



## Convention on Biological Diversity

Distr.  
GENERAL

UNEP/CBD/ABS/A10/EM/2016/1/4  
3 February 2016

ENGLISH ONLY

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### EXPERT GROUP MEETING ON ARTICLE 10 OF THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

Montreal, 1-3 February 2016  
Item 6 of the provisional agenda\*

### REPORT OF THE EXPERT GROUP MEETING ON ARTICLE 10 OF THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

#### INTRODUCTION

##### A. Background

1. In decision NP-1/4, the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization invited Parties, other Governments, international organizations, indigenous and local communities, and relevant stakeholders, to submit to the Executive Secretary views on: (a) situations which may support the need for a global multilateral benefit-sharing mechanism that are not covered under the bilateral approach; (b) possible modalities for a global multilateral benefit-sharing mechanism as well as information regarding the implications of different scenarios on these modalities; and (c) the areas requiring further consideration, as identified in paragraph 23 of the report of the 2013 Expert Meeting on Article 10 of the Nagoya Protocol (UNEP/CBD/ICNP/3/5). Views could also include, where available, reflections on any experiences gained working towards the implementation of the Protocol.

2. The decision also requested the Executive Secretary to: (a) prepare a synthesis of the views submitted; (b) to commission a study on (i) the experiences gained with the development and implementation of the Nagoya Protocol and other multilateral mechanisms; and (ii) the potential relevance of ongoing work undertaken by other processes, including case studies in relation to ex situ and in situ genetic resources, traditional knowledge associated with genetic resources, and transboundary situations; and (c) to convene a meeting of a regionally balanced expert group to review the synthesis of views and the commissioned study with a view to reaching a common understanding on the areas requiring further examination as identified in paragraph 23 of the report of the 2013 expert meeting.

3. The expert group meeting is to submit the outcomes of its work for consideration by the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol at its second meeting.

4. With financial support from the Governments of Norway and Belgium, the Expert Group Meeting on Article 10 of the Nagoya Protocol was held at the offices of the Secretariat of the Convention on Biological Diversity from 1 to 3 February 2016.

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\* UNEP/CBD/ABS/A10/EM/2016/1/1.

## **B. Attendance**

5. By notification 2015-111 (ref. No. SCBD/ABS/VN/KG/jh/85065) of 25 September 2015, Parties to the Nagoya Protocol were invited to nominate an expert to be considered for the meeting. Other Governments, indigenous and local communities and relevant organizations were also invited to nominate an expert who would participate as an observer in the meeting. The Secretariat received a total of 26 nominations from Parties and 26 nominations from other Governments, indigenous and local communities and relevant organizations. The experts and observers were selected on the basis of their expertise and experience and the need to ensure equitable geographical distribution and gender balance. The selection of experts and observers was reviewed by the Bureau of the Conference of the Parties.

6. The meeting was attended by experts nominated by Belarus, Cambodia, Cuba, the European Union, Hungary, Indonesia, Mexico, Norway, Peru, South Africa, Switzerland and Uganda. The experts from India and Rwanda, who had been selected and invited, were unable to attend the meeting.

7. Experts from the following other Governments and organizations participated in the meeting as observers: Japan; Asia Indigenous Peoples Pacts and Tebtebba; Tulalip Natural Resources; United Nations Division for Ocean Affairs and the Law of the Sea; World Health Organization; and International Chamber of Commerce. The experts from Costa Rica, the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Peruvian Society for Environmental Law, who had been selected and invited, were unable to attend the meeting.

### **ITEM 1. OPENING OF THE MEETING**

8. The meeting was opened at 9:30 a.m. on Monday, 1 February 2016 by the Executive Secretary of the Convention.

9. The Executive Secretary welcomed the experts to the Secretariat and thanked the Governments of Norway and Belgium for providing financial support to convene the meeting. He recalled that the Nagoya Protocol had entered into force just over one year before, on 12 October 2014. He noted that the Protocol had now received 70 ratifications and that 100 ratifications were expected by the second meeting of the Parties, in December 2016. He highlighted capacity-building efforts being undertaken by the Secretariat in collaboration with partners to assist Parties in developing national access and benefit-sharing (ABS) frameworks to implement the Protocol. He also emphasized the need to make progress on Article 10 and urged the participants to use the meeting as an opportunity to seek creative solutions.

### **ITEM 2. ORGANIZATIONAL MATTERS**

10. The participants elected Ms. Elzbieta Martyniuk chair of the meeting.

11. The group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/ABS/A10/EM/2016/1/1) prepared by the Secretariat:

1. Opening of the meeting.
2. Organizational matters.
3. Review of the commissioned study and the synthesis of views.
4. Conclusions and possible next steps.
5. Other matters.
6. Adoption of the report.
7. Closure of the meeting.

12. The meeting agreed on the organization of its work in annex I to the annotated provisional agenda (UNEP/CBD/ABS/A10/EM/2016/1/1/Add.1).

**ITEM 3. REVIEW OF THE COMMISSIONED STUDY AND THE SYNTHESIS OF VIEWS****A. Review of commissioned study**

13. Under this agenda item, the group first took up the document entitled “Study on experiences gained with the development and implementation of the Nagoya Protocol and other multilateral mechanisms and the potential relevance of ongoing work undertaken by other processes, including case studies” (UNEP/CBD/ABS/A10/EM/2016/1/2). The meeting heard a presentation by Ms. Elisa Morgera, Professor of Global Environmental Law at the University of Edinburgh, School of Law, who had conducted the study requested by decision NP-1/10.

14. Ms. Morgera described how some experience had been gained in the development and implementation of the Nagoya Protocol at the national and regional levels, particularly with regard to regional approaches to “transboundary situations”. She noted that the academic literature had emphasized the opportunity for non-monetary benefit-sharing as well as opportunities for voluntary contributions by different stakeholders. The selected case studies also provided evidence of stakeholders’ voluntary initiatives that could contribute to or complement multilateral benefit-sharing.

15. Ms. Morgera explained that existing multilateral mechanisms were characterized by relatively specialized ambits of application and relied on standard contractual clauses, although the degree to which these clauses were open to negotiations varied from one framework to another. She identified a trend with regard to non-monetary benefit-sharing preceding monetary benefit-sharing, with some evidence indicating that more institutionalized multilateral approaches to facilitate and broker information-sharing, scientific cooperation and capacity-building as non-monetary benefit-sharing were emerging. On the other hand, she suggested that there was no clear trend in providing international guidance on how to realize fairness and equity vis-a-vis beneficiaries, although the Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits (PIP Framework) of the World Health Organization (WHO) had provided a benchmark to that end and the International Seabed Authority was moving towards a more need-based approach to sharing non-monetary benefits and was expected to develop equitable criteria for monetary benefit-sharing. In addition, no clear trend could be identified in ensuring the financial viability of multilateral benefit-sharing mechanisms, although WHO had put in place a system of mandatory contributions and ITPGRFA was considering the development of a subscription system. Finally, she suggested that there appeared to be very little experience with regard to traditional knowledge in the context of existing multilateral benefit-sharing mechanisms, although ongoing work in different international processes might provide an opportunity to clarify its role and appropriate approaches.

16. Following the presentation by Ms. Morgera and some questions from the participants, the Chair invited the representatives of intergovernmental organizations to provide information on relevant ongoing work in their respective forums.

17. The representative of the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, provided information on the work 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, which she noted had concluded in 2015 with the adoption by the United Nations General Assembly of resolution 69/292 of 19 June 2015, in which the Assembly had decided to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. She described the process established in the resolution, which foresaw several meetings of a preparatory committee mandated to make substantive recommendations to the General Assembly on the elements of a draft text of such an instrument. She noted that marine genetic resources, including questions on the sharing of benefits, was among the issues to be considered by the preparatory committee, which was to start its work in 2016 and report to the General Assembly on its progress by the end of 2017. She also indicated that the General Assembly was to take a decision, before the end of its seventy-second session, that is by mid-September 2018, on the convening and on the starting date of an

intergovernmental conference to consider the recommendations of the preparatory committee and to elaborate the text of the instrument.

18. The representative of the World Health Organization informed the group of two ongoing processes that might be relevant. First, he noted that work was commencing on the review of the PIP Framework as mandated in the Framework itself. The review was to be undertaken in 2016, with a report to be presented to the World Health Assembly in 2017. The scope of the work included examining issues of access, benefit-sharing and linkages, and consideration of linkages would include linkages with the Nagoya Protocol. Secondly, he noted that the Executive Board of WHO had requested the Secretariat to analyse how the implementation of the Nagoya Protocol might affect the sharing of pathogens and the potential public health implications. He indicated that the Secretariat would submit a report on that work to the Executive Board in January 2017.

19. The experts welcomed the commissioned study and recognized that it provided a good overview of a number of relevant areas; however, they noted that it was not exhaustive, and they identified other processes that could have been included, such as the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO IGC) and the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. They also noted that the multilateral mechanisms considered in the study deal with specific subject areas and suggested that synergies should be enhanced. The question of the financial viability of multilateral mechanisms and their ability to generate benefits was also raised.

## **B. Review of synthesis of views**

20. The meeting next took up consideration of the document entitled “Synthesis of views pursuant to decision NP-1/10” (UNEP/CBD/ABS/A10/EM/2016/1/3). In the context of examining areas of possible common understanding, the experts recalled paragraph 21 of the report of the 2013 expert meeting on Article 10 and reaffirmed their common understanding on the points in that paragraph. They recalled the sovereign right of States over their genetic resources and, as a result, highlighted the importance of respecting the bilateral approach to ABS that was set out in the Nagoya Protocol. They agreed that, accordingly, the bilateral approach to ABS was to be followed wherever possible and any potential global multilateral benefit-sharing mechanism would have a narrow application.

21. With a view to fulfilling their mandate and pursuant to discussions on how to make further progress, the expert group first agreed to identify situations in which it might not be possible to grant or obtain prior informed consent (PIC) for access to genetic resources or associated traditional knowledge and, for each of those situations, to consider whether they would support exploring the establishment of a global multilateral benefit-sharing mechanism or whether the issue could be addressed through other means. Secondly, they agreed to consider the need for a global multilateral benefit-sharing mechanism for genetic resources and associated traditional knowledge that occur in transboundary situations.

### *1. Situations in which it may not be possible to grant or obtain PIC*

#### *(a) Genetic resources in ex situ collections for which it may not be possible to grant or obtain PIC*

22. When considering the issue, the experts first exchanged experiences of situations in which material was held in ex situ collections.

23. They noted that many collections had developed codes of conduct and best practices related to ABS. It was also pointed out that measures to implement the Protocol had been and could be developed in such a way as to discourage the use of genetic resources for which information on PIC and mutually agreed terms (MAT) was unavailable. It was highlighted that, in many situations where ex situ collections were unable to identify the source of their material, users were unwilling to use this material because it did not provide legal certainty and collections were unwilling to share it. One expert stated that some ex situ collections, in the spirit of the Nagoya Protocol, redirected users to the provider country to negotiate PIC and MAT, and some experts noted that that might provide a useful example.

24. During the discussions, the paucity of information with respect to the ABS practices of ex situ collections was highlighted. It was also pointed out that further information regarding the extent to which it was not possible to grant or obtain PIC for genetic resources found in ex situ collections would be useful.

25. The experts agreed that a study would be useful for providing background information on how ex situ collections operate with a view to building common understanding and informing further discussions in the context of Article 10. Such a study would also be useful for building trust between users and providers of genetic resources.

26. They suggested that the study could examine ABS practices and experiences in different ex situ collections (e.g. national and international, public and private), located in different regions and for various types of genetic resources (e.g. plant, animal, microorganisms). Such issues as access, transfer, exchange, utilization and benefit-sharing of genetic resources could be explored. The study could also examine the demand for genetic resources held by ex situ collections for which it might not be possible to grant or obtain PIC.

*(b) Situations in which a Party has not yet developed its procedures and/or it lacks the capacity to grant prior informed consent*

29. In such situations, the experts recognized that, rather than a global multilateral benefit-sharing mechanism (GMBSM), there was a need for capacity-building to support the establishment of national ABS frameworks and strengthen human resources and institutional capacities for effective implementation in line with Article 22 of the Protocol.

30. In addition, one expert mentioned that ABS measures could encourage the sharing of benefits with the provider country even in the absence of a legal requirement.

*(c) Situations in which a Party has decided not to require PIC*

31. It was agreed that the decision by a Party not to require PIC for access to its genetic resources would not call for the establishment of a GMBSM as this would be contrary to the sovereign rights of the Party.

*(d) Situations in which it is not possible to grant or obtain PIC for traditional knowledge associated with genetic resources*

31. The experts discussed a number of situations in which it might not be possible to grant or obtain PIC for traditional knowledge associated with genetic resources. Those situations might include: (a) a lack of capacity to grant PIC; (b) where it was not clear who had the authority to grant PIC; and (c) when community protocols included procedures for access although no national PIC requirement had been established. They felt that such situations did not call for a GMBSM but, rather, could be addressed through capacity-building with a view to supporting the participation of indigenous and local communities in ABS processes and enhancing collaboration between indigenous and local communities for shared genetic resources and associated traditional knowledge. They also noted that the work undertaken in the context of Article 8(j) of the Convention might be useful in that regard.

*(e) Situations in which it is not possible to grant or obtain PIC for publically available traditional knowledge associated with genetic resources*

32. The group noted that discussions taking place in other forums, such as WIPO IGC, including those on publically available traditional knowledge, could inform discussions on Article 10 and the Nagoya Protocol more generally.

2. *Genetic resources or associated traditional knowledge that occur in transboundary situations*

33. The experts concluded that Article 11 was sufficient to address genetic resources found in situ in more than one Party and traditional knowledge associated with genetic resources when it was shared by one or more indigenous and local communities in several Parties. They noted that, while experience with

Article 11 was limited, information in the submissions and the study indicated that transboundary situations had been addressed through regional approaches.

34. In that context, challenges related to the issue of migratory species were raised, and some experts expressed the view that the location where genetic resources were accessed would determine the ABS requirements to be followed. Furthermore, cooperation in those cases should be encouraged.

35. They also noted the relevance of the United Nations Convention on the Law of the Sea and other relevant international instruments as well as ongoing work in that area under other processes.

### **C. Other issues**

36. In their consideration of the synthesis and the study, the experts discussed a number of other issues. They noted the reference to databases of genetic sequence data in some submissions; however, they recognized that it was beyond the mandate of the group to discuss that issue.

37. Some experts expressed the need to address the loss of traditional knowledge associated with genetic resources, while noting that that might go beyond Article 10.

38. In the absence of legal obligations to share benefits, the experts discussed the potential benefits and risks of voluntary benefit-sharing with the provider country or through a GMBSM, if it were to be established.

### **D. Paragraph 23 of the report of the 2013 expert meeting**

39. Following the discussions, the group reviewed the areas for further examination identified in paragraph 23 of the report of the 2013 expert meeting to ensure that they had covered the different points raised in that paragraph. The experts agreed that it was still premature to determine whether or not there was a need for a GMBSM. It was noted that further experience was needed from Parties, indigenous and local communities and stakeholders with implementation of the Nagoya Protocol in order to develop the necessary knowledge base to determine whether such a need existed. In particular, it was noted that experience with implementation of the provisions of the Protocol related to traditional knowledge associated with genetic resources was lacking.

40. It was recognized that other processes were addressing genetic resources in areas beyond national jurisdiction, including questions on the sharing of benefits, as well as ABS-related issues in the Antarctic Treaty area.

## **ITEM 4. CONCLUSIONS AND POSSIBLE NEXT STEPS**

41. The expert group reached a number of conclusions and possible next steps for consideration by COP-MOP at its second meeting, as follows:

(a) To recall the sovereign right of States over their genetic resources and accordingly, that the bilateral approach to ABS should be followed wherever possible and any potential global multilateral benefit-sharing mechanism would have a narrow application;

(b) To note that there is insufficient information and experience to determine whether or not there is a need for a global multilateral benefit-sharing mechanism and that further experience is needed with implementation of the Nagoya Protocol;

(c) To welcome relevant developments under other international processes and organizations, such as the United Nations General Assembly, the International Treaty on Plant Genetic Resources for Food and Agriculture, the Commission on Genetic Resources for Food and Agriculture, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the World Health Organization and the Antarctic Treaty System;

(d) To request the Executive Secretary to make information available on developments in relevant international processes and organizations with a view to informing future discussions on Article 10;

(e) To request the Executive Secretary to synthesize information provided through the interim national reports and the Access and Benefit-sharing Clearing-House of relevance to Article 10;

(f) To recognize that there is limited information available on implementation of the provisions of the Protocol related to traditional knowledge associated with genetic resources and to invite Parties to pay particular attention to providing such information when preparing and submitting their interim national reports;

(g) To remind Parties of their obligation to make available to the Access and Benefit-sharing Clearing-House all mandatory information in accordance with the Nagoya Protocol;

(h) To request the Executive Secretary to commission a study on ABS practices and experiences in different ex situ collections (e.g. national and international, public and private), located in different regions and for various types of genetic resources (e.g. plant, animal, microorganisms). The study could also examine the demand for genetic resources held by ex situ collections for which it may not be possible to grant or obtain PIC;

(i) To recognize that many situations in which it is not possible to grant or obtain prior informed consent may be addressed through capacity-building for Parties and indigenous and local communities and to highlight the need for continued support in line with the Strategic Framework for Capacity-Building and Development to Support the Effective Implementation of the Nagoya Protocol on Access and Benefit-Sharing.

#### **ITEM 5. OTHER MATTERS**

42. The chair invited the experts to raise any other matter related to Article 10 of the Nagoya Protocol. No other matters were raised.

#### **ITEM 6. ADOPTION OF THE REPORT**

43. The chair introduced the draft report of the expert group, which was adopted as orally amended.

#### **ITEM 7. CLOSURE OF THE MEETING**

44. Participants expressed their appreciation to the Governments of Norway and Belgium for providing financial support for the meeting.

45. Following the customary exchange of courtesies, the meeting was closed at 6:15 pm on Wednesday, 3 February 2016.

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