ROYAL NORWEGIAN MINISTRY OF
CLIMATE AND ENVIRONMENT

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Notification 2015-049- Submission of views from Norway in preparation for the Expert Meeting on the need for and modalities of a global multilateral benefit-sharing mechanism

Reference is made to the letter from the Secreteriat 05.May 2015. We are thankful for the opportunity to comment on these issues. We concentrate our comments on iii "The areas requiring further consideration". We would also like to point out
FNI Report 10/2011 from the reflection meeting on the Global Multilateral Benefit Sharing Mechanism (GMBSM), held 24-25 March 2011 at Lysaker, Norway. ABS negotiators from different continents and representatives from different professional sectors discussed ways in which Article 10 of the Nagoya Protocol can be elaborated and implemented.

Brief summary of the meeting:
"At the reflection meeting the background for the mechanism was outlined as to capture ABS situations not already contributing to the conservation and sustainable use through contracts as is generally assumed. Several possible needs for a mechanism were explored; each of these would probably require separate discussions of their corresponding modalities if the rationale were identified and agreed upon by parties at the second ICNP or later. Overall questions raised were whether contributions should be voluntary or mandatory; whether benefits would be shared from private and/or public sectors; and whether they should be financial and/or non-financial. The main questions regarding the recipient-side discussed were: For what purpose

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monetary benefits shared through the mechanism may be used; who will select beneficiaries (governance of the mechanism)", see abstract.
http://www.fni.no/doc&pdf/FNI-R1011.pdf

The report is still relevant.

(a) Whether or not there is a need for a GMBSM;

Exploring the potential modalities and the expected effects of such a mechanism is key. At this stage we find it important to build trust through a process that can broaden the understanding and the knowledge base for a potential GMBSM. Such a process must respect the bilateral nature of the Nagoya Protocol. A GMBSM would have to be an additional tool, complementary to bilateral ABS. In the process it is also important to learn from experiences with other Global Mechanisms for instance the Funding Strategy of the FAO International Treaty for Plant Genetic Resources for Food and Agriculture.

(b) Whether there is sufficient experience with implementation of the Protocol to determine whether such a need exists;

This is an important question to ask but should not be decisive for the assessment whether there is a need for a GMBSM or not. Central is whether the bilateral nature of the Protocol will be effective across borders or where it is not possible to grant or obtain prior informed consent. It is important to promote clear rules and procedures and flexibility for art 10 situations.

(c) Whether the utilization of genetic resources without PIC would entail benefit-sharing obligations that could be met through a GMBSM;

In which circumstances is it not possible to grant or obtain PIC in the context of article 10? This can inter alia where genetic resources are accessed before the CBD and the Nagoya Protocol entered into force and where the resources are kept in ex situ collections, botanical gardens etc.

(d) Whether a Party's decision not to require PIC (e.g. under Art. 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 decision not to require prior informed consent cannot be regarded as a situation where it is not possible to obtain prior informed consent. Such an interpretation would come in conflict with the principle of state sovereignty. It is important to bear in mind that states are at liberty to decide that access and utilisation of genetic resources should not require prior informed consent. However in such instances it is in line with the Protocol to accept voluntary contributions to a GMBSM.

(e) Whether benefit-sharing requirements are waived when a Party has decided not to require PIC or has waived PIC;

Whether benefit-sharing requirements are waived when a Party has decided not to require PIC or has waived PIC cannot be answered in general terms but depends on the legal system of the Party in question.

(f) Whether there is no requirement for benefit-sharing when mutually agreed terms are not required or have not been established;

Mutually agreed terms can follow from a contractual agreement or from the law itself. If this is not the case the question is whether sharing of benefits should happen via GMBSM. The answer must depend on the circumstances following the establishment of mutually agreed terms. In such a case a duty to benefit-sharing via a Global Multilateral Benefit-Sharing Mechanism(GMBSM) could undermine the bilateral nature of the Protocol. If there are objective reasons for the absence of mutually agreed terms, for example that it has been impossible to reach the rightsholder or the State has not determined whether access should be subject to prior informed consent or not, benefit-sharing via GMBSM is more relevant.

(g) 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 benefits. In the context of Article 10, whether such instances would constitute situations for which it is not possible to grant or obtain PIC;

The core question here is whether access should be postponed until conditions for the establisment of prior informed consent and mutually agreed terms are improved. It is important to note that the absence of a framework for access to traditional knowledge associated with genetic resources does not necessarily mean that prior informed consent and benefit-sharing is not obligatory. This will depend on the legal system of the Parties. In Norway prior informed consent and benefit-sharing is subject to regulations being developed by the Government. If benefit-sharing via GMBSM should be relevant in such cases it has to be fairly clear that it has been impossible to determine the question of prior informed consent. However: We would also like to point out that some Parties might want to establish a link in their national legislations to a global GMBSM.

(h) 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;

The absence of measures does not necessarily mean that prior informed consent and benefit-sharing is not obligatory. It is hard to see how article 10 measures could serve the same function as rules that protects indigenous peoples and local communities at a national level. More work is needed to explore how these situations can be solved in order to protect the rights and traditional knowledge of indigenous peoples and local communities.

(i) Whether a 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 the 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;

Many genetic resources are found in two or more states. This is a common situation. We hold the view that the Party that has granted access also should be the country benefiting from the access. A genetic resource can also be accessed from a country that has decided that access is free with no rules on benefit sharing. A duty to share benefits via GMBSM must then be ruled out, but contributions to a *GMBSM* could be voluntary. This would be in line with the bilateral nature of the Protocol.

(j) Whether traditional knowledge associated with a 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 the genetic resource) or whether the bilateral approach should be applied if traditional knowledge 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;

The same traditional knowledge associated with genetic material can be found in two or more states. This is probable the case in the Nordic countries where the same indigenous peoples live in several states. The Norwegian Nature Diversity Act 61 A(courtesy translation)states that:
"Authorities shall facilitate respect and safeguarding of the interests of indigenous peoples and local communities when traditional knowledge associated with genetic material that is developed and preserved by indigenous and local communities is accessed and utilized.

The King may issue a regulation stipulating that access to and utilisation of traditional knowledge associated with genetic material requires prior informed consent from the indigenous peoples or local community, including rules on sanctions and remedies against misappropriation of such traditional knowledge associated with genetic resources. This could also be applied to traditional knowledge associated with genetic material that is developed, transferred and preserved by indigenous peoples and local communities in another state, provided that the national legislation of that state requires prior informed consent for access to or utilization of traditional knowledge associated with genetic material ".

Decisive for the question of benefit-sharing is if indigenous peoples and local communities have consented to the utilisation of their traditional knowledgde. In such cases there should be no use of a GMBSM. In the Norwegian context a demand for prior informed consent will only have relevance for actions in Norway and not in other Nordic countries even if the same traditional knowledge should exist there.

(k) Whether Article 11 is sufficient to respond to transboundary situations;
Article 11 is important and it clearly states that Parties are under duty to endevaour to cooperate, but it silent on how exactly this is to be carried out. A core question is how the

duty to cooperate should adhered to when states have different ABS-frameworks. It is clear that cooperation can benefit the purpose of the Protocol where countries have similar access requirements, However, if frameworks differ eg. one Party have free access and the other Party have access and benefit-sharing regulations, cooperation can be more difficult. In such cases art 11 can be interpreted to at least entail a duty to convey factual information on ongoing developments. There is, of course, also the possibility that states that share the same genetic resources enter into an agreement that is followed up in national legislation.

(l) *Whether a GMBSM should address the sharing of benefits arising from the utilization of:*

(i) *Genetic resources in ex situ collections in relation to transboundary situations or for which it is not possible to grant or obtain PIC;*

In which circumstances is it not possible to grant or obtain PIC in the context of article 10? This can inter alia be where genetic resources are accessed before the CBD and the Nagoya Protocol entered into force and where the resources are kept in ex situ collections, botanical gardens etc. However: How ex-situ collections should be regarded in terms of benefit-sharing must from the outset depend on the ABS-framework of the Party in question. Some national frameworks, like the Norwegian Nature Diversity Act, has provisions for genetic material in public collections and the King can make regulations on access and benefit-sharing: "Genetic material from public collections shall be managed or utilised to the greatest possible benefit of the environment and human beings in both a national and an international context, also attaching importance to appropriate measures for sharing the benefits arising out of the utilisation of genetic material and in such a way as to safeguard the interests of indigenous peoples and local communities".

(ii) *Genetic resources in ex situ collections used for purposes for which PIC was not granted and for which it is not possible to grant or obtain PIC;*

If a Party or a rightsholder has chosen not to grant access to the applicant it should not be possible to make use of GMBSM. In such cases use of the resources might be unlawful.

(iii) Genetic resources in areas beyond national jurisdiction or whether this issue falls within the competence of the United Nations General Assembly;

Article 4 of the Nagoya Protocol determines the relationships with other international agreements and instruments. It states among other things that “The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreements including other spezialised access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol". In effect the Protocol foresees the need for more specialised instruments of access and benefit-sharing.

The United Nations General Assembly has decided to develop an international legally-binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of

marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology, see A/69/L.65, Sixty-ninth session**,** Agenda item 74 (a), Oceans and the law of the sea. In the terms of the Nagoya Protocol the international legally-binding instrument under the United Nations Convention on the Law of the Sea will constitute a specialised access and benefit agreement. In effect The Nagoya Protocol hereunder article 10 will then not apply to the coming agreement under the United Nations Convention on the Law of the Sea provided that it is consistent with and does not run counter to the objectives of the Convention on Biological Diversity and the Nagoya Protocol.

The negotiations can provide useful input to the article 10 process under the Nagoya Protocol and vice-versa.

(iv) Genetic resources in the Antarctic Treaty area;
The Antarctic Treaty is the appropriate framework for managing the collection of biological material in the Antarctic Treaty area and for considering its use. We refer to ATCM-resolutions 9(2009) and 6(2013) where Parties to the Antartic Treaty agree on that questions about access and utilisation of genetic resources should be handled within the Antarctic Treaty System(ATS).

(v) *Traditional knowledge associated with genetic resources that is publicly available and where the holders of such traditional knowledge cannot be identified or for which it is not possible to grant or obtain PIC.*
Norway is in the process of making regulations on traditional knowledgde associated with genetic material. If the knowledge has been publicly available for a reasonable period of time access should be free. However, it does seem fair and in line with the objective of the Protocol that GMBSM could be open for voluntary contributions, even where the knowledge is publicly available.

Yours sincerely,

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