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**COMPILATION OF SUBMISSIONS PROVIDED BY PARTIES, GOVERNMENTS,
INDIGENOUS AND LOCAL COMMUNITIES AND STAKEHOLDERS ON CONCRETE
OPTIONS ON SUBSTANTIVE ITEMS ON THE AGENDA OF THE FIFTH AND SIXTH
MEETINGS OF THE AD HOC OPEN-ENDED WORKING GROUP ON ACCESS AND
BENEFIT-SHARING**

Note by the Executive Secretary

Addendum

SUBMISSION FROM CANADA

1. The Secretariat is circulating herewith, as an addendum to the original compilation of submissions on concrete options on substantive items on the agenda of the fifth and sixth meetings of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (UNEP/CBD/WG-ABS/6/INF/3), a non-paper from the Government of Canada on facilitated access to genetic resources.
2. The contribution has been reproduced in the form and language in which it was received by the Secretariat.

* UNEP/CBD/WG-ABS/6/1.

NON-PAPER ON FACILITATED ACCESS TO GENETIC RESOURCES

1. Introduction

Under the right conditions, access to genetic resources can help stimulate research and innovation, leading to the development of products that enhance the sustainable use of biological diversity. Often access is a precursor to the possibility of benefit-sharing from the use of genetic resources. Some would even go as far to say that without access, there will be no use of genetic resources and therefore no possibility for the generation of benefits arising from their use, and ultimately no benefit-sharing.

This non-paper¹ describes the origins of facilitated access, attempts to scope out some of the major issues associated with this concept in an impartial way, and provides an initial list of elements and questions to assist Parties in determining what constitutes facilitated access. In Article 15, Parties to the *Convention on Biological Diversity* recognize “facilitated access” as an important element of access and benefit-sharing. However, Parties have not fully articulated their view as to what constitutes facilitated access. As a result, the concept remains relatively undefined, as reflected in recent COP decisions.

2. Origins: The Convention on Biological Diversity and the Bonn Guidelines

The obligation to provide facilitated access is stipulated in Article 15.2 of the Convention, which states that:

“(e)ach Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.”

This “facilitated access” obligation, alongside of benefit-sharing, must be pursued in accordance with the three objectives of the *Convention* which are to conserve and sustainably use biodiversity and share the ensuing benefits generated from the use of genetic resources. Facilitated access should also be considered in the broader context of the rest of Article 15, which describes the conditions for access to genetic resources, the aim of benefit-sharing, Prior Informed Consent, and Mutually Agreed Terms.

While the Bonn Guidelines do not explicitly define “facilitated access,” several key principles associated with facilitated access are found throughout. For example, the Bonn Guidelines identify some key elements of facilitated access, namely: (a) Legal certainty and clarity; (b) Access to genetic resources should be facilitated at minimum cost; (c) Restrictions on access to genetic resources should be transparent, based on legal grounds, and not run counter to the objectives of the Convention, and (d) that facilitated access is linked to benefit-sharing and to the need to support research as specified, for example, under the Global Taxonomy Initiative. It is also useful to recall that during negotiations of the Bonn Guidelines, the principle of “non-discriminatory” access was discussed at length by Parties.

Even with common guidance from the Bonn Guidelines on implementing ABS nationally, countries have made use of a wide range of approaches to facilitating access at the national level. These approaches range from no or minimal state involvement in genetic resources transactions to very detailed rules governing both access and private contracts.

¹ This non-paper has been prepared using as source documents: the Convention on Biological Diversity, The Bonn Guidelines, CBD COP7 and COP8 decisions and the official and information documents distributed for WGABS-5.

Some countries have sought to address facilitated access through the nature and characteristics of the administrative and/or regulatory framework they have adopted to grant access and negotiate mutually-agreed terms. While the meaning of, “facilitated access” generally implies that providers will make genetic resources available to other Parties consistent with Article 15, it can also be interpreted as an obligation to minimize regulatory burden and minimize transaction costs.

Some stakeholders have advocated the need for speedy, transparent and simple procedures for obtaining access to genetic resources at the national level. They have also argued the need for streamlined processes for obtaining prior informed consent from relevant authorities and communities on mutually agreed terms, and for national treatment that does not differentiate between national and foreign applicants. Industry stakeholders in particular have stated that they look to an international ABS regime to ensure transparency, predictability, consistency, durability and non-discriminatory treatment.

While the Convention and the Bonn Guidelines provide some guidance as to what is meant by “facilitated access”, there is still a need to identify potential measures that would facilitate access while supporting benefit sharing. While countries have adopted different approaches in terms of the types of measures adopted, it is still possible to draw some general conclusions on what facilitated access means based on an analysis of these different approaches and measures.

3. Issues Associated with Facilitated Access

a) Legal certainty and clarity

Facilitated access should provide legal certainty to recipients regarding the use they can make of the genetic resources they obtain. Lack of legal certainty may act as a disincentive for researchers to seek access to genetic resources where the legal ownership over biological samples is uncertain, especially in sectors where the research and development of innovative products using genetic resources is long and costly.

Legal certainty may be an issue in federal states where there is a complex system of property laws, as well as established constitutional arrangements such that the federal government, provinces/states and territories, as applicable, have jurisdiction over public lands and waters. In some countries, indigenous peoples have rights to or control significant areas and access to genetic resources is subject to relevant indigenous laws under self-government/comprehensive land claim agreements. In multi-jurisdictional countries with a wide range of potential ABS competent authorities and local beneficiaries, clarifying ownership rights over genetic resources, minimizing the administrative burden and negotiation of benefit-sharing agreements may pose a significant challenge. A question for discussion by Parties relates to what is the optimal number of competent authorities granting access to genetic resources since an overly centralized and an overly decentralized system will pose unique but different access issues for government administrators and users.

Facilitated access may also be complex within the context of bi-lateral and multi-lateral agreements that by their nature transcend national authorities. Shared biodiversity, shared culture/legal approaches and co-operative governance/administrative efficiencies are some reasons why regional approaches have been established or are being considered. Small island developing states (SIDS) provide an example of administrative challenges for small countries trying to implement both provider and user ABS measures.

Another important legal certainty issue is non-discrimination against foreigners or sectors/technologies. Non-discrimination means that nationals and foreigners are treated equally before the law such that there are no discriminatory requirements for foreigner’s access to and use of genetic resources. As such, any obligations applied to genetic resources would apply equally to nationals and foreigners. The principle of National Treatment has been advocated by some countries concerned that foreign investments in GR-based research leading to proprietary research are not arbitrarily expropriated or mutually-agreed terms are not unilaterally changed when research leads to promising commercial products. On the other hand, some Parties have advocated the position that preferential treatment of national interests is necessary to support industrial development goals. Similarly, some stakeholders may advocate non-discrimination regarding sectors or technologies during ABS regime negotiations;

but others have pointed out that various pre-existing arrangements for access to genetic resources, and sharing the benefits arising from their use, have been developed by different communities of practice.

The question of legal certainty also arises with regard to the issue of obtaining PIC. Article 15.3 recognizes that providers of genetic resources can either be Parties which are countries of origin or Parties which have acquired genetic resources in accordance with the Convention. Some Parties see requirements for PIC from countries of origin, even when those resources are accessed in another country, as a way to better share benefits equitably and/or support the conservation of regional centres of diversity or origin of agricultural crops and trees. Most Parties would agree with the need to conserve biodiversity in these centres of origin. However, many public researchers and industry representatives have raised concerns that to provide an additional obligation to obtain PIC from the country of origin – in addition to obtaining PIC from a Party that has obtained genetic resources in accordance with the Convention – would not facilitate access but would be a major administrative complication, diminish legal certainty and create a costly regulatory burden. This issue is perhaps most obvious in the agricultural sector where it is difficult to trace the history of plant genetic resources used in plant breeding, which have been shared and improved long ago and distributed world-wide. While conservation of biodiversity is an extremely important common goal for Parties, the most effective mechanism for garnering new resources to better support the conservation and sustainable use of these valuable genetic resources may be within the overall scope of the ABS regime.

b) Minimizing administrative and transaction costs

Facilitated access to global genetic resources is also often assumed to mean administrative and transactions costs are minimized for users accessing genetic resources. Costs for users include time and effort employed in negotiating access and benefit-sharing agreements (transaction costs), administrative fees and reporting requirements (to ensure regulatory compliance). In effect, access is facilitated when the administrative and transactions costs are minimized for those engaged in scientific research and product development. Some Parties have made additional efforts to facilitate access by providing targeted economic incentives or scientific/technical investments which have the effect of lowering R&D costs and increasing the likelihood of the development of successful commercial innovations. Minimizing administrative and transactions costs for both providers and users ought to be a goal in facilitating access especially where administrative and/or regulatory costs are likely to be passed on to users on a cost recovery basis.

Some Parties would argue that the administration of national ABS policies is more cost effective in the marketplace rather than ensuring compliance with government-led enforcement efforts. However, in some cases providers may have limited abilities and face high costs in obtaining redress when genetic resources are accessed and exported without authorization, so there may be an incentive for many Parties to seek some level of international cooperation.

It is also worth considering the minimization of costs associated with access in global terms. Arguably, Parties should be considering the most efficient system to support the global trade in genetic resources as this will be most effective in supporting their conservation and sustainable use. Consideration should therefore be given to the relationship between international cooperation and both the administrative/regulatory costs of compliance mechanisms at the national level and the globally aggregate cost of these national systems.

c) The justifiability of restrictions on access to genetic resources

While there is general agreement on the need for conditions which enable access to genetic resources by other Parties, there is divergence of opinion on whether any conditions which limit or restrict access by definition run counter to the notion of facilitated access. Some Parties have expressed the view that “facilitated access” exists even in the absence of national and international ABS regulation so there is no need to undertake facilitative measures. These Parties argue that, on the contrary, access must be “regulated” or “controlled” to ensure that access leads to benefit-sharing.

Some Parties have also expressed the view that “facilitated access” should not be interpreted to mean that a Party must provide access to all of its genetic resources. Parties may seek to restrict access to certain genetic resources

where, for example, the administrative costs of doing so outweigh any anticipated benefits, where there are questions of jurisdiction/ownership or where endangered species or habitats need to be protected.

The fact that these discussions exist indicates the need to further explore the nature of these terms facilitated access and the rights and obligations of those accessing and providing genetic resources.

Conditions of access can be interpreted as consistent with the objectives of the Convention if the conditions support Article 15 (PIC, MAT, benefit-sharing) and more generally the Convention's objectives: conservation, sustainable use and benefit-sharing. For instance, most, if not all, Parties would accept that bioprospecting and/or harvesting activities can be justifiably restricted, or be the object of environmental assessment, if there is a possibility of these activities threatening endangered species or vulnerable, sensitive ecosystems.

In contrast, while there may well be other public policy objectives associated with conditions of access beyond the scope of the Convention, they must be weighed against their impact on access and the degree to which they may dilute the objectives of the CBD.

d) The roles of providers and users in facilitating access

All countries are both providers and users of biodiversity and genetic resources, which is why the obligation for facilitated access in Article 15.2 applies to each Contracting Party. While the *Convention* focuses the obligations for facilitated access on each Party while in provider mode, there is an associated role for users in facilitating access. User measures can facilitate access by alerting researchers and industry to the existence of ABS obligations, the Bonn Guidelines and national ABS laws thereby increasing their compliance with PIC obligations and enhancing the negotiation of fair benefit-sharing agreements.

For example, a number of countries and industries have undertaken awareness-raising activities, organized sectoral and/or bi-lateral ABS workshops and developed research guidelines. These initiatives are important for facilitating access to genetic resources since firms will be better prepared to understand bioprospecting obligations and enter into ABS agreements at the national level.

A number of Parties have advocated the need for 'user country' measures which require monitoring, compliance, enforcement and/or redress in cases where genetic resources have not been accessed from authorities in providing countries. In general, however, many countries are reluctant to enforce other countries' laws or take on onerous enforcement measures in their own countries. Other Parties seem to advocate strong user measures without considering that all Parties would then need to adopt such user measures under an international ABS regime.

Another view is that countries which create legal certainty in the fair treatment of both providers and users (e.g. appropriate redress mechanisms in cases where ABS contracts are violated or genetic resources are obtained unlawfully) will ultimately facilitate access to global biodiversity for its scientists and industry.

e) Capacity-building

Facilitating access to genetic resources will in many cases require capacity-building at the national level. Countries, international organizations and users have a central role in facilitating access through bi-lateral, GEF-funded and research/industry action. The capacity necessary to facilitate access and benefit-sharing includes human and financial resources to implement and administer effective national ABS regimes and capacity to negotiate benefit-sharing agreements by providers of genetic resources including indigenous and local communities. In this context, facilitated access does imply that users accessing genetic resources from developing countries and indigenous and local communities can have a role in facilitating access to genetic resources through capacity-building initiatives at the national and local levels.

4. Elements

Given the issues raised above, Parties may wish to consider including the following elements within the concept of facilitated access:

1. Legal certainty to recipients of genetic resources regarding the use they can make of the genetic resources they obtain.
2. Clarity in the ownership of genetic resources and in procedures for obtaining access, including any process for PIC, and benefit-sharing.
3. Facilitation of sustainable use of genetic resources, which generates benefits to be shared fairly and equitably
4. Non-discrimination: nationals and foreigners are treated equally before the law such that there are no discriminatory requirements for foreigners' access to and use of genetic resources.
5. Due process
6. Minimum cost
7. Restrictions on access to genetic resources should be transparent, justifiable, based on legal grounds, and not run counter to the objectives of the Convention
8. Practicality: measures are practical and aimed at reducing transaction costs.
9. Flexibility: to be useful across a range of sectors, users and national circumstances and jurisdictions
10. Transparency
11. Facilitation of basic research including taxonomic research, as specified under the Global Taxonomic Initiative

5. Questions

To support the process for the elaboration and negotiation of an international ABS regime, the following non-exhaustive list of questions related to facilitated access may assist Parties in considering the objectives and options for achieving facilitated access at the local, national and international levels.

- What are the principles of facilitated access to genetic resources?
- Should the international regime create legal certainty and minimize costs?
- Would minimum standards and harmonized national approaches/standards create legal certainty and minimize costs?
- Should exceptions to access be identified clearly and transparently or determined on a case by case basis? Should exceptions to access be non-discriminatory?
- Are there examples of best practices that can be identified both for facilitating access and sharing benefits?
- What role can users best play in facilitating access to genetic resources?
- What capacity-building is necessary to facilitate access to genetic resources?
- How can federal states facilitate access considering the problem of multi-jurisdictional national ABS policies?
- Where there are multiple stakeholders with ownership claims to genetic resources in a country, how can the costs of facilitating access be streamlined?
