



# COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

## Item 5 of the Provisional Agenda

### INTERGOVERNMENTAL TECHNICAL WORKING GROUP ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

#### Eighth Session

Rome, 8 – 10 June 2016

### ELABORATION OF SUBSECTOR-SPECIFIC ELEMENTS FOR ACCESS AND BENEFIT-SHARING FOR GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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## I. INTRODUCTION

1. The Commission on Genetic Resources for Food and Agriculture (Commission), at its Fourteenth Regular Session in April 2013, established the Team of Technical and Legal Experts on Access and Benefit-Sharing (ABS Expert Team). As mandated by the Commission, the ABS Expert Team participated in relevant portions of the meetings of the intergovernmental technical working groups (Working Groups), helped inform their discussions on access and benefit-sharing (ABS) and, after each meeting, considered the lessons learned from each subsector.

2. Drawing on a body of studies, reports and other inputs, the ABS Expert Team prepared *Draft Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture* (ABS Elements) and agreed to submit them to the Commission, for its consideration.<sup>1</sup> The material made available to the ABS Expert Team and the Commission included:

- Inputs received from the Commission's Working Groups;<sup>2</sup>
- Background studies of the use and exchange of aquatic<sup>3</sup>, animal<sup>4</sup>, forest<sup>5</sup>, microbial genetic resources<sup>6</sup> and of biological control agents for food and agriculture<sup>7</sup>;
- Results of a multi-stakeholder dialogue<sup>8</sup>;
- Government submissions describing the conditions under which specific genetic resources for food and agriculture (GRFA) are exchanged and utilized<sup>9</sup>;
- Stakeholder submissions on voluntary codes of conduct, guidelines and best practices, and/or standards in relation to ABS for all subsectors of GRFA<sup>10</sup>; and
- Explanatory notes to the distinctive features of GRFA.<sup>11</sup>

3. At its Fifteenth Regular Session in January 2015, the Commission welcomed the *Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture* (ABS Elements)<sup>12</sup> and invited the Director-General of FAO to bring them to the attention of the Conference.<sup>13</sup> The FAO Conference, at its Thirty-Ninth Session in June 2015, welcomed the ABS Elements and invited Members to consider and, as appropriate, make use of them. The Conference also noted the complementarity between the work of the Commission and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) in regard to access and benefit-sharing for genetic resources.<sup>14</sup>

4. The Commission further requested its Working Groups, including the newly established *Ad Hoc* Intergovernmental Technical Working Group on Aquatic Genetic Resources for Food and Agriculture, to continue elaborating, with the assistance of the Secretary, subsector-specific elements for ABS, including consideration of the role of traditional knowledge associated with GRFA and their customary use, and bearing in mind the on-going activities or processes under the International Treaty on Plant Genetic Resources for Food and Agriculture (Treaty), for consideration by the ABS Expert Team established by the Commission at its last session.<sup>15</sup> It requested the ABS Expert Team to reconvene to consolidate the outputs of the meetings of the Working Groups and any additional

<sup>1</sup> CGRFA-15/15/Inf.11; CGRFA-15/15/Inf.12.

<sup>2</sup> See CGRFA-15/15/9, paragraphs 19-25; CGRFA-15/15/12, paragraphs 30-36; CGRFA-15/15/14, paragraphs 40-45.

<sup>3</sup> Background Study Paper No. 45.

<sup>4</sup> Background Study Paper No. 43.

<sup>5</sup> Background Study Paper No. 44.

<sup>6</sup> Background Study Paper No. 46.

<sup>7</sup> Background Study Paper No. 47.

<sup>8</sup> Background Study Paper No. 59.

<sup>9</sup> CGRFA-15/15/Inf.14.

<sup>10</sup> CGRFA-15/15/Inf.13; CGRFA-15/15/Inf.13 Add.1.

<sup>11</sup> CGRFA-15/15/Inf.10.

<sup>12</sup> CGRFA-15/15/Report, *Appendix B*.

<sup>13</sup> CGRFA-15/15/Report, paragraph 22(ii).

<sup>14</sup> C 2015/REP, paragraph 52.

<sup>15</sup> CGRFA-15/15/Report, paragraph 22

information from thematic studies on sectors not covered by the Working Groups, and to report to the Commission at its next session.

5. In response to the Commission's request to the Working Groups to continue elaborating subsector-specific elements for ABS, including consideration of the role of traditional knowledge associated with GRFA and their customary use, this document provides a brief overview of the global context of ABS. The document then illustrates by reference to the ABS Elements some of the features typically addressed by ABS legislative, administrative or policy measures and invites the Working Group to provide guidance and recommendations in its area of expertise with regard to:

- subsector-specific issues that may warrant special attention and/or treatment in the elaboration and implementation of subsector-specific ABS measures;
- possible future action on ABS in the subsector by the Working Group and the Commission, including the ABS Expert Team; and
- the review of existing access and benefit-sharing instruments and their impact on GRFA, foreseen in the Commission's Multi-Year Programme of Work for the Commission's Seventeenth Regular Session<sup>16</sup>.

6. The inputs of the Commission's Working Groups will be made available to the Commission and the ABS Expert Team. The latter will, as requested by the Commission, consolidate outputs of the meetings of the Working Groups and any additional information from thematic studies and report to the Commission at its next session.

## II. GLOBAL CONTEXT

7. Access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed, is among the universally agreed targets of the 2030 Agenda for Sustainable Development.<sup>17</sup>

8. The international regime on access to genetic resources and benefit-sharing underlying this target is constituted of the Convention on Biological Diversity (CBD), the Nagoya Protocol, as well as complementary instruments, including the Treaty and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.<sup>18</sup> ABS is also on the agenda of the negotiations of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on marine biological diversity in areas beyond national jurisdiction.

### *Convention on Biological Diversity*

9. The CBD was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993. As of 1 March 2016 the CBD has 196 Parties. The Convention has three main goals: the conservation of biological diversity; sustainable use of its components; and fair and equitable sharing of benefits arising from genetic resources, including by appropriate access to genetic resources, technology transfer and funding.

10. The CBD requires its Contracting Parties to take legislative, administrative or policy measures, as appropriate, with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Parties providing such resources.<sup>19</sup> Access to genetic resources shall be subject to prior informed consent (PIC)<sup>20</sup> and, where granted, shall be on mutually agreed terms (MAT).<sup>21</sup> Potential benefits to be shared also include: access to and transfer of technology using genetic

<sup>16</sup> CGRFA-14/13/Report, *Appendix I*, Table 1.

<sup>17</sup> Resolution A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development, Targets 2.5; 15.6.

<sup>18</sup> UNEP/CBD/COP/10/27, Decision X/1.

<sup>19</sup> CBD, Article 15.7.

<sup>20</sup> CBD, Article 15.5; 15.3.

<sup>21</sup> CBD, Article 15.4.

resources; participation in biotechnological research activities based on the genetic resources; and priority access to the results and benefits arising from biotechnological use of the genetic resources.<sup>22</sup>

*Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*

11. The Nagoya Protocol was adopted on 29 October 2010 by the Conference of the Parties to the CBD, at its tenth meeting, and entered into force on 12 October 2014. As of 1 March 2016, the Nagoya Protocol has 69 Parties.<sup>23</sup> The objective of the Nagoya Protocol is to further advance the third objective of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources, technology transfer and funding.

12. The Nagoya Protocol is based on the sovereign right of states over their natural resources, which implies that the authority to determine access to genetic resources rests with national governments and is subject to national legislation. The Nagoya Protocol, which covers genetic resources, including GRFA, within the scope of Article 15 of the CBD as well as associated traditional knowledge, sets out core obligations for its Parties to take measures in relation to: (1) access to genetic resources for their utilization, *i.e.* research and development on the genetic and/or biochemical composition of genetic resources, and to associated traditional knowledge; (2) the sharing of benefits derived from such research and development as well as subsequent applications and commercialization; and (3) the compliance by the user of genetic resources and associated traditional knowledge utilized within its jurisdiction with the applicable ABS measures.

13. The Nagoya Protocol, in its preamble, explicitly recognizes the importance of genetic resources to food security, the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions, as well as the interdependence of all countries with regard to GRFA and the special nature and importance of these resources for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change. In this regard, the Nagoya Protocol also acknowledges the fundamental role of the Treaty and the Commission.

14. In its operational provisions, the Nagoya Protocol requires Parties to consider, in the development and implementation of their ABS legislation or regulatory requirements, the importance of GRFA and their special role for food security.<sup>24</sup> Parties shall also create conditions to promote and encourage research that contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research.<sup>25</sup>

15. The Nagoya Protocol leaves room for other international agreements in the field of ABS and it does not prevent its Parties from developing and implementing other relevant international agreements, including other specialized ABS agreements, provided that they are supportive of and do not run counter to the objectives of the CBD and the Nagoya Protocol.<sup>26</sup> Where a specialized international ABS instrument that is consistent with and does not run counter to the objectives of the CBD and the Nagoya Protocol applies, the Nagoya Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.<sup>27</sup> One of the instruments explicitly acknowledged in the Preamble of the Nagoya Protocol is the Treaty, which has been developed in harmony with the CBD.<sup>28</sup> Beyond this openness to other international instruments, the Nagoya Protocol also states that due regard should be paid to “useful and relevant ongoing work or practices under such international instruments and

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<sup>22</sup> CBD, Articles 15.7 ; 16 ; 19 ; 20 ; 21.

<sup>23</sup> <http://www.cbd.int/abs/nagoya-protocol/signatories/>

<sup>24</sup> Nagoya Protocol, Article 8(c).

<sup>25</sup> Nagoya Protocol, Article 8(a).

<sup>26</sup> Nagoya Protocol, Article 4.2.

<sup>27</sup> Nagoya Protocol, Article 4.4.

<sup>28</sup> Treaty, Article 1.1.

relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the CBD and this Protocol.”<sup>29</sup>

16. The Nagoya Protocol also requires Parties to encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for MAT and of voluntary codes of conduct, guidelines and best practices and/or standards in relation to ABS.<sup>30</sup> The Conference of the Parties to the CBD serving as meeting of the Parties to the Nagoya Protocol shall periodically take stock of the use of the model contractual clauses, codes of conduct, guidelines and best practices and/or standards.<sup>31</sup>

#### *International Treaty on Plant Genetic Resources for Food and Agriculture*

17. The Treaty was negotiated between 1994 and 2001 by the Commission and adopted by the FAO Conference, at its Thirty-first Session on 3 November 2001. It entered into force on 29 June 2004. As of 1 March 2016, the Treaty has 137 Parties. The objectives of the Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA) and the fair and equitable sharing of the benefits arising out of their use, in harmony with the CBD, for sustainable agriculture and food security.

18. Like the CBD and the Nagoya Protocol, the Treaty is based on the premise that States have sovereign rights over their genetic resources and that the authority to determine access to these resources lies with national governments. However, under the Treaty, the Contracting Parties exercised their sovereign rights to establish the Multilateral System of Access and Benefit-sharing (MLS) to facilitate access and the sharing of monetary and non-monetary benefits arising from the use of PGRFA through standardized conditions as set out in the Standard Material Transfer Agreement (SMTA). The Treaty applies to all PGRFA. Its MLS applies to 64 of the world’s most important crops which together account for a very high percentage of the food derived from plants. Under the Treaty, monetary and other commercial benefits flow to the Treaty’s Benefit-sharing Fund, which makes them primarily available, directly and indirectly, to farmers in all countries, especially developing countries and countries with economies in transition, who conserve and sustainably utilize PGRFA.

19. The Treaty’s Governing Body, at its last session, initiated the elaboration of a full draft revised SMTA focusing especially on the development of a subscription system with the aim to increase the income of the Benefit-Sharing Fund. In addition, options for adapting the coverage of the Multilateral System based on different scenarios and income projections shall be elaborated.<sup>32</sup>

20. The Treaty explicitly recognizes the enormous contribution farmers have made to the ongoing development of the world’s wealth of PGRFA, in particular through Article 9 of the Treaty on Farmers’ Rights. It calls for protecting the traditional knowledge of these farmers, increasing their participation in national decision-making processes and ensuring that they share the benefits from the use of these resources. The Governing Body adopted several resolutions on Farmers’ Rights<sup>33</sup> and a global consultation on Farmers’ Rights will be held during the current biennium.<sup>34</sup>

#### *United Nations Convention on the Law of the Sea*

21. UNCLOS is the international agreement that defines the rights and responsibilities of nations with respect to their use of the world’s oceans, regulating the conduct of certain economic activities, the protection of the environment, and the conservation and management of marine natural resources. The Convention, concluded in 1982, entered into force on 16 November 1994. As of 1 March 2016, 167 countries and the European Union have joined the Convention.

22. Marine genetic resources found in areas beyond national jurisdiction, i.e. the high seas and the deep seabed (“Area”) are outside of the scope of the CBD and its Nagoya Protocol. However, in the case of processes and activities carried out under the jurisdiction or control of a State, the provisions of

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<sup>29</sup> Nagoya Protocol, Article 4.3.

<sup>30</sup> Nagoya Protocol, Articles 19.1; 20.1.

<sup>31</sup> Nagoya Protocol, Articles 19.2; 20.2.

<sup>32</sup> IT/GB-6/15/Report, Appendix A.1.

<sup>33</sup> Resolutions 2/2007; 6/2009; 6/2011; 8/2013 and 5/2015.

<sup>34</sup> <http://planttreaty.org/notification/notifications>

both instruments apply, regardless of where their effects occur, within the area of its national jurisdiction or beyond the limits of national jurisdiction.<sup>35</sup> To which extent marine genetic resources in areas beyond national jurisdiction are covered by UNCLOS is controversial due to different interpretations of certain UNCLOS provisions, including those addressing the high seas, the Area and marine scientific research. However, building on the work of its *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, the United Nations General Assembly decided on 19 June 2015 to negotiate an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The topics to be addressed by the negotiations include “*the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology.*”<sup>36</sup>

### III. ELABORATING SUBSECTOR-SPECIFIC ELEMENTS FOR ABS

23. The overall objective of the ABS Elements is to assist governments considering developing, adapting or implementing legislative, administrative or policy measures for ABS to take into account the importance of GRFA, their special role for food security and the distinctive features of the different subsectors of GRFA, while complying, as applicable, with international ABS instruments.<sup>37</sup>

24. With a view to facilitate further elaborations of subsector -specific elements for ABS, this section presents some of the key features of the Nagoya Protocol through the lenses of the ABS Elements, i.e. with a special focus on: (i) institutional arrangements; (ii) access to and utilization of genetic resources and traditional knowledge associated with them; (iii) fair and equitable sharing of benefits; and (iv) compliance. In addition, (v) the scope of subsector-specific rules and their relationship with other ABS rules are discussed.

#### (i) Institutional arrangements

25. Parties to the Nagoya Protocol have to designate one or more competent national authorities on access and benefit-sharing responsible, *inter alia*, for advising on applicable procedures and requirements for obtaining PIC and entering into MAT.<sup>38</sup> Where more than one competent national authority for the Nagoya Protocol is designated, the national focal point on access and benefit-sharing must provide information about their respective competencies and mandates.<sup>39</sup> The ABS Elements suggest that in order to clarify institutional arrangements around ABS for GRFA, governments may wish to:

- Take stock of existing institutions and institutional arrangements that are potentially relevant;
- Decide on the allocation of institutional responsibility for various aspects of ABS as they apply to different subsectors of GRFA;
- Put in place mechanisms and/or procedures for communication and coordination between designated institutions; and
- Publicise and provide information about the resulting institutional arrangements.<sup>40</sup>

<sup>35</sup> CBD, Article 4(b).

<sup>36</sup> Resolution A/RES/69/292 - Development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

<sup>37</sup> ABS Elements, paragraph 14.

<sup>38</sup> Nagoya Protocol, Article 13.2.

<sup>39</sup> Nagoya Protocol, Article 13.4. Similarly, under the Treaty most Parties have national focal points and institutions providing access to material that is part of the Treaty’s Multilateral System of Access and Benefit-sharing do so only upon acceptance of the SMTA by the recipient of the material.

<sup>40</sup> ABS Elements, paragraph 29.

26. The administrative responsibility for ABS for GRFA may vary depending on the subsector of (e.g. plant; animal, forest, or aquatic) GRFA. The ABS Elements therefore suggest that institutional arrangements are clear and transparent, and that adequate coordination and information exchange mechanisms are in place.<sup>41</sup> Where the competence is divided between different institutions, governments should consider designating one lead authority or national clearinghouse to oversee the whole approval chain.

**(ii) Access to and utilization of genetic resources and traditional knowledge associated with them**

27. The Nagoya Protocol provides that, “[i]n the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD, unless otherwise decided by that Party.”

*Utilization of genetic resources for food and agriculture*

28. While the Nagoya Protocol does not define “access”, “genetic resources” are defined as “genetic material of actual or potential value” and “genetic material” as “any material of plant, animal, microbial, or other origin containing functional units of heredity.”<sup>42</sup> The Nagoya Protocol further defines “utilization of genetic resources” which means “to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the CBD.”<sup>43</sup> The Nagoya Protocol’s access provisions thus apply to access to any material of plant, animal, microbial, or other origin that contains functional units of heredity and is of actual or potential value, for the purposes of conducting research and development on its genetic and/or biochemical composition, including through biotechnology.

29. The ABS Elements point out that if ABS measures are limited to the above meaning of “utilization” they will not apply to certain typical uses of GRFA, for example the growing of seeds and subsequent use of the harvested product for human consumption. However, the ABS Elements also stress that “other activities regularly performed with respect to GRFA are more difficult to classify.”<sup>44</sup> According to the ABS Elements, such activities include:

- Selection and reproduction of plant genetic resources, for example by farmers or farming communities, based on phenotypic traits and not entailing any genetic methods;
- Fish farming serving the purpose of producing fish for human consumption and, at the same time, selecting and, in fact, domesticating fish;
- Provenance trials of forest trees that help to identify seed sources best adapted to the conditions of a specific planting site with the purpose of reforestation and wood production and, at the same time, breeding;
- Selection of semen-donor bulls and of livestock offspring for multiplication where the purpose is genetic herd improvement just as much as dairy and meat production.

30. The ABS Elements point out that many GRFA are being shaped, developed and improved through their continued use in agricultural production. Where “research and development” and agricultural production occur in tandem, it may be difficult to distinguish research and development activities covered by ABS measures from activities related to the production of agricultural products for sale and human consumption which many ABS laws do not intend to address. The ABS Elements explicitly stress that further technical guidance on this matter would be important to facilitate the implementation of national ABS measures.<sup>45</sup>

31. For the further elaboration of subsector-specific elements for ABS, guidance may be useful as to which subsector-specific activities constitute “utilization” of GRFA. Such guidance could draw on

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<sup>41</sup> ABS Elements, paragraph 30.

<sup>42</sup> Nagoya Protocol, Article 2, CBD, Article 2.

<sup>43</sup> Nagoya Protocol, Article 2(c)

<sup>44</sup> ABS Elements, paragraphs 47-48.

<sup>45</sup> ABS Elements, paragraph 48.

national ABS measures or countries' implementation experiences. In its area of expertise, the Working Group may wish to identify typical uses of GRFA and discuss whether they qualify as "utilization", i.e. research and development on the genetic and/or biochemical composition of GRFA, including through the application of biotechnology. The Working Group may also wish to indicate the extent to which research and development activities are intertwined with production in its subsector. On the basis of typical 'dual uses' of GRFA identified and their practical relevance, the Working Group may wish to develop, or propose to the Commission to initiate the development, of a typology of GRFA uses with a view to assist policy and decision makers in the preparation and implementation of ABS measures.

#### *Countries of origin*

32. ABS measures often provide that access to genetic resources for their utilization requires the PIC of the country of origin of the genetic resources. Article 2 of the CBD defines the country of origin as the country that possesses those genetic resources in *in situ* conditions. "*In situ* conditions" means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

33. The ABS Elements point out that, in the case of many GRFA, it may be difficult to determine with certainty the country of origin. Many GRFA have been widely exchanged across regions, countries and communities, often over long periods of time. Many different stakeholders, including indigenous and local communities, farmers, researchers and breeders have contributed to the development of GRFA, in different places and at different points in time. The ABS Elements stress that the maintenance and evolution of many GRFA depend on continued human intervention, and that their sustainable utilization in research, development and production is important for their conservation.<sup>46</sup> ABS measures should therefore be clear as to the conditions under which a genetic resource is considered as originating from the country to which the measures apply.

34. The identification of the correct country of origin for a genetic resource is as important for countries as it is for potential recipients and users of genetic resources. Both, the provider country and the users of genetic resources need to have clarity as to their authorisation to act. Further guidance by the Working Group may therefore be useful to consider what a genetic resource's "distinctive properties" might mean, the development of which in the surroundings of a specific country qualify, according to the above definition, the country as "country of origin" of the genetic resource. For the further elaboration of subsector-specific elements for ABS, guidance as to what constitutes a property, what would make it "distinctive" and whether different distinctive properties may be acquired in different countries could be useful. Such guidance could draw on national ABS measures, countries' implementation experiences and possibly other legal regimes using the concept of distinctiveness.

#### *Genetic resources held by indigenous and local communities*

35. GRFA may be held by indigenous and local communities. The Nagoya Protocol requires in such cases that Parties take measures, in accordance with domestic law, as appropriate, with the aim of ensuring that the PIC or approval and involvement of the communities is obtained for access to genetic resources where the communities have the established right to grant access to such resources.<sup>47</sup>

36. The ABS Elements point out that ABS measures should address how PIC or approval and involvement of indigenous and local communities may be obtained, taking into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable.<sup>48</sup> For the further development of subsector-specific ABS elements, a manual could be useful identifying different options as to how PIC or approval and involvement of indigenous and local communities may be obtained in the different subsectors of GRFA. Such options could be based on country experiences, customary laws, community protocols and procedures.

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<sup>46</sup> ABS Elements, paragraph 35.

<sup>47</sup> Nagoya Protocol, Article 6.2.

<sup>48</sup> ABS Elements, paragraph 41.

*Access to traditional knowledge associated with GRFA*

37. Under the Nagoya Protocol, in accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources is accessed with the PIC or approval and involvement of the indigenous and local communities holding such traditional knowledge, and that MAT have been established.<sup>49</sup> The ABS Elements point out that these requirements apply to access to traditional knowledge associated with genetic resources irrespective of whether genetic resources are being made available at the same time.<sup>50</sup>

38. According to the ABS Elements, further guidance may well be required as to how PIC or approval and involvement of indigenous and local communities may be obtained.<sup>51</sup> In response to this and the Commission's request to the Working Group to further elaborate subsector-specific elements for ABS, the Working Group may wish to provide guidance on this matter, taking into account that in the case of traditional knowledge associated with GRFA much of the knowledge is often shared by several communities, and ABS measures could clarify how in such case fully valid approvals may be obtained. In this context, the Working Group may wish to take note of the *Draft Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the [free,] prior informed consent [or approval and involvement] of indigenous peoples and local communities for accessing their knowledge, innovations and practices, the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity and for reporting and preventing unlawful appropriation of traditional knowledge*, which the *Ad Hoc* Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity has recommended to be adopted by the Conference of the Parties to the CBD at its thirteenth meeting, to be held in December 2016.<sup>52</sup>

*Authorization procedures*

39. The ABS Elements point out that many variations of access authorization procedures exist.<sup>53</sup> Governments may therefore wish to consider advantages and disadvantages of the different procedures for the different subsectors of GRFA and the different purposes for which they may be used.

40. The ABS Elements consider exceptions from the PIC requirement, for example for taxonomic research or the exchange of GRFA among small-scale farmers. In addition, they mention a range of different types of authorization procedures, for example fast-track procedures for specific uses of genetic resources. With a view to further elaborate subsector-specific elements for ABS, the Working Group may wish to discuss subsector-specific requirements related to PIC and MAT and reflect upon authorization procedures and modalities particularly suited for certain types or uses of GRFA. Where the intended use of a genetic resource changes after access has been granted, authorization procedures may foresee a requirement to (re-)negotiate PIC and MAT.

**(iii) Fair and equitable sharing of benefits**

41. The fair and equitable sharing of benefits arising from the utilization of genetic resources is a key component of ABS measures. Benefits may include monetary and non-monetary benefits. The ABS Elements refer to the Nagoya Protocol, which requires benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization to be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD. The sharing of benefits shall be on MAT.

*Benefit-sharing standards*

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<sup>49</sup> Nagoya Protocol, Article 7.

<sup>50</sup> ABS Elements, paragraph 63.

<sup>51</sup> ABS Elements, paragraph 64.

<sup>52</sup> UNEP/CBD/WG8J/REC/9/1 (<https://www.cbd.int/recommendations/wg8j/?m=wg8j-09>)

<sup>53</sup> ABS Elements, paragraphs 53 - 62.

42. The ABS Elements point out that bilateral case-by-case negotiations of MAT for GRFA may entail high transaction costs and therefore not be practical. Providers and users of GRFA may therefore wish to rely on model contractual clauses, codes of conduct, guidelines, best practices and/or standards developed for their sector or subsector. The ABS Elements explicitly refer to the SMTA developed under the Treaty, which includes standardized provisions on benefit-sharing.<sup>54</sup>

43. Taking into account the Commission's request to the Working Group to further elaborate subsector-specific elements for ABS, the Working Group may wish to consider recommending the development of mechanisms or model clauses for sharing the benefits derived from the utilization of genetic resources in its subsector.

*Benefit-sharing for incremental innovation processes*

44. As stressed by the ABS Elements, the innovation process for many GRFA, in particular plant and animal genetic resources, is usually of incremental nature and based on contributions made by different people in different places at different points of time. Most products are not developed out of an individual genetic resource, but with the contributions of several genetic resources at different stages. The ABS Elements therefore consider the sharing of benefits with the proper beneficiary “a major challenge for most subsectors of GRFA, including aquatic and forest genetic resources, where breeding technologies play an increasingly important role”<sup>55</sup>. The ABS Elements conclude that depending on the extent to which genetic resources and associated traditional knowledge contribute to a final product, it may be difficult to determine the fair and equitable sharing of benefits with the different countries and indigenous and local communities that contributed.

45. Various options for accommodating the incremental nature of the innovation process typical of many GRFA are available, including: the pooling of benefits in a benefit-sharing fund and disbursement of funds in line with agreed policies and disbursement criteria;<sup>56</sup> and the sharing of benefits through research partnerships.<sup>57</sup> The ABS Elements also refer to the on-going process under the Nagoya Protocol<sup>58</sup> to consider the need for and modalities of a global benefit-sharing mechanism for genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent.<sup>59</sup> The Working Group may wish to consider benefit-sharing options that are suitable to the specificities of its subsector.

*Benefit-sharing for GRFA accessed prior to CBD/ Nagoya Protocol*

46. There is an international debate about whether national benefit-sharing obligations could also cover genetic resources that have been accessed prior to and utilized (for the first time or on a continuous basis) after the entry into force of the CBD/ Nagoya Protocol. The ABS Elements clarify that the Nagoya Protocol, in the absence of any rules to the contrary, does not prevent its Parties from applying ABS measures to utilizations or access to genetic resources that fall outside the scope of the Protocol. However, the ABS Elements also point out that with regard to such resources the Protocol does not require Parties to take user country compliance measures<sup>60</sup> and that, as most countries are using GRFA originating from other countries, ABS measures covering previously accessed GRFA could lead to considerable uncertainty regarding the status of such resources and, more importantly, severely discourage potential users from utilizing such GRFA for research and development.<sup>61</sup>

47. The Working Group may wish to recommend that the review of existing access and benefit-sharing instruments and their impacts on GRFA, foreseen for the Commission's Seventeenth Regular Session, pay, as part of the further elaboration of subsector-specific ABS element, particular attention to the impact of ABS measures that apply to previously accessed GRFA on the use and exchange of GRFA.

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<sup>54</sup> ABS Elements, paragraph 68.

<sup>55</sup> ABS Elements, paragraph 70.

<sup>56</sup> ABS Elements, paragraph 71.

<sup>57</sup> ABS Elements, paragraph 74.

<sup>58</sup> <https://www.cbd.int/abs/bfmechanism.shtml>

<sup>59</sup> ABS Elements, paragraph 75.

<sup>60</sup> ABS Elements, paragraph 33.

<sup>61</sup> ABS Elements, paragraph 33.

#### (iv) Compliance

48. The ABS Elements provide some clarification with regard to the different types of compliance measures in the area of ABS. They may address compliance (of Contracting Parties) with an instrument, such as the Treaty or the Nagoya Protocol, compliance of users of genetic resources or traditional knowledge with MAT or compliance of users of genetic resources and associated traditional knowledge with domestic ABS legislation of the provider country. With regard to the third type of compliance, the Nagoya Protocol requires each Party to take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources/traditional knowledge utilized within its jurisdiction have been accessed in accordance with PIC and that MAT have been established, as required by the domestic ABS legislation or regulatory requirements of the other Party.<sup>62</sup> Parties to the Nagoya Protocol shall also take measures to address non-compliance with user country measures and cooperate in cases of alleged violations.<sup>63</sup> To support compliance, Parties to the Nagoya Protocol shall also take measures, as appropriate, to monitor and to enhance transparency about the utilization of genetic resources, which shall include the designation of one or more checkpoints.<sup>64</sup> It should be noted that under the Treaty, access shall be accorded expeditiously without the need to track individual accessions.<sup>65</sup>

49. The ABS Elements consider compliance measure a challenge to the food and agriculture sector, where the ABS status of GRFA used in breeding is unknown to the user. Uncertainty regarding the ABS status of GRFA may act as disincentive and deter stakeholders from improving such genetic resources. The ABS Elements therefore call upon Governments to consider distinctive solutions to this problem, including through supporting the development of subsectoral standards building on current best practices, such as the breeders' exemption, or putting in place multilateral solutions.

#### (v) Scope and relationship of subsector-specific rules

50. Section 3 of the ABS Elements provides detailed guidance regarding the development, adaptation and implementation of ABS measures. The different steps governments may wish to take include: an assessment of the concerned subsectors of GRFA, the identification and consultation of relevant stakeholders holding, providing or using GRFA; the consideration and evaluation of the different options for ABS measures; the integration of ABS measures with broader food security and sustainable agricultural development policies and strategies; the integration of the implementation of ABS measures into the institutional landscape; the communication of ABS measures to potential providers and users of GRFA; and the *ex ante* assessment as well as monitoring of the effectiveness and impact of ABS measures.<sup>66</sup>

51. The ABS Elements suggest analysing in detail the implications of the scope of ABS rules for GRFA, including the subject matter and the temporal scope.<sup>67</sup> ABS rules for (subsectors of) GRFA should be clear as to which genetic resources and to which uses thereof they apply. Under the Treaty's MLS, for example, access shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, if such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.<sup>68</sup> With a view to further elaborate subsector-specific elements for ABS, the Working Group may wish to address, in particular, the scope of application of subsector-specific ABS elements and their relationship with other ABS rules.

### IV. GUIDANCE SOUGHT

52. The Working Group may wish to provide guidance and make recommendations to the ABS Expert Team and the Commission on ABS for its subsector, including with regard to:

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<sup>62</sup> Nagoya Protocol, Articles 15.1; 16.1.

<sup>63</sup> Nagoya Protocol, Articles 15.2, 15.3, 16.2 & 16.3.

<sup>64</sup> Nagoya Protocol, Article 17.

<sup>65</sup> Treaty, Article 12.3(b).

<sup>66</sup> ABS Elements, paragraph 15.

<sup>67</sup> ABS, Elements, paragraph 15.

<sup>68</sup> Treaty, Article 12.3(a).

- The elaboration of additional ABS elements, including for model contractual clauses or codes of conduct, guidelines and best practises and/or standards, for the subsector addressing access to genetic resources and associated traditional knowledge and the sharing of benefits arising from the utilization of genetic resources, including genetic resources that are held by indigenous and local communities, and from associated traditional knowledge held by indigenous and local communities;
- The scope of possible subsector-specific ABS elements and their relationship with other ABS rules;
- Administrative specificities of the subsector and how these could be reflected in the governance and institutional ABS arrangements for the subsector;
- Subsector-specific or subsector-typical uses of GRFA, their possible classification as “utilization of genetic resources” as defined by the Nagoya Protocol and the practical implications such classification would have;
- Specific properties of GRFA that could typically qualify as “distinctive properties” and therefore make the country where GRFA acquired these properties the “country of origin” of the GRFA;
- The possible development of a manual of options as to how PIC or approval and involvement of indigenous and local communities may be obtained in the case of GRFA held by them, where they have the established right to grant access to such resources;
- Possible adjustments of ABS authorization procedures reflecting special features or needs of the subsector, such as exceptions or privileges for (specific uses of) genetic resources, for example for taxonomic research, the exchange of GRFA among small-scale farmers or research and development for food and agriculture;
- The possible development of guidelines on how PIC or approval and involvement of indigenous and local communities may be obtained in the case that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed, taking into account the Draft Voluntary Guidelines currently being developed under the CBD;
- The feasibility of benefit-sharing options reflecting the innovation process of the subsector to the extent it is incremental, including the pooling of benefits in a benefit-sharing fund and disbursement of funds in line with agreed policies and disbursement criteria and the sharing of benefits through research partnerships;
- The review of existing access and benefit-sharing instruments and their impact on GRFA, foreseen for the Commission’s Seventeenth Regular Session, including the impact of ABS measures that apply to previously accessed GRFA on the use and exchange of GRFA; and
- PGRFA, as relevant to the mandate of the Working Group, and may wish to recommend that:
  - The Secretaries of the Commission and the Governing Body of the Treaty continue strengthening collaboration to promote coherence in the development and implementation of the respective programmes of work of the two bodies with regard to access and benefit-sharing;
  - The Commission renew its invitation to the Governing Body of the Treaty, in its continued governance of PGRFA, to continue to closely coordinate with the Commission, in order to address in a complementary way the distinctive features and specific uses of PGRFA, especially in light of the development of access and benefit-sharing measures at both national and international levels, bearing in mind the on-going activities and processes under the Treaty, including the current process to enhance the functioning of the MLS and the on-going cooperation to support the harmonious implementation of the Treaty, the CBD and the Nagoya Protocol; and that
  - The Commission invite the Governing Body to inform the Commission at regular intervals on the process to enhance the MLS with a view to avoid duplication of efforts.