource and/or its derivatives and traditional knowledge, innovations and other associated intangible elements, regardless of whether the resource is kept *in situ*, *ex situ* or in any other conditions.

Ethiopia

24. The Bonn guidelines are on access to genetic resources and associated knowledge. The definition of the concept of "access to genetic resources" is, however, limited to genetic resources. In view of the scope of the guidelines, we suggest to define the concept of "access" instead of "access to genetic resources".

25. "Access" may be defined as collecting, acquiring, transferring, or using, genetic resources and/ or associated knowledge.

India

26. "Access to genetic resources" means to obtain a genetic resource by whatever means and/or to utilize any genetic resource for research and/or commercial utilization, and includes bio-prospecting and field collection.

27. The term 'bio-prospecting' which has been used in the above definition, may be defined as follows:

> "Bio-prospecting" means survey and collection of species, sub-species, genes, compounds and extracts of biological resource for any purpose and includes characterization, inventorisation and bioassay.

Nigeria

28. The permission and **facility** to acquire and use genetic resources. (Addition of **facility** to the definition of the *Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing*).

Peru

29. Firstly, access to genetic resources as a notion is limited to "physically obtaining biological material from any source and using the genetic resources contained therein". Strictly speaking people are accessing genetic resources at all times, for different purposes and under varied circumstances. However, key in the context of article 15 is the fact that the genetic resources are actually utilized in some way, generally for some type of research.

30. In this sense, it makes it a little easier to understand the issue if actual access (which regularly occurs) is linked to biological resources with subsequent utilization (in some way) of the genetic resources and their related information. If biological resources are obtained and used, but there is no actual use of their genetic content, this situation is not to be addressed by ABS regulations.

31. Secondly, depending on the actual use of the genetic resources, specific conditions can be set.

32. Breeding animals and even plants offer interesting examples. In these cases the genetic content and potential of these animals (whether horses, cows, vicuñas, flowers, etc.) is being utilized without really accessing genetic resources per se. However, semen and ovules or pollen in the case of plants are the most important issue at stake in these processes. In this regard, one could argue that genetic resources are being used (and certainly accessed by breeders) in some way. This is clearly the case in artificial insemination procedures or through genetic engineering procedures. This is an important issue for Andean countries, where the main producers of alpaca and vicuña fibers are now in New Zealand, Australia, the United States of America, where breeders had access to the genetic content and potential of these species. Breeders of all kinds are in fact using genetic resources by accessing biological resources in terms of animal or plant specimens. It should be noted that breeding is certainly a commercial activity with a huge and very lucrative market worldwide.

Poland

33. "Access to genetic resources" means, in accordance with terms mutually agreed by the provider and the user, the granting of permission by a provider to the user for collecting, obtaining or otherwise acquiring ownership of or property rights with respect to genetic resources *in situ* or *ex situ.*

34. This definition applies only to access to physical items, plants, animals, microbes and not to intangible subjects such as associated knowledge or traditional knowledge, innovations or practices. The importance of this note should be considered in context of definition of "benefit sharing" where by term "access to genetic resources" is defined scope of benefit sharing.

Switzerland

35. "Access to genetic resources" means the admission/consent for collecting, obtaining or otherwise acquiring genetic resources.

Ukraine

36. "Access to genetic resources" means the permission to acquire and use, and/or the acquisition and use of, biological and genetic resources conserved in *ex situ* and *in situ* conditions, including organisms and their derivatives [see definition], for the purposes of research, biological prospecting, conservation, industrial application or commercial use, among others.

37. *Comment*: In many cases the direct access to genetic and biological resources without associated knowledge means nothing, since the use of the resources clearly depends on that knowledge and technologies. The definition of Access to Genetic Resources should also include the obtaining of associated knowledge, innovations, technologies or practices. (See OAU Model Law and Costa Rica Law No. 7788). However, the proper wording is to be specified.

B. Benefit-sharing

China

38. "Benefit-sharing" means the sharing of benefits arising from the use, whether commercial or not, of genetic resources and their derivatives, and may include both monetary and non-monetary returns, in particular the participation in scientific research and development on genetic resources, and the making available of the findings of such scientific research and development and the transfer of technology.

Cuba

39. "Benefit-sharing" means any monetary or other benefits, mutually agreed to by the competent authority in the country that grants access and the party that requests access to genetic resources or to their derivatives and any knowledge, innovations and other associated intangible elements.

Ethiopia

40. The definition of benefit sharing should also include traditional knowledge. The concept of equitability should be included while defining benefit sharing. There may be possibilities of sharing benefits in an inequitable manner. The Bonn guideline and the national schemes that will be developed there on should target and promote equitable sharing of benefits within the meaning of the CBD.

41. The following definition is suggested: "equitable benefit sharing " means the sharing of benefits arising from the commercial or non commercial use of genetic resources and their derivatives as well as associated traditional knowledge and community practices in a fair and equitable manner. The form of sharing of benefit may be monetary and non monetary.

India

42. "Benefit sharing" means the sharing of benefits mutually agreed upon by the designated authority of the providing country and the applicant for the accessed genetic resources, their by products and associated knowledge.

43. The benefits may *inter alia* include:

(a) Grant of joint ownership of intellectual property rights to the designated National Authority, or where benefit claimers are identified, to such benefit claimers;

(b) Transfer of technology;

(c) Location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers;

(d) Association of scientists, benefit claimers and the local people of the providing country with research and development in biological resources and bio-survey and bio-utilisation;

(e) Setting up of venture capital fund for aiding the cause of benefit claimers;

(f) Payment of monetary compensation and other non-monetary benefits to the benefit claimers as the designated National Authority may deem fit.

Nigeria

44. (As given by Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing).

Peru

45. Most of existing definitions of benefit-sharing are basically oriented in the right direction: benefit sharing is a wide ranging notion which, in general terms, refers to all the different types of benefits which can be shared when the process of accessing genetic resources takes place. These will obviously vary from case to case. However, we should not limit the understanding of benefit sharing to situations where actual tangible benefits are perceived in the R&D process or when money is made from commercializing a product. Even before this point there are benefits (i.e. participating in field work and learning collecting techniques, informing a wider audience about bioprospecting and its potential) which are being generated and can be realized. A wide definition is suggested, in line with that of the Common Policy Guidelines for Participating Botanical Gardens.

Poland

46. "Benefit sharing" means in accordance with terms mutually agreed [could be different forms of agreements bilateral or multilateral] the granting of monetary and/or non-monetary benefits arising from the [use of] [granted access to] genetic resources [traditional knowledge, innovations and practices].

47. I put two different terms into definition "use of" and "granted access". The second term is considered as more precise, because focus on the fact of taken agreement, not of the way of using e.g. commercial or not, and can be applied to all aspects of genetic resources as conservation, collecting, utilization etc.

48. Benefit-sharing could be any compensation, reward or recognition that flows directly or indirectly from the user of genetic resources to the provider of that resources. The possible range of benefits is therefore very broad. They could include royalties or shares of profits from the commercialization of a commodity derived from a genetic resource, flat fees for access to a controlled area of exploration, access of the provider to technology and training, joint ventures or access to global funds for development assistance.

Switzerland

49. Benefit-sharing means any form of mutual compensation for the utilization of genetic resources, whether monetary or non-monetary. Examples of monetary and non-monetary benefits are included in Appendix II of the guidelines.

C. Commercialization

China

50. "Commercialization" means applying for, 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 sale of any resulting product.

Cuba

51. "Commercialisation" means using for commercial purposes the genetic resource or its components or derivatives or any products obtained from the genetic resource, through its sale, concession of licences and other means that make it possible to obtain a monetary benefit.

India

52. "Commercialization" means end uses of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through breeding or genetic intervention and shall not include traditional practices in use in any agriculture, horticulture, poultry, dairy farming or animal husbandry and bee keeping.

Nigeria

53. Converting to commercial use (sale, use, or exchange for financial or other benefit), including preparation or positioning for such use as with patenting, licensing or advertising.

Peru

54. This refers to any use of genetic resources which is oriented at generating a short, medium or long term economic return. However, any use of genetic resources could lead directly or indirectly and at some point to economic benefits of some sort. It would probably be more convenient to understand ABS rules as applying to ANY type of use. When there is some indication that a commercial use or industrial application is part of the specific project, there will be specific conditions for these types of use. In a bio-prospecting project when patents are involved, licenses are negotiated, agreements are celebrated, companies are involved, etc. these are indications about the type of use sought (for a lucrative commercial or industrial purpose).

Poland

55. "Commercialization" means the making available for sale, lease or license on usual commercial terms. Commercialisation does not refer to the publication of the results and other information arising from research on genetic resources.

Switzerland

56. "Commercialization" means making available genetic resources or the findings of research and development on such resources with the intention of making a monetary profit.

D. Derivatives

China

57. Derivatives: Something extracted from biological and genetic resources such as blood, oils, resins, genes, seeds, spores, pollen and the like as well as the products derived from, patterned on, or incorporating manipulated compounds and/or genes.

Cuba

58. "Derivative" means, but is not limited to, products developed from a genetic resource or its individual components or a mixture of them, or extracted from them and includes the combination of the genetic resource in question with other genetic resources.

India

59. "Derivative" means a compound, molecule or any extract of an organism resulting from any metabolic process.

Nigeria

60. "Derivative" is a product **(including information**) developed, or part taken or extracted, from a biological or genetic resource, e.g. varieties, strains or breeds, blood, proteins, oils, resins, gums, genes, seeds, spores, bark, wood, leaf matter, or **formulae.** It includes products incorporating material or formulae as above.

(Modification of definitions of OAU Model Law and draft ASEAN Framework Agreement etc. combined)

Peru

61. Clearly, ABS regulations should target access to biological material and USE of genetic resources on one hand, as well as access to derivatives of biological resources or materials which are understood to include: liquid extracts from a plant, mixtures of biologically derived materials among themselves (or with non biological materials), pollen, seeds, oils, etc. Probably derivatives would include all and any material which directly originates from a biological resource as such. A limit in terms of the scope of ABS rules would be established when a synthesized product is generated. This would not be considered to be a derived product in the context of ABS discussions.

62. Strictly speaking these mixtures, combinations, resins etc. are not derived from genetic resources per se, but in terms of trying to come up with a legal construction or a basic understanding this type of " definition" serves an important purpose.

Poland

63. "Derivatives" means product developed or extracted from a biological resources.

Switzerland

64. Comments on the term "derivatives" are included in the general suggestions of the expert from Switzerland in paragraph 18 above.

Ukraine

65. "Derivatives" include, but are not limited to, any parts, materials, substances and products extracted or developed from biological and genetic resources (living or dead organisms and their metabolites), such as seeds, spores, pollen, blood, oils, resins, gums, proteins, genes and the like, as well as any materials, substances and products derived from, patterned on, or incorporating manipulated (altered) compounds and/or genes.

66. Comment: In short, derivatives are any parts, product or substances derived from living or dead organisms, or products of their metabolism (living activity).

67. Probably derivatives may also include whole organisms modified by humans, such as artificial mutants and hybrids, cultivars (plant varieties and forms), breeds of animals, altered or modified strains of microorganisms, etc. (See the definition in OAU Model Law.) However, this issue should be additionally discussed.

E. Provider

China

68. "Provider" means any individual or organization, whether governmental or non-governmental, that acquires genetic resources or derivatives from a Participating Institution with its consent.

Cuba

69. "Provider" means the competent authority in the country that grants access to genetic resources or any other legal entity empowered by the said authority to make available to the authorised requesting party samples of the genetic resource or of its derivatives and knowledge, innovations and other associated intangible elements.

Ethiopia

70. The definition of provider should include local communities and reflect the acquisition of their consent. Moreover, the concept of traditional knowledge and community practices should be included in the definition.

India

71. "Provider" means the authority designated by the providing country to provide access to genetic resources.

Nigeria

72. "Provider" means any individual, organization, group or community with legitimate custody to make genetic material accessible for acquisition. There may be a need to distinguish between primary (as the original providers) and subsequent providers.

Peru

73. The Convention on Biological Diversity applies to States. States are responsible to comply with its provisions and, if necessary, enact legislation for this purpose. The Guidelines are voluntary and, from some of the concepts used, would seem to also apply to entities, for example a company or a research institution, which are not States.

74. Although the State can be a provider of genetic resources, in the context of the Guidelines a "provider" would be referred to as the person or institution or community which physically gives or allows access to biological materials from which genetic resources will be used.

Poland

75. "Provider" means any entity that makes available genetic resources for users.

Switzerland

76. "Provider" means any entity that makes available genetic resources to users.

F. User

China

77. "User" means any entity which collects, obtains or otherwise acquires genetic resources to conduct scientific research and development on these genetic resources, to commercialize the findings of this scientific research and development, or to supply other entities with these genetic resources.

Cuba

78. "User" means a physical person or legal entity that acquires an authorisation to access a genetic resource or to its derivatives and any knowledge, innovations and other associated intangible elements, receiving, in exchange for the use of these resources, benefits of monetary and non-monetary nature.

Ethiopia

79. The definition of "user" should also include a definition where a legal and natural person make use of the genetic resources and associated traditional knowledge.

India

80. "User" means any individual, agency/organization or institution receiving/authorized to receive genetic resources for any kind of use.

Nigeria

81. "User" means any entity that legitimately acquires and uses genetic resources or their derivatives.

Peru

82. Although the State can also be conceived as a user, in the context of the Guidelines, the "user" could be understood as any person or institution or community which makes use of genetic resources in one way or another. The problem lies not so much in who actually uses genetic resources but the status which will be given to the different types of users. For example an indigenous community as a user of genetic resources will certainly not be subject to the conditions set for a company, botanic garden or research institution which accesses and uses genetic resources. Stronger conditions should be set in place for users who are part of a commercial or industrial enterprise.

83. It is clear that all countries are users of genetic resources. However, those where industrial and research and development capacities are concentrated could bear a stronger burden in relation to potential user measures to be devised in order to ensure CBD objectives are met, particularly with regards to benefit sharing.

84. General comment on the user - provider concepts: If the Guidelines are to remain as voluntary in nature, it makes more sense to try and develop these Guidelines as true and effective assistance for institutions (of all types) who are in the process of developing their ABS policies. If we consider the Guidelines in a broader context, and take into account that many or most biodiversity rich countries have already developed ABS drafts or even regulations, there are actually limited benefits and guidance which they might offer these countries. If the Guidelines focus on how countries which regularly use genetic resources might implement measures to ensure the ABS objectives of the CBD are met, then the focus would be different and we might still want to see the Guidelines as targeting Contracting Parties. As this is in essence not the case - except for a minor part of the Guidelines – it is suggested that they are targeted to user and providers as institutions, countries, companies, communities, etc.

Poland

85. "User" means any entity, which collects, obtains or otherwise acquires genetic resources to conduct scientific research and development on these genetic resources, to commercialise the findings of scientific research and development, or to supply other entities with these genetic resources.

Switzerland

86. "User" means any entity which collects, obtains or otherwise acquires from providers genetic resources to conduct scientific and development on these genetic resources, or which commercialises the findings of this scientific research and development, or which supplies other entities with these genetic resources.

G. Stakeholder

China

87. "Stakeholder" means an individual, organization or group whether formal or informal, affected by, or with an interest in, the activities relating to the acquisition, use or supply of genetic resources or their derivatives. Stakeholders involved in conservation and the granting of collecting permits and prior informed consent for access may include relevant departments of government, local authorities, private individuals such as landowners, indigenous peoples, local communities, farmers and non-governmental organizations. Stakeholders such as these are often described in law relating to access and benefit-sharing.

Nigeria

88. (As given by Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing).

Peru

89. The Common Policy Guidelines makes an interesting list of those who might be considered stakeholders. Again, the problem is not so much who are regarded as having interests with regards to

access and genetic resources but the conditions and status of these different stakeholders. The stakes for an indigenous community are certainly not the same as those of a company.

Poland

90. "Stakeholder" means any entity that is involved in, or affected by, or with an interest in, the activities relating to conservation, acquisition and utilization of genetic resources and the sharing of benefits arising from their utilization.

Switzerland

91. "Stakeholder" means any entity that is involved in, or affected in its use of genetic resources by, the collection or other acquisition of genetic resources, the utilization of theses resources and the sharing of benefits arising from their utilization.

H. Ex situ *collection*

China

92. *"Ex situ* collection" means managed, documented biological material maintained outside their natural habitat in conditions other than *in situ*..

Cuba

93. "*Ex situ* collection" means a collection of genetic resources maintained outside their natural habitat, under conditions different from those *in situ*.

Ethiopia

94. Input by the expert from Ethiopia relevant to *ex situ* collections is included under section III on "Additional terms to be included in the use of terms", in paragraphs 114 and 115.

Germany

95. Refer to paragraph 13 of the "Specific comments on some terms" provided by the expert from Germany.

India

96. "*Ex-situ* collection" means any collection of genetic resources conserved outside their natural habitats.

Nigeria

97. Biological material or genetic resources maintained outside the natural habitat.

Peru

98. "*Ex situ* collection" refers to any type of biological collection maintained under artificial or semi artificial conditions and outside the natural habitats where the actual materials, animals, plants, etc. collected generally live and reproduce.

99. It is suggested that the concept is clear in the normal, colloquial context in which it is regularly used, that probably no definition is required and that the term is almost self explanatory.

Poland

100. "*Ex situ* collections" means maintenance of biological material outside their original or natural environment, in conditions other then *in situ*:

> "Collection" – the material gathered by the act of collecting is termed a collection.
> *"Ex situ"* – out of place not in the original or natural environment e.g. seeds stored in a gene bank.

Switzerland

101. Refer to paragraph 17 above under "general suggestions" made by the expert from Switzerland.

Ukraine

102. *Ex situ* collection means managed and properly documented, living or preserved biological material (e.g., whole organisms, seeds, spores, germplasm, isolated genes, and any other parts and/or substances that have genetic and other basic biological properties of the original organisms) maintained in conditions other than *in situ*, i.e. outside of the natural habitats of the organisms concerned. *Ex situ* collections originate from intentional activities of man, as opposed to unintentionally introduced alien species, or species naturally spreading outside their original (natural) area of distribution.

103. *Comment*: The expression "Outside their natural habitats" is somewhat vague. Such a definition could include, for example, unintentionally introduced non-native (alien, adventive) organisms, which spread outside their original (i.e., "natural") ranges. Thus, it would be useful to emphasize the intentional character of *ex situ* collections.

104. Technically speaking, some *ex situ* collections are not always "living" (e.g., isolated genes or frozen samples), but they still have the essential biological features of the original organisms, and may be used in studies and utilization of genetic resources.

105. *Ex situ* collections should be properly maintained, managed and documented.

I. Voluntary nature

Cuba

106. "Voluntary nature" means that there is no application obligation.

Germany

107. Refer to paragraph 13 of this document under "specific comments on some terms" provided by the expert from Germany.

Nigeria

108. Made without external compulsion.

Peru

109. It is proposed that this notion is related to the need for institutions to make efforts at adapting policies and practices to the alternatives suggested in the Guidelines. These should inform these policies and practices.

110. It is also suggested that this concept is clear in the normal, colloquial context in which it is regularly used and that probably no definition is required as the term is almost self explanatory.

Poland

111. "Voluntary nature" is used only in Article 4(a) and already provides its own definition, i.e. to be used to "guide both users and providers of genetic resources on a voluntary basis".

Switzerland

112. Refer to paragraph 17 of this document under "General suggestions" provided by the expert from Switzerland.

III. ADDITIONAL TERMS TO BE INCLUDED

113. Certain experts suggested that the following terms should also be defined:

A. In situ conditions

Ethiopia

114. *In-situ* and *ex-situ* are conditions and forms of conservation of genetic resources. It is thus suggested to define "*ex-situ* condition instead of *ex-situ* collection" and define *in-situ* condition.

115. The terms could be defined as follows:

> "*Ex-situ condition*" means a condition in which genetic resources are conserved and found outside their natural habitat.
> "*In-situ condition*" means a condition in which a genetic resource is found its eco-system or natural habitat.

B. Prior informed consent

Ethiopia

116. The guideline refers to consent without defining it. The definition could be developed based on relevant provisions of the CBD.

C. Entity

Poland

117. "Entity" means any natural or legal person; any community; any government or any body placed under its authority; any organization, regardless of weather this organization is governmental or non-governmental; regional and international agricultural research centres, regional plant genetic resources networks as well as relevant inter-governmental agencies such as FAO.

Switzerland

118. "Entity" means any natural or legal person or any plurality thereof; any government or local or indigenous community; any body placed by government under its authority; or any organization, regardless of whether this organization is governmental or non-governmental.

Annex II

DRAFT BONN GUIDELINES ON ACCESS TO GENETIC RESOURCES AND FAIR AND EQUITABLE SHARING OF THE BENEFITS ARISING OUT OF THEIR UTILIZATION: USE OF TERMS

Paragraph 6 of the draft Bonn guidelines:

"[*In addition the following terms could be included and defined in the guidelines: access to genetic resources; benefit-sharing; commercialization; derivatives; provider; user; stakeholder; ex situ collection; voluntary nature]*."

With a view to assisting the expert group, there follows a list of existing definitions of the terms listed in paragraph 6 of the Bonn guidelines found in guidelines, codes of conduct, agreements and legislation which relate to access and benefit-sharing.

Access to genetic resources

Access to genetic resources means the permission to acquire and use genetic resources.
(Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

Access means the admission for collecting, obtaining or otherwise acquiring genetic resources. (Swiss Draft Guidelines on Access and Benefit-sharing Regarding the Utilization of Genetic Resources)

Access is the acquisition of biological resources, their derivatives, community knowledge, innovations, technologies or practices as authorized by the National Competent Authority. (OAU Model Law)

Access to Biological and Genetic Resources – the acquisition and use of biological and genetic resources as well as the derivatives thereof or, as applicable, intangible components, for purposes of research, bioprospecting, conservation, industrial application or commercial use, among others. (Draft ASEAN Framework Agreement on Access to Biological and Genetic Resources, February 2000)

Access means the acquisition and use of genetic resources conserved in *ex situ* and *in situ* conditions, and of their derivatives or, as applicable, intangible components, for purposes of research, biological prospecting, conservation, industrial application or commercial use, among others. (Andean Pact Decision 391)

Access to biochemical and genetic elements: the action of obtaining samples of the elements of biodiversity existing in the wild or domesticated, in *ex situ* or *in situ* conditions, and the obtaining of associated knowledge, with the aim of fundamental research, bioprospection and economic exploitation. (Costa Rica Law No. 7788)

Benefit-sharing

Benefit-sharing means the sharing of benefits arising from the use, whether commercial or not, of genetic resources and their derivatives, and may include both monetary and non-monetary returns. (Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

Benefit-sharing means all forms of compensation for the utilization of genetic resources, whether monetary or non-monetary, and includes, in particular, the participation in scientific research and development on genetic resources, and the making available of the findings of such scientific research and

development and the transfer of technology. (Swiss Draft Guidelines on Access and Benefit-sharing Regarding the Utilization of Genetic Resources)

Benefit sharing is the sharing of whatever accrues from the utilization of biological resources, community knowledge, technologies, innovations or practices. (OAU Model Law)

Commercialization

Commercial use: of MGRs includes but is not limited to the following activities: sale, patenting, obtaining or transferring intellectual property rights or other tangible or intangible rights by sale or licence, product development and seeking pre-market approval. (MOSAICC)

Commercialization means applying for, 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 sale of any resulting product.
(Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

Derivatives

Derivatives includes, but are not limited to, an institution maintaining documented collections of living and/or preserved plant accessions for purposes such as scientific research, conservation, sustainable use, display and education.
(Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

Derivative is a product developed or extracted from a biological resource; a derivative may include such products as plant varieties, oils, resins, gums, proteins etc.
(OAU Model Law)

Derivatives: Something extracted from biological and genetic resources such as blood, oils, resins, genes, seeds, spores, pollen and the like as well as the products derived from , patterned on, or incorporating manipulated compounds and/or genes. (Draft ASEAN Framework Agreement on Access to Biological and Genetic Resources, February 2000)

Derivatives means a molecule or combination or mixture of natural molecules, including raw extracts of living or dead organisms of biological origin, derived from the metabolism of living organisms (Andean Pact Decision 391)

Something extracted from biological and genetic resources such as blood, oils, resins, genes, seeds, spores, pollen and the like, taken from or modified from a product. (Philippines Executive Order 247 (1995) and Department of Environment and Natural Resources Administrative Order 96-20 (1996))

Provider

Provider means any individual or organization, whether governmental or non-governmental, that acquires genetic resources or derivatives from a Participating Institution with its consent (Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

User

User means a legal or natural person that utilizes and benefits from plant genetic resources and related information. (FAO International Code of Conduct for Plant Germplasm Collecting and Transfer,1995)

User means any entity which collects, obtains or otherwise acquires genetic resources to conduct scientific research and development on these genetic resources, to commercialise the findings of this scientific research and development, or to supply other entities with these genetic resources. (Swiss Draft Guidelines on Access and Benefit-sharing Regarding the Utilization of Genetic Resources)

Stakeholder

Stakeholder means an individual, organization or group whether formal or informal, affected by, or with an interest in, the activities relating to the acquisition, use or supply of genetic resources or their derivatives. Stakeholders involved in conservation and the granting of collecting permits and prior informed consent for access may include relevant departments of government, local authorities, private individuals such as landowners, indigenous peoples, local communities, farmers and non-governmental organizations. Stakeholders such as these are often described in law relating to access and benefit-sharing. (Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

Key stakeholder - term to be defined in the ASEAN Framework Agreement on Access to Genetic Resources.

Stakeholder means any entity which is involved in, or affected in its traditional use of genetic resources by, the collection or other acquisition of genetic resources, the utilization of these resources by, the collection or other acquisition of genetic resources, the utilization of these resources and the sharing of benefits arising from their utilization. (Swiss Draft Guidelines on Access and Benefit-sharing Regarding the Utilization of Genetic Resources)

Ex situ collection

Ex situ collection means managed, documented biological material maintained in conditions other than *in situ*. (Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing)

Ex situ collection means a collection plant genetic resources for food and agriculture maintained outside their natural habitat. (International Treaty on Plant Genetic Resources for Food and Agriculture)

Voluntary nature

No definition found in the documents referred to below.

LIST OF REFERENCES

Anthology of definitions that may be pertinent for the revision of the International Undertaking on Plant Genetic Resources, prepared for the fifth extraordinary session of the Commission on Genetic Resources for Food and Agriculture, held in June 1998, CGRFA-Ex5/98/Inf.2.

Draft ASEAN Framework Agreement on Access to Biological and Genetic Resources, February 2000.

Draft Guidelines on Access and Benefit-sharing Regarding the Utilization of Genetic Resources, proposed by the Government of Switzerland.

FAO International Code of Conduct for Plant Germplasm Collecting and Transfer, adopted by the FAO Conference in November 1993.

International Treaty on Plant Genetic Resources for Food and Agriculture, adopted by the FAO Conference, at its thirty-first session, on 3 November 2001.

Latorre García, F., Williams, C., ten Kate, K. & Cheyne, P. 2001 (based on contributions from 36 individuals from 28 botanic gardens and herbaria from 21 countries), *Results of the Pilot Project for Botanic Gardens: Principles on Access to Genetic Resources and Benefit- Sharing, Common Policy Guidelines to assist with their implementation and Explanatory Text*, Royal Botanic Gardens, Kew, 78pp.

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Philippines Executive Order 247 (1995) and Department of Environment and Natural Resources Administrative Order 96-20 (1996).

The Organisation of African Unity's (OAU's) Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, November 2000.
