



**Convention on
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OPEN-ENDED AD HOC INTERGOVERNMENTAL
COMMITTEE FOR THE NAGOYA PROTOCOL ON
ACCESS TO GENETIC RESOURCES AND THE
FAIR AND EQUITABLE SHARING OF BENEFITS
ARISING FROM THEIR UTILIZATION

Second meeting

New Delhi, 2-6 July 2012

Item 3.6 of the provisional agenda*

**SYNTHESIS OF VIEWS WITH RESPECT TO THE NEED FOR AND MODALITIES OF A
GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM (ARTICLE 10)**

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 to the Convention on Biological Diversity states that “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. At its tenth meeting, the Conference of the Parties mandated the Intergovernmental Committee for the Nagoya Protocol (the Intergovernmental Committee) to consider, at its second meeting, the need for and modalities of a global multilateral benefit-sharing mechanism (GMBSM) pursuant to Article 10 of the Nagoya Protocol (decision X/1, annex II, section B, item 10).

3. This document has been prepared by the Executive Secretary to assist the Intergovernmental Committee in fulfilling its mandate.

4. In preparation for this meeting, Parties, other Governments, international organizations, indigenous and local communities and relevant stakeholders were invited to provide by 1 November 2011 views and/or relevant information to the Executive Secretary on Article 10 of the Nagoya Protocol for the consideration of the Intergovernmental Committee.

5. In response to notification 2011-142 (SCBD/ABS/VN/SG/77099) of 1 August 2011, and the reminder in notification 2011-206 (SCBD/ABS/VN/SG/77099) of 1 November 2011, as of 25 January 2012, the Executive Secretary had received submissions from the African Group, Canada, the European

* UNEP/CBD/ICNP/2/1/Rev.1.

Union, Mexico and the International Chamber of Commerce. All submissions were made available online at: <http://www.cbd.int/icnp2/submissions/>.

6. Section II of this note contains a synthesis of the views received on the need for a GMBSM. Section III synthesizes views on the modalities of a GMBSM. Section IV provides a synthesis of process-related views made in the submissions. Section V presents possible issues for consideration by the Intergovernmental Committee.

II. THE NEED FOR A GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM

7. Article 10 of the Protocol provides that Parties shall consider the need for a GMBSM. It further suggests two general situations to which a GMBSM could apply: (i) transboundary situations; and (ii) situations where it is not possible to grant or obtain prior informed consent.

8. All submissions presented views in relation to the need for a GMBSM.

9. One submission argued that the international regime on access and benefit-sharing should have a multilateral dimension in addition to the basic bilateral model based on prior informed consent (PIC) and mutually agreed terms (MATs). The international regime should have the widest possible scope, at least when it comes to benefit-sharing. The submission also suggested that establishing a GMBSM could have a number of advantages:

(a) *Advantages for Parties:*

- (i) Assisting Parties to discharge at least some of their obligations under Protocol Article 11 (Transboundary cooperation) at a reasonable transaction cost and without needing to deal with every instance on a case-by-case basis; and
- (ii) Assisting Parties to discharge their obligation under Protocol Article 9 (Contribution to conservation and sustainable use) to encourage providers and users to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components.

(b) *Advantages for users of genetic resources from ex situ collections:* Clarifying the legal status of the utilisation of genetic resources from *ex situ* collections.

(c) *Other advantages:*

- (i) A “user pays” GMBSM could potentially be one of the “innovative financial mechanisms” foreseen in the Strategic Plan for Biodiversity 2011-2020; and
- (ii) A GMBSM could contribute to achieving the objectives of the Convention, by ensuring that benefits derived from utilization occurring outside the usual bilateral ABS model contribute to the conservation of biological diversity and the sustainable use of its components.

10. One submission suggested focusing on identifying (a) which genetic resources and traditional knowledge could be covered by the potential GMBSM and (b) the implications for users and providers in order to reach a common understanding of the situations where a GMBSM might actually be of added value in the future. It further suggested that Articles 4 (Relationship with international agreements and instruments) and 11 (Transboundary cooperation) of the Protocol should be borne in mind when considering possible situations where there could be a need for a GMBSM.

11. Another submission suggested that, before the possible modalities of a GMBSM could be determined, a list of technical questions needed to be discussed:

(a) What will happen where a genetic resource is associated with the traditional knowledge of several communities?

(b) How will benefits be shared in the case of a resource shared within one country or among several countries?

(c) What action will be taken in cases where the domestication of a crop has taken place in a country other than the country of origin of the resource?

(d) What action will be taken in cases where the centre of diversity is located in a place other than the place of origin of the resource?

(e) What will happen where users are not authorized to utilize a resource *in situ*, but have access to *ex situ* collections?

(f) What will happen where there is no prior informed consent, but where the user can access the resource in another country or in *ex situ* collections?

(g) How will benefits be shared where users obtain the traditional knowledge from a published text, but obtain the resource from a land race (which may or may not be in a protected natural area)?

(h) How will monitoring be carried out for the genetic resources which are contemplated in Article 10 and with which no traditional knowledge is associated, but which may have an economic benefit?

(i) How will the use of domesticated varieties be handled?

12. Another submission, provided by a stakeholder, suggested that there was no need for a GMBSM considering that: (i) transboundary cooperation is already covered by Article 11 of the Protocol; and (ii) in cases of both *in situ* and *ex situ* collections, prior informed consent from a legitimate provider should always be possible for genetic resources and traditional knowledge associated with genetic resources that fall under the scope of the Protocol. The submission also noted that Article 4, paragraph 4, of the Protocol recognizes other international instruments like the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and that care must be taken that any mechanisms considered in relation to the Protocol's implementation in no way interfere with, or run counter to the ITPGRFA Multilateral System.

Situations where a Global Multilateral Benefit-sharing Mechanism could apply

13. Article 10 of the Protocol suggests two general situations to which a GMBSM could apply. Views submitted with respect to the need for a GMBSM addressed these situations: (i) transboundary situations; and (ii) situations where it is not possible to grant or obtain prior informed consent.

Transboundary situations

14. One submission made reference to the need to deal with genetic resources and associated traditional knowledge occurring in transboundary situations due to the arbitrariness of national borders established during colonial times.

15. Another submission suggested that one situation where the current bilateral approach may not apply, and which Parties may consider, is transboundary accessions for which the genetic resource is held by several Parties, but under the Nagoya Protocol access is only sought from one, and concurrently mutually agreed terms for benefit-sharing is only with the provider and not with other authorities with jurisdiction over the same genetic resource.

16. One other submission, provided by a stakeholder, noted that Article 11 of the Protocol (Transboundary cooperation) refers to *in situ* genetic resources in transboundary situations while Article 10 (GMBSM) does not specify whether it only covers *in situ* genetic resources or if *ex situ* genetic resources are also covered. It was also argued that the understanding of the term "transboundary situations", as used during the negotiations of the Protocol, would exclude the applicability of Article 10 to *ex situ* genetic resources, as the term addresses a territory which is unique with respect to its ecological

characteristics but extends over at least two neighbouring countries. The submission concluded that there is no need to address transboundary issues also under Article 10 by creating a GMBSM.

Situations where it is not possible to grant or obtain prior informed consent

17. One submission suggested that, even though there must be some form of access before there can be benefits, the obligation to share benefits is not dependent in every case on prior informed consent having been granted for such access.

18. Another submission, provided by a stakeholder, argued that a situation could not be foreseen, once the Protocol is ratified, where legally binding prior informed consent could not be granted in exchange for access in compliance with the Protocol.

19. The following situations where it is not possible to grant or obtain prior informed consent were raised in the views submitted:

(a) *Genetic resources accessed from locations outside national jurisdiction.* Three submissions raised this situation. Of these, one submission suggested that benefits arise from this situation even though no Party has the authority to grant prior informed consent. Another submission, provided by a stakeholder suggested that, according to Article 3 of the Protocol, the Protocol's provisions apply to genetic resources within the scope of Article 15 of the Convention. It further suggested that in light of Articles 3 and 4 of the Convention, Parties should not set-up rules on genetic resources which lie outside their jurisdictions via a GMBSM and that if such rules are to be set up it should happen via other specialized international instruments;

(b) *Genetic resources and/or associated traditional knowledge accessed before the Convention on Biological Diversity entered into force.* Two submissions raised this situation. One suggested that benefits arise from these situations. The other, provided by a stakeholder, suggested that setting up a benefit-sharing mechanism involving pre-Convention transfers implies that a GMBSM would provide for obligations retroactively and that the Convention on Biological Diversity does not provide for the retroactive implementation of access and benefit-sharing arrangements;

(c) *Genetic resources and/or associated traditional knowledge acquired prior to entry into force of the Protocol.* Two submissions raised this situation. Of these, one submission provided by a stakeholder suggested that setting up a benefit-sharing mechanism involving pre-Protocol transfers implies that a GMBSM would provide for obligations retroactively and that the Protocol does not provide for implementing ABS retroactively. The same submission referred to Article 28 of the Vienna Convention on the Law of Treaties,¹ which deals with the non-retroactivity of treaties unless a different intention appears in the treaty or is otherwise established, concluding that consideration of a mechanism that would provide for retroactive application of obligations would be inconsistent with the Protocol's scope;

(d) *Where the material is accessed from a country where there is no ABS legislative, administrative or policy measures in place.* Two situations emerged from the views submitted:

- (i) *Genetic resources accessed from the jurisdiction of a Party that has decided not to require PIC for access.* Two submissions raised this situation. One submission suggested benefits arise from these situations. The other submission, provided by a stakeholder, suggested that decisions by Parties to the Convention on Biological Diversity not to set up any ABS obligations for genetic resources under their sovereignty should be respected by other Parties, and that this discretionary power should not be undermined by a back-up benefit-sharing mechanism;
- (ii) *When the providing Party has not yet established the legislative, administrative or policy measures requiring PIC and MAT.* Two submissions raised this situation. One submission viewed the situation in terms of the providing Party's non-

¹ United Nations, *Treaty Series*, vol. 115, p. 331.

compliance with the obligations of the Protocol. The other, provided by a stakeholder, viewed the situation in terms of a country having not yet implemented the requirements of the Convention on Biological Diversity in national law, and the possibility that it might need assistance in setting up a national framework to ensure benefit-sharing. This submission expressed the view that assistance should be undertaken via capacity building measures and not via an international “back-up” mechanism;

(e) *Where the genetic resource and/or traditional knowledge associated with genetic resources was accessed without prior informed consent or mutually agreed terms and resides in an ex situ collection.* One submission, provided by a stakeholder, raised this situation. The view was expressed that national laws often address access and benefit-sharing for *ex situ* collections, and a GMBSM would only interfere with the principle of national sovereignty. It also suggested that in the case of plant genetic resources for food and agriculture a multilateral system already exists as provided by the ITPGRFA.

20. One submission suggested that when benefits arise from genetic resources utilized without prior informed consent being granted, such utilization would nevertheless be subject to the monitoring and compliance systems that Parties to the Nagoya Protocol are obliged to create.

III. MODALITIES OF A GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM (GMBSM)

21. Four of the submissions addressed the modalities of a GMBSM.

A. Existing benefit-sharing mechanisms

22. One submission suggested that existing benefit-sharing mechanisms should be considered when dealing with the modalities of a GMBSM. The submission noted that the mechanisms for benefit-sharing under the Nagoya Protocol and the ITPGRFA differ in that:

- (a) Benefit-sharing under the Nagoya Protocol is bilateral transactional in nature;
- (b) Benefit-sharing under the ITPGRFA is non-transactional. The ITPGRFA uses a “global multilateral mechanism” including a fund; and
- (c) Benefits under the ITPGRFA are directed toward conservation of PGRFA in developing countries, whereas under the Nagoya Protocol Parties are encouraged, but not required to direct the benefits to conservation and sustainable use of biodiversity.

B. Nature, objective and scope of a Global Multilateral Benefit-Sharing Mechanism

23. Two submissions suggested some questions for discussion in relation to the possible modalities of a GMBSM. Of these, one submission suggested:

- (a) What is the nature of the GMBSM?
- (b) Should the mechanism be established under the Nagoya Protocol?
- (c) Should administration of the mechanism include representation of entities other than Parties?
- (d) What is the objective of the GMBSM?
- (e) Should the GMBSM identify and or restrict the type of benefits to be shared?

24. The other submission posed the question of how could a GMBSM best contribute to the conservation of biological diversity and sustainable use of its components globally.

25. One submission proposed that the decision-making about how to allocate and use GMBSM funds could be guided by an independent international governing body constituted according to the usual

regionally balanced United Nations formula, and that this body should keep the administrative costs as low as possible. It also considered the possibility of having independent scientific advice provided to the governing body about global funding priorities to be supported by the GMBSM.

IV. PROCESS-RELATED VIEWS

26. Three submissions also addressed process-related issues with a view to considering the need for and modalities of a GMBSM. They reflected different approaches on possible steps for considering the need for and modalities of a GMBSM.

27. The first proposed the creation of a pilot-phase for a GMBSM at the first meeting of the Parties to the Protocol so that Parties could include this mechanism in their national ABS legal systems. For this purpose a drafting group could be created to draft a decision by the meeting of the Parties. The same submission also suggested that the need for a more formal legally binding instrument could be assessed later as part of the first review of the Nagoya Protocol.

28. The second submission suggested that, prior to discussion on the need for, or the modalities of, a GMBSM, it was imperative for Parties to consider and reach consensus on whether there are instances where genetic resources or traditional knowledge associated with genetic resources are or have been accessed in transboundary situations, or where it is not possible to obtain prior informed consent and to establish mutually agreed terms and, if so, consider if these cases fall within the ambit of the Nagoya Protocol or are better addressed under different mechanisms or procedures. The same submission also argued that discussion on these issues should include consideration of: (a) the sovereign rights of States to manage their genetic resources, (b) the legal scope of the Nagoya Protocol and the Convention on Biological Diversity, and (c) the scope of other intergovernmental institutions.

29. Finally, the third submission suggested that Parties first need to reach a common understanding on the need for a GMBSM and that a discussion of the following at the second meeting of the Intergovernmental Committee could help to explore whether there is common understanding on the need for a GMBSM: (i) the situations that could be covered under the mechanism; and (ii) the implications for users and providers. If agreement is established on these issues the next step would be to determine the modalities. It was also suggested that this process would provide a good basis for the formal consideration of the issue after the entry into force of the Nagoya Protocol while noting that any decisions on Article 10 could only be taken after the entry into force of the Nagoya Protocol by the Parties to the Protocol.

30. This submission also suggested some possible activities to be carried out in the next inter-sessional period with a view to assist Nagoya Protocol Parties in their consideration of the need for and the modalities of a possible GMBSM:

(a) A broad web-based consultation of Parties, stakeholders and indigenous and local communities could be organized by the Convention Secretariat based on a series of well-defined questions;

(b) The Convention Secretariat would be asked to compile and synthesize the answers received in the public consultation;

(c) Based on the outcome of the public consultation the feasibility and added value of convening an expert group could be considered with a view to discuss the results of the initial exploratory discussions resulting from the Intergovernmental Committee's second meeting as well as the outcome of the web-based public consultation.

V. ISSUES FOR CONSIDERATION

31. The second meeting of the Intergovernmental Committee will be the first opportunity since the Protocol's adoption to take up the issue of the need for and modalities of a GMBSM. In its work the Intergovernmental Committee will be guided by Article 10 of the Protocol whose elements suggests the basic framework for consideration: The Parties are to identify the need for and modalities of a GMBSM.

32. Keeping in mind Article 10, the Intergovernmental Committee may wish to consider how best to support the meeting of the Parties in its work and in particular determine what inputs to the meeting of the Parties could be deemed most useful. Such a determination may then help to guide the Intergovernmental Committee's work at this meeting and possible subsequent future meetings as well.

33. In this regard, the Intergovernmental Committee may wish to structure its work in order to share views with respect to the:

(a) Need for a GMBSM taking into account that Article 10 refers to (i) transboundary situations and (ii) situations where it is not possible to grant or obtain prior informed consent; and

(b) Modalities of a GMBSM, taking into account that Article 10 refers to benefits being shared through this mechanism as means to support biodiversity conservation and the sustainable use of its components.

34. The Intergovernmental Committee may also wish to consider process-related issues beyond its second meeting which would form the basis of its recommendation. In this regard, if for example the solicitation of further views or an expert meeting is deemed desirable, consideration could be given to the development of a list of questions as part of the Committee's recommendation to help ensure targeted responses. Furthermore, an expert meeting would require clear terms of reference with respect to the inputs required and what it would be expected to accomplish.
