**India’s submission in response to CBD Notification 2015-49 dated 5th May 2015 relating to Article 10 of Nagoya Protocol on ABS**

***Article 10. Global Multilateral Benefit-sharing Mechanism***

*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.*

Article 10 provides for Parties to consider the need for and the modalities of a global multilateral benefit sharing mechanism to address sharing of benefits from the utilization of genetic resources (GRs) or traditional knowledge (TK) associated with genetic resources that occur in transboundary situation in which it is not possible to grant or obtain PIC.  The benefits are to be used to support the conservation and sustainable use of biodiversity.

**I. Situations which may support the need for a global multilateral benefit sharing mechanism that are not covered under the bilateral approach**

Article 10 of the Nagoya protocol identifies two situations for the creation of a Global Multilateral Benefit Sharing Mechanism (GMBSM):

1. GRs and associated TK that occur in transboundary situations; or
2. GRs and TK for which it is not possible to grant or obtain PIC.

However, the mere occurrence of GRs and associated TK in transboundary situation does not support the need of a GMBSM. This is because Article 11 of the Protocol sets out provisions dealing with transboundary situations, where same genetic resources are found in-situ within the territory of more than one Party or where the same TK is shared by one or more ILCs in several Parties. Since such transboundary situations fall within the scope of Article 11, the need for GMBSM is not supported in such cases.

Certain situations where it is not possible to grant or obtain PIC that may support the need for GMBSM are given below.

1. Areas beyond national jurisdictions including the high seas, deep seabed and Antarctica may support the need for a GMBSM. Considering the jurisdictional scope of CBD, Article 4 of the Convention specifies that for each Contracting Party, the provisions of the Convention are applicable in respect of the components of biological diversity, in areas within the limits of its national jurisdiction; as well as in respect of processes and activities carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction. Article 5 of the Convention also specifies that Contracting Parties should cooperate with each other directly or through competent international organizations in respect of areas beyond national jurisdiction and on other matters of mutual interest for the conservation and sustainable use of biological diversity. Thus, it is clear that areas beyond national jurisdictions should also be considered for conservation and sustainable use of biological diversity as per the mandate of the CBD.
2. Another potential situation where it is not possible to grant or obtain PIC could be when GR or TK is accessed from ex-situ collection, which does not have any data on country of origin of GR/TK, provided all reasonable efforts are made to identify the country of origin.
3. A situation where GRs obtained from a country that has decided not to establish access requirements are utilised, may also call for a GMBSM to enable users to discharge their benefit sharing obligations.

**II. Possible modalities for a global multilateral benefit sharing mechanism as well as information regarding the implications of different scenarios on these modalities**

Once the need for a GMBSM is established, the modalities as well as implications of different scenarios on these modalities may be ascertained.

Some relevant issues relating to possible modalities that may then be considered keeping into consideration how GMBSM could contribute to conservation and sustainable use of biodiversity at the global level, include: existing benefit sharing mechanisms; nature of GMBSM; funding source; institutional arrangements; administration; administrative cost; decision making; monitoring of utilisation of funds etc.

**III. The areas requiring further consideration as identified in paragraph 23 of the report of the Expert Meeting on Article 10 of the Nagoya Protocol**

* + 1. **Whether or not there is a need for a GMBSM?**

There may be a need for a GMBSM, to deal with instances where the country of origin of the resource or TK is not known or identifiable even after reasonable efforts are made, irrespective of the fact that the resources or TK occur in transboundary situations or where it is impossible to grant or obtain PIC.The GMBSM if set up**,** therefore would have a very limited application.

May also see response to I above.

* + 1. **Whether there is sufficient experience with implementation of the Protocol to determine whether such a need exists?**

Implementation of Nagoya Protocol and learning from this experience is an ongoing process, which may go hand in hand with discussions on potential situations that may support the creation of a GMBSM, and the possible modalities for a GMBSM.

* + 1. **Whether the utilization of genetic resources without PIC would entail benefit sharing obligations that could be met through a GMBSM?**

Utilization of genetic resources without PIC would not always trigger benefit sharing obligations that could be discharged through a GMBSM. If genetic resources are utilized without obtaining PIC from a legal regime that mandates the same, benefit sharing through a GMBSM cannot operate since the activity becomes a violation of the legal requirement of the country from where the genetic resource is accessed. This has to be addressed by measures for non-compliance with ABS law of the concerned State and not through a GMBSM.

However, utilisation of GRs without PIC from a country that has decided not to establish PIC/access requirements, could entail benefit sharing obligations that could be met through GMBSM.

* + 1. **Whether a Party’s decision not to require PIC (e.g. under Article 6(1)) or to waive PIC (e.g. under Art.8) can constitute situations for which it is not possible to grant or obtain PIC in the context of Article 10?**

A Party’s decision not to require PIC or to waive PIC falls within the discretion allowed by the Protocol to Member States in this regard. The discretion operates in exercise of the sovereign rights of the country which decides that access need not be regulated through PIC. This decision of the Party therefore can be considered a situation where it is not possible to grant or obtain PIC in the context of Article 10, since this is a situation where it is indeed to grant or obtain PIC, but the Party chose to waive this requirement.

* + 1. **Whether benefit sharing requirements are waived when a Party has decided not to require PIC or has waived PIC?**

PIC and benefit sharing are two different requirements and the absence of one does not preclude the existence of the other. By waiving PIC, benefit sharing requirements are not waived off automatically, unless the Party waiving off the PIC may specifically provide for waiving off the benefit sharing obligation of the user in its ABS regime through MAT.

* + 1. **Whether there is no requirement for benefit sharing when mutually agreed terms are not required or have not been established?**

Article 5(1) of the Nagoya protocol makes fair and equitable sharing of benefits with the country of origin or country providing the genetic resource on mutually agreed terms a legal obligation in respect of utilization. So, there also cannot be a situation where no MAT are required. Not establishing MAT would be violation of provision in Article 5(1). Hence ab initio there cannot be a no benefit sharing requirement. The only situation when there may be a no requirement of benefit sharing is when this is agreed upon mutually and incorporated in the agreement/permit on MAT.

* + 1. **Whether the absence of ABS legislation or regulatory requirements in a Party due to lack of capacity or lack of governance means that PIC for access to genetic resources is not required and there is no obligation to share the benefits? In the context of Article 10, whether such instances would constitute situations for which it is not possible to grant or obtain PIC?**

Article 6(10) of the Nagoya Protocol provides that access to GRs shall be subject to PIC, which is subject to domestic ABS regulatory requirement. Hence, in the absence of ABS legislation or regulatory requirement, it may not be possible to have a PIC for access to GRs. However, there would still be an obligation to share the benefits on MAT as per Article 5(1).

These instances mentioned above would not constitute situations for which it is not possible to grant or obtain PIC in the context of Article 10. It is a situation where the grant of PIC is possible, but could not be achieved due to lack of capacity or governance.

* + 1. **Whether the absence of measures in a Party to implement Article 7 means that PIC for access to traditional knowledge associated with genetic resources is not required and there is no obligation to share benefits? In the context of Article 10, whether such instances would constitute situations for which it is not possible to grant or obtain PIC?**

Same as in response to 7 above.

* + 1. **Whether genetic resource that is found in more than one Party constitutes a transboundary situation in the language of Article 10 (even if it is possible to identify the source of genetic resource) or whether the bilateral approach should be applied if a genetic resource is found in more than one Party and it is possible to identify the source of the genetic resource? In the latter case, whether the bilateral approach or a GMBSM could be fair and equitable?**

Article 10 on GMBSM has to be read with Article 11 on transboundary cooperation.

If it is possible to identify the source of GR that is found in more than one Party, this would not constitute a transboundary situation in the language of Article 10. Under such a situation, the bilateral situation should be applied, and not GMBSM, for fair and equitable sharing of benefits.

* + 1. **Whether traditional knowledge associated with a genetic resources that is found in more than one Party constitutes a transboundary situation in the language of Article 10 (even if it is possible to identify the source of genetic resource) or whether the bilateral approach should be applied if TK associated with a genetic resource is found in more than one Party and it is possible to identify the source of the genetic resource? In the latter case, whether the bilateral approach or a GMBSM could be fair and equitable?**

Same as in response to 9 above.

* + 1. **Whether Article 11 is sufficient to respond to transboundary situations?**

Article 11 is sufficient to respond to those transboundary situations, where the countries of origin are identifiable. However, such transboundary situations in which countries of origin cannot be identified after making reasonable efforts, Article 11 would be inadequate, and would support GMBSM.

* + 1. **Whether a GMBSM should address the sharing of benefits arising from the utilization of**
       1. **Genetic resources in ex-situ collections in relation to transboundary situations or for which it is not possible to grant or obtain PIC?**

GMBSM could address sharing of benefits arising from utilisation of GRs in situations where it is not possible to identify countries of origin even after reasonable efforts are made. The important consideration in applying GMBSM has to be when is not possible to identify country of origin.

* + - 1. **Genetic resources in ex-situ collections used for the purposes for which PIC was not granted and for which it is not possible to grant or obtain PIC?**

Same as in response to (i) above.

* + - 1. **Genetic resources in areas beyond national jurisdiction or whether this issue falls within the competence of UN General Assembly?**

As has been explained in response to I above, Articles 4 and 5 of the CBD allow for scope under the Nagoya protocol to address the benefit sharing issues from GRs in areas beyond national jurisdiction. The current discussions under the aegis of UN General Assembly relate to conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, and do not seem to cover benefit sharing arising from the utilisation of resources from such areas. Hence, GMBSM could address benefit sharing in such situation. The GMBSM could be structured in a way to harmonise its operation under such situation with the UNGA efforts for conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

* + - 1. **Genetic resources in the Antarctic Treaty area?**

In the situation of utilisation of GRs in the Antarctic Treaty area also, GMBSM could address sharing of benefits.

* + - 1. **Traditional knowledge associated with genetic resources that is publicly available and where the holders of such knowledge cannot be identified or for which it is not possible to grant or obtain PIC?**

In the situation of utilisation of publicly available TK associated with GRs, GMBSM cannot be applied even, if holders of such knowledge cannot be identified, since the country/countries of origin of the publicly available TK are known. GMBSM can be applied only if after reasonable efforts, the country of origin of publicly available TK cannot be ascertained.

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