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COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Items 3 & 4 of the Provisional Agenda

TEAM OF TECHNICAL AND LEGAL EXPERTS ON ACCESS AND BENEFIT-SHARING

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ACCESS AND BENEFIT-SHARING AND FOREST GENETIC RESOURCES

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I. INTRODUCTION

1. At its last Session in April 2013, the FAO Commission on Genetic Resources for Food and Agriculture (the Commission) considered the need for and modalities of access and benefit-sharing (ABS) arrangements for genetic resources for food and agriculture (GRFA). The Commission put in place a process the final output of which it requested to be *Draft Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture (Draft Elements)*, taking into account relevant international instruments on access and benefit-sharing[1]. As part of this process, the Commission requested its intergovernmental technical working groups on animal, forest and plant genetic resources to explore ABS issues for their respective subsectors.[2]

2. The Commission established a Team of Technical and Legal Experts on Access and Benefit-sharing (TTLE ABS) consisting of up to two representatives from each of the seven FAO regions. The TTLE ABS was mandated to:

- Coordinate, with the assistance of the Secretariat, by electronic means as appropriate, to help prepare the intergovernmental technical working group meetings, and based on input from their regions to prepare written materials and propose guidance for the intergovernmental technical working groups;[3]
- Participate in designated portions of the intergovernmental technical working group meetings dedicated to addressing ABS issues, to help inform and shape the intergovernmental technical working group discussions and output;[4] and
- Work after each intergovernmental technical working group meeting with the Secretariat to compile the intergovernmental technical working group outputs into the *Draft Elements*, and communicate the *Draft Elements* to their regions for information.[5]

3. The Commission requested its Secretary to develop explanatory notes to the distinctive features of GRFA identified in *Appendix E* to the Commission's report, for review by the Working Groups and consideration by the Commission.[6] In addition, it invited countries and stakeholders to report on use and exchange practices and relevant voluntary codes of conduct, guidelines and best practices, and/or standards on ABS, respectively, for consideration of the Working Groups and the Commission.[7] The explanatory notes as well as the country and stakeholder reports are contained in information documents provided for this agenda item.[8]

4. This document provides a brief overview of the Commission's work on access and benefit-sharing and summarizes recent developments in this area, including relevant provisions of the *Nagoya Protocol on Access to Genetic Resources and the Fair Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Protocol). In a second step, the document discusses the relevance of the Protocol to forest genetic resources (FGR) as well as options the Working Group may wish to consider in addressing ABS for FGR.

[1] CGRFA-14/13/Report, paragraph 40 (xv).
[2] CGRFA-14/13/Report, paragraph 40 (xii).
[3] CGRFA-14/13/Report, paragraph 40 (xiii).
[4] CGRFA-14/13/Report, paragraph 40 (xiii).
[5] CGRFA-14/13/Report, paragraph 40 (xv).
[6] CGRFA-14/13/Report, paragraph 40 (x).
[7] CGRFA-14/13/Report, paragraph 40 (viii); (ix).
[8] CGRFA/WG-FGR/3/14/Inf.6; CGRFA/WG-FGR/3/14/Inf. 7; CGRFA/WG-FGR/3/14/Inf. 8. See also UNEP/CBD/ICNP/3/10; UNEP/CBD/ICNP/3/INF/2; and: http://www.cbd.int/icnp3/submissions/

II. BACKGROUND

5. FAO and its Commission have a longstanding history of dealing with issues related to ABS for GRFA, in particular with regard to PGRFA. In 1983, the FAO Conference adopted the International Undertaking on Plant Genetic Resources for Food and Agriculture, which provided a policy and planning framework for the Commission with respect to plant genetic resources. During the following years, the Commission negotiated further resolutions that interpreted the International Undertaking, and in 1994, started revising the International Undertaking in response to the Convention on Biological Diversity (CBD) which had just entered into force. As a result of this process, the FAO Conference, in 2001, adopted the International Treaty on Plant Genetic Resources for Food and Agriculture (Treaty), the first legally-binding and fully operational international instrument for ABS for genetic resources.

6. The International Undertaking, as adopted in 1983, covered all PGRFA, including FGR, and the Commission which was established during the same year, was mandated to also provide advice, where appropriate, to FAO's Committee on Forestry.[9] However, food crops clearly dominated the Commission's work in its initial years and the Undertaking, although neither formally replaced by the Treaty nor suspended by the FAO Conference, fell into desuetude with the adoption, entry into force and increasing national implementation of the Treaty.

7. In 2001, the CBD convened the first meeting of its *Ad Hoc* Open-Ended Working Group on ABS which produced the draft *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.* In 2002, the Conference of the Parties of the CBD adopted the *Bonn Guidelines*. Shortly thereafter, the World Summit on Sustainable Development set a process in motion which, in 2010, led to the adoption of the *Nagoya Protocol on Access to Genetic Resources and the Fair Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Protocol).

8. The Treaty, the CBD and the Protocol recognize the authority of governments to determine, subject to national legislation, access to genetic resources, and acknowledge that this authority flows from the sovereign rights of States over their natural resources. The Treaty allows Contracting Parties of the Treaty to exercise their sovereign rights through the Multilateral System of Access and Benefit-sharing (MLS), by facilitating access and the sharing of monetary and non-monetary benefits arising from the use of plant genetic resources for food and agriculture through standardized conditions as set out in the Standard Material Transfer Agreement (SMTA). The ABS mechanism of the Treaty is thus different from the bilateral, case-by-case approach primarily envisaged by the CBD and the Protocol. While the Treaty applies to all PGRFA, including FGR, its MLS applies only to PGRFA set out in Annex I to the Treaty. FGR covered by Annex I of the Treaty include: apple (*Malus*); breadfruit (*Artocarpus*); citrus (incl. *Poncirus* and *Fortunella* as root stock); coconut (*Cocos*) and some forages that are woody plant species, including *Medicago arborea* and *Lespedeza cuneata*. In addition, the Treaty's MLS applies to Annex I FGR held in the *ex situ* collections of the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR).[10] FGR for food and agriculture not listed in Annex I, collected before the entry into force of the Treaty and held by CGIAR Centres and other international institutions, that have signed agreements with the Treaty's Governing Body, are exchanged under terms and conditions similar to those of the MLS.[11] Some countries apply, on a voluntary basis, the SMTA to non-Annex I PGRFA. With the entry into force of the Protocol, the Protocol might increasingly govern international exchanges of FGR and the sharing of benefits derived from them.

9. While the Treaty, the CBD and the Protocol may be considered the key instruments that make up the global framework of access and benefit-sharing, other instruments have been developed or are

[9] C 1983/Report, Resolution 9/83.
[10] Treaty, Article 11.5.
[11] IT/GB-2/07/Report, paragraphs 66-68.

currently being developed, in particular at the regional level. These instruments include the Forestry Protocol of the Southern African Development Community which entered into force in 2009 and requires Parties "to adopt national policies and implement mechanisms to ensure that access to the forest genetic resources is subject to prior informed consent (PIC) and mutually agreed terms (MAT) and that there is an equitable sharing of the benefits derived from the use of these resources."[12] Non-binding instruments addressing access and benefit-sharing for forest genetic resources include the Code of Conduct for Sharing Tree Germplasm within the South Pacific Regional Initiative on Forest Genetic Resources (SPRIG), which restricts distribution of material to non-SPRIG parties as well as the commercial development of collected material.[13] Access and benefit-sharing rules and their implications for the use and exchange of forest genetic resources are increasingly being considered by the subsector.[14] The Global Plan of Action for the Conservation, Sustainable Use and Development of Forest Genetic Resources (GPA FGR) aims, *inter alia*, to promote the equitable sharing of benefits arising from the use of FGR. Strategic Priority 23 of the GPA FGR, agreed by the Commission at its last session and adopted by the FAO Conference in 2013, explicitly calls for the promotion and application of "mechanisms for germplasm exchange at regional level to support research and development activities, in agreement with international conventions."

III. THE USE AND EXCHANGE OF FOREST GENETIC RESOURCES

10. The exploration, assessment and movement of forest reproductive material have a long history in the forest sector. Early provenance trials revealed the existence of "geographical races" within tree species and also that the origin of the seed has a major influence on the performance of tree planting efforts. Numerous international provenance trials have been established for many tree species to test the performance of tree germplasm from different countries. Subsequently, the results of these provenance trials have had a large influence on the types of germplasm being transferred between countries and regions. The provenance trials have also provided incentives for conservation of FGR.[15]

11. One of the main uses of FGR is direct use as reproductive material (in the form of seeds, cuttings and other propagating parts of a tree) for the regeneration of natural forests on the one hand, and for the establishment of plantations and agroforests on the other.[16] The extent to which FGRs are used in systematic exploration and breeding programmes varies a lot among different tree species. For several fast-growing tree species used for industrial and smallholder planting, systematic exploration and improvement started some 50 years ago and has mainly focused on the most common plantation tree species such as acacias, eucalypts and pines. For various temperate and boreal tree species, exploration and assessment efforts started more than 200 years ago, although more systematic improvement programmes were initiated, for the most part, only in the course of the twentieth century. More recently, tree breeding has progressed to encompass a range of biotechnological techniques, including marker informed breeding and other marker applications and genomic sequencing.

12. For the majority of other species, improvement efforts still remain limited and are mostly restricted to provenance trials and the selection of seed stands. In general, forest tree breeding is determined by long generation intervals and breeding cycles and most species are still within the first generations of genetic improvement. However, genetic gains per generation can be quite substantial due to the fact that many species are virtually wild and diversity and selection opportunity is very high. Additionally, some species such as tropical eucalypts, acacias and some pines are progressing relatively rapidly because of shorter generation intervals (typically less than 10 years) and early

[12] Protocol on Forestry, Article 17.1.
[13] See L. Thomson *et al*. 2002. Access issues in forest genetioc resources – experience in sharing and exchange of germplasm in Australia and the South Pacific. FORSPA Publication No. 31/2002 (http://www.fao.org/docrep/005/ac648e/ac648e0l.htm#bm21).
[14] See J. Buiteveld. 2011. Options for access rules and benefit-sharing on plant material within a future Treebreedex network; Myking *et al*. 2011. Access and rights to forest genetic resources. Copenhagen.
[15] Background Study Paper No. 44.
[16] This section draws on Part 1.C of Background Study Paper No. 59.

selection techniques. In line with the situation described above, the genepools of many tree species, even in breeding programmes, are still semi-wild, and tested, selected or improved material is only available for a relatively small number of tree species. According to the level of improvement involved, reproductive material of forest tree species may be obtained from a wide variety of sources. For example, the collection of seeds from wild stands and natural populations for mass propagation of plantations or forest regeneration is still common. Additionally, seed orchards, special facilities associated with organized breeding programmes, are managed specifically for seed production. The genetic material produced in these orchards has usually been tested and selected in provenance trials across different sites and climatic conditions, and may be optimized for specific commercial traits such as wood volume, pulp yield, biomass yield or leaf oils. Large-scale nurseries producing tree seedlings and/or cuttings are often managed by large companies or state agencies, but small-scale nurseries operated by farmers and local communities are often the main source of tree seedlings in rural areas, especially in areas where no commercial forestry is practised.

13. Furthermore, some *ex situ* collections of FGR have been established for conservation and research purposes and are usually managed by public or semi-public research institutions. While the movement of FGR around the world has a long history and the proportion of exotic forest reproductive material used for plantation and afforestation is quite high, considerable differences exist between species with regard to their involvement in international exchange of germplasm and the extent to which they have spread outside their natural distribution ranges. For example, several fast-growing plantation species, such as acacias, pines and eucalypts, have been moved extensively throughout the world and are nowadays cultivated far beyond their natural distribution ranges. Also, some tropical high-value speciality timber species such as mahogany, Spanish cedar and teak are grown as exotics.

14. Although the exchange of some species, such as agroforestry tree species, may have taken place on a smaller scale, their distribution to countries beyond their native ranges has played an important role in the development of the sector. However, for many species exchange of genetic material has been limited to date, and takes place mainly on a regional level or between countries sharing the same climatic conditions. Various species are also used largely within their natural habitats in native forests and are only exchanged very occasionally, for example for specific research purposes

IV. FOREST GENETIC RESOURCES AND ACCESS AND BENEFIT-SHARING

International Treaty on Plant Genetic Resources for Food and Agriculture

15. The Treaty covers plant genetic resources for food and agriculture. However, the MLS covers only few trees (apple (*Malus*); breadfruit (*Artocarpus*); citrus (incl. *Poncirus* and *Fortunella* as root stock); coconut (*Cocos*)) and some forages that are woody plant species. In addition, the Treaty's MLS applies to Annex I FGR held in the *ex situ* collections of the IARCs or by other international institutions the Governing Body of the Treaty has signed agreements with[17]. Access to PGRFA, including FGR, of the MLS shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/ or other non-food/feed industrial uses.[18] The Governing Body, at its Second Session, also endorsed the use of the SMTA by IARCs, for PGRFA other than those listed in Annex I of the Treaty and collected before its entry into force, with an interpretative footnote or series of footnotes.[19]

16. Access to FGR which are governed by the Treaty's ABS rules shall be granted in accordance with standardized conditions and be accorded "expeditiously without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost

[17] Treaty, Articles 11.5; 15.5. See http://planttreaty.org/content/agreements-concluded-under-article-15.
[18] Treaty, Article 12.3(a).
19 IT/GB-2/07/Report, paragraph 68.

involved." ABS under the Treaty are thus not a matter for negotiation on a case-by-case basis, they follow a set of standardized, pre-defined conditions, as laid down in the Standard Material Transfer Agreement (SMTA) adopted by the Governing Body. The Treaty explicitly recognizes that this "facilitated access" to PGRFA constitutes itself a major benefit of the MLS.[20] Monetary benefits accrued in the Multilateral System are not shared bilaterally between provider and recipient, as envisioned by the CBD and the Protocol. Instead, they are paid by the recipient into a trust fund (the Benefit-sharing Fund) established for receiving financial resources and utilizing them primarily for the direct or indirect benefit of farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainably use PGRFA.[21]

17. The Treaty, with its standardized access and benefit-sharing conditions creates an obligation for countries to provide facilitated access in accordance with the conditions laid down in the Treaty. While under the CBD, Parties shall "endeavour to create conditions to facilitate access to genetic resources"[22] and Parties of the Protocol shall, *inter alia*, "create conditions to promote and encourage research,"[23] neither of the two instruments creates any (conditional or unconditional) obligations to provide access to genetic resources. ABS, as envisioned by the CBD and the Protocol, are ultimately a matter for bilateral agreements on a case-by-case basis.

18. In adopting the Protocol, the Conference of the Parties to the CBD recognized the Treaty as one of the "complementary instruments" that constitute the International Regime on access and benefit-sharing and recognized that the objectives of the Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security. The Governing Body of the Treaty, at its Fifth Session, called on Contracting Parties to ensure that any legislative, administrative or policy measures taken for the implementation of both the Treaty and the Convention on Biological Diversity or its Nagoya Protocol, are consistent and mutually supportive.

19. The Governing Body, at its Fifth Session, also decided to establish an *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing with the mandate to develop a range of measures that will: (a) increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and (b) enhance the functioning of the Multilateral System by additional measures.[24] The Governing Body is to consider and decide on these measures at its Sixth Session. At this stage, it is unclear whether or to what extent this process will touch upon the issue of FGR.

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

20. The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources. The objective of the Nagoya Protocol is to further advance the third of these three objectives: the fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources. 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 genetic or biochemical research and development; (2) the sharing of benefits derived from such research and development as well as subsequent applications and commercialization; and (3) the compliance of the use of genetic resources with the applicable ABS measures:

[20] Treaty, Article 13.1.
[21] Treaty, Article 13.3.
[22] CBD, Article 15.2.
[23] Protocol, Article 8a.
[24] IT/GB-5/13/Report, Appendix A.2, Part IV.

Access to genetic resources for utilization

21. The Protocol does not require countries to restrict access to their genetic resources. It confirms and elaborates on the right of countries to require prior informed consent (PIC) for access to (some or all of) their genetic resources, unless they decide otherwise. Parties that decide to require PIC for access to their genetic resources for "utilization" have to take the necessary measures to provide, for example, for legal certainty, clarity and transparency of their ABS legislation and provide for fair and non-arbitrary procedures on accessing genetic resources ("access standards").[25]

22. While the Protocol does not define "access to genetic resources," it relies on the CBD definition of "genetic resources"[26] and it introduces the concept of "utilization of genetic resources" which focuses the Protocol's access provisions on access to genetic resources for genetic and/ or biochemical research and development. According to the Nagoya Protocol "utilization of genetic resources" means

> "to conduct research and development on the genetic and/ or biochemical composition of genetic resources, including through the application of biotechnology (...)."[27]

23. Parties that decide to require PIC for access to (all or some of) their genetic resources for "utilization" (e.g. access to seeds for provenance trials or breeding purposes) have to follow the Protocol's access standards. Even access to a genetic resource for the purpose of deriving from it and further developing a biochemical component, e.g. resin, that in its final state might not contain DNA and therefore no longer qualify as "genetic resource" is considered access for "utilization." On the other hand, access to material that is not a genetic resource, and access to a genetic resource for purposes other than research and development on the genetic and/ or biochemical composition of genetic resources, e.g. access to forest for timber extraction, are outside the scope of the Protocol. The Protocol thus draws a line between access to genetic resources for genetic or biochemical research and development, on the one hand, and subsequent acts of application and commercialization, on the other. The PIC requirement is triggered when a genetic resource is accessed for the purpose of genetic or biochemical research and development.

24. The Protocol limits the right to require PIC to countries that have acquired the genetic resources "in accordance with the CBD" and to "countries of origin" of the genetic resources, i.e. countries which either possess the genetic resources in *in situ* conditions, or in the case of domesticated or cultivated plants, where the genetic resources have developed their distinctive properties.[28] The right to require PIC does thus not extend to a country's *ex situ* genetic resources collected from other countries, nor does it extend to material collected prior to the entry into force of the CBD; such material could not be collected "in accordance with the CBD".

25. The Protocol also requires Parties to take, "in accordance with domestic law" and "as appropriate," measures that aim to ensure that the PIC or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

Benefit-sharing

26. The Protocol requires that benefits arising from the "utilization of genetic resources" as well as subsequent applications and commercialization shall 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 benefit-sharing shall be on mutually

[25] Protocol, Article 6.
[26] "Genetic resources" mean "genetic material of actual or potential value." "Genetic material" is defined as "any material of plant, animal, microbial or other origin containing functional units of heredity." Biotechnology means "any technological application that uses biological systems, living organisms, or derivatives therefore, to make or modify products or processes for specific use." See CBD, Article 2.
[27] Protocol, Article 2.
[28] Protocol, Article 6.1.

agreed terms (MAT), concluded between the provider and the recipient. A non-exhaustive list of monetary and non-monetary benefits that could be shared is contained in the Annex to the Protocol.

27. The Protocol also addresses as additional beneficiaries indigenous and local communities whose genetic resources or traditional knowledge is being utilized. Parties shall take legislative, administrative or policy measures with the aim of ensuring that benefits arising out of the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these communities over these resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms. In addition, Parties to the Protocol shall take measures in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with the communities holding such knowledge, upon mutually agreed terms.

Compliance measures

28. The Protocol requires all Parties to take so-called user-country measures: appropriate, effective and proportionate measures to provide that genetic resources utilized within their jurisdiction are of good legal status, i.e. have been accessed in accordance with PIC, and that MAT have been established as required by the applicant domestic ABS legislation or regulatory requirements.[29] The rationale of these measures clearly is to discourage illegal access to or acquisition of genetic resources as well as the violation of benefit-sharing obligations. The utilization of resources which are not of good legal status becomes a major legal and economic risk if it may be subject to sanctions in all Parties of the Protocol, irrespective of where the resources come from and where they are being used.

29. To support compliance, countries have to monitor and enhance transparency about the utilization of genetic resources and designate one or more so-called checkpoints. It is important to note that Parties are not under the obligation to address compliance with specific provisions of ABS agreements. The compliance measures, as required under the Protocol, are limited to the *presence* of PIC and MAT. With regard to disputes arising over the compliance with specific MAT, Parties shall encourage users and providers to agree on proper dispute resolution mechanisms.[30] In addition, they shall ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements[31] and take effective measures regarding access to justice and the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.[32]

30. User-country compliance measures are also required to provide that traditional knowledge associated with genetic resources is utilized in accordance with PIC or approval and involvement of indigenous and local communities and that MAT have been established, as required by the domestic ABS legislation or regulatory requirements of the Party where such indigenous and local communities are located.[33] As in the case of genetic resources, the compliance measures do not address the question of compliance with MAT; they are focused on the presence of PIC and MAT.

The Nagoya Protocol and genetic resources for food and agriculture

31. The negotiation of the Nagoya Protocol revealed different views regarding the status that should be given to the issue of food security, and more broadly, the sector of food and agriculture. The Protocol, as adopted, reflects to some extent this multiplicity of views in that it takes a differentiated and balanced approach which, in fact, reflects to a remarkable extent issues stressed and concerns raised by FAO and its Commission.

[29] Protocol, Article 15.1.
[30] Protocol, Article 18.1.
[31] Protocol, Article 18.2.
[32] Protocol, Article 18.3.
[33] Protocol, Article 16.1.

32. In adopting Resolution 18/2009, the FAO Conference had stressed the essential role of GRFA in food security and sustainable development and recognized the interdependence of countries with respect to these resources and the dependence of the resources for their survival on active cooperation among all stakeholders involved in their conservation, breeding and sustainable utilization as well as benefit-sharing. The FAO Conference therefore invited negotiators of the Nagoya Protocol to:

- "take into account the special nature of agricultural biodiversity, in particular of genetic resources for food and agriculture, their distinctive features and problems needing distinctive solutions;
- "in developing policies [...] consider sectoral approaches which allow for differential treatment of different sectors or sub-sectors of genetic resources, different genetic resources for food and agriculture, different activities or purposes for which they are carried out; [...]
- "to explore and assess options for the International Regime on Access and Benefit-sharing that allow for adequate flexibility to acknowledge and accommodate existing and future agreements relating to access and benefit-sharing developed in harmony with the CBD; [...]
- "to work closely with the Commission on Genetic Resources and the Governing Body of the International Treaty regarding access and benefit-sharing in the area of genetic resources for food and agriculture in a mutually supportive manner in future years." [34]

33. The Nagoya Protocol reflects the issues raised by FAO. The Protocol, in its preamble, explicitly recognizes the importance of genetic resources to food security[35], the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions[36], 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 Protocol also acknowledges the fundamental role of the International Treaty and the Commission.[37]

34. In its operational provisions, the Protocol requires Parties to consider, in the development and implementation of their access and benefit-sharing legislation or regulatory requirements, the importance of GRFA and their special role for food security.[38] Parties shall pay due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally.[39] In addition, they shall create conditions to promote and encourage research which 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.[40]

35. The Protocol does not prevent its Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and the Protocol.[41] Where a specialized international access and benefit-sharing instrument that is consistent with and does not run counter to the objectives of the Convention and the Protocol applies, the 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.[42] One of the instruments explicitly acknowledged by the Protocol is the International Treaty developed in harmony

[34] C 2009/REP, paragraph 174 (Resolution 18/2009).
[35] Protocol, preamble paragraph 14.
[36] Protocol, preamble paragraph 15.
[37] Protocol, preamble paragraph 16.
[38] Protocol, Article 8(c).
[39] Protocol, Article 8(b).
[40] Protocol, Article 8(a).
[41] Protocol, Article 4.2.
[42] Protocol, Article 4.4.

with the Convention.[43] Beyond this openness to other international instruments, the Protocol also states that due regard should be paid to "useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol."[44]

36. The Protocol also requires Parties to encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for mutually agreed terms and of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing. The CBD COP serving as meeting of the Parties to the Protocol shall periodically take stock of the use of the model contractual clauses, codes of conduct, guidelines and best practices and/or standards.[45] Sectoral approaches, including those in line with current commercial practices that allow for different treatment of sectors or subsectors of genetic resources may therefore form part of the International Regime, which, according to CBD COP Decision X/1, is constituted of the CBD, the Nagoya Protocol, as well as complementary instruments, including the International Treaty.

Global Plan of Action for the Conservation, Sustainable Use and Development of Forest Genetic Resources

37. The GPA FGR, agreed by the Commission at its last session and adopted by the FAO Conference in 2013[46], addresses the issue of ABS without, however, going into much detail. One of the aims of the GPA FGR is "to promote access to, and use of, quality forest reproductive material to support research and development programmes at national and regional levels and in line with international laws and regulations regarding intellectual property".[47] Strategic priority 23 explicitly calls for the promotion and application of "mechanisms for germplasm exchange at regional level to support research and development activities, in agreement with international conventions" and for the improvement/ development of exchange regulations that ensure that records are kept of the source and transfer of forest genetic material for research purposes, and for the promotion of mechanisms to facilitate access to material for scientific work within the region.

V. OPTIONS TO ADDRESS FOREST GENETIC RESOURCES IN ABS LEGISLATION

38. The Commission tasked its Working Group to explore ABS issues for its subsector of FGR. The Working Group may therefore wish to consider in the light of the above and taking into account the information provided to it,[48] issues ABS policy and decision-makers should take into account with regard to ABS for FGR and provide recommendations with regard to the *Draft Elements* the Team of Technical and Legal Experts on Access and Benefit-sharing has been asked to compile with the Secretariat.

Scope of FGR-specific ABS measures

39. To the extent (some or all) FGR are considered to deserve any special treatment in ABS policies, and be it only under specific circumstances and conditions, it will be important to define those FGR. Issues to be considered include, whether FGR-specific ABS measures should apply to all "forest genetic resources" or a sub-category, such as "forest genetic resources for food and agriculture" that could either focus exclusively on FGR that contribute directly to food security or also embrace other primary forestry products. Depending on the definition, FGR could thus include all forest reproductive and genetic material (e.g. seeds, seedlings, rooted cuttings, genes) ranging from tree species providing tree fruits, other edible products and/ or species providing other services

[43] Protocol, preamble paragraph 19.
[44] Protocol, Article 4.3.
[45] Protocol, Articles 19-20.
[46] C 2013/REP, paragraph 77.
[47] GPA FGR, paragraph 16.
[48] CGRFA/WG-FGR-3/14/Inf. 5; CGRFA/WG-FGR-3/14/Inf. 6; CGRFA/WG-FGR-3/14/Inf. 7.
See also UNEP/CBD/ICNP/3/10; UNEP/CBD/ICNP/3/INF/2; and: http://www.cbd.int/icnp3/submissions/

relevant to food and agriculture (e.g. erosion control; wind resistance; bee forage for honey; soil fertility improvement; nitrogen fixation; shade) to trees which allow foresters to generate income from non-food forest products (e.g. fibre; clothing; shelter; energy; tannin; timber). In many cases, trees will of course serve several purposes at the same time or their originally envisaged purpose will change, which may raise the question how access to FGR for utilization may be regulated in such cases.

40. Another aspect to be considered is whether FGR-specific ABS measures should be restricted to FGR that are under the management and control of governments and in the public domain[49] or also address privately held/ owned FGR. ABS measures for FGR could also exclude specific activities from PIC and MAT requirements. In line with similar exclusions in patent law, ABS measures for FGR could exempt, for example, access for private use.

Standardized *vs*. case-by-case ABS arrangements

41. FGR-specific ABS measures could provide for standardized conditions, under which FGR could be made available and benefits derived from them be shared. There is a whole range of measures countries or stakeholders may wish to consider, including contractual clauses for mutually agreed terms, voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing for FGR.[50] Such arrangements of facilitated access could be sought at national, regional or even global level. Based on experiences of the forestry sector, various ABS measures could be considered ranging from standardized models to case-by-case arrangements.

Legislative, administrative or policy measures

42. In addressing ABS for FGR, various measures may be considered. Interestingly, the Protocol leaves quite some discretion to the Parties as to whether to adopt legislative, administrative or policy measures.[51] With regard to ABS for FGR, the existing exchange and benefit-sharing practices could be explored on which ABS rules could piggyback.[52] The Treaty demonstrates that the development of ABS rules along the lines of existing exchange practices may contribute to a high level of acceptance amongst user communities.

ABS modalities

43. There is a wide range of modalities that may be considered with regard to ABS for FGR. Depending on the approach countries decide to take with regard to ABS for genetic resources, they may wish to consider addressing, through legislative, administrative or policy measures: objectives of the ABS measures for FGR; their relationship with other agreements and instruments; the designation of competent authorities for ABS for FGR; prior informed consent (PIC) and mutually agreed terms (MAT) for FGR; benefit-sharing for FGR; measures to provide that FGR have been accessed in accordance with PIC and MAT; designation of checkpoints to monitor and enhance compliance.

VI. GUIDANCE SOUGHT

44. The Working Group may wish to take note of the explanatory notes to the distinctive features of GRFA.

45. The Working Group may further wish to consider current use and exchange practices, relevant voluntary codes of conduct, guidelines and best practices, and/or standards on ABS, as reported to the Commission Secretariat, and request the Secretariat to continue updating, in collaboration with the

[49] See Treaty, Article 11.2.
[50] See above paragraph 31.
[51] See Protocol, Articles 5.2; 6.3; and 15.1; 15.2.
[52] For an economic analysis of standardization options for ABS, see Täuber, S. *et. al*. (2011): An economic analysis of new instruments for Access and Benefit-Sharing under the CBD – Standardization options for ABS transaction. Bonn (http://www.bfn.de/fileadmin/MDB/documents/service/skript286.pdf).

CBD Secretariat, these compilations, focussing in particular on practices, codes of conduct, guidelines and best practices and/or standards on ABS which specifically address FGR.

46. The Working Group may wish to refer to the on-going process under the Treaty to develop a range of measures that will: (a) increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and (b) enhance the functioning of the Multilateral System by additional measures.[53]

47. The Working Group may further wish to

- explore ABS issues for its subsector, in the light of the information provided in this document,
- provide guidance with regard to the development of elements on ABS for FGR, and
- recommend to the Commission that the *Draft Elements* be shared with the Working Group, at its fourth session, for review.

[53] IT/GB-5/13/Report, Appendix A.2, Part IV.