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AD HOC OPEN-ENDED INTER-SESSIONAL WORKING GROUP ON ARTICLE 8(j) AND RELATED PROVISIONS OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Seventh meeting

Montreal, 31 October -4 November 2011

Item 6 (a) of the provisional agenda*

TASKS 7, 10, AND 12 OF THE REVISED MULTI-YEAR PROGRAMME OF WORK

Note by the Executive Secretary

INTRODUCTION

1. In paragraphs 5 and 7 of decision X/43, the Conference of the Parties decided to revise the programme of work as adopted by decision V/16, as follows: to retire completed or superseded tasks 3, 5, 8, 9 and 16; to postpone the consideration and commencement of other uninitiated tasks of the programme of work, pending the completion of current tasks, in the light of ongoing developments, namely tasks 11, 6, 13, 14 and 17; to maintain ongoing tasks including 1, 2, 4, 7, 10 and 12; and based on the results of the work, to identify any further activities needed to fulfil these tasks.

2. The same decision requested Parties, Governments, relevant international organizations and indigenous and local communities to submit national approaches to facilitate tasks 7, 10 and 12, and furthermore requested the Executive Secretary to compile and analyze this information with a view to identifying minimum standards, best practices, gaps and lessons learned, for the consideration of the seventh meeting of the Working Group on Article 8(j) and Related Provisions. A compilation of input received has been made available as an information document (UNEP/CBD/WG8j/7/INF/2).

3. The Executive Secretary, has prepared this document to assist the Working Group in its work. Section I provides an overview of submissions received and section II considers the status of the tasks and possible future directions based on submissions received and building on the in-depth review held at the sixth meeting of the Working Group on Article 8(j). Section III proposes draft recommendations for the consideration of the Working Group. Submissions on tasks 7, 10 and 12 were received from Norway and China and are available *in extenso* as document UNEP/CBD/WG8J/7/INF/2.

* UNEP/CBD/WG8J/7/1/Rev.1

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I. TASKS 7, 10 AND 12 OF THE REVISED PROGRAMME OF WORK

Summary of submissions received

4. In its submission concerning task 7 on the equitable sharing of benefits, **Norway** presents the recently adopted Nature Diversity Act and its relevance to benefit-sharing, including the concept that the natural environment, including genetic resources is a common resource belonging to Norwegian society as a whole. The submission emphasizes that the new legislation has provided an entirely new set of regulations concerning the extraction and exploitation of genetic materials from animals, plants and micro-organisms. Concerning task 12, Norway emphasizes the importance of the International Labour Organizations (ILO) Convention No. 169, as relevant to the Norwegian implementation of the Convention on Biological Diversity and the programme of work on Article 8(j) and related provisions. Norway also notes that the Finnmark Act (2005) has the purpose of facilitating the management of lands and natural resources in the county of Finnmark in a balanced and ecologically sustained manner for the benefit of all the residents of the county and particularly as a basis for Saami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life. Norway also emphasizes the agreement on “Procedures for Consultations between States Authorities and the Sami Parliament of 11 May 2005”¹, is an extensive agreement applying to all levels of government and its activities, and applies to all matters of direct interest to Saami. The obligation to consult the Saami Parliament may include all material and immaterial forms of Saami culture, including biodiversity and nature conservation.

5. Concerning task 12 on exchange and dissemination of information, Norway again refers to its Nature Diversity Act which states that a person managing public collections has a duty to register genetic material that is removed from the collection and provide public access to such information. As such, the public collection is managed on behalf of the State and any person can have access depending on specified conditions. Users accessing genetic materials from the public collections in Norway or abroad must refrain from claiming intellectual property rights or any other rights that may limit the use of the material, unless the material has been modified in such a way that results in a substantial change. Non-compliance can result in the competent authorities taking measures, including legal action. The Norwegian Patent Act 2004 also requires an obligation for applications regarding both disclosure of origin of biological materials and also prior and informed consent if required in the country of origin. The disclosure obligations were extended to traditional knowledge in 2009. The Norwegian Plant Variety Act 2009 also contains a similar provision however the disclosure provisions only apply to national applications. The Norwegian General Civil Penal Code stipulates the penalty for breach of the duty to disclose can be fines or imprisonment for a term not exceeding two years, however, a breach of the duty to disclose does not affect the processing of patent applications or the validity of granted patents. The purpose of the disclosure provisions is to introduce transparency concerning national provisions on prior, informed consent and benefit-sharing regarding genetic resources and traditional knowledge. Norway believes that disclosure can contribute to the relevant provisions of the Convention on Biological Diversity, including the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, and that disclosure makes it easier for parties to enforce and protect their rights to their own genetic resources and traditional knowledge when these are used.

6. The Government of **China** advises in their submission that legislative measures exist in China to protect the holders of knowledge, innovations and practices within local communities ensuring benefits arising from such knowledge can be shared in a fair and equitable way. In particular the patent law and regulations on the protection of traditional Chinese medicines provide legal protection to such medicines and ensures the holder has exclusive rights. Regulations concerning plant varieties clearly define ownership, including ownership review and termination. The Copyright Law provides copyright to

¹ http://www.regjeringen.no/nb/dep/ad/dok/lover_regler/reglement/2007/procedures-for-consultations-between-sta.html?id=440913.

holders of traditional knowledge. The Cultural Heritage Protection Law, to be enacted soon, provides for the State to survey, conserve and encourage the use of intangible cultural heritage, with the consent of the holders.

7. In their previous submissions concerning the revised programme of work, indigenous and local community representatives have emphasized that there is a need to fully consider tasks according to their relevance, in light of other developments in recent years and current needs, particularly concerning the implementation of the Nagoya Protocol. At the same time, indigenous and local community representatives also believe that there is a need for a more holistic and forward looking programme of work, focused on priorities for the International Decade on Biodiversity and the new Strategic Plan for Biodiversity 2011-2020. Indigenous and local communities have emphasized that the smooth implementation of the international regime on access and benefit-sharing (ABS), the Nagoya Protocol, requires strong engagement by all stakeholders, including indigenous and local communities. An intersessional process under Article 8(j) should advance tasks 7, 10 and 12 as a contribution to the implementation of the Nagoya Protocol. Hence there is also a need, with the finalization of the work of the Working Group on Access and Benefit Sharing, to establish a procedure for the Working Group on Article 8(j) to continue to provide views and advice directly to the newly established Inter-Governmental Committee on the Nagoya Protocol.

II. STATUS OF THE TASKS AND POSSIBLE FUTURE DIRECTIONS

Tasks 7, 10 and 12 of the revised programme of work

8. Tasks 7, 10 and 12 were originally adopted in decision V/16, in May 2000, as part of the initial work programme for Article 8(j) and related provisions. After the in-depth review of the work programme conducted at the sixth meeting of the Working Group on Article 8(j), the Conference of the Parties, in decision X/43, decided to maintain these tasks. Some developments that have occurred in the last decade since the adoption of the work programme, including the adoption of the Nagoya Protocol and the new Strategic Plan for Biodiversity 2011-2020, are of direct relevance to these tasks. Thus, it is suggested that the latter should be examined and implemented in the light of these recent developments.

9. In particular, task 7 on the development of guidelines for benefit-sharing appears to be addressed, at least in part, by the some provisions of the Nagoya Protocol on Access to Genetic Resources and the Sharing of Benefits Arising from their Use. Task 10 on the development of standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and associated genetic resources also relates to the Nagoya Protocol and could further contribute to its implementation by providing specific advice on traditional knowledge associated with genetic resources. Alternatively, task 10 could take on a broader focus and address traditional knowledge not associated with genetic resources. Task 12 has a broad scope focussing on the national implementation of Article 8(j) and related provisions, which could also include *sui generis* systems, and thus will need to be considered in light of the significant work already accomplished on elements of *sui generis* systems and taking into account the Nagoya Protocol. Each task is examined in more detail below.

Task 7 *Equitable sharing of benefits. Based on tasks 1, 2 and 4, the Working Group to develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure: (i) that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices; (ii) that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed approval of the indigenous and local communities; (iii) advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used.*

Submissions received

10. Regarding this task, submissions received indicate that some countries have already established legislation to ensure benefit-sharing with holders of knowledge, innovations and practices, and that access to such knowledge is based on consent of the holders. Indigenous and local communities continue to advocate for free, prior and informed consent as a prerequisite for access to both traditional knowledge and genetic resources held by them. The Norwegian and Chinese submissions indicate a preferred option of law reform as opposed to the creation of *sui generis* systems concerning the protection of traditional knowledge. Regarding task 7 (iii) concerning disclosure of origin of genetic resources and associated traditional knowledge, the Norwegian submission indicates that disclosure of origin in the Norwegian context is limited to national applications only.

Sui generis systems

11. The Working Group on Article 8(j) will also consider, under agenda item 6 (c), the development of elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices. *Sui generis* systems may be considered as means to achieve task 7 (as well as tasks 10 and 12), since the objective of task 7 is to ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from the use of their traditional knowledge based on prior informed consent and mutually agreed terms for the fair and equitable sharing of benefits. The issue of prior informed consent is covered extensively in UNEP/CBD/WG8J/7/3 “Elements of *sui generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices”. Section II covers “*further development of elements to be considered in the development of sui generis systems for the protection of traditional knowledge, innovations and practices of indigenous and local communities*”, and element E describes “*a process and set of requirements governing prior informed consent, mutually agreed terms and equitable sharing of benefits with respect to traditional knowledge, innovations and practices associated with genetic resources and relevant for the conservation and sustainable use of biological diversity*”.

The Nagoya Protocol

12. The development of guidelines for the development of mechanisms, legislation and other appropriate initiatives regarding benefit-sharing, prior informed consent and identifications of obligations of countries of origin, by the Working Group, must be considered in light of discussions and advances concerning *sui generis* systems and related developments in the Nagoya Protocol.

13. Various provisions of the Nagoya Protocol are of direct relevance to the core issues of task 7 which are benefit-sharing, prior informed consent of indigenous and local communities and identification of countries of origin, as well as identification users of traditional knowledge and associated genetic resources. It follows, therefore, that activities carried out by the Working Group on Article 8(j) with regard to task 7 should be complementary and supportive of measures established under the Nagoya Protocol. In particular, article 3 of the Protocol places traditional knowledge associated with genetic resources within the scope of the Protocol and article 5 addresses the issue of benefit sharing arising from genetic resources where domestic legislation recognises established indigenous and local communities’ rights over those resources. Paragraph 5 of Article 5 states that Parties “shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge”. It also stipulates that benefit-sharing will be upon mutually agreed terms. The annex of the Nagoya Protocol includes a list of possible monetary and non-monetary benefits.

14. Furthermore article 7 requires that access to traditional knowledge associated with genetic resources held by indigenous and local communities is based on their prior and informed consent and also that benefit-sharing is based upon mutually agreed terms. Article 12, which is the primary article on traditional knowledge within the Nagoya Protocol stipulates in paragraph 2 that “Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to

inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge” and as such, procedures for obtaining prior and informed consent. It further suggests that access to traditional knowledge associated with genetic resources may be assisted or informed by community protocols and procedures and customary laws. Article 12 also specifically states that: “Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of (para. 3): Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and (para 3 (b)) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources (para. 3 (c)).

15. In light of the apparent overlap, Parties may wish to approach task 7 by identifying gaps and additional measures needed to complement the Nagoya Protocol. In addition, Parties may also wish to take a broad view of tasks 7 (and 10 and 12), and focus efforts on traditional knowledge relevant for the conservation and sustainable use of biological diversity but not necessarily associated with genetic resources, in order to ensure the overall and broad protection of traditional knowledge in general. Should the Parties wish to adopt this approach, care should be taken to ensure coordination and harmonization of efforts with the work of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC). Text-based negotiations are currently taking place in the WIPO IGC concerning the protection of traditional knowledge, and traditional cultural expressions, as well as draft objectives and principles relating to intellectual property and genetic resources. Within these processes WIPO IGC is also considering glossaries of key terms related to intellectual property and traditional knowledge and traditional cultural expressions (WIPO/GRTKF/IC/19/5 and WIPO/GRTKF/IC/19/4 respectively), as well as options for future work on intellectual property and genetic resources (refer WIPO/GRTKF/IC/19/6). These documents and further information are available at: http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html

Task 10. The Ad Hoc Working Group to develop standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources.

16. The Nagoya Protocol sets out the basic requirements for access to associated traditional knowledge as prior informed consent (PIC) and mutually agreed terms (MAT). Furthermore, the Protocol will consider potential contractual parameters for MAT, including model contractual clauses, and offers a list of possible benefits which may be shared as a result of the utilization of genetic resources and associated traditional knowledge (refer annex I). Contractual obligations reflected in mutually agreed terms are a significant innovation of the Protocol. Specifically Article 12, paragraph 3(b) requires that Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of: (b) minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and (c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources. The Nagoya Protocol also contains compliance measures aimed at preventing the unlawful appropriation of genetic resources and associated traditional knowledge in article 16, which stipulates that “each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located” (para. 1). Article 16 also requires that “each Party shall take appropriate,

effective and proportionate measures to address situations of non-compliance with these measures...” (para. 2).

17. Against this background, task 10 could significantly contribute to the protection of traditional knowledge including traditional knowledge associated with genetic resources, by ensuring mechanisms are in place which either monitor, and report on, the use of traditional knowledge associated with genetic resources, and/or traditional knowledge in general.

18. The Nagoya Protocol does not preclude the development of complementary standards and guidelines for the monitoring, reporting and prevention of unlawful appropriation of associated traditional knowledge or traditional knowledge, in general.

19. The need for further work on this issue is also taken up in the note by the Executive Secretary on elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices (UNEP/CBD/WG8J/7/3) under item J: “Provisions regarding enforcement and remedies”. Furthermore as this issue may be considered under both agenda items 6 (a) (tasks 7, 10 and 12) as well as item 6 (c) (*sui generis* systems) there is a need to ensure complementarity of tasks and avoid duplication and overlap.

20. The Parties may wish to review task 10, with a view to ensuring its compatibility and complementarity to the Nagoya Protocol and other work on *sui generis* systems and then, based on this, request submissions on national approaches, commission a study on possible standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and refer the compilation and study to an ad hoc technical expert group meeting to provide advice on taking this task and the others

Task 12: Guidelines to implement Article 8(j). *The Working Group to develop guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, as appropriate, to implement Article 8(j) and its related provisions (which could include sui generis systems), and definitions of relevant key terms and concepts in Article 8(j) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their traditional knowledge, innovations and practices, within the context of the Convention.*

forward.

21. Under agenda item 6 (c), the Working Group will also examine the question of the development of elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices (see UNEP/CBD/WG8J/7/3), and decide on future directions. Coordination of the work of task 12 and *sui generis* systems will be necessary to ensure that the tasks are mutually supportive and avoid duplication and overlap. Discussions specifically on task 12 should not be limited to *sui generis* systems, noting the preference of some developed and developing countries is to pursue law reform and to consider *sui generis systems* only if and when gaps have been identified.

22. On the issue of definitions, the Working Group considered *sui generis* systems and the revised definitions at its fifth meeting and took note of the draft glossary of terms relevant for Article 8(j) in annex I of UNEP/CBD/WG8J/5/INF/15, taking into account the views compiled on definitions provided and also considering the ongoing work concerning the development of an international regime on access and benefit-sharing of genetic resources, and noted the need for harmony of terms throughout the Convention, the Multilateral Environmental Agreements (MEAs) and the international system. However, it is important to note that the ninth meeting of the Conference of the Parties did not take any actions regarding terms and definitions in the decision IX/13, F, on *sui generis* systems, pending the outcome of the access and benefit-sharing (ABS) negotiations.

23. With the ABS negotiations completed and the Nagoya Protocol adopted and in the process of implementation, further work on definitions could build on existing work, in coordination with the work on *sui generis* systems, definitions already established within the text of the Convention, the Nagoya Protocol, and also with other Multi-lateral Environmental Agreements, and perhaps with the consideration of the work of the World Intellectual Property Organization (WIPO). To assist in taking this matter forward, an information document (UNEP/CBD/WG8J/7/INF/1/Add.1) has been compiled from extracts of UNEP/CBD/WG8J/3/7, UNEP/CBD/WG8J/4/7, UNEP/CBD/WG8J/5/6 and UNEP/CBD/WG8J/5/INF/16, to provide Parties with a background into this issue in order to decide on the best methodology to take this matter forward. Documents WIPO/GRTKF/TWG/2/INF/2 and WIPO/GRTKF/IC/17/INF/9 which deal with definitions being discussed under the World Intellectual Property Organization have also been made available as a contribution to the discussions.

24. In the draft recommendations prepared for the consideration of the Working Group, contained in *sui generis* document UNEP/CBD/WG8J/7/3, Parties are invited to consider the terms and definitions developed in response to decision VII/16 H, paragraph 4, which appear in the annex of this document, taking into account the adoption of the Nagoya Protocol and task 12 of the multi-year programme of work program, and to submit views, including additional terms and definitions for possible inclusion, to the Executive Secretary and requests the Executive Secretary to compile these views and based on information received, to revise the terms and definitions, include additional terms and definitions proposed, taking into account the work of other international bodies, and to propose a draft glossary of terms for the consideration of the eighth meeting of the Working Group on Article 8(j) and Related Provisions.

25. The Parties may wish to review task 12, with a view to ensuring its compatibility and complementarity to the Nagoya Protocol and the current work on *sui generis* systems being undertaken by the Working Group on Article 8(j) and then based on this: communicate national approaches to the Secretariat for compilation; commission a study on *definitions of relevant key terms and concepts in Article 8(j) and related provisions* building on existing work including the Nagoya Protocol and taking into account the work of relevant international agencies including WIPO, MEAs, and the United Nations Environment Programme (UNEP); and to make the compilation and study available to an ad hoc technical expert meeting, which will consider tasks 7, 10 and 12, as well as to the eighth meeting of the Working Group on Article 8(j) and related provisions.

III. POSSIBLE RECOMMENDATIONS FOR THE CONSIDERATION OF THE WORKING GROUP

In light of developments and considerations discussed in sections II and III of the present document, the Ad Hoc Open-Ended Intersessional Working Group on Article 8(j) and Related Provisions may wish to recommend that the Conference of the Parties adopt a decision along the following lines:

The Conference of the Parties,

Taking into account the implementation of the Nagoya Protocol and the ongoing work of the Intergovernmental Committee, and building on the work of the Convention concerning *sui generis* systems for the protection of traditional knowledge,

Having considered and reviewed tasks 7, 10 and 12 in light of recent developments, with a view to avoid duplication and overlap and to ensure complementarity and harmonization of efforts,

1. *Decides* to advance these tasks through developing draft guidelines for each task, based on diverse national experiences and best practices,

2. *Requests* Parties, Governments, relevant international organizations and indigenous and local communities to submit views concerning national approaches to facilitate tasks 7, 10 and 12 and furthermore *requests* the Executive Secretary to compile, analyze and research information, with a view to identifying minimal standards, best practices, gaps and lessons learned and to make the information available to the ad hoc technical expert group meeting on tasks 7, 10, and 12, and to eighth meeting of the Working Group on Article 8(j) and Related Provisions for their consideration,

3. *Requests* the Executive Secretary to commission a study on (task 7) guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure: (a) that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices; (b) that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed approval of the indigenous and local communities; and (c) advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used, in light of and fully taking into account the Nagoya Protocol, with a view to identifying gaps or additional measures needed and further request the Executive Secretary to make the study available to both the expert group meeting on tasks 7, 10 and 12 and the eighth meeting of the Working Group on Article 8(j) and related provisions,

4. *Requests* the Executive Secretary to commission a study on (task 10) concerning *standards and guidelines for the reporting and prevention of the unlawful appropriation of traditional knowledge*, taking fully into account the Nagoya Protocol and the work of relevant international organizations including the World Intellectual Property Organization (WIPO), and to make the study available to an ad hoc technical expert meeting on tasks 7, 10 and 12 and to the eighth meeting of the Working Group on Article 8(j) and Related Provisions,

5. *Requests* the Executive Secretary to commission a study on (task 12) concerning guidelines to assist Parties and Governments in the development of legislation or mechanisms to implement Article 8(j) and related provisions including *definitions of relevant key terms and concepts in Article 8(j) and related provisions* building on existing work and taking into account the Nagoya Protocol, international agencies including WIPO, other multilateral environmental agreements, and the United Nations Environment Programme (UNEP), and to make the study available to the ad hoc technical expert group on tasks 7, 10 and 12 and to the eighth meeting of the Working Group on Article 8(j) and related provisions,

6. *Requests* the Executive Secretary to convene an ad hoc technical expert group on tasks 7, 10, and 12, subject to the availability of resources, taking into account expertise, fair and equitable geographic balance, gender equity and the need to ensure effective participation of indigenous and local communities, to consider possible gaps and identify complementary measures to support the implementation of the Nagoya Protocol as it relates to traditional knowledge associated with genetic resources, to prevent unauthorized access and ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from the utilization of traditional knowledge associated with genetic resources based on their prior informed consent, and *requests* the Secretariat to make the results of the meeting available to the eighth meeting of the Working Group on Article 8(j) and Related Provisions, in order to take these tasks forward,

7. *And further requests* the Ad Hoc Open Ended Working Group on Article 8 (j) and Related Provisions to regularly inform the Open-ended Ad Hoc Intergovernmental Committee (ICNP) for the Nagoya Protocol on ABS regarding of progress of work under tasks 7, 10 and 12 of relevance to the implementation of the Nagoya Protocol.
