

## THEMATIC REPORT ON BENEFIT- SHARING

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*Please provide summary information on the process by which this report has been prepared, including information on the types of stakeholders who have been actively involved in its preparation and on material which was used as a basis for the report*

This report was elaborated by a core team of advisors from the Swiss administration and by consulting the experts of the various ministries concerned.

The second part of this document on the case study presents the initiative of the Government of Switzerland to develop guidelines for the Access to genetic resources and the Benefits Sharing (ABS) arising from their utilization. These guidelines were developed within the Federal administration in close consultation with the private and academic sector as well as non-governmental organizations (NGO's).

## **FIRST PART : VIEWS ON IPRs AND TRADITIONAL KNOWLEDGE RELATED TO GENETIC RESOURCES AND BENEFIT-SHARING AGREEMENTS**

### **I. Please provide the views of your country on the following issues:**

**Preliminary remarks:** The subject area «intellectual property rights – traditional knowledge – genetic resources – access and benefit sharing» has been discussed in various international fora, including the Convention on Biological Diversity (CBD), the World Intellectual Property Organization (WIPO), and the United Nations Conference on Trade and Development (UNCTAD). Switzerland has actively participated in these discussions and, among others, financed the CBD's "Expert Panel on Access to Genetic Resources and Benefit Sharing" held in Costa Rica in October 1999, and presented the "Draft Guidelines on Access and Benefit-Sharing Regarding the Utilization of Genetic Resources" to COP5 in Nairobi in May 2000. Switzerland believes that issues related to intellectual property law are to be dealt with by the competent international organizations, that is, WIPO, the Union for the Protection of New Varieties of Plants (UPOV), and the World Trade Organization (WTO). At present WIPO is particularly well-fitted to deal with these issues. Switzerland strongly supported the establishment of the "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore" at the General Assembly of WIPO in the fall of 2000. This committee is scheduled to meet for the first time in April/May of 2001.

Furthermore, as stated in decision V/26 (section B, para 2) the Parties at COP5 recognized "the fact that the provisions of the TRIPs Agreement and the CBD are interrelated." Efforts should therefore be undertaken to develop further cooperation between the CBD and other relevant international fora, with the aim to retain mutual supportiveness between the CBD and International Intellectual Property law for the questions which could affect the implementation of the Convention or which are closely related to it. Those questions include the issues of the possible impacts of IPRs on the conservation and sustainable use of biological diversity, as well as their relationship with ABS and with the valuation and protection of traditional knowledge of indigenous communities.

For some of the issues listed in the questionnaire, no viable answers have been found to date. Many of these answers need to be agreed to at the international level, as single-handed efforts by individual national governments they will not bring the desired results. For other issues listed in the questionnaire, answers depend on the applicable national laws. Consequently, Switzerland is currently not in a position to provide answers to all of the issues listed in the questionnaire.

#### **A. Intellectual property and traditional knowledge related to genetic resources**

##### *(a) How to define relevant terms including subject matter of traditional knowledge and scope of existing rights*

Clear terminology is crucial to the discussion on traditional knowledge related to genetic resources. Switzerland therefore considers it to be important to define relevant terminology at the outset of any discussion on this issue. The relevant international fora should cooperate to fulfill this task.

The scope of existing intellectual property rights is clearly defined in the relevant international agreements and national laws. At this stage, we therefore see no need to clarify the scope of

these rights. As the definition of terminology regarding traditional knowledge related to genetic resources and a system to protect such knowledge are being developed, it may be necessary to evaluate the linkages between the various systems of protection. Both the development and the evaluation should be carried out on the multilateral level (see also answer to issue (c) below).

(b) *Whether existing intellectual property rights regimes can be used to protect traditional knowledge*

Many differing forms of traditional knowledge exist. For the protection of some of these forms of traditional knowledge, existing intellectual property rights regimes may be useful, whereas for other forms of traditional knowledge other systems of protection must be found. Whether existing intellectual property rights regimes can be used to protect traditional knowledge must therefore be decided in each individual case at hand; a generally applicable answer can thus not be given.

(c) *Options for the development of sui generis protection of traditional knowledge rights*

Switzerland holds the view that States are free to develop *sui generis* systems to protect traditional knowledge, this as long as they meet the obligations they may have under international law. With respect to the term *sui generis* protection, we consider it to be crucial to keep in mind that the *sui generis* system of protection referred to in Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) only applies to plant varieties. This *sui generis* system of protection should thus be clearly distinguished from other forms of *sui generis* systems that protect subject matters other than plant varieties.

The development of a *sui generis* system to protect traditional knowledge on the national level only may not serve the needs of adequate protection. It may, for example, lead to situations where the national *sui generis* system of protection in one country is circumvented by using the same or similar traditional knowledge in another country that does not have the necessary system of protection in place. Therefore, it may be desirable to develop a framework for such protection on the multilateral level to achieve an effective protection of traditional knowledge. This framework could help to maintain an equal level playing field for all stakeholders involved.

(d) *The relationship between customary laws governing custodianship, use and transmission of traditional knowledge, on the one hand, and the formal intellectual property system, on the other*

This relationship must be dealt with by national law. A generally applicable answer can therefore not be given.

(e) *Means by which holders of traditional knowledge, including indigenous peoples, may test means of protection of traditional knowledge based on existing intellectual property rights, sui generis possibilities, and customary laws*

As existing intellectual property rights are territorial rights (i.e., they only have legal effects within the territory of the State for which they were granted), any means by which holders of traditional knowledge, including indigenous people, may test means of protection of traditional knowledge based on existing intellectual property rights would have to be made available by the State for the territory of which protection is asked for. The same applies for

*sui generis* possibilities and customary laws. Nevertheless, the international community may assist national governments in providing these means.

*(f) How to ensure that granting intellectual property rights does not preclude continued customary use of genetic resources and related knowledge*

As territorial rights, existing intellectual property rights have no legal effects outside the territory of the State for which they were granted. Inside this territory, it is the respective State's responsibility to ensure the continued customary use of genetic resources and related knowledge. However, it is the view of Switzerland that access to genetic resources and related activities should not impede the continuation of traditional use of genetic resources (see, e.g., Article 7.5 of the "Draft Guidelines on Access and Benefit-Sharing Regarding the Utilization of Genetic Resources" proposed by Switzerland [document UNEP/CBD/COP/5/Inf/21] that lays down this principle).

See also answers to issues (c) and (a) above.

## **B. Intellectual property rights and access and benefit-sharing agreements**

*(g) Ways to regulate the use of resources in order to take into account ethical concerns*

The term "ethical concerns" may cover many different contents. As we are uncertain what exactly is meant in this context, we are not in a position to answer this question.

*(h) Ways to ensure the continued customary use of genetic resources and related knowledge*

See answer to issue (f) above.

*(i) How to make provision for the exploitation and use of intellectual property rights to include joint research, obligation to work any right on inventions obtained or provide licenses*

- Joint research: Swiss public and private research institutions have on a voluntary basis frequently carried out research jointly with research institutions from abroad. Measures to encourage joint research can be taken at various levels and can be of different nature. One important such measure is the availability of adequate protection of the results of the joint research by intellectual property rights in the country where this joint research is taking place. Otherwise, we consider other bodies of law than intellectual property law to be better suited as the place where such measures could be foreseen.
- Obligation to work any right on inventions obtained: The TRIPS Agreement spells out in Article 31 the conditions under which WTO Members may grant compulsory licenses on patented inventions. If a WTO Member foresees in its patent law the possibility to grant a compulsory license in case a patented invention is not sufficiently used by the patent holder, Article 27.1 of the TRIPS Agreement clearly establishes that the importation of patented products is one form of working the patent. With the provisions of Article 31, an internationally agreed minimum standard for the granting of compulsory licenses already exists.
- Obligation to provide licenses: Holders of intellectual property rights can be expected to have an interest in licensing their protected goods, as the earned royalties will create a return on their investment. Thus, licenses will generally be made available on a voluntary basis. Some forms of intellectual property rights can, under certain circumstances, be

subjected to compulsory licenses. Regarding patents, for example, the TRIPS Agreement contains in Article 31 provisions on the granting of compulsory licenses.

*(j) How to take into account the possibility of joint ownership of intellectual property rights*

Existing intellectual property rights can be held jointly by several owners. If, for example, several persons are jointly responsible for an invention, they can be granted joint ownership of the patent protecting this invention. Existing intellectual property rights therefore already adequately take into account the possibility of joint ownership.

## **Second Part : Case study on the development of "Draft Guidelines on Access and Benefit Sharing Regarding the Utilisation of Genetic Resources"**

### **Introduction**

*This part of the report introduces the initiative taken by the Government of Switzerland regarding access to genetic resources and the fair and equitable sharing of the benefits arising from their utilisation. It summarises the process which led to the drawing up of the "Draft Guidelines on Access and Benefit Sharing Regarding the Utilisation of Genetic Resources" (Draft Guidelines), explains their main features, and describes some of the responsibilities of the main stakeholders involved in access and benefit sharing. And finally, this thematic report contains an overview on the further development of the initiative since the fifth Conference of the Parties (COP 5) to the Convention of Biological Diversity (CBD).*

### **Developments Prior to COP 5**

#### **Drawing-Up of the Draft Guidelines**

*From the early beginning of the CBD, Switzerland has been actively involved in the discussion on access to genetic resources and the sharing of the benefits arising from their use. In 1997/98, a survey had been conducted with the private sector and the research community in Switzerland to gather information and to better understand the issues arising at a practical level. This survey showed that one possible solution to address these issues is the elaboration of a set of voluntary guidelines. The results of the survey were presented during the fourth Conference of the Parties (COP 4) of the CBD in Bratislava in 1998 (see Document UNEP/CBD/COP/4/INF/16).*

*In the aftermath of COP 4, the Draft Guidelines were drawn up by the Swiss State Secretariat for Economic Affairs; the Swiss Federal Institute of Intellectual Property; and the Swiss Agency for the Environment, Forests and Landscape. The partners from the private sector and the research community that had been involved in the above-mentioned survey were given the opportunity of active collaboration in this process. A first outline of the Draft Guidelines was presented to the experts during the CBD's first Expert Panel on Access and Benefit Sharing held in San José, Costa Rica, in October 1999. The positive consideration of the first outline by the Expert Panel encouraged the involved Federal agencies to continue the work and to adapt the Draft Guidelines to the results achieved during the Expert Panel. Switzerland presented the current version of the Draft Guidelines during COP 5 (see Document UNEP/CBD/COP/5/Inf/21).*

A core team of three advisors from the above mentioned branches of the Swiss administration was working jointly on the Draft Guidelines. This had the advantage that considerations related to ecology, economy and intellectual property rights (IPRs) could be integrated in the process from the beginning of the work. Consultations were held within the Federal administration and with the private and academic sector as well as non-governmental organisations (NGO's). On the international level, the current version of the Draft Guidelines have been discussed at several occasions. The open and broad process was very enriching and helpful to develop the Draft Guidelines.

#### **Main Features of the Draft Guidelines**

*The Draft Guidelines are intended to serve as a point of reference for the stakeholders involved in access to genetic resources and the sharing of benefits arising from their use. In other words, the stakeholders have an instrument of orientation for their work at hand. Furthermore, the Draft Guidelines are intended to give guidance to Governments on how to*

*implement the CBD's obligations regarding access and benefit sharing. Although guidelines are of voluntary nature, they are a tool that allows for predictability and confidence building. Their voluntary nature does not mean that guidelines will not be followed. Public pressure to comply with the standards set out can be significant, especially if all interested sectors have been involved in their drawing up.*

*The aim of the Draft Guidelines is twofold:*

- *Firstly, they aim at the fair and equitable sharing of the benefits arising from the use of genetic resources. The benefit sharing shall be designated to contribute to the conservation of the biological diversity and to foster the sustainable use of genetic resources.*
- *Secondly, they aim at promoting the appropriate access to genetic resources. Access activities shall create only minimum adverse environmental impacts.*

*The Draft Guidelines follow a process-based approach. They differentiate between the various steps involved in access to genetic resources and the sharing of the benefits arising from their use. Accordingly, they distinguish the steps from the search for genetic resources to the commercialisation of the results of scientific research and development. The Draft Guidelines thus describe the responsibilities of the various stakeholders involved, regardless of the sector to which these stakeholders belong, that is, for example, botanical gardens or culture collections of micro-organisms. On one hand this across-the-board approach has the advantage that only one single instrument has to be applied in any given situation. Especially the donor of genetic resources might find it easier to deal with a request for such resources if there is only one instrument to comply with. On the other hand, already existing sectoral guidelines may very well give additional guidance to the users of that sector and, in doing so, further facilitate the implementation of the CBD.*

*The Draft Guidelines are one possible instrument for regulating access to genetic resources and benefit sharing. They are not primarily intended to set rules regarding traditional knowledge related to genetic resources. Nevertheless, the Draft Guidelines contain some elements, such as the participation of indigenous and local communities in decision making and benefit sharing, that are relevant to traditional knowledge. Neither scientific research and development nor the commercialisation and other utilisation of genetic resources shall impede the continuation of traditional use of genetic resources.*

### **Developments After COP 5**

*Switzerland will continue to actively participate in the international developments on access and benefit sharing. The Swiss Government believes that an operational and practical implementation of the CBD's provisions regarding access and benefit sharing is crucial for the conservation and sustainable use of biological diversity. This implementation, however, needs to be mutually supportive with the developments in the different international fora.*

### **System of Certification of Genetic Resources Transactions**

*The Draft Guidelines encourage stakeholders to create a system of certification which would confirm the fulfilment of the access and benefit requirements of the CBD. The Swiss Government supports efforts to further develop the concept of such a system. This support aims at exploring the demand for an independent system to certify genetic resource transactions as well as the feasibility of such a system and at outlining an architecture for it.*

### **Planned Overview of the Legal Situation in Switzerland**

*According to its Federal Constitution, Switzerland forms a federal republic with a federal, a cantonal and a communal level. Each of these levels has specific competences regarding access and benefit sharing. On the cantonal level alone, there are 26 cantons with different*



*bodies of law. In some cases, even historic public entities such as alpine co-operatives are relevant competent right holders. In this complex legal situation, it is important to gain an overview of the legal state of affairs on each of these different levels. This overview would assist the different authorities, users and providers of genetic resources in their decision taking regarding the subject matter in question.*

#### Development of National Guidelines for Access and Benefit Sharing

Based on the Draft Guidelines and on the experience gained during the development of the initiative Switzerland is considering the development of national guidelines for access and benefit sharing. Switzerland intends to collaborate closely with the three relevant scientific academies, that are, the Swiss Academy for Natural Sciences, the Swiss Academy for Social Sciences and the Swiss Academy for Medical Sciences. This would allow to address industry and universities, as well as other users of genetic resources. Other stakeholders such as NGO's will also be involved in this process. It has to be ensured that the national guidelines will be based on broad acceptance.