Practical Considerations for Exercise 1

(to be distributed after the exercise has been completed)

After doing this exercise, participants will be able to critically evaluate the assumptions that underlie the decision-making process around access and benefit sharing, what their objectives are regarding access and benefit sharing, how their policy/legislation does or should relate to these objectives, and what information they need in order to evaluate their choices at each juncture of the decision-making process. In this exercise, the participants use this knowledge and apply it in specific situations. This enables them to evaluate what is required and what might be needed in law and policy to support the objectives they originally hoped to achieve with legislation on access and benefit sharing.

General issues

First, determine the regime that governs access to the material

Hypothetical case 1: Groundnuts are not covered by the Treaty. Since the accessions of groundnuts were collected before the entry into force of the Convention on Biodiversity (CBD), they are not included within the scope of the CBD. There is thus no international agreement that governs access to these accessions. You are therefore free to set any conditions you wish for access to them.

Hypothetical case 2: Cassava (Manihot esculenta) is included in Annex 1 of the Treaty. However, most wild relatives of cassava are not covered by the Treaty. Since the accessions were collected after the entry into force of the CBD, the CBD governs access to them. Your country is a country of origin of the accessions. Access is therefore subject to prior informed consent and is to be on the basis of mutually agreed terms.

Hypothetical case 3: Cassava (Manihot esculenta) is included in Annex 1 of the Treaty. The Treaty governs access to these accessions.

Considerations relative to the negotiation of access under hypothetical cases 1 and 2

First, critically evaluate your assumptions

Before you jump into negotiations and try to sell (or buy) PGRFA, evaluate the assumptions you are making. Does this particular accession or sample have the qualities of a good commodity? Does it have a valuable characteristic (one that, if incorporated into a new variety will enable the seed company to obtain a premium for it in the marketplace)? Is the characteristic rare or unique? Do you control the supply? How big is the market (one company, many companies, an under-funded public institution)? Unless you come up with the right answers to all these questions, you might not have a potentially successful commodity. Remember: value is not the same thing as utility. Something can be very useful without being monetarily valuable (the rain falling from the sky, a sunset, the 50% of the genes that are common in you, me and the grass growing outside the meeting room).
To be a successful negotiator, you must understand your own situation as well as that of the person sitting across the table. This requires you not just to think like a ‘seller’, but also like a ‘buyer’. As a seller, you cannot ask more than the market will bear. So, be realistic and assess your own needs, goals and expectations as well as the capacity and likelihood of the other negotiator being able to meet them. Remember: all nations are interdependent for PGRFA. This means that everyone will be both a buyer and a seller. This means that some buyers will have significant resources; others will not.

**Next, consider the costs**

Still want to sell PGRFA? There are a few more questions to consider: Do you have the infrastructure and capacity for negotiating and enforcing a good deal? Have you considered the transaction costs? Will they exceed the benefits? Will your government be willing to advance these funds prior to reaping any benefits? Will the negotiations have to take place ‘in person’ (plane tickets, per diems!) or can they be conducted by mail or telephone? Who will pay for the time of the lawyers, scientists and administrators that might need to become involved?

**Finally, consider the alternatives**

It is natural to adopt a marketplace approach in negotiating access to PGRFA, without much questioning of whether that model is the most appropriate. Sellers provide goods; buyers hand over money. But, depending on the situation, the characteristics of the ‘commodity’ and the needs of the negotiators, other approaches might be preferable:

- **Co-operative agreements/umbrella agreements**: agreements to share PGRFA between two countries or within a network. You each share what you have. Given the ‘market’ in many countries, sharing might be a win-win situation. Even if you ‘give away’ something valuable/useful, you still have it. Now, perhaps, you know more about how to use it and appropriate that usefulness for your farmers.

- **Non-monetary agreements**: agreements to provide or share the information generated when research is undertaken with the accession.

Sometimes such benefit-sharing arrangements produce more benefits at less cost than would an agreement aimed at yielding monetary benefits. This is almost always likely to be true when developing countries are dealing with other developing countries. What is the potential, therefore, for ‘South-South’ cooperation?

**Some specific comments about the hypothetical cases**

1. **Groundnuts.** Groundnuts are of South American origin, but are a common and important food crop in Africa. They are not included in Annex 1 of the Treaty, nor are these particular accessions covered by the CBD, since they were collected before the entry into force of the CBD. The country being asked for access might or might not be the ‘country of origin’. In this case, legally speaking, it does not really matter. When neither the Treaty nor the CBD applies, what do you do?

2. **Wild relatives of cassava.** Most wild relatives of cassava are not covered by the Treaty, which only lists *Manihot esculenta* in Annex 1. The CBD is thus the pertinent legal regime. In this case, the accessions were acquired after the entry into force of the CBD. Cassava is not a high-value crop and breeding materials
could not be expected to be of great monetary value, as breeders typically serve a rather poor market.

3. Cassava. Cassava (*Manihot esculenta*), a crop of South American origin, is included in the Treaty’s multilateral system. Since you can assume that the accessions are under the management and control of the Contracting Party and in the public domain, you are required to provide access using the standard material transfer agreement (SMTA). This means that you are not required to negotiate terms of access and can (and, indeed, must) rely on the standard terms set out in the SMTA. Cassava is not a high-value crop and breeding materials could not be expected to be of great monetary value, as breeders typically serve a rather poor market. This example is a good case to illustrate the importance of the Treaty’s multilateral system.