



**Secretariat of the Convention on  
Biological Diversity**

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**Subject: ESA Submission to the Secretariat of the Convention on Biological Diversity  
for the seventh meeting of the Ad Hoc Open-ended Working Group on Access and  
Benefit-sharing**

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ESA European Seed Association is the voice the European seed industry and represents the interests of those active in research, breeding, production and marketing of seed of agricultural, vegetable and ornamental plant varieties in Europe. Today, ESA's membership comprises 37 national seed associations from EU Member States and beyond, representing several hundreds of seed companies, as well as more than 45 direct company members, many of them small and medium sized enterprises.

The European seed industry attaches great importance to the discussions held on the issue of biodiversity, access to plant genetic resources and benefit sharing. ESA and its members are committed to the conservation and sustainable use of plant genetic resources, the lifeblood of plant breeders for developing new and better yielding varieties in a changing environment. Open access to genetic resources and interdependency of countries constitute the foundation of professional plant breeding. Access to plant genetic resources is therefore of key importance to the seed industry all around the world.

In view of the seventh meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing to be held in Paris on 2-8 April 2009, ESA is keen to share its position on some of the main components listed in the annex I to decision IX/12 and in particular on **objective (1), scope (2), fair and equitable benefit sharing (3), downstream products (4), access (5), and compliance (6)**. In addition, ESA would like to express its support to the relevant submissions from ICC (International Chamber of Commerce) to the CBD Secretariat.

### **1) Objective of the IR**

Access to genetic resources (GR) should be actively supported as it is a precondition for the generating of benefits and for the sharing of these benefits. An effective International Regime (IR) on Access and Benefit Sharing (ABS) should maintain and foster the diversity of uses of these resources as well as the commercial arrangements through which they are acquired. The IR should be a transparent, non-discriminatory, predictable, and facilitative structure

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narrowly targeted. The establishment of a workable system with regards to traditional knowledge (TK) should also be an essential part of the IR.

Accordingly, ESA suggests the following amended version of the Objective text as proposed in Annex I of Decision IX/12 adopted at COP 9:

**Objective  
(Annex I of Decision IX/12)**

*Effectively implement the provisions [in Articles 15, 8(j), 1, 16 and 19.2] of the Convention [and its three objectives], specifically by:*

- *[[Facilitating] [regulating transparent] access to genetic resources, [their derivatives] [and products] [and associated traditional knowledge]; ]*
- *Ensuring [the conditions and measures for] the [effective,] fair and equitable sharing of benefits arising out of their utilization, [their derivatives] [and products] [and associated traditional knowledge] [and to prevent their misappropriation and misuse];*
- *[Securing compliance in user countries with national laws and requirements, including PIC and MAT, of the country [of origin] providing those resources or of the Party that has acquired those resources in accordance with the Convention on Biological Diversity].*

*[taking into account all rights over those resources, including the rights of indigenous and local communities, and ensuring compliance with PIC.]*

**2) Scope**

The IR should not apply to biological resources, derivatives and products. This should be subject to agreement between the Provider and the Recipient. The IR should only apply to acquisitions of GR which take place after entry into force of the IR in the provider country, and be without prejudice to prior acquisitions carried out in good faith. The IR should not provide the possibility of changing obligations relating to such acquisitions after they have been made.

Pathogens should be explicitly excluded from the IR. The IR approach on ABS is not suitable for pathogens as these do not appear to fit within the objectives of the CBD on conservation and sustainable use. With regards to plant genetic resources (PGR), the IR should not create overlaps with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and species covered by the ITPGRFA should not fall under the scope of the IR.

**Objective  
(ESA proposal for legal text)**

*Effectively implement the provisions in Articles 15, 8(j), 1, 16 and 19.2 of the Convention on Biological Diversity and its three objectives, specifically by:*

- *Facilitating access to genetic resources and associated traditional knowledge;*
- *Ensuring the conditions and measures for the effective, fair and equitable sharing of benefits arising out of their utilization and associated traditional knowledge*

Therefore, among the three options of the Scope text still to be negotiated, ESA favours the Option 1 in Annex I of Decision IX/12 amended as follows (additional provisions or wording proposed by ESA are underlined):

**Scope  
(Option 1, Annex I of Decision IX/12)**

1. *The international regime on access and benefit-sharing applies to [biological resources,] genetic resources, [derivatives,] [products] as well as [to their] [associated] traditional knowledge, [and derivatives of traditional knowledge associated with genetic resources,] innovations and practices [in accordance with Article 8(j)] [within national jurisdiction and of a transboundary nature] [in accordance with the relevant provisions of the CBD].*

*[2. Subject to paragraph 1, the international regime on access and benefit-sharing applies to:*

*(a) [Benefits arising from commercial and other utilization] [from] [genetic resources acquired after] the entry into force of the [international regime] [Convention on Biological Diversity];*

*[(b) Continuing benefits arising from commercial and other utilization taken prior to the coming into force of the Convention on Biological Diversity.]]*

*3. The international regime on access and benefit-sharing does not apply to:*

*(a) [Human genetic resources;]*

*(b) [Genetic resources that were acquired before the entry into force of the Convention on Biological Diversity on 29 December 1993 [or before the entry into force for a Party];] [Genetic material acquired prior to the national ratification of the Convention on Biological Diversity [and since then cultivated ex situ];]*

*(c) [Genetic material already made freely available by the country of origin;]*

*(d) [[Species] [listed in Annex I of] [genetic resources covered under] the International Treaty on Plant Genetic Resources for Food and Agriculture [unless they are used beyond the purpose of the said treaty];]*

*(e) [Genetic resources, including marine*

**Scope  
(ESA proposal for legal text)**

*1. The international regime on access and benefit-sharing applies to genetic resources as well as associated traditional knowledge, within national jurisdiction in accordance with the relevant provisions of the CBD and subject to specific sectoral provisions set out in the International Regime.*

*2. Subject to paragraph 1, the international regime on access and benefit-sharing applies to benefits arising from commercial and other utilization from genetic resources acquired after the entry into force of the international regime;*

*3. The international regime on access and benefit-sharing does not apply to:*

*(a) Human genetic resources;*

*(b) Genetic resources that were acquired before the entry into force of the International Regime for a Party or according to national legislation already in place;*

*(c) Genetic material already made freely available by the country of origin;*

*(d) Species covered under the International Treaty on Plant Genetic Resources for Food and Agriculture unless they are used beyond the purpose of the said treaty*

*(e) Genetic resources, including marine genetic resources found in areas beyond*

*genetic resources found in areas beyond national jurisdiction;]*

*national jurisdiction;*

*(f) [Genetic resources located in the Antarctic Treaty Area.]*

*(f) Genetic resources located in the Antarctic Treaty Area.*

[...]

*(g) Human, animal and plant pathogens*

[...]

### **3) Benefit-sharing: the breeder's exemption**

For the plant breeding sector the Standard Material Transfer Agreement of the International Treaty on Plant Genetic resources for Food and Agriculture (ITPGRFA) is a workable system. Access and Benefit Sharing of genetic resources in this way can be done quick and efficient. The use of the contract could be extended for those crops that are not yet in Annex 1 of the ITPGRFA.

The UPOV convention has inherent benefit sharing principle in the form of the breeder's exemption and other exceptions, which authorise the free use of improved varieties and the genetic diversity for further breeding activities. The FAO ITPGRFA (Article 13(d)(ii)) recognises the concept of breeders' exemption, in that breeders, who commercialise a variety, that incorporates material accessed from the Treaty's Multilateral System (MLS), are exempted from mandatory financial benefit sharing whenever these products are available without restriction to others for further research and breeding.

### **4) Downstream products**

The IR should only regulate the relationship between the provider and party gaining access to genetic resources and not seek to regulate downstream activities and/or derivatives or products being developed from them. An IR which tries to regulate downstream activities and products will be unworkable, unenforceable and extremely costly to implement by governments and users alike. Broadening the scope of the IR to downstream products would bring under the IR common household items such as wine, bread and wood products. Benefit-sharing arrangements in relation to derivatives and downstream products should instead be determined through MAT in the ABS contract between the providing and accessing parties, as provided for in Article 15(7).

### **5) Access**

ESA recognizes the sovereign rights and the authority of Parties to determine access. However, it is important that legal certainty is provided through access rules. In addition those access rules should be non-discriminatory over nationalities.

In providing access, it is important that the administration and transaction costs are minimized to stimulate sustainable use of genetic resources.

### **6) Compliance**

On this issue, ESA would like to recall that the business delegation, coordinated by the International Chamber of Commerce (ICC) has developed and submitted a position to the CBD Secretariat on "Access and Benefit Sharing; Priority issues for the Compliance TEG" from 28 November 2008 (Document n° 450/1042).