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ON ACCESS AND BENEFIT-SHARING

Third meeting

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Item 5 of the provisional agenda*

FURTHER CONSIDERATION OF OUTSTANDING ISSUES RELATED TO ACCESS AND BENEFIT-SHARING: USE OF TERMS, DEFINITIONS AND/OR GLOSSARY, AS APPROPRIATE

Note by the Executive Secretary

I. INTRODUCTION

1. In decision VII/19 B, on “Use of terms, definitions and/or glossary, as appropriate”, the Conference of the Parties noted “that the terms as defined in Article 2 of the Convention shall apply to the Bonn Guidelines on Access and Benefit-Sharing” and “that a number of other relevant terms not defined in the Convention may need to be examined”.

2. In paragraph 1 of the same decision, the Conference of the Parties invited: “Parties, Governments, relevant organizations, indigenous and local communities, and relevant stakeholders, to submit to the Executive Secretary:

“(a) Information on existing national definitions or other relevant definitions of the following terms: access to genetic resources, benefit sharing, commercialization, derivatives, provider, user, stakeholder, ex situ collection, and voluntary nature (as contained in annex II of document UNEP/CBD/COP/6/INF/4);

(b) Views on whether additional terms need to be considered, such as arbitrary restrictions.”

3. In a notification dated 29 April 2004 and a reminder sent out on 28 September 2004, Parties, Governments, relevant organizations, indigenous and local communities, and all relevant stakeholders, were invited to communicate to the Secretariat information on existing national definitions and their views on whether additional terms need to be considered. As of 10 November 2004, the Secretariat had received submissions on use of terms from Brazil, Canada, Colombia, the European Community and its Member States, Madagascar, Norway and Venezuela. The Food and Agriculture Organization of the United Nations (FAO), the World Trade Organization (WTO) and the non-governmental organization Amigos de la Tierra (Costa Rica) also provided information.

4. Finally, the Conference of the Parties requested that a compilation of the information referred to above be prepared by the Executive Secretary for consideration by the Working Group on Access and Benefit-Sharing at its next meeting. The Working Group on Access and Benefit-Sharing was requested to

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“further examine the issue of use of terms not defined in the Convention including the possible establishment of an expert group to determine the need for definitions or a glossary, and to report back to the Conference of the Parties”.

5. The Executive Secretary has prepared the present note to assist the Working Group in its consideration of item 5 of the provisional agenda. Under section II, a table provides an overview of the definitions submitted by Parties and relevant organizations related to each of the terms initially identified for consideration. The last section of the table includes additional terms to be defined, as suggested by some Parties in their submissions.

6. Finally, comments provided by Parties and relevant organizations on the issue of “use of terms” are compiled in section III.

II. TABLE INCLUDING INFORMATION ON EXISTING DEFINITIONS AND POSSIBLE ADDITIONAL TERMS TO BE DEFINED

TERMS TO BE DEFINED	EXISTING DEFINITIONS	SOURCE
<i>Access to genetic resources</i>	<i>Access to genetic resources</i> : Possibility given by provider to user(s) to acquire information and samples of genetic resources for declared way of utilization and under agreed terms	Czech Republic, annex to the submission from the European Commission ^{1/}
	<i>Access to genetic resources</i> : Access for research and for use of genetic characteristics of biodiversity resources without possession	Madagascar
	<i>Access to genetic resources</i> : means the permission to acquire and use genetic resources	United Kingdom, Royal Botanic Gardens, Kew, annex to the European Commission submission

^{1/} All the definitions from Czech Republic given in this table are not codified in national legislation (with exception of *ex situ* collection), however the terms are used on an agreed basis. Term *ex situ* collection is codified in national acts, e.g. Act 148/2003 on Conservation and Utilization of Genetic Resources of Plants and microorganisms Important for Food and Agriculture (Submission of Czech Republic in annex to the EC submission).

	<p><i>Access to genetic resources</i>: is the action through which an interested party, having fulfilled all relevant legal requirements in national and international legislation, makes use of genetic resources. The relevant authorization is personal and not transferable and may be granted by the competent national authority only when there is irrefutable proof of prior informed consent, on the part of the holder or owner of the resource to be accessed and that there are sufficient monitoring and follow-up mechanisms in place regarding the use of those resources.</p> <p><i>(Acceso a los recursos genéticos</i> : es la acción mediante la cual una parte interesada habiendo cumplido con todos los requisitos legales correspondientes en la legislación nacional e internacional, hace uso de los recursos genéticos. La autorización correspondientes es personal e intransferible y deberá ser otorgado por la autoridad nacional competente siempre y cuando se compruebe fehacientemente que existe consentimiento previamente informado de parte del poseedor o dueño del recurso a acceder y que existen los suficientes mecanismos de control y seguimiento al uso que se le dará a esos recursos.)</p>	Amigos de la tierra/Costa Rica
<i>Benefit-sharing</i>	<i>Benefit-sharing</i> : Taking part on benefit(s) of any kind arising from utilization of genetic resources	Czech Republic, annex to the EC submission
	<i>Benefit-sharing</i> : Monetary advantages sharing deriving or not from exploitation of these genetic resources between possessors country and users, but also at the level of possessor country in taking into account local communities and traditional knowledge	Madagascar
	<i>Benefit-sharing</i> : means the sharing of benefits arising from the use, whether commercial or not, of genetic resources, and may include both monetary and non-monetary returns	United Kingdom, Royal Botanic Gardens, Kew, annex to the EC submission

	<p><i>Benefit-sharing</i>: it is an obligation that must be fulfilled in all actions related to access to genetic resources or to traditional knowledge. This obligation is derived from the Convention on Biological Diversity. This participation must be fair and equitable. In order to fulfill these essential requirements, before an authorization is granted, there must be access to information, sufficient time for the resource supplier to independently analyze the information received and definition of control mechanisms regarding the use that will be given to the elements being accessed.</p> <p><i>(Participación en los beneficios</i>: es una obligación que debe cumplirse en toda acción de acceso a recursos genéticos o al conocimiento tradicional que exista. Esta obligación se deriva de la Convención en Diversidad Biológica. Esta participación debe ser justa y equitativa y para que cumpla con estos requisitos esenciales, deben existir previo al otorgamiento de los permisos respectivos acceso a información, plazos para que el proveedor del recurso analice en forma independiente esa información y definición de mecanismos de control sobre el uso que se le dará a los elementos objeto del acceso).</p>	Amigos de la tierra/Costa Rica
Commercialization	<i>Commercialization</i> – The fact to buy and to sell some goods	Madagascar
	<i>Commercialization</i> : 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 the sale of any resulting product	United Kingdom, Royal Botanic Gardens, Kew, annex to the EC submission
	<i>Commercialization</i> : economic use of genetic resources or of traditional knowledge. <i>(Comercialización</i> : aprovechamiento económico de recursos genéticos o del conocimiento tradicional).	Amigos de la tierra/Costa Rica

	<p>Notions of commercialization and placing on the market exist in EC law. However, the notion of placing on the market is more broadly used and includes the notion of commercialization. The latter may have a different meaning depending on the areas covered.</p> <p>(Les notions de commercialisation et de mise en marché existent toutes les deux en droit communautaire. Toutefois, la notion de mise en marché est plus largement utilisée et intègre la notion de commercialisation. Cette dernière est par ailleurs déclinée de manière différente selon les domaines couverts.)</p>	France, annex to EC submission
Derivatives	<p><i>Derivatives:</i> Molecule, combination or mixture of natural molecules, including raw extracts of organisms of biological origin, whether alive or dead, derived from the metabolism of live organisms.</p> <p>(<i>Derivados</i> : molécula, combinación o mezcla de moléculas naturales, incluyendo extractos crudos de organismos vivos o muertos de origen biológico, provenientes del metabolismo de seres vivos).</p>	Colombia – Decision 391 of the Andean Community
	<p><i>Derivatives:</i> Body gotten by the transformation of another.</p>	Madagascar
Provider	<p><i>Provider of intangible components:</i> Person who through an access contract and within the framework of this decision and of complementary national legislation is authorized to provide intangible components associated to genetic resources or its by-products.</p> <p>(<i>Proveedor del componente intangible</i> : persona que a través del contrato de acceso y en el marco de esta Decisión y de la legislación nacional complementaria está facultada para proveer el componente intangible asociado al recurso genético o sus productos derivados).</p>	Colombia – Decision 391 of the Andean Community

	<p><i>Provider of biological resources:</i> person authorized within the framework of this decision and of the complementary national legislation, to provide biological resources containing genetic resources or its by-products.</p> <p><i>(Proveedor del recurso biologico :</i> persona facultada en el marco de esta Decisión y de la legislación nacional complementaria, para proveer el recurso biológico que contiene el recurso genético o sus productos derivados).</p>	
	<p><i>Provider:</i> Natural or juridical person providing genetic resources to user(s) under generally determined conditions.</p>	Czech Republic, annex to the EC submission
	<p><i>Provider:</i> The entity authorized to provide genetic material or traditional knowledge for various uses, that is supposed facilitated the access to resources to the lowest cost and condition the access in all transparency.</p>	Madagascar
	<p><i>Provider:</i> means any individual or organization, whether governmental or non-governmental, that provides genetic resources.</p>	United Kingdom, Royal Botanic Gardens, Kew, annex to the EC submission
	<p><i>Provider:</i> natural person or legal entity who is responsible, possess or owns material containing genetic resources that are the purpose of the access. Suppliers are also the people or groups of people (Indigenous or local communities) that are responsible for traditional knowledge.</p> <p><i>(Proveedor:</i> es una persona física o jurídica que es responsable, posee o es dueño de bienes donde se encuentren los recursos genéticos que quieren accesarse. Igualmente son las personas o grupos de personas (Pueblos Indígenas o comunidades campesinas y locales) que son responsables del conocimiento tradicional).</p>	Amigos de la tierra – Costa Rica

	<p>In the particular context of the commercialization of vegetable seedlings (plants de legumes) and materials for the multiplication of vegetables other than seeds (Directive 92/33/CEE of the Council of the European Union), “provider” is defined as “any physical person or entity which carries out professionally at least one of the following activities related to the multiplication materials or vegetable seedlings: reproduction, production, protection and/or treatment and commercialization”. However, the notion of provider is not included in all directives.</p> <p>(Dans le contexte particulier de la commercialisation des plants de légumes et des matériels de multiplication de légumes autres que les semences (Directive 92/33/CEE du Conseil, UE) « fournisseur » est défini comme : « toute personne physique ou morale qui exerce professionnellement au moins une des activités suivantes ayant trait aux matériels de multiplication ou aux plants de légumes : reproduction, production, protection et/ou traitement et commercialisation. » Cependant, la notion de fournisseur n’est pas présente dans toutes les directives.)</p>	<p>France, annex to the EC submission</p>
<p>User</p>	<p><i>User:</i> Natural or juridical person requesting genetic resources for research, breeding or education; if not agreed otherwise.</p>	<p>Czech Republic, annex to the EC submission</p>
	<p><i>User:</i> The entity that exploits the genetic materials to commercial or research ends.</p>	<p>Madagascar</p>
	<p><i>User and interested party:</i> Person who request access - whether a natural person or legal entity, national or foreign- interested in obtaining access to genetic resources or traditional knowledge. This person will obtain a personal and consequently non-transferable right.</p> <p>(<i>Usuario y parte interesada:</i> es quien solicita el acceso, sea persona física o jurídica, nacional o extranjera interesada en obtener el acceso a los recursos genéticos o al conocimiento tradicional. Este obtendrá un derecho personalísimo que por lo tanto es intransferible).</p>	<p>Amigos de la tierra – Costa Rica</p>

	<p>The terms user or product are generic terms, which appears several times in a large number of texts in different sectors without being defined in any of these (e.g.: Code de la Consommation, Code de la santé publique).</p> <p>(Les termes d'utilisateur ou de produit sont désormais des termes génériques, qui apparaissent à de multiples reprises dans un grand nombre de textes dans différents secteurs sans y être définis à aucun endroit (Code de la Consommation, Code de la santé publique).</p>	France, annex to the EC submission
Stakeholder	<i>Stakeholder</i> : Subject involved and/or interested in study, conservation and utilization of genetic resources.	Czech Republic, annex to the EC submission
	<i>Stakeholder</i> : Participants in a contract.	Madagascar
	<i>Stakeholder</i> : 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. 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;	United Kingdom, Royal Botanic Gardens, Kew, annex to the EC submission
Ex situ collection	<i>Ex situ collection</i> - Collection of genetic resources conserved out of their natural occurrence	Czech Republic, annex to the EC submission
	“ <i>Ex situ collection</i> ” a collection of genetic material for agriculture maintained outside their natural habitat”.	EC submission - Council Regulation (EC) No 870/2004 of 24 April 2004 establishing a Community programme on the conservation, characterization, collection and utilization of genetic resources in agriculture and repealing Regulation (EC) No 1467/94, Article 3 h)

	“ <i>Ex situ collection</i> ” means a collection of plant genetic resources for food and agriculture maintained outside their natural habitat.	France - definition from the FAO International Treaty on Plant Genetic Resources for Food and Agriculture
	<i>Ex situ collection</i> : The conservation of constituent elements of biological diversity outside their natural habitat.	Madagascar
	<i>Ex situ collection</i> : means managed, documented biological material maintained in conditions other than <i>in situ</i> .	United Kingdom, Royal Botanic Gardens, Kew, annex to the EC
Voluntary nature	<i>Voluntary nature</i> : Qualification of an act makes freely without constraint.	Madagascar
<i>Additional term (s) to be defined</i>		
Access to traditional knowledge associated to genetic resources	No definition provided	Brazil
Bioprospecting	No definition provided	Brazil
Utilization of genetic resources	No definition provided	Brazil
Country of origin of genetic resources (Pais de Origen del recurso genetico)	<i>Country of origin of genetic resources</i> : the country who possesses genetic resources in <i>in situ</i> conditions, including those that after being in these conditions are now found in <i>ex situ</i> conditions. <i>(Pais de origen del recurso genetico</i> : país que posee los recursos genéticos en condiciones <i>in situ</i> , incluyendo aquellos que habiendo estado en dichas condiciones, se encuentran en condiciones <i>ex situ</i>).	Colombia

III. GENERAL COMMENTS ON USE OF TERMS

7. The following are general comments related to “use of terms” provided by Parties and relevant organizations:

Belgium (in annex to the EC submission):

“(a) No specific national definitions of the terms referred to above in the context of biodiversity in Belgium;

(b) Belgium would like to mention the basic common understanding of the meaning of the principle of free, prior and informed consent reached by participants in the United Nations Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights (held in Geneva from 5 to 7 December 2001), which is: “the right of indigenous peoples, as land and resource owners, to say no to proposed development projects at any point during negotiations with Governments and/or extractive industries” (E/CN.4/Sub.2/Ac.4/2002/3, para. 52).

This is mentioned back in the preliminary working paper on principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Mrs. Motoc and the Tebtebba Foundation at the twenty-second session of the Working Group on Indigenous Populations, 19-23 July 2004 (E/CN.4/Sub.2/AC.4/2004/4, 8 July 2004, par.12).”

Brazil:

“Definitions of terms eventually adopted should not be a substitute for the definitions of the national legislation of countries of origin of the genetic resources. These legislations, in accordance with Article 15 (1) of the Convention, must always prevail. Brazil has a legal framework that defines some of the terms related to access to genetic resources, access to traditional knowledge associated to genetic resources and has been developing some others.”

Canada:

“It is not essential at this time to address use of terms, definitions and/or a glossary, due to the early stage of negotiations on an international regime.

Previously, the issue of use of terms arose in the context of the Bonn Guidelines to ensure that they would be user friendly. ABS discussions have moved on from a narrow focus on the Guidelines, even though the Guidelines are an important part of the international ABS regime. Discussions in Thailand are expected to focus on the crucial conceptual level. Whether or when use of terms, definitions or a glossary will be required will necessarily depend on the outcome of those conceptual discussions.

Nevertheless, we support a full discussion of this issue at the third meeting of the Ad Hoc Open-ended Expert Group on Access and Benefit-Sharing under Sub-Working Group II in order to come to a common understanding about when this type of discussion might become more appropriate. We do not support the creation of an expert group at the third meeting of the Ad Hoc Open-ended Expert Group on Access and Benefit-Sharing, as set out in UNEP/CBD/WG-ABS/3/1/Add.1, paragraph 17, as this would divert attention from the important conceptual analysis which the Working Group on Access and Benefit-Sharing will be undertaking. Furthermore, if at any point terms were to be discussed, we would propose that it would be more appropriate in an open-ended context.

At this time, Canada is therefore not providing either existing national definitions or other relevant definitions of the terms cited in decision VII/19 B, nor are we suggesting additional terms that need to be addressed. We would also like to note that Canada recently embarked on a domestic policy initiative for access and benefit-sharing which will address issues related to definitions in a Canadian legal and socio-economic context. As is the case for other countries, our perspective on definitions for the international regime will be guided in large measure by our domestic deliberations.

We are of the view that all of the terms previously proposed for discussion are: (i) adequately defined by the ordinary meaning of the term (e.g. voluntary nature, “access” in “access to genetic resources”); (ii) clear from their use in the Bonn Guidelines or would be made clear in any material transfer agreement (MTA) (e.g. benefit-sharing, commercialization, derivatives, provider, user, stakeholder); or (iii) defined in the Biodiversity Convention itself (e.g. “genetic resources”, “*ex situ*”).”

EC and its Member States:

“The EC does not support the development of further definitions for additional terms, including ‘arbitrary restrictions’ which are normally defined under trade law. The EU believes that the compilation of a glossary containing definitions already used in multilateral environmental agreements and other relevant multilateral agreements, codes of conduct, guidelines, guiding principles, etc. would be helpful. Such glossary would usefully encourage stakeholders’ endorsement and use of the Bonn Guidelines throughout a wide range of sectors.”

France (in annex to the EC submission):

“The practice which generally prevails in legal drafting consists of:

- Providing, by grouping them in one article, definitions to terms which are likely to have, in the context of the law or the international agreement, a different or more precise meaning than it has in another context. They are then preceded by a formulation of the type “for the purpose of this treaty” (example: “*ex situ* collection”)
- Devoting a whole article to defining a concept, which generally is used as the title to this article (e.g., the Convention on Biological Diversity defines access to genetic resources);
- Not defining terms for which the usual meaning applies to the context of the law or the treaty in question (e.g., notion of user”).

(La pratique qui prévaut généralement en matière de rédaction juridique consiste à :

- Donner, en les regroupant dans un même article, des définitions aux termes susceptibles d’avoir, dans le contexte de la loi ou de l’accord international, une acception différente ou plus précise que celle qu’elle a dans d’autres contextes. Elles y sont alors précédées d’une formule du type «aux fins du présent traité» (exemple: «collection *ex situ*»).
- Consacrer un article complet à définir un concept, qui donne généralement son titre à cet article (exemple: la Convention sur la diversité biologique définit l’accès aux ressources génétiques);
- Ne pas définir les termes dont l’acception courante s’applique au contexte de la loi ou du traité en cause (exemple : notion d’utilisateur.)

Germany (in annex to the EC submission):

“As part of a study commissioned by the German Environment Ministry consultants will explore whether definitions can be found in German legislation. The study will be finalized by the end of September 2004.”

The Netherlands (in annex to the EC submission):

“An interesting discussion on definitions has taken place in the ITPGRFA (FAO) circles. It is important to look at their findings as a basis for further discussion. A list of their definitions should be available soon.

Of particular interest to our discussion:

- Definition of commercialization is problematic. What are the criteria for commercialization? A similar discussion is taking place in the FAO expert discussion on standard MTA.

Definition of benefit-sharing has never been defined properly. This is the conclusion drawn by the FAO Commission on Genetic Resources about “non-monetary benefit-sharing”. Interestingly, benefit-sharing is usually applied to those goods that are difficult to define ‘concretely’, like water and the environment.”

Norway:

“Relevant definitions pertaining to genetic resources will be developed under the forthcoming legislative proposal on access to genetic resources and benefit-sharing.”

Spain: (annex to EC submission)

“Spain has no definitions beyond what is the text of the Convention on Biological Diversity itself. Some regional laws ...have attempted to establish a framework for ABS decision-making but the bills that are being discussed are all very careful in preventing the introduction of definitions.”

Venezuela:

“Certainly, with the aim of speaking a common language and to avoid misunderstandings, a comparative analysis is required of the existing definitions in different countries relative to the following terms and expressions: access to genetic resources, benefit-sharing, commercialization, derivatives, supplier, user, interested, *ex situ* collection, voluntary nature.

(Ciertamente, con los fines de hablar un lenguaje común y evitar malentendidos, se requiere un análisis comparativo sobre las definiciones existentes en diferentes países relativas a los siguientes términos y expresiones: acceso a recursos genéticos, participación en los beneficios, comercialización, derivados, proveedor, usuario, interesado, recolección *ex situ*, carácter voluntario).

Food and Agriculture Organization of the United Nations (FAO):

“It should be understood that all terms, definitions and/or glossary developed for the Bonn Guidelines apply only for the purposes of those guidelines.

A number of the terms specified in paragraph 1 (a) of decision VII/19 B appear in the International Treaty on Plant Genetic Resources for Food and Agriculture, of which one is defined for the purposes of the Treaty:

‘*Ex situ* collection’ means a collection of plant genetic resources for food and agriculture maintained outside of their natural habitat’

In addition, a standard Material Transfer Agreement is being developed for the implementation of the Multilateral System of Access and Benefit-sharing under the Treaty, in the context of which the question of definitions will be considered.”

Friends of the Earth (Amigos de la tierra)- Costa Rica:

“We consider this topic important since, through those concepts, a specific model of access to genetic resources is defined. Therefore, a consultation like this, must respond to criteria of prior information to ensure ample participation, justice and fairness given that in most circumstances, the consultations obtain answers from the respective Governments only. We consider that in order for the mentioned process to exist, mechanisms that assure first of all access to the information must be implemented, at national level and by the Secretariat of the Convention on Biological Diversity, so that before long the diverse groups, specially indigenous and local communities as well as NGOs, will be able to participate. Once these mechanisms are implemented, it will have to be defined how and whether or not to incorporate the various contributions and how to make available the documentation enriched by means of this process to all the participants. The participation must look for and be constructed beyond the electronic routes since access to these routes is always limited.”

(« Este punto lo consideramos importante ya que a través de esos conceptos, se define un modelo específico de acceso a los recursos genéticos. Por lo tanto, una consulta como esta, debe responder a criterios de información previa para que exista amplia participación, justicia y equidad ya que en la mayoría de las oportunidades, las consultas obtienen respuestas de únicamente, los respectivos gobiernos. Consideramos que, para que exista un proceso como el mencionado, deben implementarse a nivel nacional y desde el Secretariado de la CDB, mecanismos que aseguren en primer lugar acceso a la información para que luego los diversos grupos, en especial Pueblos Indígenas, comunidades campesinas y locales así como ONGs, puedan participar. Una vez implementados estos mecanismos deberán definirse de igual forma cómo se incorporaran o no las diversas contribuciones y cómo se hará llegar los documentos enriquecidos mediante este proceso de participación a quienes formaron parte de este proceso. La participación debe buscarse y construirse más allá de las vías electrónicas ya que el acceso a las mismas siempre es limitado”).
