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EXPERT MEETING ON ARTICLE 10 OF THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION
Montreal, 17-19 September 2013
Items 3 and 4 of the provisional agenda*

SYNTHESIS OF THE ONLINE DISCUSSIONS ON ARTICLE 10 OF THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

I. INTRODUCTION

1. Article 10 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization ("Nagoya Protocol") addresses a global multilateral benefit-sharing mechanism (GMBSM). The article provides as follows:

> Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.

2. In decision XI/1 B, the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) requested the Executive Secretary to:

- Conduct a broad consultation on Article 10;

- Prepare and distribute a synthesis of the views provided in the broad consultation; and

- Convene a meeting of a regionally balanced expert group, including representatives from indigenous and local communities to: (i) review the synthesis; (ii) identify potential areas of common understanding with respect to Article 10; and (iii) identify areas that could be further

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examined. The expert group is to submit the outcomes of its work for consideration by the third meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol (ICNP) which, in turn, should consider the need for an additional study, including on non-market-based approaches.

3. In order to conduct the broad consultation on Article 10, the Secretariat organized online discussion groups convened through the Access and Benefit-Sharing (ABS) Clearing-House from 8 April to 24 May 2013.[1] The online discussions were organized around the indicative list of questions and the additional questions contained in annex I to decision XI/1. The annex to this document presents the structure and schedule of the online discussions.

4. Parties, other Governments, organizations and indigenous and local communities were invited to nominate representatives to take part in the online discussions.[2] In response, 142 participants were nominated for the online discussions and over 350 interventions were made.

5. The following sections provide a synthesis of the online discussions. Section II contains a summary of the key points raised during the discussions, namely the geographical and temporal scope of the Protocol and issues of State sovereignty. Section III contains a more detailed synthesis of the views that were expressed, organized according to the questions around which the discussions were structured. Finally, section IV contains a synthesis of other considerations and perspectives that were raised during the online discussions.

II. SUMMARY OF KEY POINTS

6. While the views expressed during the online discussions were extensive, as can be seen from the synthesis in sections III and IV, the interventions primarily revolved around two themes: (i) State sovereignty; and (ii) the need for a GMBSM.

(i) State sovereignty

7. The first observation regarding this theme is that there seemed to be general agreement in the online discussions that Parties could create a multilateral mechanism through the exercise of their sovereignty and also that a GMBSM should not undermine State sovereignty (see paragraph 129, below). Beyond this, however, the views were largely divergent.

8. The first aspect to State sovereignty is where States have sovereign rights over genetic resources, the exercise of these rights needs to be respected. This aspect was raised in two contexts during the online discussions:

(a) The first context is in relation to paragraph 1 of Article 15 of the Convention which establishes State sovereignty over genetic resources and provides that "the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." In this context, a number of participants observed that while a genetic resource may be found in more than one jurisdiction, thus potentially constituting a 'transboundary situation' in the language of Article 10 of the Protocol, Article 15(1) means that every Party where this genetic resource is found[3] has the right to grant

[1] http://absch.cbd.int/art10/.

[2] See notification 2013-014 of 7 February 2013.

[3] So long as the Party is a country of origin of the genetic resource or has acquired the genetic resource in accordance with the Convention as per Article 15(3) of the CBD and Article 6(1) of the Nagoya Protocol.

access to the resource. At the same time, other participants expressed the view that the mere existence of the same species in more than one country constitutes a 'transboundary situation', meaning that a GMBSM should apply. There were thus a lot of questions and concerns over how a GMBSM would co-exist with the sovereign right of a State to grant access to the genetic resources found within its jurisdiction, especially where States have already established access and benefit-sharing systems for the genetic resources in their jurisdiction, including for genetic resources that may be transboundary.

(b) The second context is with regards to the possibility for a Party to the Protocol not to require prior informed consent (PIC) for access to genetic resources on the basis of Article 6(1) of the Protocol and the possibility of a Party waiving any PIC requirements it may have established in light of the special considerations in Article 8 of the Protocol. During the online discussions, some participants expressed the view that not establishing PIC requirements or waiving these requirements would constitute a situation "for which it is not possible to grant or obtain prior informed consent" in the language of Article 10. Others, however, emphasized that where a Party has made a conscious decision not to require PIC (either by not establishing such requirements or by waiving them), this decision would be an exercise of the Party's sovereignty and would thus need to be respected. This raised concern among some participants of the possibility that a GMBSM could somehow override these decisions.

9. In addition, interventions noted the situation where States have sovereign rights over genetic resources but they experience difficulties to exercise these rights due to insufficient capacity. A number of participants suggested that these situations could be best addressed through capacity-building.

10. The second aspect to State sovereignty is where States have no sovereign rights and so cannot act. This was also raised in two contexts related to the geographical and temporal scopes of the Protocol:

(a) In the first instance, some participants suggested that genetic resources in areas beyond national jurisdiction (i.e. the high seas, the deep seabed and Antarctica) may constitute transboundary situations (if the genetic resources move between areas within national jurisdiction and areas beyond national jurisdiction) or genetic resources for which it is not possible to grant or obtain PIC seeing as there is no State with the authority to grant PIC and no other institution has been assigned this responsibility. Others felt, however, that exactly because there is no State sovereignty over these areas, the genetic resources within them cannot be considered to be occurring in transboundary situations or to be genetic resources for which it is not possible to grant or obtain PIC.

(b) In the second instance related to the temporal scope of the Protocol, a number of participants suggested that genetic resources accessed prior to the CBD (including those held in *ex situ* collections) should be considered genetic resources for which it is not possible to grant or obtain PIC. Other participants pointed out, however, that the concept of PIC is not relevant in this situation as the resources were accessed prior to the CBD establishing State sovereignty over genetic resources. On the other hand, many interventions expressed the view that it is not the time of access that is relevant under the Protocol, rather it is the time of utilization. From this perspective, new or continuing uses of genetic resources accessed prior to the Protocol or the CBD should still be subject to benefit-sharing obligations.

(ii) The need for a GMBSM

11. Article 10 begins by stating that "Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism…". The questions that formed the basis of the online discussions (as annexed to the COP-11 decision) did not address the issue of the need for a GMBSM directly but it was raised by a number of participants. Some felt that information on the need for a GMBSM was missing and suggested that experience should first be gained with the implementation of the bilateral approach in order to identify the gaps that could be addressed by a GMBSM.

12. Others pointed to the need for a GMBSM being identified in the language of Article 10 itself which provides that a GMBSM is "to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent." They thus felt that the need for such a mechanism has already been agreed upon and action should instead focus on actually establishing a GMBSM.

III. SYNTHESIS OF THE ONLINE DISCUSSIONS

A. What could be the 'transboundary situations' covered by Article 10 of the Nagoya Protocol that are within the scope of the Protocol?

13. Participants identified the following as specific cases that could constitute transboundary situations:

(a) Countries sharing the same ecosystem or species, genetic resources located across national boundaries, organisms in rivers or lakes shared by more than one country;

(b) Areas beyond national jurisdiction including the high seas, the deep seabed and Antarctica;[4]

(c) Migratory species, including species that migrate from areas within national jurisdiction to areas beyond national jurisdiction;

(d) Cases where no physical access is needed to obtain a genetic resource or its derivative (e.g. with databases or synthetic production of biochemical components);

(e) Resources or traditional knowledge in *ex situ* collections that are subject to access and utilization and the origin cannot be traced or is unknown;

(f) Traditional knowledge or genetic resources shared by one or more indigenous or local community located in different countries;[5] and

(g) Publicly available traditional knowledge of unknown origin that is the subject of access and utilization.

14. A Party representative[6] did not agree that countries sharing the same ecosystem or species should constitute a 'transboundary situation'. Also, while she did agree that using genetic information from databases to artificially produce biochemical compounds is a problem, she did not believe the situation fell under Article 10 of the Protocol.

15. An industry representative was of the view that *ex situ* genetic resources were excluded from the meaning of 'transboundary situations' while two Party representatives and a representative of academia argued that for most *ex situ* collections, it is possible to know the country in which the resource was collected and so a GMBSM would only be a solution in exceptional cases. For situations where the same

[4] The question of areas beyond national jurisdiction is also addressed below particularly in the context of situations where it is not possible to grant or obtain prior informed consent and other international instruments or processes.

[5] Associated traditional knowledge and transboundary situations is considered further in sub-section A(ii) below.

[6] The use of the word 'Party' in this document refers to Parties to the Convention on Biological Diversity.

genetic resources or traditional knowledge associated with genetic resources are found *ex situ* in different countries, another industry representative described how the existing provisions of the Nagoya Protocol would cover the initial access to the genetic resources (necessary for placing them in *ex situ* collections in the first place) and thus there is no need to create a GMBSM for such circumstances.

16. A Party representative observed that answering the question of what could constitute transboundary situations covered by Article 10 of the Protocol required looking at what is already covered by the requirements of the Protocol. In this light, he suggested that a GMBSM would only come into play where Parties holding the same resource have entered into agreements providing that benefits arising from the utilization of these resources should be shared through a GMBSM.

(i) Does the mere existence of the same species in more than one country constitute a transboundary situation?

17. Several representatives of Parties along with a representative of a non-governmental organization (NGO) and a representative of an indigenous or local community (ILC) agreed that the existence of the same species or the same genetic resource in more than one country constitutes a transboundary situation. In this regard, the question of the equity of the bilateral approach was raised and a Party representative expressed the view that it would be unfair to share benefits with only one range state of a genetic resource or one provider of associated traditional knowledge, contravening the requirement for benefit-sharing to be fair and equitable.

18. In contrast, a number of representatives of Parties and representatives of industry did not share the view that the mere existence of the same species in more than one country constitutes a transboundary situation. Views expressed in this regard included the following:

(a) Access and benefit-sharing is subject to the PIC of the country that actually provides the genetic resource so the sovereign right of countries to grant access to genetic resources should not be compromised by including all species distributed in more than one country in a GMBSM;[7]

(b) Cooperative agreements for genetic resources shared by two or more countries (including as foreseen in Article 11 of the Protocol) could solve issues related to benefit-sharing;[8]

(c) A requirement for benefit-sharing across all countries in which the same species or genetic resource is found could create a perverse situation whereby a species or genetic resource that is more plentiful may require more benefit-sharing than a rare species or genetic resource found in only one country.

19. Some participants identified different factors or considerations that could assist in determining whether the existence of the same species in more than one country constitutes a transboundary situation:

(a) A Party representative suggested that existence of the same species in more than one country could possibly constitute a transboundary resource if the States consider the resource to be strategic and feel that its use should be regulated, shared or co-managed;

(b) Another Party representative suggested that it is also necessary to ask what level will be used to identify a genetic resource. He suggested that if it is at the level of genes, then the occurrence of

[7] This issue is further addressed in sub-section I below.

[8] Article 11 is considered further below, particularly in sub-section D(i)

transboundary situations will be far less common than if genetic resources are identified at the level of species;

- Other Party representatives noted that the mere presence of a gene does not mean it is expressed and a number of factors influence gene expression so even though a species exists in a number of countries, it may not produce the same chemical compound;

- An NGO representative suggested that it is necessary for a GMBSM to target the species and ecosystem levels if there is to be fair and equitable benefit-sharing and thus conservation of species and ecosystems.

20. Other Party representatives expressed the view that the Nagoya Protocol does not concern species, subspecies, other taxonomic entities or information; rather it concerns genetic resources and these are defined as genetic material of actual or potential value. They stated that it was difficult to imagine how a genetic resource as material can occur in two or more countries at the same time. From this perspective, it should always, in principle, be possible to determine the source of a specific material and therefore the bilateral approach would be applicable in most cases regardless of whether material with similar properties is found in different countries.

(ii) Does 'transboundary situation' refer to access to genetic resources and associated traditional knowledge?

21. Many representatives of Parties and ILCs as well as of an intergovernmental organization and an NGO agreed that 'transboundary situation' refers to genetic resources and associated traditional knowledge. Views expressed in this regard stated that:

(a) A GMBSM must not compromise the rights of ILCs over traditional knowledge associated with genetic resources, and as such, the Protocol would appear to require the approval of the relevant indigenous and local community to include their knowledge in a GMBSM;

(b) While the concept of 'transboundary' applies to both genetic resources and traditional knowledge, the two situations may require different policy and legal approaches.

22. A Party representative stated that transboundary situations could include traditional knowledge because knowledge is not a material thing and can be shared among indigenous and local communities located in different countries. He suggested, however, that as the Nagoya Protocol refers to traditional knowledge associated with genetic resources, it could be argued that it is the genetic resource that is decisive for determining the source of the associated traditional knowledge so even in this case, the bilateral approach could still work.

23. Some Party representatives did not share the view that 'transboundary situation' refers to genetic resources and associated traditional knowledge. Views expressed in this regard included that:

(a) There shouldn't be a multilateral fund for traditional knowledge as the origin of this knowledge is known and this must be respected;

(b) The meaning of what is 'traditional knowledge' is not clear and a transboundary situation even less so; and

(c) With a GMBSM, the monetary and non-monetary benefits from the use of traditional knowledge would be too dilute especially with regards to small indigenous communities so it would be easier to create a regional mechanism and this would enable the benefits to go more directly to the communities.

(iii) How could benefits derived from utilization of shared genetic resources or associated traditional knowledge be shared through a global mechanism?

24. A Party representative suggested three principles that he considered to be relevant: (i) to be consistent with Article 5 of the Nagoya Protocol, a GMBSM must ensure that the benefits are shared with the provider of the genetic resource or the ILC holding the traditional knowledge; (ii) in cases of access without prior informed consent, benefits should be shared with the relevant provider or indigenous and local community to effectively compensate for an absence of mutually agreed terms (MAT) of access; and (iii) any additional benefits received by a GMBSM could be shared in a manner to promote the conservation and sustainable use of biodiversity.

25. Another Party representative was of the view that this question should be addressed in the context of the discussions on the modalities of a GMBSM, if there is a need for such a mechanism.

26. A Party representative explained that benefits derived from utilization of shared genetic resources or associated traditional knowledge could be shared through a GMBSM by creating an international source of funding for activities aimed at conservation and sustainable use globally.[9] He suggested that lessons could be learned from the experiences of the benefit-sharing mechanism of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).[10]

27. An ILC representative expressed the view that if a genetic resource in a transboundary situation is exploited then a mechanism between the concerned States should be established. She provided the example of countries that have already created systems to share income from resources that move across borders such as agreements to share income generated from tourism in transboundary national parks. A Party representative pointed to the possibility of creating an inter-State mechanism like the Forestry Commission of Central Africa (COMIFAC) to provide a framework for cooperation.

B. What could be the situations where it is not possible to grant or obtain prior informed consent?

28. Several Parties representatives were of the view that access to genetic resources in areas beyond national jurisdiction, such as the high seas, the deep seabed or Antarctica, would constitute a situation where it is not possible to grant or obtain PIC. However, a number of Party representatives and representatives of industry and academia noted that Article 10 must be within the scope of the CBD and the Nagoya Protocol, which excludes its application to areas beyond national jurisdiction. They substantiated their views with reference to Article 15 of the CBD and Articles 3 and 4 of the Protocol.

29. Several Party representatives indicated that the utilization of genetic resources obtained from a country that has decided not to require PIC would constitute a situation where it is not possible to grant or obtain prior informed consent. It was noted that this situation could arise in two instances:

[9] See sub-section C for further discussion of the role of a GMBSM in supporting conservation and sustainable use of biodiversity globally.

[10] See sub-section G(i) on international instruments and processes and the component on triggers in sub-section I for more on the ITPGRFA and possible lessons it may offer.

(a) When a Party does not require PIC in accordance with Article 6(1) of the Protocol; or

(b) When a Party provides for situations where PIC is not required, e.g. in an emergency or for national security in light of Article 8 of the Protocol.

30. A number of representatives of Parties and of industry as well as a representative of a non-Party and of academia indicated that a Party's sovereign right not to require PIC, under either Article 6 or Article 8, cannot be considered a situation where it was not possible to grant or obtain PIC. Rather, they were of the view that waiving the requirement for PIC would be the desired procedure of the Party and so an act of subsequently capturing benefits from the genetic resource or associated traditional knowledge accessed in this manner would likely infringe on a Party's sovereignty. Nonetheless, a Party representative argued that Parties who do not require PIC may nevertheless still require users to contribute to a GMBSM as a way to support conservation and sustainable use.

31. On this same point, some Party representatives noted that PIC and MAT are likely to apply to the situations referred to in Article 8, and indicated that Article 8(b) in particular was not intended to bypass PIC requirements as indicated by the condition set for expeditious access, i.e. expeditious benefit-sharing, including affordable medicines.[11]

32. A number of interventions identified the following instances where genetic resources or associated traditional knowledge have already been accessed without PIC and the provider is not known and cannot be traced and argued that these would constitute situations where it is not possible to grant or obtain PIC:

(a) If the resource or traditional knowledge is accessed from an *ex situ* collection without data on the country of origin. In this regard, two ILC representatives suggested that situations where genetic resources in *ex situ* collections can be linked to their original ecosystem or traditional knowledge associated with genetic resources can be traced to distinct ILCs would enable the relevant community to be approached in order to obtain PIC. For genetic resources in *ex situ* collections that have become extinct *in situ*, a representative of an ILC suggested that no PIC would be required;

(b) If the resources or knowledge were taken illegally and their countries of origin are uncertain; or

(c) For new or continuing uses[12] of genetic resources or associated traditional knowledge accessed prior to the entry into force of the CBD or the Protocol. On the other hand, a representative of industry disagreed that this could be considered a situation where it is not possible to grant or obtain PIC;

(d) Where traditional knowledge associated with genetic resources is in the public domain;

(e) Where traditional knowledge is not limited to a single ILC or an identifiable group of ILCs. An ILC representative indicated, however, that where States can, through agreements, work with the existing institutions of ILCs to resolve issues of PIC and MAT and address conflicts should not be considered situations where it is not possible to grant or obtain PIC.

[11] The issue of non-commercial research in Article 8(a) is further addressed in the discussion of a GMBSM and academic, non-commercial research in section IV below.

[12] The issue of new or continuing uses is considered in more detail in sub-section B(vi) below.

33. A representative of academia was of the view that a situation where it is not possible to grant or obtain PIC could be where the providing country does not have transparent PIC or MAT procedures in place or PIC is not available in a reasonable period of time.

34. Representatives from Parties and industry expressed the view that it is necessary to distinguish between when PIC is impossible to obtain versus when it cannot be obtained because of factors that could be improved through capacity-building such as the time taken to grant PIC, capacity to track back information, no ABS procedures or legislation or no consensus with indigenous communities. It was suggested that a country without the capacity to grant PIC would presumably wish to control access and benefit-sharing itself meaning that capacity-building would better correspond to its national objectives than a multilateral system.

35. A Party representative suggested that an organization seeking to access and utilize a particular genetic resource or associated traditional knowledge *in situ* should be able to apply for access in one of the countries of origin and thus should be able to obtain PIC and agree to MAT.

36. An ILC representative suggested that the issue of how to obtain PIC will need to be settled, perhaps through a 'due diligence' hierarchy allowing a user to know when it has exhausted avenues to obtaining PIC.

(i) In those situations, what would be the role of national legislation or bilateral alternatives?

37. A number of suggestions were made as to the role of national legislation and bilateral arrangements in situations where it is not possible to grant or obtain PIC. Party representatives and an ILC representative indicated that:

(a) National legislation should establish the principle of no utilization without fair and equitable benefit-sharing;

(b) Bilateral alternatives would have limited applicability and higher transaction costs;

(c) It may be possible to use regional organizations to facilitate the process;

(d) Many cases could be resolved with the bilateral mechanism established in the CBD and the Protocol or through regional cooperation under Article 11 of the Protocol and countries should seek a solution through a GMBSM only where such bilateral and regional agreements are not possible;

(e) States can, through agreements, facilitate the creation of institutions like indigenous competent authorities to manage transboundary situations.

38. Suggested solutions for where providers face difficulties in granting PIC were that a GMBSM could seek to assist countries to put the necessary measures in place or a group of countries could work with regional organizations to put alternatives in place or develop a regional benefit-sharing mechanism.

(ii) In which situations could genetic resources or associated traditional knowledge be accessed without prior informed consent and while not violating the obligations in the Nagoya Protocol?

39. A Party representative and a representative of academia suggested a number of situations in which genetic resources or associated traditional knowledge could be accessed without PIC and without violating the Nagoya Protocol:

(a) If specialized ABS agreements are negotiated for different categories of genetic resources and associated traditional knowledge;

(b) Resources held *ex situ* pre-CBD (noting that there are collections, like Kew, that do not distinguish between pre- and post-CBD resources);

(c) Traditional knowledge in the public domain;

(d) Access to resources in countries that have waived the right to request PIC.

40. A Party representative, supported by a representative of an intergovernmental organization, noted that the obligation to obtain PIC was a key outcome of the negotiation of the Nagoya Protocol and thus any GMBSM should not undermine the rights of provider countries or indigenous and local communities and careful consideration needs to be given before establishing a mechanism that might be interpreted as undermining those rights.

(iii) Would the transfer of genetic resources or associated traditional knowledge to third parties be covered by the situations identified in the previous question?

41. A Party representative explained that the transfer of genetic resources or traditional knowledge associated with genetic resources is covered by Article 6(3)(g)(iii) of the Protocol which provides for terms on third party use to be included in mutually agreed terms. He thus felt that the Protocol makes it clear that Article 10 is not intended to address the issue of transfers to third parties which should rather be addressed through compliance with and enforcement of MAT established between providers and users.

42. A Party representative suggested that the benefit-sharing obligations attached to 'subsequent applications and commercialization' in Article 5(1) of the Nagoya Protocol make it clear that users have a duty to ensure that third parties also share benefits even if they do not require PIC from the country of origin for access to product derivatives.

43. A representative of academia indicated that: (i) genetic resources stored in *ex situ* collections prior to the CBD would constitute a situation where the genetic resource could be accessed without PIC while not violating the Protocol, which would also cover the transfer of these resources to third parties; and (ii) genetic resources stored in *ex situ* collections post-CBD but pre-Protocol could be accessed without PIC while not violating the Protocol, which would also cover the transfer of these resources to third parties when the transfer is for non-commercial use and is agreed upon in MAT. She stated that traditional knowledge associated with genetic resources in the public domain could be accessed without PIC while not violating the Protocol and because the traditional knowledge is already in the public domain, the issue of third party transfer is not relevant.

(iv) How to make sure that a global multilateral benefit-sharing mechanism will only be used when there is no real possibility to obtain prior informed consent?

44. A number of Parties agreed that a GMBSM needs to be used as an additional tool rather than a loophole so it should not be an alternative to PIC and MAT at the discretion of the user; rather, it needs to be a last resort after all attempts have been made to identify the provider and to seek PIC and MAT. Suggestions from Parties and an intergovernmental organization on how to achieve this were:

(a) To clearly spell out the specific trigger points for the GMBSM[13] and taking care that the mechanism does not become a convenient path of least resistance;

(b) For all Parties to make an inventory and characterization of the genetic resources in their jurisdiction;

(c) Recognizing an obligation to apply for new PIC for all new uses;

(d) To establish organizations to ensure the ownership of information vested in the source country.

(v) How would a global multilateral benefit-sharing mechanism address collections made (i) pre-Convention; (ii) post-Convention but pre-Nagoya Protocol; (iii) post-Nagoya Protocol?

45. Some participants made reference to Article 28 of the Vienna Convention on the Law of Treaties. Article 28 states that "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." A Party representative, along with representatives of industry and an intergovernmental organization agreed that the Protocol is not retroactive as it does not rebut the presumption against retroactivity. An industry representative added that retroactive legislation is generally not advisable as it creates legal uncertainty for stakeholders.

46. A Party representative expressed the view that Article 28 of the Vienna Convention is not relevant because the Protocol refers to access for utilization rather than physical access so it is the time of utilization that is relevant, not the time of collection. In the alternative, he suggested that the standard from Article 28 of the Vienna Convention regarding a different intention appearing from the treaty itself is met because Article 6(1) is meant to regulate new utilization of old instances of access. A representative of academia expressed the view that many questions require agreement on the new and continuing uses issue (see the following sub-section) before there can be a clear answer to this question.

47. Regarding how a GMBSM would address collections made prior to the Convention, a Party representative and a representative of academia agreed that the CBD and the Protocol do not apply to genetic resources and associated traditional knowledge that were accessed before the CBD entered into force. The Party representative, while noting that resources that were accessed prior to the CBD represent a situation in which it is not possible to grant or obtain PIC, indicated that because these resources were accessed before the CBD established that countries had sovereign rights over their genetic resources, he did not find it acceptable to create benefit-sharing requirements arising from their use. Another representative of academia supported voluntary contributions to a GMBSM in case of the generation of monetary benefits, similar to the approach under the ITPGRFA for commercialized resources that remain in the public domain.

48. Regarding how a GMBSM would address collections made post-Convention but pre-Protocol, a representative of academia suggested that genetic resources accessed post-CBD but pre-Nagoya Protocol in circumvention or disregard of ABS legislation or from countries without such laws who had not waived the PIC requirement should be subject to Article 10. He did not consider this to constitute retroactivity. Another representative of academia supported contributions to a GMBSM where monetary benefits are generated when it is not possible to grant or obtain PIC.

[13] See sub-section I below for more discussion of triggers of a GMBSM.

49. A Party representative identified two aspects to this discussion: (i) the legal question of whether the Nagoya Protocol applies to pre-Protocol or pre-CBD acquisitions; and (ii) the scientific question of whether resources can be traced back to their place of origin long after they were acquired. She raised the point that the Nagoya Protocol gives Parties the sovereign right to determine the conditions of access to their resources and to establish mutually agreed terms. She felt that the presumption is that these terms will be upheld in the future and that it is those who hold the resource at the time that it is accessed who have the right to determine how the benefits from its future use should be shared. She indicated that if the Protocol were to be applied retroactively, it would also imply that those who made these decisions in the past did not have such rights or that their rights ought not to be upheld, which she found to be a difficult contradiction to follow moving forward.

(vi) How would a global multilateral benefit-sharing mechanism address new uses of pre-Convention collections and continuing uses of pre-Convention collections?

50. A Party representative suggested that for on-going benefits flowing from past and continuing utilization, users could be encouraged as a 'moral obligation' to voluntarily share benefits through a GMBSM as a contribution to conservation and sustainable use. For new uses, he expressed the view that PIC for their utilization would be required and that this should be obtained bilaterally; only where this is not possible or where there are other agreed triggers for a multilateral solution would a GMBSM apply. He also highlighted the need to consider the issue of new uses of resources in *ex situ* collections.

51. A number of representatives of Parties and a representative of academia agreed that new or continuing uses of genetic resources accessed prior to the Protocol or the Convention are new situations and a GMBSM should address benefit-sharing from these situations.

52. A representative of a non-Party suggested that linking new uses to new benefits seems to challenge the basis of the Protocol while a representative of academia expressed concern that the concept of new uses could create legal uncertainty.

C. How could a global multilateral benefit-sharing mechanism be used to support the conservation and sustainable use of biological diversity globally?

53. A number of interventions on this question referred to the Global Environment Facility (GEF) and the Intergovernmental Platform on Biodiversity & Ecosystem Services (IPBES). Representatives from a number of Parties suggested that resources from a GMBSM could feed into the GEF, which could perhaps then channel the resources to activities related to transboundary situations. Another Party representative suggested that if there are cases where it is not possible to grant or obtain PIC then perhaps a voluntary contribution to the GEF and its Nagoya Protocol Implementation Fund could be explored.

54. A representative of academia suggested considering essential elements of conservation and sustainable use of biodiversity that have not been covered by other support mechanisms and how best these could be served via a funding mechanism. Two Party representatives suggested that a GMBSM could support conservation and sustainable use of biodiversity globally by contributing to priority areas identified by IPBES. One of these representatives noted that targeting global priorities in this manner would mean that the use of the benefits shared would not be limited to the priorities of the providing countries as is the case in the bilateral approach.

55. A representative of an inter-governmental organization expressed the view that a GMBSM should be used to support the conservation and sustainable use of biodiversity globally by helping biodiversity-rich developing countries create an inventory of their genetic resources and help them to participate in the International Barcode of Life.

56. Other interventions referred to traditional knowledge:

(a) A Party representative expressed the view that for benefits arising from accessing and utilizing traditional knowledge, the benefits should be directed towards the indigenous and local communities that shared it, perhaps to fund projects that would promote traditional practices that maintain traditional knowledge;

(b) A Party representative stated that it would be particularly beneficial to direct support to activities under Articles 8(j), 10(c) and 10(d) of the Convention;

(c) A representative of an ILC suggested that a GMBSM could assemble funds for creating national, regional or global biocultural heritage trusts targeted to projects and both monetary and non-monetary benefit-sharing activities that benefit ILCs and help to support the biocultural contexts for generating and sustaining biodiversity.

D. How might the operation of a global multilateral benefit-sharing mechanism co-exist with the underlying principles, objective and scope upon which the Nagoya Protocol is based?

(i) How to apply Art. 10 and 11 without causing harm to the principle of the sovereign right of states over their natural resources?

57. A representative of a non-Party expressed concern about the relationship between Articles 10 and 11 and the principle of State sovereignty over natural resources. He noted that the scope of the Protocol is Article 15 of the Convention, which recognizes sovereign rights over natural resources and that the authority to determine access to genetic resources rests with national governments and is subject to national legislation. He explained that Article 10 is subject to this scope and so he found it difficult to see how the requirement to obtain PIC could be applied in the absence of the will of the State providing the resource. A Party representative agreed that a GMBSM would need to respect a country's decision to establish a bilateral system to govern the genetic resources under its jurisdiction and to respect where a country decides to use a multilateral mechanism only in situations where it is not possible to use the bilateral one.

58. Other participants provided views suggesting that Articles 10 and 11 are not incompatible with the principle of State sovereignty over natural resources. Party representatives indicated that:

(a) International cooperation does not constitute a violation of State sovereignty and Articles 10 and 11 should be applied in a complementary manner;

(b) The principle of the sovereign right of States over their natural resources cannot be touched as it is enshrined in the UN Charter and the CBD;

(c) Article 11 is not relevant and a GMBSM should not and likely could not force a State to provide PIC unless it chooses to do so but it can provide those who are willing to use it with an additional tool for securing benefit-sharing and supporting conservation and sustainable use of biodiversity globally;

(d) Multilateral and bilateral approaches to ABS are not incompatible or mutually exclusive as the preamble to the Protocol recognizes "that an innovative solution is required to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent".

(ii) How to ensure that a global multilateral benefit-sharing mechanism does not represent a disincentive for implementation of the bilateral system of the Protocol?

59. Interventions from representatives of a number of Parties expressed the view that in order for a GMBSM not to serve as a disincentive for implementation of the bilateral system of the Protocol, it must be carefully drafted to complement the bilateral system and only be applicable in limited and clearly defined situations. One Party representative elaborated that there is a natural hierarchy of (i) national legislation, (ii) bilateral negotiations, and (iii) a GMBSM for situations that cannot be addressed by (i) and (ii). He stated that it is important that these systems not overlap and expressed concern that establishment of a GMBSM could creation duplication.

60. A Party representative suggested that in order to ensure that a GMBSM does not create a disincentive for implementation of the bilateral system, a competent authority could be designated for transboundary resources and/or for resources for which it is not possible to grant or obtain PIC and this authority would grant PIC, negotiate MAT, communicate with the ABS Clearing-House and with States as needed.

61. A Party representative did not see why the creation of a GMBSM would create a disincentive to implementing national access measures. Rather, he saw a GMBSM as creating a practical way to implement a universal benefit-sharing obligation thereby lessening the competitive advantage of genetic resources and associated traditional knowledge with no access and benefit-sharing requirements, making it more likely that users will seek access through bilateral arrangements.

62. A representative of industry noted that Article 10 provides that any benefits obtained from a GMBSM are to be used only for the conservation of genetic resources globally and therefore, it would be in States' own interests to implement the Protocol if they wish to derive benefits from the commercialization of their own genetic resources.

E. What could be the advantages and disadvantages of a global multilateral benefit-sharing mechanism?

(i) As a provider of genetic resources or associated traditional knowledge, what problems would a global multilateral benefit-sharing mechanism (a) create and (b) solve?

63. Representatives of Parties and a non-Party as well as a representative of industry identified the following as problems that a GMBSM might create for providers:

(a) Multiple processes may produce uncertainty for providers over which process or mechanism applies and could result in a situation where a GMBSM seeks to override a provider's claim;

(b) Benefits for providers may be reduced if there is a need to also provide benefits to a GMBSM and to use benefits towards the administration of a GMBSM;

(c) Benefits would go to global conservation rather than provider communities, obscuring the rationale of the Convention in that those conserving genetic resources would not be the ones reaping the benefits;

(d) Providers would relinquish their ability to negotiate benefit-sharing to a global body whose interests may not be aligned with their own;

(e) If a GMBSM is seen as an alternative process that applies when a user does not meet national legislative requirements, it could undermine sovereign rights and create incentives for non-compliance with national requirements;

(f) It could create a disincentive to creating functional national ABS frameworks; and

(g) It could replace the role of States in decision-making by an outside organization that could be subject to lobbying pressure by users, which could create frustration and disputes.

64. A Party representative expressed the view that a GMBSM should not create new problems for providers because it would not provide a 'surrogate PIC' but would instead focus on capturing benefits from a wider range of uses and users.

65. Representatives of Parties, academia and industry identified problems that a GMBSM might solve for providers. It would:

(a) Provide a platform to generate some benefits that would not otherwise be available to the provider for cases impossible to solve through the bilateral system, allowing for more cases of legal access and users committed to sharing benefits;

(b) Provide national governments that have limited capacity with an alternative to creating their own ABS system and it could potentially reduce administrative costs by increasing efficiencies, reducing the need for every country to maintain national ABS infrastructure;

(c) Allow all provider countries to support and facilitate the monitoring of a genetic resource that has crossed the border of a country;

(d) Help to avoid a race to the bottom among providers and by ensuring all forms of utilization that result in private benefits attract an obligation to share benefits, a GMBSM would prevent the flooding of the market with resources for which benefit-sharing is not required;

(e) Reduce conflict by creating cooperative strategies for managing genetic resources among States that recognize their common interests;

(f) Allow effective control mechanisms of all genetic resources where they are found;

(g) Encourage responsible development with economic opportunities while ensuring the conservation of genetic resources and biological resources.

(ii) As a user of genetic resources or associated traditional knowledge, what problems would a global multilateral benefit-sharing mechanism (a) create and (b) solve?

66. A number of representatives of Parties as well as a representative of industry identified problems that a GMBSM might create for users:

(a) It could create uncertainty around rights and applicable processes for users including:

- If a user is required to follow two processes for access to the same resource: one in national legislation and one under a GMBSM or if the situations where use of a GMBSM is required are not clearly defined;

- Delays for users who, having followed the appropriate process established in national legislation, then find there is an additional process under a GMBSM;

- Lack of clarity around compliance obligations;

- If a provider requires additional protections on top of a GMBSM due to the lack of legal authority of a GMBSM to enforce its jurisdictional claims on a national government;

- The possibility of conflicting negotiations or jurisdictional claims between providers and a GMBSM requiring users to either comply with two provisions for access to the same genetic resource, or be subject to claims of violation despite complying with a provider's PIC and MAT;

(b) It would remove users' ability to negotiate benefit-sharing directly with a provider, to customize benefit-sharing arrangements with providers and tailor benefit-sharing to the needs of the provider;

(c) It would increase the likelihood that benefit-sharing would focus on monetary benefits, which would be easiest for a GMBSM to distribute, rather than non-monetary benefits, which might be more relevant;

(d) It could require users to negotiate with a global body that likely would not have as much understanding of the value of the genetic resource in question as would the provider country; and

(e) It could extend benefit-sharing requirements to genetic resources that previously did not carry such obligations.

67. A Party representative expressed the view that new problems for users should not be anticipated from a GMBSM so long as users are willing to support conservation and sustainable use while another Party representative did not believe that a GMBSM would undermine capacity-building derived from the sharing of non-monetary benefits.

68. Representatives of Parties, industry and academia identified problems that a GMBSM might solve for users:

(a) It could create legal certainty and reduce transaction costs by simplifying the process for negotiating MAT and resolving situations that are a challenge using the bilateral approach;

(b) By increasing the confidence of providers that utilization would be followed by benefit-sharing, a GMBSM would increase the likelihood of providers facilitating access and putting in place simplified ABS procedures for non-commercial research thus contributing to facilitating research for conservation and sustainable use.

69. Other Party representatives suggested that bilateral and multilateral approaches should complement one another and both had the potential to lower transaction costs depending on how they were designed.

(iii) If there is no global multilateral benefit-sharing mechanism, what problems would remain?

70. A number of Party representatives as well as a representative of academia pointed to problems that would remain in the absence of a GMBSM:

(a) Difficulties with benefit-sharing, including in situations where capacity to provide PIC or negotiate MAT is limited; where it is not possible to apply the bilateral system; from products developed from marine genetic resources which may be from areas beyond national jurisdiction; for genetic resources or associated traditional knowledge that occur in transboundary situations or for which it was not possible to grant or obtain PIC;

(b) Developing countries would be unable to profit from nor play a significant role in the exploitation and control of transboundary resources;

(c) Increased transaction costs and ongoing recriminations for borderline cases not clearly covered by the bilateral approach;

(d) Research and development would focus on genetic resources and associated traditional knowledge that may be used with no benefit-sharing obligation (e.g. from countries that do not require PIC, areas beyond national jurisdiction, purchased as commodities or already available as information in the public domain), undermining the bilateral system, reducing the flow of benefits to support conservation and sustainable use, fuelling mistrust between users and providers and possibly violating Articles 4(b) and 5 of the Convention;

(e) The bilateral approach favours users who can afford to pay for legal advice creating the incentive for providers to restrict access.

71. Party representatives as well as a representative of academia identified general advantages of a GMBSM:

(a) Capturing a wider although not necessarily higher share of benefits, especially arising from new uses, and directing them towards supporting conservation and sustainable use of biodiversity;

(b) Providing a way to lower transaction costs, including those involved in negotiating PIC and MAT and monitoring and compliance;

(c) Serving as a framework on which to build more specialized ABS systems;

(d) Mobilising new, additional and innovative financial flows for conservation and sustainable use of biodiversity and making a closer link between benefit-sharing and conservation and sustainable use;[14]

(e) Being guided by scientific criteria and supporting conservation and sustainable use projects that may not benefit under the bilateral approach;

(f) Creating a vehicle for dealing with projects that are already at an advanced stage of the research and development pipeline both for which there is no PIC or MAT;

(g) Recognizing the value of natural or cultural resources for users and providers, allowing more profit thus encouraging the owner or the holder of the genetic resource to conserve it;

[14] A Party representative suggested this could be achieved under the bilateral approach, see paragraph 130 below.

(h) Equalizing the balance of power between users and providers, building trust and facilitating access.

72. Representatives of Parties and industry raised a number of questions and general disadvantages of a GMBSM:

(a) Whether a GMBSM would really resolve the difficulties around unclear situations or whether it would just defer them to a global body;

(b) How to distribute the benefits from a GMBSM in a fair and equitable manner, i.e. how to select the conservation projects;

(c) How to address non-monetary benefits;

(d) Uncertainty over how benefits would be received by the provider and whether they would be used to solve specific conservation problems in the country of origin;

(e) A GMBSM may not be motivated to negotiate as quickly or as efficiently as a provider;

(f) States may just rely on a GMBSM and thus fail to implement the Protocol nationally;

(g) How to handle the prerogative of governments that elect not to require benefit-sharing;

(h) In situations where only two countries are involved, a GMBSM may make things more difficult by involving a larger number of countries;

(i) What would be the dispute resolution mechanism for allocating benefits between several providers and for resolving jurisdictional disagreements between providers and a GMBSM?

F. What influence might other articles of the Nagoya Protocol have in the context of a global multilateral benefit-sharing mechanism?

73. A Party representative stated that the articles of the Protocol have a lot of influence as a GMBSM should have a mandate and rules of procedure that operate under the principles and objectives of the Protocol. Many participants also identified links between specific articles of the Protocol and a GMBSM:

(a) Article 1: refers to benefit-sharing "including by appropriate access" confirming that utilization rather than access triggers benefit-sharing obligations;

(b) Article 2: defines 'utilization of genetic resources' and clarifies that it includes naturally occurring biochemical derivatives, extending the likelihood that resources occur in a transboundary situation;

(c) Article 3:

- was only agreed to on the understanding that the unresolved scope issues would be further discussed under Article 10 and so a GMBSM must have a wider scope than what is stipulated in Article 3;

- states that the scope of the Protocol (including Article 10) is that of Article 15 of the Convention, which recognizes sovereign rights over natural resources and that

the authority to determine access to genetic resources rests with national governments and is subject to national legislation, making it difficult to see how natural resources that fall outside the jurisdiction of a State could be covered by a GMBSM;[15]

(d) Article 4: provides in paragraph 4 for the possible creation of specialized approaches to ABS and a GMBSM could provide a stepping stone towards these;[16]

(e) Article 5:

- is the main benefit-sharing provision and a GMBSM would provide an additional way to establish and discharge benefit-sharing obligations;

- paragraph 1 addresses *ex situ* collections and the article in general indirectly addresses questions of temporal scope;

(f) Article 6:

- indirectly addresses questions of temporal scope;

- Parties that do not require PIC could use a GMBSM to ensure that their free access system does not undermine the global system while Parties that do require PIC can decide to channel some benefits through a GMBSM;

- echoes Article 15 of the Convention stating that PIC is subject to the exercise of a sovereign right of a Party;

(g) Article 7: is relevant as much associated traditional knowledge occurs in transboundary situations or is available in the public domain;

(h) Article 8: a GMBSM could be used as a framework for developing special ABS measures for the situations mentioned in this article;[17]

(i) Article 9: addresses particular aspects of fair and equitable benefit-sharing by suggesting the direction in which shared benefits should flow and it could be implemented by voluntarily directing a percentage of bilateral benefits into a GMBSM;

(j) Article 11:

- is relevant as a GMBSM would help countries discharge their cooperation obligations without incurring large transaction costs;

- a GMBSM should complement the requirements for transboundary cooperation in Article 11 and be designed to be used in conjunction with or as a supplement to such approaches;

[15] Issues of State sovereignty are considered further below.

[16] Article 4 is considered further in sub-section G(ii) below.

[17] More discussion of Article 8 may be found below in section IV in the context of a GMBSM and academic, non-commercial research.

- for genetic resources in areas beyond national jurisdiction, a GMBSM should complement transboundary cooperation as prescribed in Article 11 of the Protocol;

- provides an agreed upon alternative to the non-negotiated concept in Article 10 of creating a GMBSM;

(k) Article 12: is relevant as much associated traditional knowledge occurs in transboundary situations;

(l) Article 13: is relevant to the extent that Parties choose to include a GMBSM in their domestic ABS systems;

(m) Article 14: is relevant for information exchange and transparency around a GMBSM;

(n) Article 15: is relevant to the extent that some Parties voluntarily incorporate elements of a GMBSM into their domestic systems and possibly in cases involving the utilization of very common and widely distributed resources which would need a large number of PICs and MATs;

(o) Article 16: is relevant if a GMBSM is incorporated into national systems and potentially in cases of common or widely distributed associated traditional knowledge;

(p) Article 17: is relevant in that a GMBSM could provide an alternative way to proceed through certain checkpoints under defined circumstances and could play an important role in monitoring new uses of genetic resources;

(q) Article 18: is relevant as use of a GMBSM could be agreed to in MAT;

(r) Article 19:

- addresses particular aspects of fair and equitable benefit-sharing, which is a component of a GMBSM, and if properly implemented, model contractual clauses should create a supportive environment for providers and users to successfully negotiate, develop and execute fair and equitable benefit-sharing agreements;

- is relevant as the existence of a GMBSM would enable an approach of capturing interim benefits while testing sectoral model clauses or whole standard material transfer agreements within a common framework;

(s) Article 20:

- addresses particular aspects of fair and equitable benefit-sharing, which is a component of a GMBSM, and if properly implemented, the tools referred to in this article should create a supportive environment for providers and users to successfully negotiate, develop and execute fair and equitable benefit-sharing agreements;

- is relevant as a GMBSM could come to form part of codes of conduct and other tools;

(t) Article 21: is relevant as a GMBSM will raise awareness that all privatized benefits from the utilization of genetic resources and associated traditional knowledge must be shared to support conservation and sustainable use;

(u) Article 22:

- is relevant as a GMBSM could be used as a short-term substitute by countries that have not yet developed the capacity for a full ABS system or who have limited ABS opportunities so cannot justify the cost of establishing dedicated ABS capacity;

- a GMBSM could also help to identify areas in which capacity development is needed and could provide funding for capacity development directly relevant to conservation and sustainable use;

(v) Article 23:

- addresses particular aspects of fair and equitable benefit-sharing, which is a component of a GMBSM, by referring to two specific types of non-monetary benefit-sharing, namely collaboration and cooperation in technical and scientific research and development programmes on the one hand and access to and transfer of technology on the other;

- is relevant as a GMBSM could fund technology transfer for conservation and sustainable use;

(w) Article 24: is relevant as a GMBSM could provide a means for receiving benefits from users in non-Parties;

(x) Article 25: is relevant, particularly its paragraph 6, as a GMBSM could be a means to channel financial resources;

(y) Annex: addresses particular aspects of fair and equitable benefit-sharing.

74. A Party representative suggested that the relevance of the other articles of the Protocol would depend on the modalities of a GMBSM.

G. Are there any existing international instruments or processes that could offer lessons learned for consideration in the context of a global multilateral benefit-sharing mechanism under the Nagoya Protocol?

(i) Are there any existing international instruments or processes that could cover aspects that may be relevant to a global multilateral benefit-sharing mechanism under the Nagoya Protocol?

Convention on Biological Diversity

75. A Party representative expressed difficulties in reconciling the modalities of a GMBSM with Article 15(1) of the Convention and the bilateral relationship under the Nagoya Protocol.

76. A representative of an NGO pointed to Article 15(7) of the CBD as establishing a link that benefits derived from utilization, not from access, are to be shared in a fair and equitable manner with the provider country. He also suggested that regulating utilization rather than access has the potential to ease

the pressure on researchers. He noted that the CBD's provisions are the point of departure for understanding the rules of the Nagoya Protocol.

77. A representative of an NGO supported the need to give more importance to technology transfer as a stand-alone obligation under Article 16 of the Convention.

78. A Party representative emphasized the need to consider the issues relevant to ensuring the rights of the country to the biotechnologies associated with the commercial use of genetic resources (Article 19(1)).

79. A Party representative suggested that a GMBSM could provide new and innovative sources of finance on a user-pays basis to supplement additional funding made available by developed countries under Article 20 of the CBD.

80. A Party representative pointed to Article 22 of the Convention along with relevant COP decisions such as decision X/29, especially its paragraph 22, as indicating that issues concerning marine biodiversity in areas beyond national jurisdiction should be addressed through mechanisms established under the United Nations Convention on the Law of the Sea.

International Treaty on Plant Genetic Resources for Food and Agriculture

81. Representatives of a number of Parties as well as a representative of an intergovernmental organization pointed to the ITPGRFA as being relevant to and possibly offering lessons learned for consideration in the context of a GMBSM. One Party representative noted that the preamble to the Protocol gives special recognition to the ITPGRFA and its multilateral system of ABS.

82. A Party representative suggested that the ITPGRFA offers lessons to be learned from how it has struggled to attract benefits other than donor funds and how this difficulty has discouraged many providers from contributing additional material to the multilateral system beyond Annex I of the Treaty. He expressed the view that the ITPGRFA has so far failed to deliver the predicted level of benefits because it has left users too many options to utilize plant genetic resources for food and agriculture without incurring benefit-sharing obligations. He did not feel that current conditions would lead to the conservation of plant genetic resources for food and agriculture.

83. A representative of industry, supported by a representative of an intergovernmental organization, pointed out that the Parties opted for a bilateral ABS system in the Nagoya Protocol, making the Protocol fundamentally different from other international instruments set up as multilateral systems such as the ITPGRFA. She indicated that the intent of the ITPGRFA is to enable an administratively simple system to facilitate access to plant genetic resources, recognizing that facilitated access is a major benefit in itself. In contrast, she felt that the discussions related to the need for a GMBSM seem to focus on benefit-sharing without noting the value of facilitated access. She questioned whether it is possible to draw lessons from the multilateral system of the ITPGRFA and the need for and modalities of a GMBSM beyond the fact that decisions to participate are based in national sovereignty.

Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations

84. A Party representative noted that the preamble to the Protocol gives special recognition to the Commission on Genetic Resources for Food and Agriculture.

85. A Party representative highlighted current discussions under the Commission on Genetic Resources for Food and Agriculture regarding animal, forestry, aquatic, invertebrate and microbial genetic resources for food and agriculture. He found that all these genetic resources and their associated traditional knowledge fall under the scope of the Nagoya Protocol. He expressed the view that limiting the Protocol to a bilateral approach will eliminate the possibility of agreement on specialised ABS instruments addressing these genetic resources per Article 4(4) of the Protocol.

86. A representative of an intergovernmental organization pointed out the distinction between the option to create a GMBSM under Article 10 of the Protocol and the option to create other international instruments under Article 4. He noted that the mandate to consider the need for and modalities of a GMBSM lies with the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) whereas international instruments relevant to the Protocol (Article 4(3)) and specialized international ABS instruments (Article 4(4)) may be considered by other international instruments and organizations. He stated that multilateral benefit-sharing mechanisms may be developed under both provisions. He referred to relevant developments from the 14th session of the Commission, which agreed that it was premature to negotiate an international agreement on ABS for genetic resources for food and agriculture but did request further work on this issue, which is to take the form of draft elements to facilitate domestic implementation of access and benefit-sharing for different subsectors of genetic resources for food and agriculture. He noted that these draft elements would be voluntary tools to assist governments rather than new international ABS instruments.

87. A Party representative indicated that the process beginning under the auspices of the Commission could include the option of Parties using a GMBSM as part of their domestic implementation of ABS for different subsectors of genetic resources for food and agriculture. He also suggested that the creation of a GMBSM could provide some flexibility for transitional arrangements while specialized rules are negotiated for genetic resources for food and agriculture.

United Nations General Assembly, United Nations Convention on the Law of the Sea and the Antarctic Treaty System

88. Representatives of a number of Parties as well as a representative of an NGO noted that the issue of genetic resources in areas beyond national jurisdiction is being addressed by the United Nations General Assembly (through the 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) and the Antarctic Treaty System (including Measure 9 of 2009 and the Commission for the Conservation of Antarctic Marine Living Resources). In this connection, a Party representative also identified the United Nations Convention on the Law of the Sea as an existing international instrument that could cover aspects that may be relevant to a GMBSM.

89. In light of these discussions in other fora, a Party representative advocated careful consideration of whether these genetic resources would be included under a GMBSM referred to in the Nagoya Protocol. Another Party representative pointed to the guidance provided by Article 4 of the Protocol when considering the application of the Protocol vis-à-vis other instruments, particularly paragraph 1 of the Article which provides that the Protocol does not affect the rights and obligations from existing international agreements.

90. A Party representative advocated the creation of a GMBSM under the Protocol which could then be offered for use in the law of the sea and Antarctic Treaty contexts as a potential solution for addressing their specialized ABS arrangements and to avoid duplication of efforts, incoherency and higher transaction costs.

Regional initiatives

91. A Party representative stated that there are many international instruments that could serve as a reference but few of them are directly related to ABS. She indicated that within the *Sistema de la Integración Centroamericana* at the regional level, the *Comisión Centroamericana de Ambiente y Desarrollo* plays a role as it is responsible for such things as the Convention for the Conservation of the Biodiversity and the Protection of Wilderness Areas in Central America, the Central America system of protected areas, the Central America agreement for access to biochemical and genetic resources and associated traditional knowledge and the regional strategy for the conservation and sustainable use of biodiversity in Mesoamerica.

92. A Party representative noted that there are no international instruments that can provide lessons learned for a non-market based approach to ABS.[18] She did, however, highlight some regional initiatives such as the Bolivarian Alliance for the Peoples of Our America – Trade Treaty (ALBA-TCP) whose principles are based on solidarity, complementarity, justice and cooperation.

Others

93. Other interventions identified the following other international instruments or processes that could be relevant:

(a) The World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore;

(b) The World Health Organization (which is referred to in the preamble to the Protocol) and its Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and other Benefits;

(c) The Convention on Migratory Species;

(d) The Global Crop Diversity Trust as it provides an example of a pooled voluntary fund that provides benefits directly beneficial to the conservation of crop genetic resources and could be linked to Article 10 or something created along the lines of a biocultural heritage trust fund;

(e) Discussions on benefit-sharing from REDD-net.

94. A Party representative suggested that proliferating the number of international ABS agreements will involve high transaction and implementation costs for providers and create legal uncertainty for users when a GMBSM could provide a simple solution. A representative of an NGO similarly suggested that making new regimes will create loopholes and blind spots in the ABS system which could reduce the incentives for users to adhere to the ABS rules of each country.

95. Representatives of Parties proposed that the CBD Secretariat be requested to prepare an analysis of the multilateral system of the ITPGRFA and its benefit-sharing fund as well as compile information on the ongoing discussions of the 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 and others to provide information for further consideration with respect to a GMBSM and funding for activities aimed at conservation and sustainable use globally. Alternatively, the secretariats of the instruments and processes could be invited to provide materials for further consideration.

[18] See section IV of this document.

(ii) If other instruments or processes exist, should Article 10 of the Nagoya Protocol be prioritized over these instruments or processes?

96. A representative of a Party and a representative of industry did not feel that Article 10 could be prioritized over other instruments as this would be counter to the principles set out in the Protocol, especially Article 4. A representative of another Party indicated that for an existing binding international treaty, he did not believe it possible for a Party to be obliged to prioritize a GMBSM, the modalities of which are not enshrined in the Protocol text. He pointed to Article 4(1) of the Protocol as providing further support for this principle. He also expressed the view that prioritizing a GMBSM as a general rule would likely not give due regard to the ongoing work and practices of other international instruments as required by Article 4(3).

97. A Party representative advocated prioritizing the creation of a GMBSM over the completion of discussions on ABS in other fora as the existence of a GMBSM would help to resolve sticking points elsewhere.

98. A Party representative stated that it is not a matter of subordinating or prioritising the Nagoya Protocol or not being willing to address the issues at hand; rather, it is a matter of recognising which bodies have the mandate and expertise to address these issues, following the rules of the Protocol. He emphasized the importance of avoiding overlap and duplication of efforts, which could lead to debating the same issues in multiple fora, creating the potential for legal uncertainty. He suggested that it would be more helpful to ask how a GMBSM would complement existing instruments and processes rather than asking which should be prioritized.

99. A representative of an ILC stated that Article 4 of the Protocol should be understood in its entirety and pointed out that it contains an exemption to State obligations in other treaties where these "obligations would cause a serious damage or threat to biological diversity" (Article 4(1)); that it does not prevent the development or amendment of other international agreements (Article 4(2)); and that other instruments may be developed that do not run counter to the aims of the Protocol (Article 4(4)).

100. A Party representative made reference to the "IUCN Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing" and recalled that Article 4(1) of the Protocol reminds States that the intention is not to create a hierarchy with other existing international agreements (in favour of the Protocol or of the other agreement); however, Article 4(4) clarifies that the Protocol is the instrument for implementing the provisions on ABS of the CBD and it will not operate in situations where a specialized instrument applies that is consistent with the objectives of the CBD and the Protocol in respect to the specific genetic resource covered by and for the purpose of the instrument. In this light, he identified three conditions that govern the relationship between the Protocol and specialized instruments: (i) the specialized instrument is to be consistent with and not run counter to the objectives of the CBD and the Protocol; (ii) regarding membership, if a Party to the Protocol is not a Party to the specialized instrument then the Protocol's provisions will apply to all transactions of genetic resources; and (iii) priority given to specialized instruments over the Protocol only applies to genetic resources covered by and for the purpose of the specialized instrument.

H. What other aspects of a global multilateral benefit-sharing mechanism should be considered?

101. A number of Party representatives as well as an NGO representative indicated other aspects of a GMBSM that should be considered:

(a) Its specific nature, objective and scope, including temporal and geographic scope;

(b) Its rules of operation and functioning and the administration, financial and budgetary implications of a GMBSM;

(c) Determining users' intentions with respect to a GMBSM in order to develop acceptable modalities;

(d) The issue of the change of intended use of the resource;

(e) How a GMBSM could contribute to the objective of the Protocol, including the conservation and sustainable use of biodiversity;

(f) Capacity-building and development activities;

(g) How to regulate the fact that some parties use genetic resources but fail to contribute to the conservation and sustainable use of biodiversity;

(h) Distribution of benefits in a transboundary situation;

(i) Whether a GMBSM may share non-monetary benefits;

(j) How a GMBSM can create positive incentives for users to share through such a system in addition to sharing with the country of origin where identifiable.

102. Other participants noted that a GMBSM needs to be clear and transparent and needs to contribute to the global functionality of ABS.

(i) Is Article 10 of a compulsory or voluntary nature?

103. Two Parties indicated that Article 10 is part of the Protocol and the Protocol is legally binding for those who ratify it. Others pointed to a GMBSM being compulsory in situations agreed to by the COP-MOP or its nature being determined by the ICNP. It was also suggested that if a GMBSM is developed through a consensual process, it could be binding on the Parties who ratify it, including through the possibility of amending the Protocol.

104. A number of Party representatives also felt that a GMBSM should leave open the possibility of being used on a voluntary basis for situations where it cannot be mandatory.

105. A Party representative indicated that Article 10 is a soft law obligation that is essential to achieve the objective of the Protocol and prevent conflicts between Parties. A representative of an ILC also suggested that Article 10 only requires that a GMBSM be considered.

106. An industry representative suggested that Article 10 requires Parties to first consider the need for a GMBSM and that this first step in compulsory. She noted that considerations of this aspect have taken place during meetings of the ICNP and now during the online discussions. She felt that the discussions would be more valuable if concrete examples were provided of areas where a GMBSM could assist in filling gaps remaining after national implementation of the Protocol. For this reason, she found it important for Parties to first implement the Protocol nationally to enable a full investigation of the need for a GMBSM.[19]

[19] See sub-section I for more discussion of the need for a GMBSM.

(ii) What incentives for the contribution of the private sector could be envisaged in the global multilateral benefit-sharing mechanism?

107. Representatives of a number of Parties identified different incentives for the private sector in a GMBSM:

(a) The creation of legal certainty, clarity and transparency;

(b) Providing fair and non-arbitrary rules and procedures;

(c) Enhancing mutual trust by providing an internationally agreed means for private sector users of genetic resources and associated traditional knowledge to address any gaps in their ABS arrangements;

(d) Providing an opportunity for private sector actors to demonstrate that they are good global citizens, willing to support the conservation and sustainable use of the source of their wealth, rather than seeking access without benefit-sharing.

108. A Party representative outlined how the Costa Rican Biodiversity Law establishes monetary and non-monetary incentives for those who support conservation programmes and activities. These incentives include tax exemptions, awards, recognition of good practices and technical support for the management, use and conservation of biodiversity. A representative of another Party felt that these examples of monetary and non-monetary incentives could be used as templates for further work.

109. A representative of academia suggested a CBD or Nagoya Protocol certification scheme could be established as an incentive for companies to share benefits under a GMBSM, especially for pre-CBD material.

110. An industry representative felt that the requirement to first consider the need for a GMBSM means that it is premature to discuss incentives for private or State contributions to such a mechanism.

(iii) How could capacity-building activities enhance capacity of Parties to handle transboundary situations or situations where no prior informed consent has been granted?

111. A Party representative indicated that capacity-building activities of a GMBSM would complement those provided for in bilateral ABS relations. Specific capacity-building activities that were suggested included the sharing of inventories and identification of genetic resources and associated traditional knowledge, supporting the transfer of specific technologies to support conservation and sustainable use of biodiversity, strengthening the pre-negotiation process and encouraging more participation by Parties.

112. Two representatives of Parties agreed that capacity-building to implement a GMBSM will be necessary but one of these Party representatives indicated that capacity-building would not otherwise contribute a great deal to countries' ability to handle these situations.

113. A Party representative suggested that capacity-building could improve the understanding among parties involved in transboundary situations and prevent disputes.

(iv) What is the status with regard to the Nagoya Protocol where the country has a law which covers pre-Convention collections?

114. Representatives of a number of Parties, of an intergovernmental organization and of academia indicated that the law should be reviewed in light of the international instruments ratified by the country in order to avoid inconsistencies and uncertainty. One Party representative noted, however, that a State can place higher standards of protection without violating the object and purpose of an international instrument.

I. Perspectives on other matters which should be considered

Need for a GMBSM & next steps

115. A number of interventions from a Party representative as well as representatives of industry pointed to the language of Article 10 first requiring consideration of the need for a GMBSM. A representative of industry felt that some of the suggestions in the online discussions had lacked important details in this regard, including the possible impact of a GMBSM on innovation.[20]

116. In determining the need for a GMBSM, a number of participants advocated first gaining experience with implementation of the bilateral approach of the Protocol, following which it would be easier to determine its effectiveness for achieving the goals of the CBD, to determine the advantages and disadvantages of the bilateral versus the multilateral approach, and to identify gaps, including those that could be better addressed through capacity-building.

117. Representatives of a number of Parties and of an NGO disagreed that the bilateral approach must be fully implemented before the need for a multilateral element can be agreed; rather, they were of the view that a GMBSM will facilitate implementation of the bilateral approach and will deliver the most value if it is created as soon as possible and implemented alongside the bilateral system as a complementary option. An ILC representative felt that it would be good to gain experience with and understanding of both the bilateral approach and a GMBSM.

118. Some Party representatives agreed that there is sufficient evidence of the need for a GMBSM as Article 10 already identifies the gaps: transboundary situations and situations where it is not possible to grant or obtain PIC, and that it is not possible to close these gaps at the national level or through bilateral arrangements. Party representatives indicated that there is a need for a GMBSM to allow providers to capture benefits from all users who derive private benefits from public goods. Furthermore, a Party representative indicated that there are also other gaps that could be addressed through a GMBSM while a representative of industry suggested that the need for a GMBSM could also consider other circumstances in which the application of ABS principles to access and utilization of genetic resources needs to be facilitated or to issues such as possible advantages or disadvantages of a multilateral over a bilateral approach.

119. A representative of an ILC emphasized that limiting benefit-sharing to only those situations where bilateral contracts may be negotiated could leave a significant gap in maintaining traditional knowledge and genetic resources, especially where there are problems in identifying traditional rights holders.

120. A Party representative expressed the understanding that Article 10 raises a number of questions: (i) whether an inability to grant or obtain PIC creates a situation of concern that must be addressed; (ii)

[20] See below for further discussion of the issue of opportunity costs.

whether a GMBSM is the most appropriate means of addressing such concerns; and (iii) if the answers to the first two questions is yes, then the modalities of the mechanism could be explored.

121. A Party representative stated that in considering the need for a GMBSM, its possible modality would be bound by the scope of the Protocol.

122. An NGO representative expressed the view that there is probably not consensus on the need for a GMBSM. A Party representative responded that global consensus is not necessary as Article 22 allows that if a significant number of developing countries express the need for a GMBSM then the other Parties are obliged to recognize and accommodate that need.

123. A number of participants supported a step-by-step approach to the introduction and implementation of a GMBSM including: beginning with areas where there is common ground, identifying necessary elements for the future such as solutions for specific organisms (e.g. microorganisms),[21] situations (e.g. *ex situ* collections) or regions, and keeping any entity dynamic and open to later changes based on experience gained from the initial functions.

124. While a representative of academia felt that a step-by-step approach should start from a clear definition of 'transboundary' and 'no PIC available', a Party representative did not feel that it was worthwhile to spend time discussing a definition of 'transboundary situation' and the rules for it; rather, he suggested that a GMBSM and the ABS Clearing-House could start working on concrete cases.

Opportunity costs

125. A representative of a non-Party as well as representatives of industry expressed concern that Parties could lose more than they gain from a GMBSM by creating uncertainty or increasing transaction costs that would dissuade research thus impeding conservation and sustainable use of biodiversity and hindering innovation. They pointed to gains such as higher yielding crops and new medicines that have resulted from access to genetic resources and expressed concern that similar benefits could be lost in the future if access to genetic resources is too restricted or uncertain.

126. A representative of an NGO disagreed that benefit-sharing requirements that may be imposed be a GMBSM would discourage research. He considered them to be analogous to intellectual property rights, a tool with a long history of use for encouraging research.

Triggers for a GMBSM

127. A representative of an NGO noted that if a GMBSM is to include mandatory elements then a first question is what the trigger points should be for when benefit-sharing shall take place. He did not find the situations provided for in the language of Article 10 to be very helpful in this regard while the triggers in the ITPGRFA are formulated in a manner that does not capture the bulk of situations where monetary benefits are created. He expressed the view, supported by an intergovernmental organization, that looking first at the triggers for a GMBSM increases the possibility of developing a GMBSM that creates incentives to follow national systems.

128. Representatives of two Parties agreed that a GMBSM would be triggered when private benefits are derived from the utilization and subsequent applications and commercialization of genetic resources and associated traditional knowledge, regardless of their origin, if they are not otherwise covered by PIC and MAT from a Party that is the country of origin of such resources or a Party that has acquired the

[21] See section IV for more discussion of microorganisms.

genetic resources in accordance with the CBD. A representative of a Party and a representative of an NGO agreed that these private benefits entail an obligation to contribute a fair and equitable share of those benefits to the conservation and sustainable use of this biodiversity.

State sovereignty

129. Representatives of a number of Parties as well as of industry, an NGO and an intergovernmental organization agreed that the interpretation of 'transboundary situation' should not undermine State sovereignty but States may exercise their sovereignty to develop a GMBSM.

130. Representatives of Parties also noted that it would be open for a State, in the exercise of its sovereign rights, to provide in mutually agreed terms for a contribution to a GMBSM. A Party representative and an industry representative expressed the view that as per Article 15(1) of the CBD, the application of a GMBSM is subject to the sovereign rights of the country providing the genetic resource so if that country elects to resolve the matter through national legislation or bilateral negotiations between users and providers, this would take precedence over any multilateral mechanism.

131. A representative of industry expressed the view that a country that does not prioritize implementation of an ABS framework is implicitly giving its consent for the use of the genetic resources in its jurisdiction without need for an explicit authorization or benefit-sharing. She thus felt that caution should be exercised in including this type of situation in any multilateral system as this could be seen to undermine state sovereignty.

132. Representatives of two NGOs agreed that the bilateral approach should not be conflated with sovereignty.

IV. OTHER CONSIDERATIONS AND PERSPECTIVES

'Bounded openness'

133. A representative of an NGO expressed the view that transboundary resources are the norm if genetic resources are understood as natural information. He outlined the concept of 'bounded openness' as an approach for governing genetic resources as natural information. As he described it:

(a) Access to genetic resources would be open, bounded only by disclosure requirements in patent applications;

(b) It only becomes worthwhile to determine the countries of origin of the genetic resources if the patent is commercially successful;

(c) The International Barcode of Life could facilitate this determination;

(d) There would be a fixed royalty rate and the proceeds would be distributed to countries according to their geographic share of the habitat of the genetic resource;

(e) Non-monetary benefits could remit to the country of origin that supplies the material which contains the natural information that is transboundary;

(f) For natural information that is ubiquitous, such as some microorganisms, the royalties would be remitted to the International Barcode of Life to assist in its work of determining species distribution;

(g) *Ex situ* collections would only have a claim when the natural information is absent *in situ*;

(h) The high seas and Antarctica would need to fall under the scope of this model otherwise the regime would create incentives to conduct bioprospecting in areas where no royalty is being levied.

134. He identified a number of advantages to this approach:

(a) It is more fair and equitable for all countries that have habitat of a species in their jurisdiction to share benefits arising from the use of the information in these species than for one country to appropriate all benefits as the first one to grant access;

(b) It avoids a race-to-the-bottom situation that results from Parties competing to grant access and thus better exercises the principle of State sovereignty as the approach is better aligned with States' interests;

(c) It would eliminate the costs of monitoring and tracking genetic resources and distinguishing between commercial and non-commercial research except at the point when monetary benefits arise;

(d) It would align incentives for conservation as a country of origin (among many countries of origin) would receive its fair and equitable share of royalty income proportional to the geographic area of habitat in its jurisdiction while an endemic species would allow royalties to be concentrated in just one country (a non-transboundary situation);

(e) A flat royalty rate would reduce transaction costs, facilitating research and development;

(f) It could include biomimicry, non-human culture and other expressions of natural information in its scope;

(g) It focuses on facilitating access and so does not require the development of complex ABS frameworks, just a simple permitting or other contractual mechanism to agree on non-monetary benefits;

(h) It overcomes or better addresses information asymmetries in bilateral negotiations for royalties.

135. He also identified some challenges:

(a) It would imply building a new institutional framework;

(b) It would require developing or building on existing databases of species distribution;

(c) It would need to bind all parties;

(d) It would need to recognize or establish the international certificate of origin, an agreed royalty rate, a monies distribution scheme and trigger points when patents start generating monetary benefits.

136. Other participants found a number of challenges with this approach:

(a) Party representatives and a representative of academia indicated that there is insufficient data to use databases such as the International Barcode of Life to determine species distribution;

(b) A Party representative expressed concerns about relying on the International Barcode of Life as many countries are not participating in the initiative and developed countries have more information in the International Barcode of Life databases which could result in poorer and smaller countries not receiving a fair and equitable share of royalty income;

(c) A Party representative stated that data in *ex situ* collections is not consistent, not always very extensive and frequently not digitized so not available in databases;

(d) A Party representative suggested that the percentage of a species' distribution that is being protected or exploited in each country should also be taken into account;

(e) An ILC representative noted that benefits based on intellectual property rights arise from a 'bioprospecting lottery' in which some products may be very profitable but many fail and the benefits are short-term as they will run for 20 years at best;

(f) A Party representative questioned whether it would be fair for one country, as a provider of the genetic resource, to have the benefits from commercialization of that resource dispersed among every country in which the resource is found;

(g) A representative of industry questioned whether countries would really simply agree to share whatever monetary benefits arise from the use of a resource, whether countries would share less if a genetic resource is widely dispersed or if the user would be required to pay more for a widely available resource, and whether a user would find itself criticized for not having shared enough and whether such negative publicity and legal uncertainty would lead the user to forgo the research, resulting in no product and no benefit-sharing;

(h) A representative of a non-Party expressed the view that a single flat royalty rate would not take into consideration different industry cost structures or market prices and could disrupt well-established practices for collaborative research. He remarked that the imposition of a flat rate – or the wrong flat rate – could determine which industries undertake research and development on genetic resources and which do not, which products they develop and which they do not;

(i) A representative of academia expressed the view that this model would not create incentives for cooperation and sharing of non-monetary benefits;

(j) A representative of academia wondered whether free access to *in situ* resources would create a risk that limitations are then imposed via export restrictions;

(k) A representative of academia noted that not all products based on the utilization of genetic resources or traditional knowledge are patented, which would require agreement on other triggers especially in light of difficulties in reaching agreement on disclosure of origin;

(l) Party representatives as well as a representative a non-Party and representatives of academia raised questions as to the feasibility and consistency of this model with the Protocol;

(m) An ILC representative explained that traditional knowledge is about the nexus between intangible knowledge and tangible resources so he did not support approaches that attempted to divide these two, undermining the integrity of the knowledge systems or biodiversity on which ILCs depend.

137. A Party representative explained how his country's experience with implementation of its ABS legislative regime had found that rather than a race to the bottom, users increasingly insisted on documented evidence of PIC and MAT to legally underpin their work. He noted that royalty rates have not been a significant factor in research decisions; rather, there is preference for a clear system with legal certainty. He emphasized that providers manage biodiversity, not information. He noted that there is often a powerful cultural and political attachment to these resources and so it is very disturbing for a provider when resources disappear from the country with no more heard of them, the researcher or the results of the research. In this light, he indicated that providers are not only interested in the money but also in ongoing involvement in what happens to the resources they manage and in how users go about their business. He agreed that it is important to facilitate non-commercial research but did not support the assumption that MAT necessarily involves high transaction costs. He explained that if a country chooses to standardize and simplify its terms, this creates a simple bilateral system that maintains the relationship between user and provider that is at the centre of the Protocol. He stated that one of the most significant non-monetary benefits for his country has been the increase in understanding of the country's biodiversity and its value in research from requiring PIC and MAT. He concluded by expressing the belief that if the Protocol is implemented in a practicable and workable way, it will create an irresistible incentive for researchers to obtain PIC and MAT.

GMBSM and academic, non-commercial research

138. Representatives of academia proposed a regime of free access and exchange of genetic resources for academic biodiversity research in order to facilitate research important for the conservation and sustainable use of biodiversity and to clarify and implement Article 8(a) of the Protocol. As proposed, the regime would include:

(a) Sharing of non-monetary benefits directly with providers;

(b) Sharing any monetary benefits through a GMBSM although mostly this would not be relevant in the context of academic research;

(c) Developing a standard material transfer agreement setting the conditions for free exchange including:

- No transfer for other uses;
- An obligation to negotiate a more comprehensive agreement should the purpose change to commercialization;
- Allowing the deposit of samples in *ex situ* collections and free flow of the resource within the academic community;
- An obligation to transfer data on the origin of the resource.

139. Advantages of this approach include that it would facilitate the transfer of material between institutions for research purposes without the need for PIC or MAT with every transfer and that a GMBSM could help countries to monitor for a change of intent.

140. Further aspects that could be considered could include: (i) sectoral approaches differentiating between, for example, *in situ* access leading to bilateral benefit-sharing and *ex situ* situations where benefits may be decoupled (drawing on relevant existing mechanisms of *ex situ* collections and discussions regarding Articles 19 and 20 of the Protocol); and (ii) defining specific research situations

that would fall under Article 10 such as basic biodiversity research, research on microorganisms,[22] research making use of multiple genetic resources where either information on the source is unavailable, it is impossible to obtain PIC for each sample, or many samples contribute to the outcome.

141. Other Party representatives expressed the understanding that Article 10 covers both monetary and non-monetary benefits, as can be seen from the reference in Article 10 to a 'mechanism' rather than a 'fund'. A Party representative as well as another representative of academia suggested that a GMBSM would still have a role to play in sharing non-monetary benefits from non-commercial research. The representative of academia suggested establishing an information sharing system that makes results more widely and easily accessible. He pointed to the information sharing system under Article 17 of the ITPGRFA as a possible source of lessons learned.

142. A Party representative suggested that it would be possible for academia to obtain PIC from the GMBSM.

143. A representative of an NGO raised the question of the distinction between academic and commercial research in light of the fact that universities now use patents to secure rights to their research and governments encourage publicly funded research to lead to commercialization.

Non-market based approaches

144. A Party representative noted her country's legal framework which requires it to prevent the mercantilization of genetic resources, illegal transfer of genetic material and participation of monopolies or oligopolies in the production and marketing of seeds and food. She explained that in this context, her country cannot participate in a GMBSM based in contracts and mercantilization processes and had instead proposed at COP-11 establishing a non-market based modality to a GMBSM. She presented three premises to serve as the basis for a GMBSM:

(a) Complementarity between States and people in the exchange of genetic resources based on solidarity, fellowship, social justice, creating edifying links and respect for the rights of Mother Earth;

(b) Access to genetic resources in exchange for solutions to the problems of developing countries that are fundamentally linked to poverty eradication, including problems of food and health, through such means as the technology transfer, financing and capacity-building;

(c) Complementarity between States and people under the exchange of genetic resources to solve mutual problems associated with technology transfer, financing and capacity-building.

Microorganisms & common pools of genetic resources

145. Party representatives felt that ABS for microorganisms or other generic genetic resources lends itself to a multilateral system based on predetermined values and the kinds of benefits to be shared dependent on end use. For microorganisms, a Party representative explained that:

(a) Collected samples of microorganism contain millions of cells of unknown species meaning that PIC and MAT become general and must try to anticipate end uses;

(b) Microorganisms are ubiquitous and thus better suited to a global common benefit approach;

[22] Micro-organisms are discussed in more detail below.

(c) There are few instances where access or use threatens *in situ* populations so conservation and sustainable use considerations are less relevant;

(d) Placing ABS for microorganisms in a GMBSM would avoid the problem of free riders where a company would seek to operate in a country providing open access. A GMBSM would require users of microorganisms to provide a share of any monetary benefits for use towards activities supporting the objectives of the CBD.

146. He suggested that there could be instances where genetic resources have restricted geographic distributions that would have different properties of different value but the onus would be on the user to demonstrate this. A Party representative disagreed with this approach as she felt there is a large variation among microorganisms, even microorganisms of the same species, from place to place. She did not see how a user could demonstrate that a microorganism has a restricted geographic distributions and she did not support including microorganisms in a GMBSM.

147. A non-Party representative suggested that the example of microbes illustrates the difficulty in taking a one-size-fits-all approach. He noted that poor information almost always results in inefficient or distorted markets and suggested that regulating or partially regulating such a market through a GMBSM would institutionalize such inefficiencies and distortions.

148. A representative of academia described four types of multilateral transnational common pools of genetic resources and traditional knowledge: grassroots pools or networks aimed at local services; basic research pools or networks encompassing collections of organisms and information; applied research pools or networks; and commercial development pools or networks. He suggested that, on the basis of Articles 4, 10 and 11, an international legal instrument could be designed that sets a framework for such pools and networks, helping them to develop further and respond to ABS requirements.

Annex

	Indicative questions	Additional questions
Round 1 *8-21 April 2013*	**What could be the 'transboundary situations' covered by Article 10 of the Nagoya Protocol that are within the scope of the Protocol?**	• Does the mere existence of the same species in more than one country constitute a transboundary situation? • Does 'transboundary situation' refer to access to genetic resources and associated traditional knowledge? • How could benefits derived from utilization of shared genetic resources or associated traditional knowledge be shared through a global mechanism?
	What could be the situations where it is not possible to grant or obtain prior informed consent?	• In those situations, what would be the role of national legislation or bilateral alternatives? • In which situations could genetic resources or associated traditional knowledge be accessed without prior informed consent and while not violating the obligations in the Nagoya Protocol? • Would the transfer of genetic resources or associated traditional knowledge to third parties be covered by the situations identified in the previous question? • How to make sure that a global multilateral benefit-sharing mechanism will only be used when there is no real possibility to obtain prior informed consent? • How would a global multilateral benefit-sharing mechanism address collections made (i) pre-Convention; (ii) post-Convention but pre-Nagoya Protocol; (iii) post-Nagoya Protocol? • How would a global multilateral benefit-sharing mechanism address new uses of pre-Convention collections and continuing uses of pre-Convention collections?
	How could a global multilateral benefit-sharing mechanism be used to support the conservation and sustainable use of biological diversity globally?	

Round 2 *22 April - 5 May 2013*	**How might the operation of a global multilateral benefit-sharing mechanism co-exist with the underlying principles, objective and scope upon which the Nagoya Protocol is based?**	• How to apply Art. 10 and 11 without causing harm to the principle of the sovereign right of states over their natural resources? • How to ensure that a global multilateral benefit-sharing mechanism does not represent a disincentive for implementation of the bilateral system of the Protocol?
	What could be the advantages and disadvantages of a global multilateral benefit-sharing mechanism?	• As a provider of genetic resources or associated traditional knowledge, what problems would a global multilateral benefit-sharing mechanism (a) create and (b) solve? • As a user of genetic resources or associated traditional knowledge, what problems would a global multilateral benefit-sharing mechanism (a) create and (b) solve? • If there is no global multilateral benefit-sharing mechanism, what problems would remain?
	What influence might other articles of the Nagoya Protocol have in the context of a global multilateral benefit-sharing mechanism?	
Round 3 *6-19 May 2013*	**Are there any existing international instruments or processes that could offer lessons learned for consideration in the context of a global multilateral benefit-sharing mechanism under the Nagoya Protocol?**	• Are there any existing international instruments or processes that could cover aspects that may be relevant to a global multilateral benefit-sharing mechanism under the Nagoya Protocol? • If other instruments or processes exist, should Article 10 of the Nagoya Protocol be prioritized over these instruments or processes?
	What other aspects of a global multilateral benefit-sharing mechanism should be considered?	• Is Article 10 of a compulsory or voluntary nature? • What incentives for the contribution of the private sector could be envisaged in the global multilateral benefit-sharing mechanism? • How could capacity-building activities enhance capacity of Parties to handle transboundary situations or situations where no prior informed consent has been granted? • What is the status with regard to the Nagoya Protocol where the country has a law which covers pre-Convention collections?
Round 4 *20-24 May 2013*	**Perspectives on other matters which should be considered**	
