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Food and Agriculture  
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Продовольственная и  
сельскохозяйственная организация  
Объединенных Наций

Organización de las  
Naciones Unidas para la  
Alimentación y la Agricultura

منظمة  
الغذية والزراعة  
للأمم المتحدة

# COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

## Item 3 of the Provisional Agenda

### TEAM OF TECHNICAL AND LEGAL EXPERTS ON ACCESS AND BENEFIT-SHARING

#### Third Session

Rome, 13 – 15 September 2016

### CONSIDERATION OF SUBSECTOR-SPECIFIC ELEMENTS FOR ACCESS AND BENEFIT-SHARING FOR GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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## I. BACKGROUND

1. The Commission on Genetic Resources for Food and Agriculture (Commission), at its Fourteenth Regular Session in April 2013, established the Team of Technical and Legal Experts on Access and Benefit-Sharing (ABS Expert Team). As mandated by the Commission, the ABS Expert Team participated in relevant portions of the meetings of the intergovernmental technical working groups (Working Groups), helped inform their discussions on access and benefit-sharing (ABS) and, after each meeting, considered the lessons learnt from each subsector.

2. Drawing on a body of studies, reports and other inputs, the ABS Expert Team prepared *Draft Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture* and agreed to submit them to the Commission, for its consideration.<sup>1</sup> The material made available to the ABS Expert Team and the Commission included:

- Background studies of the use and exchange of aquatic<sup>2</sup>, animal<sup>3</sup>, forest<sup>4</sup>, microbial genetic resources<sup>5</sup> and of biological control agents for food and agriculture<sup>6</sup>;
- A Framework study on food security and access and benefit-sharing for genetic resources for food and agriculture;<sup>7</sup>
- Results of a multi-stakeholder dialogue<sup>8</sup>;
- Government submissions describing the conditions under which specific genetic resources for food and agriculture (GRFA) are exchanged and utilized<sup>9</sup>;
- Stakeholder submissions on voluntary codes of conduct, guidelines and best practices, and/or standards in relation to ABS for all subsectors of GRFA<sup>10</sup>; and
- Explanatory notes to the distinctive features of GRFA.<sup>11</sup>

3. At its Fifteenth Regular Session in January 2015, the Commission welcomed the *Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture* (ABS Elements)<sup>12</sup> and invited the Director-General of FAO to bring them to the attention of the Conference.<sup>13</sup> The FAO Conference, at its Thirty-Ninth Session in June 2015, welcomed the ABS Elements and invited Members to consider and, as appropriate, make use of them. The Conference also noted the complementarity between the work of the Commission and 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 (Nagoya Protocol) in regard to access and benefit-sharing for genetic resources.<sup>14</sup> The Subsidiary Body on Implementation of the Convention on Biological Diversity (CBD) recommended that the Conference of the Parties to the CBD as the meeting of the Parties to the Nagoya Protocol (COP-MOP), at its second meeting, invite Parties and other Governments to take note of and to apply, as appropriate, the ABS Elements.<sup>15</sup> The second meeting of COP-MOP will be held from 4 to 17 December 2016 in Cancun, Mexico.

4. The Commission further requested its Working Groups to continue elaborating, with the assistance of the Secretary, subsector-specific elements for ABS, including consideration of the role of traditional knowledge associated with GRFA and their customary use, and bearing in mind the on-going activities or processes under the International Treaty on Plant Genetic Resources for Food and

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<sup>1</sup> CGRFA-15/15/Inf.11; CGRFA-15/15/Inf.12.

<sup>2</sup> Background Study Paper No. 45.

<sup>3</sup> Background Study Paper No. 43.

<sup>4</sup> Background Study Paper No. 44.

<sup>5</sup> Background Study Paper No. 46.

<sup>6</sup> Background Study Paper No. 47.

<sup>7</sup> Background Study Paper No. 42.

<sup>8</sup> Background Study Paper No. 59.

<sup>9</sup> CGRFA-15/15/Inf.14.

<sup>10</sup> CGRFA-15/15/Inf.13; CGRFA-15/15/Inf.13 Add.1.

<sup>11</sup> CGRFA-15/15/Inf.10.

<sup>12</sup> CGRFA-15/15/Report, *Appendix B*.

<sup>13</sup> CGRFA-15/15/Report, paragraph 22(ii).

<sup>14</sup> C 2015/REP, paragraph 52.

<sup>15</sup> UNEP/CBD/COP/13/6, Recommendation 1/2.

Agriculture (Treaty), for consideration by the ABS Expert Team established by the Commission at its last session.<sup>16</sup> It requested the ABS Expert Team to consolidate the outputs of the meetings of the Working Groups and any additional information from thematic studies on sectors not covered by the Working Groups, and to report to the Commission at its next session.

5. In response to the Commission's request, the Working Groups considered during their sessions in 2016 the elaboration of subsector-specific ABS elements, including the role of traditional knowledge associated with GRFA and their customary use.<sup>17</sup>

6. This document provides a brief overview of the global context of ABS. It illustrates by reference to the ABS Elements some of the features typically addressed by legislative, administrative or policy ABS measures and reflects inputs and recommendations of the Working Groups on these matters. In consolidating the outputs of the meetings of the Working Groups and responding to their recommendations, the ABS Experts Team may wish to provide guidance and recommendations to the Commission, including on:

- subsector-specific issues that may or may not warrant special attention in the elaboration and implementation of ABS measures; and
- possible future action on ABS in the different subsectors of GRFA.

## II. GLOBAL CONTEXT

7. Access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed, is among the universally agreed targets of the 2030 Agenda for Sustainable Development.<sup>18</sup>

8. The international regime on access to genetic resources and benefit-sharing underlying this target is constituted of the CBD, the Nagoya Protocol, as well as complementary instruments, including the Treaty and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.<sup>19</sup> The World Health Organization (WHO) addresses the sharing of influenza viruses and access to vaccines and the sharing of other benefits through its Pandemic Influenza Preparedness Framework. ABS is also on the agenda of the negotiations of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on marine biological diversity in areas beyond national jurisdiction.

### *Convention on Biological Diversity*

9. The CBD was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993. As at 1 August 2016 the CBD has 196 Parties. The Convention has three main goals: the conservation of biological diversity; sustainable use of its components; and fair and equitable sharing of benefits arising from genetic resources, including by appropriate access to genetic resources, technology transfer and funding.

10. The CBD requires its Contracting Parties to take legislative, administrative or policy measures, as appropriate, with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Parties providing such resources.<sup>20</sup> Access to genetic resources shall be subject to prior informed consent (PIC)<sup>21</sup> and, where granted, shall be on mutually agreed terms (MAT).<sup>22</sup> Potential benefits to be shared also include: access to and transfer of technology using genetic

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<sup>16</sup> CGRFA-15/15/Report, paragraph 22

<sup>17</sup> CGRFA/TTLE-ABS-3/16/Inf.2; CGRFA/TTLE-ABS-3/16/Inf.3; CGRFA/TTLE-ABS-3/16/Inf.4; CGRFA/TTLE-ABS-3/16/Inf.5.

<sup>18</sup> Resolution A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development, Targets 2.5; 15.6.

<sup>19</sup> UNEP/CBD/COP/10/27, Decision X/1.

<sup>20</sup> CBD, Article 15.7.

<sup>21</sup> CBD, Article 15.5; 15.3.

<sup>22</sup> CBD, Article 15.4.

resources; participation in biotechnological research activities based on the genetic resources; and priority access to the results and benefits arising from biotechnological use of the genetic resources.<sup>23</sup>

*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*

11. The Nagoya Protocol was adopted on 29 October 2010 by the Conference of the Parties to the CBD, at its tenth meeting, and entered into force on 12 October 2014. As at 1 August 2016, the Nagoya Protocol has 74 Parties.<sup>24</sup> The objective of the Nagoya Protocol is to further advance the third objective of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources, technology transfer and funding.

12. The Nagoya Protocol is based on the sovereign right of states over their natural resources, which implies that the authority to determine access to genetic resources rests with national governments and is subject to national legislation. The Nagoya Protocol, which covers genetic resources, including GRFA, within the scope of Article 15 of the CBD as well as associated traditional knowledge, sets out core obligations for its Parties to take measures in relation to: (1) access to genetic resources for their utilization, *i.e.* research and development on the genetic and/or biochemical composition of genetic resources, and to associated traditional knowledge; (2) the sharing of benefits derived from such research and development as well as subsequent applications and commercialization; and (3) the compliance by the user of genetic resources and associated traditional knowledge utilized within its jurisdiction with the applicable ABS measures.

13. The Nagoya Protocol, in its preamble, explicitly recognizes the importance of genetic resources to food security, the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions, as well as the interdependence of all countries with regard to GRFA and the special nature and importance of these resources for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change. In this regard, the Nagoya Protocol also acknowledges the fundamental role of the Treaty and the Commission.

14. In its operational provisions, the Nagoya Protocol requires Parties to consider, in the development and implementation of their ABS legislation or regulatory requirements, the importance of GRFA and their special role for food security.<sup>25</sup> Parties shall also create conditions to promote and encourage research that contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research.<sup>26</sup>

15. The provisions of the Nagoya Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.<sup>27</sup> Moreover, the Nagoya Protocol leaves room for other international agreements in the field of ABS and it does not prevent its Parties from developing and implementing other relevant international agreements, including other specialized ABS agreements, provided that they are supportive of and do not run counter to the objectives of the CBD and the Nagoya Protocol.<sup>28</sup> Where a specialized international ABS instrument that is consistent with and does not run counter to the objectives of the CBD and the Nagoya Protocol applies, the Nagoya Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.<sup>29</sup> One of the instruments explicitly acknowledged in the Preamble of the Nagoya Protocol is the Treaty,

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<sup>23</sup> CBD, Articles 15.7 ; 16 ; 19 ; 20 ; 21.

<sup>24</sup> <http://www.cbd.int/abs/nagoya-protocol/signatories/>

<sup>25</sup> Nagoya Protocol, Article 8(c).

<sup>26</sup> Nagoya Protocol, Article 8(a).

<sup>27</sup> Nagoya Protocol, Article 4.1.

<sup>28</sup> Nagoya Protocol, Article 4.2.

<sup>29</sup> Nagoya Protocol, Article 4.4.

which has been developed in harmony with the CBD.<sup>30</sup> Beyond this openness to other international instruments, the Nagoya Protocol also states that due regard should be paid to “useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the CBD and this Protocol.”<sup>31</sup>

16. The Nagoya Protocol also requires Parties to encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for MAT and of voluntary codes of conduct, guidelines and best practices and/or standards in relation to ABS.<sup>32</sup> The Conference of the Parties to the CBD serving as meeting of the Parties to the Nagoya Protocol shall periodically take stock of the use of the model contractual clauses, codes of conduct, guidelines and best practices and/or standards.<sup>33</sup>

#### *International Treaty on Plant Genetic Resources for Food and Agriculture*

17. The Treaty was negotiated between 1994 and 2001 by the Commission and adopted by the FAO Conference, at its Thirty-first Session on 3 November 2001. It entered into force on 29 June 2004. As at 1 August 2016, the Treaty has 139 Parties. The objectives of the Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA) and the fair and equitable sharing of the benefits arising out of their use, in harmony with the CBD, for sustainable agriculture and food security.

18. Like the CBD and the Nagoya Protocol, the Treaty is based on the premise that States have sovereign rights over their genetic resources and that the authority to determine access to these resources lies with national governments. However, under the Treaty, the Contracting Parties exercised their sovereign rights to establish the Multilateral System of Access and Benefit-sharing (MLS) to facilitate access and the sharing of monetary and non-monetary benefits arising from the use of PGRFA through standardized conditions as set out in the Standard Material Transfer Agreement (SMTA). The Treaty applies to all PGRFA. Its MLS applies to 64 of the world’s most important crops which together account for a very high percentage of the food derived from plants. Under the Treaty, monetary and other commercial benefits flow to the Treaty’s Benefit-sharing Fund, which makes them primarily available, directly and indirectly, to farmers in all countries, especially developing countries and countries with economies in transition, who conserve and sustainably utilize PGRFA.

19. The Treaty’s Governing Body, at its last session, initiated the elaboration of a full draft revised SMTA focusing especially on the development of a subscription system with the aim to increase the income of the Benefit-Sharing Fund. In addition, options for adapting the coverage of the Multilateral System based on different scenarios and income projections shall be elaborated.<sup>34</sup> The Ad Hoc Open-Ended Working Group to Enhance the Functioning of The Multilateral System continues to consider these issues throughout this year.

20. The Treaty explicitly recognizes the enormous contribution farmers have made to the ongoing development of the world’s wealth of PGRFA, in particular through Article 9 of the Treaty on Farmers’ Rights. It calls for protecting the traditional knowledge of these farmers, increasing their participation in national decision-making processes and ensuring that they share the benefits from the use of these resources. The Governing Body adopted several resolutions on Farmers’ Rights<sup>35</sup> and a global consultation on Farmers’ Rights will be held from 27 to 30 September 2016.<sup>36</sup>

#### *Pandemic Influenza Preparedness Framework*

21. In 2011, the Sixty-fourth World Health Assembly of the WHO adopted the Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and

<sup>30</sup> Treaty, Article 1.1.

<sup>31</sup> Nagoya Protocol, Article 4.3.

<sup>32</sup> Nagoya Protocol, Articles 19.1; 20.1.

<sup>33</sup> Nagoya Protocol, Articles 19.2; 20.2.

<sup>34</sup> IT/GB-6/15/Report, Appendix A.1.

<sup>35</sup> Resolutions 2/2007; 6/2009; 6/2011; 8/2013 and 5/2015.

<sup>36</sup> <http://planttreaty.org/content/global-consultation-farmers'-rights>

Other Benefits (PIP Framework). The objective of the PIP Framework is to improve pandemic influenza preparedness and response, and strengthen the protection against the pandemic influenza by improving and strengthening the WHO global influenza surveillance and response system, with the objective of a fair, transparent, equitable, efficient, effective system for, on an equal footing:

- (i) the sharing of H5N1 and other influenza viruses with human pandemic potential; and
- (ii) access to vaccines and sharing of other benefits.

22. The WHO Executive Board, at its 138th session in January 2016, requested the WHO Secretariat to analyse how the implementation of the Nagoya Protocol might affect the sharing of pathogens and the potential public health implications. The Secretariat will have to report back to the WHO Executive Board in this regard at the 140th session of the Board to be held in January 2017.<sup>37</sup>

#### *United Nations Convention on the Law of the Sea*

23. UNCLOS is the international agreement that defines the rights and responsibilities of nations with respect to their use of the world's oceans, regulating the conduct of certain economic activities, the protection of the environment, and the conservation and management of marine natural resources. The Convention, concluded in 1982, entered into force on 16 November 1994. As at 1 August 2016, 167 countries and the European Union have joined the Convention.

24. Marine genetic resources found in areas beyond national jurisdiction, i.e. the high seas and the deep seabed (“Area”) are outside of the scope of the CBD and its Nagoya Protocol. However, in the case of processes and activities carried out under the jurisdiction or control of a State, the provisions of both instruments apply, regardless of where their effects occur, within the area of its national jurisdiction or beyond the limits of national jurisdiction.<sup>38</sup> To which extent marine genetic resources in areas beyond national jurisdiction are covered by UNCLOS is controversial due to different interpretations of certain UNCLOS provisions, including those addressing the high seas, the Area and marine scientific research. However, building on the work of its 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, the United Nations General Assembly decided on 19 June 2015 to negotiate an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The topics to be addressed by the negotiations include “*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.*”<sup>39</sup> In March 2016, the Preparatory Committee established by the UN General Assembly Resolution 69/292 started its work to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under UNCLOS and, by the end of 2017, report to the Assembly on its progress.

### **III. DEVELOPING SUBSECTOR-SPECIFIC ELEMENTS FOR ABS**

25. The overall objective of the ABS Elements is to assist governments considering developing, adapting or implementing legislative, administrative or policy measures for ABS to take into account the importance of GRFA, their special role for food security and the distinctive features of the different subsectors of GRFA, while complying, as applicable, with international ABS instruments.<sup>40</sup>

26. With a view to facilitate the consolidation of the Working Groups’ outputs and to respond to their recommendations, this section presents some of the key features of ABS measures, as presented

<sup>37</sup> <http://www.who.int/influenza/pip/2016-review/NagoyaStudyTORs.pdf>.

<sup>38</sup> CBD, Article 4(b).

<sup>39</sup> Resolution A/RES/69/292 - Development of 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.

<sup>40</sup> ABS Elements, paragraph 14.

by the ABS Elements, and reflects at the same time relevant outputs of the Working Groups, for consideration by the ABS Expert Team.

### (i) Scope of subsector-specific ABS elements

27. Section 3 of the ABS Elements provides detailed guidance regarding the development, adaptation and implementation of ABS measures. The different steps governments may wish to take include: an assessment of the concerned subsectors of GRFA, the identification and consultation of relevant stakeholders holding, providing or using GRFA; the consideration and evaluation of the different options for ABS measures; the integration of ABS measures with broader food security and sustainable agricultural development policies and strategies; the integration of the implementation of ABS measures into the institutional landscape; the communication of ABS measures to potential providers and users of GRFA; and the *ex ante* assessment as well as monitoring of the effectiveness and impact of ABS measures.<sup>41</sup>

28. The ABS Elements suggest analysing in detail the implications of the scope of ABS rules for GRFA, including the subject matter and the temporal scope.<sup>42</sup> ABS elements for specific subsectors of GRFA should therefore be clear as to which genetic resources and to which uses thereof they apply. If subsector-specific elements for ABS are elaborated, as requested by the Commission, it will be important to clearly specify which of the different sets of rules or standards apply to which uses of which subsectors of GRFA.

### (ii) Institutional arrangements

29. Parties to the Nagoya Protocol have to designate one or more competent national authorities on access and benefit-sharing responsible, *inter alia*, for advising on applicable procedures and requirements for obtaining PIC and entering into MAT.<sup>43</sup> Where more than one competent national authority for the Nagoya Protocol is designated, the national focal point on access and benefit-sharing must provide information about their respective competencies and mandates.<sup>44</sup> The ABS Elements suggest that in order to clarify institutional arrangements around ABS for GRFA, governments may wish to:

- Take stock of existing institutions and institutional arrangements that are potentially relevant;
- Decide on the allocation of institutional responsibility for various aspects of ABS as they apply to different subsectors of GRFA;
- Put in place mechanisms and/or procedures for communication and coordination between designated institutions; and
- Publicise and provide information about the resulting institutional arrangements.<sup>45</sup>

30. The administrative responsibility for ABS for GRFA may vary depending on the subsector of (e.g. plant; animal, forest, or aquatic) GRFA. The ABS Elements therefore suggest that institutional arrangements be clear and transparent, and that adequate coordination and information exchange mechanisms are in place.<sup>46</sup> Where the competence is divided between different institutions, governments should consider designating one lead authority or national clearinghouse to oversee the whole approval chain.

31. The ABS Elements largely reflect considerations of the Working Groups expressed in the sessions prior to the finalization of the ABS Elements. The Working Groups stressed the importance of involving appropriate ministries in the development of domestic ABS regimes and the need to consult relevant stakeholders.<sup>47</sup>

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<sup>41</sup> ABS Elements, paragraph 15.

<sup>42</sup> ABS, Elements, paragraph 15.

<sup>43</sup> Nagoya Protocol, Article 13.2.

<sup>44</sup> Nagoya Protocol, Article 13.4. Similarly, under the Treaty most Parties have national focal points and institutions providing access to material that is part of the Treaty's Multilateral System of Access and Benefit-sharing do so only upon acceptance of the SMTA by the recipient of the material.

<sup>45</sup> ABS Elements, paragraph 29.

<sup>46</sup> ABS Elements, paragraph 30.

<sup>47</sup> CGRFA/WG-AnGR-8/14/Report, paragraph 25; CGRFA/WG-PGR-7/14/Report, paragraph 44(ii).

**(iii) Access to and utilization of genetic resources and associated traditional knowledge**

32. The Nagoya Protocol provides that, “[i]n the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD, unless otherwise decided by that Party.”

*Utilization of genetic resources for food and agriculture*

33. While the Nagoya Protocol does not define “access”, “genetic resources” are defined as “genetic material of actual or potential value” and “genetic material” as “any material of plant, animal, microbial, or other origin containing functional units of heredity.”<sup>48</sup> The Nagoya Protocol further defines “utilization of genetic resources” which means “to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the CBD.”<sup>49</sup> The Nagoya Protocol’s access provisions thus apply to access to any material of plant, animal, microbial, or other origin that contains functional units of heredity and is of actual or potential value, for the purposes of conducting research and development on its genetic and/or biochemical composition, including through biotechnology.

34. The ABS Elements point out that if ABS measures are limited to the above meaning of “utilization” they will not apply to certain typical uses of GRFA, for example the growing of seeds and subsequent use of the harvested product for human consumption. However, the ABS Elements also stress that “other activities regularly performed with respect to GRFA are more difficult to classify.”<sup>50</sup> According to the ABS Elements, such activities include:

- Selection and reproduction of plant genetic resources, for example by farmers or farming communities, based on phenotypic traits and not entailing any genetic methods;
- Fish farming serving the purpose of producing fish for human consumption and, at the same time, selecting and, in fact, domesticating fish;
- Provenance trials of forest trees that help to identify seed sources best adapted to the conditions of a specific planting site with the purpose of reforestation and wood production and, at the same time, breeding;
- Selection of semen-donor bulls and of livestock offspring for multiplication where the purpose is genetic herd improvement just as much as dairy and meat production.

35. The ABS Elements point out that many GRFA are being shaped, developed and improved through their continued use in agricultural production. Where “research and development” and agricultural production occur in tandem, it may be difficult to distinguish research and development activities covered by ABS measures from activities related to the production of agricultural products for sale and human consumption which many ABS laws do not intend to address. The ABS Elements explicitly stress that further technical guidance on this matter would be important to facilitate the implementation of national ABS measures.<sup>51</sup>

36. Although all the Working Groups flagged the issue of “utilization”, they did not provide any specific guidance for their subsectors.<sup>52</sup> Two Working Groups explicitly recommended that the ABS Expert Team consider the issue of utilization in the context of subsector-specific use and exchange practices.<sup>53</sup>

37. Guidance may be helpful as to which subsector-specific activities constitute “utilization” of GRFA. Such guidance could draw on national ABS measures or countries’ implementation experiences. The ABS Expert Group may wish to identify typical uses of GRFA and discuss whether

<sup>48</sup> Nagoya Protocol, Article 2, CBD, Article 2.

<sup>49</sup> Nagoya Protocol, Article 2(c)

<sup>50</sup> ABS Elements, paragraphs 47-48.

<sup>51</sup> ABS Elements, paragraph 48.

<sup>52</sup> CGRFA/TTLE-ABS-3/16/Inf.2, paragraph 23; CGRFA/TTLE-ABS-3/16/Inf.3, paragraph 24;

CGRFA/TTLE-ABS-3/16/Inf.4, paragraph 18; CGRFA/TTLE-ABS-3/16/Inf.5, paragraph 26.

<sup>53</sup> CGRFA/TTLE-ABS-3/16/Inf.5, paragraph 26; CGRFA/TTLE-ABS-3/16/Inf.3, paragraph 24.



they qualify as “utilization”, i.e. research and development on the genetic and/or biochemical composition of GRFA, including through the application of biotechnology. On the basis of typical uses of GRFA identified and their practical relevance, the ABS Expert Group could initiate, or propose to the Commission to initiate, the development of a typology of GRFA uses with a view to assist policy and decision makers in the preparation and implementation of ABS measures.

#### *Countries of origin*

38. ABS measures often provide that access to genetic resources for their utilization requires the PIC of the country of origin of the genetic resources. Article 2 of the CBD defines the country of origin as the country that possesses those genetic resources in *in situ* conditions. “*In situ* conditions” means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their “distinctive properties”.

39. The identification of the correct country of origin for a genetic resource is as important for countries as it is for potential recipients and users of genetic resources. Both, the provider country and the users of genetic resources need to have clarity as to their authorisation to act. However, as pointed out by the ABS Elements, it may be difficult in the case of many GRFA to determine with certainty the country of origin. Many GRFA have been widely exchanged across regions, countries and communities, often over long periods of time. Many different stakeholders, including indigenous and local communities, farmers, researchers and breeders have contributed to the development of many GRFA, in different places and at different points in time. The ABS Elements stress that the maintenance and evolution of many GRFA depend on continued human intervention, and that their sustainable utilization in research, development and production is, in fact, important for their conservation.<sup>54</sup>

40. It may therefore be useful for the development and implementation of ABS measures for GRFA to clarify and possibly specify for the different subsectors of GRFA, the concept of “country of origin”, including the meaning of “distinctive properties” the development of which in the surroundings of a specific country qualify, according to the above definition, the country as “country of origin” of the genetic resource.

41. Several Working Groups flagged at their last sessions the issues of “country of origin” and “distinctive properties,” with two Working Groups explicitly referring them for further review and analysis to the ABS Expert Team.<sup>55</sup> The ABS Expert Team could explore national ABS measures, countries’ implementation experiences and possibly other legal regimes using similar concepts. It could also consider options to apply the concepts of “country of origin” and “distinctive properties” to the different subsectors of GRFA, taking account “the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions”.<sup>56</sup>

#### *Genetic resources held by indigenous and local communities*

42. GRFA may be held by indigenous and local communities. The Nagoya Protocol requires in such cases that Parties take measures, in accordance with domestic law, as appropriate, with the aim of ensuring that the PIC or approval and involvement of the communities is obtained for access to genetic resources where the communities have the established right to grant access to such resources.<sup>57</sup>

43. The ABS Elements point out that ABS measures should address how PIC or approval and involvement of indigenous and local communities may be obtained, taking into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable.<sup>58</sup>

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<sup>54</sup> ABS Elements, paragraph 35.

<sup>55</sup> CGRFA/TTLE-ABS-3/16/Inf.2, paragraph 23; CGRFA/TTLE-ABS-3/16/Inf.3, paragraph 24; CGRFA/TTLE-ABS-3/16/Inf.5, paragraph 26.

<sup>56</sup> Nagoya Protocol, Preamble.

<sup>57</sup> Nagoya Protocol, Article 6.2.

<sup>58</sup> ABS Elements, paragraph 41.

44. Subsector-specific ABS elements could include different options or best practices as to how PIC or approval and involvement of indigenous and local communities could be obtained in the different subsectors of GRFA. Such options could be based on country experiences, customary laws, community protocols and procedures. However, the Working Groups did not provide any recommendations on this matter.

*Access to traditional knowledge associated with GRFA*

45. Under the Nagoya Protocol, in accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources is accessed with the PIC or approval and involvement of the indigenous and local communities holding such traditional knowledge, and that MAT have been established.<sup>59</sup> The ABS Elements point out that these requirements apply to access to traditional knowledge associated with genetic resources irrespective of whether genetic resources are being made available at the same time.<sup>60</sup>

46. According to the ABS Elements, further guidance may well be required as to how PIC or approval and involvement of indigenous and local communities may be obtained.<sup>61</sup> The Working Groups did not make any recommendations in this regard or provide outputs for consolidation. However, the ABS Expert Team could follow up by providing guidance on this matter, taking into account that in the case of traditional knowledge associated with GRFA much of the knowledge is often shared by several communities, and ABS measures could clarify how in such case fully valid approvals may be obtained. In this context, the ABS Expert Team may wish to take note of the *Draft Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the [free,] prior informed consent [or approval and involvement] of indigenous peoples and local communities for accessing their knowledge, innovations and practices, the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity and for reporting and preventing unlawful appropriation of traditional knowledge*, which the Ad Hoc Open-ended Intersessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity recommended for adoption by the Conference of the Parties to the CBD at its thirteenth meeting, to be held in December 2016.<sup>62</sup>

*Authorization procedures*

47. The ABS Elements point out that many variations of access authorization procedures exist.<sup>63</sup> Governments may therefore wish to consider advantages and disadvantages of the different procedures for the different subsectors of GRFA and the different purposes for which they may be used.

48. The ABS Elements consider exceptions from the PIC requirement, for example for taxonomic research or the exchange of GRFA among small-scale farmers. In addition, they mention a range of different types of authorization procedures, for example fast-track procedures for specific uses of genetic resources. While the Working Groups, at their sessions last sessions, did not specifically address this issue, some of them considered at their sessions in 2014 the option to treat different subsets of their sectors differently.<sup>64</sup> The ABS Expert Team may wish to discuss possible subsector-specific aspects related to PIC and MAT and reflect upon authorization procedures and modalities particularly suited for certain subsectors, types or uses of GRFA.

**(iv) Fair and equitable sharing of benefits**

49. The fair and equitable sharing of benefits arising from the utilization of genetic resources is a key component of ABS measures. Benefits may include monetary and non-monetary benefits. The ABS Elements refer to the Nagoya Protocol, which requires benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization to be shared in a fair and

<sup>59</sup> Nagoya Protocol, Article 7.

<sup>60</sup> ABS Elements, paragraph 63.

<sup>61</sup> ABS Elements, paragraph 64.

<sup>62</sup> UNEP/CBD/WG8J/REC/9/1 (<https://www.cbd.int/recommendations/wg8j/?m=wg8j-09>)

<sup>63</sup> ABS Elements, paragraphs 53 - 62.

<sup>64</sup> CGRFA/WG-AnGR-8/14/Report, paragraph 23; CGRFA/WG-PGR-7/14/Report, paragraph 44.iv.

equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD. The sharing of benefits shall be on MAT.

#### *Benefit-sharing standards*

50. The ABS Elements point out that bilateral case-by-case negotiations of MAT for GRFA may entail high transaction costs and therefore not be practical. Providers and users of GRFA may therefore wish to rely on model contractual clauses, codes of conduct, guidelines, best practices and/or standards developed for their sector or subsector. The ABS Elements explicitly refer to the SMTA developed under the Treaty, which includes standardized provisions on benefit-sharing.<sup>65</sup>

51. Taking into account the Commission's request to further elaborate subsector-specific elements for ABS, the ABS Expert Team could consider developing or recommending to develop mechanisms, best practices or model clauses for sharing the benefits derived from the utilization of the different subsectors of GRFA. However, the Working Groups did not provide any outputs on this matter.

#### *Benefit-sharing for incremental innovation processes*

52. As stressed by the ABS Elements, the innovation process for many GRFA, in particular plant and animal genetic resources, is usually of incremental nature and based on contributions made by different people in different places at different points of time. Most products are not developed out of an individual genetic resource, but with the contributions of several genetic resources at different stages. The ABS Elements therefore consider the sharing of benefits with the proper beneficiary "*a major challenge for most subsectors of GRFA, including aquatic and forest genetic resources, where breeding technologies play an increasingly important role.*"<sup>66</sup> The ABS Elements conclude that depending on the extent to which genetic resources and associated traditional knowledge contribute to a final product, it may be difficult to determine the fair and equitable sharing of benefits with the different countries and indigenous and local communities that contributed.

53. Various options for accommodating the incremental nature of the innovation process typical of many GRFA are available, including: the pooling of benefits in a benefit-sharing fund and disbursement of funds in line with agreed policies and disbursement criteria,<sup>67</sup> and the sharing of benefits through research partnerships.<sup>68</sup> The ABS Elements also refer to the on-going process under the Nagoya Protocol<sup>69</sup> to consider the need for and modalities of a global benefit-sharing mechanism for genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent.<sup>70</sup> While the Working Groups, at their last sessions, did not consider subsector-specific benefit-sharing options in any detail, some of them, at their sessions in 2014, recommended that benefit-sharing options be considered, such as the possibility of decoupling access and benefit-sharing<sup>71</sup> and standardized terms and conditions under which benefits are shared.<sup>72</sup>

#### *Benefit-sharing for GRFA accessed prior to CBD/ Nagoya Protocol*

54. The ABS Elements clarify that the Nagoya Protocol, in the absence of any rules to the contrary, does not prevent its Parties from applying ABS measures to utilizations or access to genetic resources that fall outside the scope of the Protocol. However, the ABS Elements also point out that with regard to such resources the Protocol does not require Parties to take user country compliance measures<sup>73</sup> and that, as most countries are using GRFA originating from other countries, ABS measures covering previously accessed GRFA could lead to considerable uncertainty regarding the

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<sup>65</sup> ABS Elements, paragraph 68.

<sup>66</sup> ABS Elements, paragraph 70.

<sup>67</sup> ABS Elements, paragraph 71.

<sup>68</sup> ABS Elements, paragraph 74.

<sup>69</sup> <https://www.cbd.int/abs/bfmechanism.shtml>

<sup>70</sup> ABS Elements, paragraph 75.

<sup>71</sup> CGRFA/WG-PGR-7/14/Report, paragraph 44iv.

<sup>72</sup> CGRFA/WG-AnGR-8/14/Report, paragraph 23.

<sup>73</sup> ABS Elements, paragraph 33.

status of such resources and, more importantly, severely discourage potential users from utilizing such GRFA for research and development.<sup>74</sup>

55. The Working Groups did not provide any outputs on this matter. The ABS Expert Team may wish to discuss subsector-specific impacts of benefit-sharing obligations applying to previously accessed GRFA.

#### (v) Compliance

56. The ABS Elements provide some clarification with regard to the different types of compliance measures in the area of ABS. They may address compliance (of Contracting Parties) with an instrument, such as the Treaty or the Nagoya Protocol, compliance of users of genetic resources or traditional knowledge with MAT or compliance of users of genetic resources and associated traditional knowledge with domestic ABS legislation of the provider country. With regard to the third type of compliance, the Nagoya Protocol requires each Party to take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources/traditional knowledge utilized within its jurisdiction have been accessed in accordance with PIC and that MAT have been established, as required by the domestic ABS legislation or regulatory requirements of the other Party.<sup>75</sup> Parties to the Nagoya Protocol shall also take measures to address non-compliance with user country measures and cooperate in cases of alleged violations.<sup>76</sup> To support compliance, Parties to the Nagoya Protocol shall also take measures, as appropriate, to monitor and to enhance transparency about the utilization of genetic resources, which shall include the designation of one or more checkpoints.<sup>77</sup> It should be noted that under the Treaty, access shall be accorded expeditiously without the need to track individual accessions.<sup>78</sup>

57. The ABS Elements consider compliance measure a challenge to the food and agriculture sector, where the ABS status of GRFA used in breeding is unknown to the user. Uncertainty regarding the ABS status of GRFA may indeed act as a strong disincentive and deter stakeholders from utilizing such genetic resources. The ABS Elements therefore call upon Governments to consider distinctive solutions to this problem, including through supporting the development of subsectoral standards building on current best practices, such as the breeders' exemption, or putting in place multilateral solutions.<sup>79</sup>

58. While the Working Groups did not provide any recommendations on this matter, the ABS Expert Team may wish to consider options for subsectoral compliance standards which do not discourage the utilization of GRFA.

#### IV. GUIDANCE SOUGHT

59. Taking into account the outputs of the Working Groups, the ABS Expert Team may wish to provide guidance with regard to the elaboration of subsector-specific elements for access and benefit-sharing for GRFA, including with regard to:

- Typical uses of (different subsectors) of GRFA and whether or not they qualify as “utilization,” with a view to develop a typology of GRFA uses assisting policy and decision makers in the preparation and implementation of ABS measures;
- The application of the concept of “country of origin” to GRFA, including the meaning of “distinctive properties” the development of which in the surroundings of a specific country qualify the country as “country of origin” of the genetic resource;
- Different options as to how, in accordance with domestic law, PIC or approval and involvement of indigenous and local communities may be obtained for the different subsectors

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<sup>74</sup> ABS Elements, paragraph 67.

<sup>75</sup> Nagoya Protocol, Articles 15.1; 16.1.

<sup>76</sup> Nagoya Protocol, Articles 15.2, 15.3, 16.2 & 16.3.

<sup>77</sup> Nagoya Protocol, Article 17.

<sup>78</sup> Treaty, Article 12.3(b).

<sup>79</sup> ABS Elements, paragraph 77.

of GRFA where GRFA are held by indigenous and local communities and these communities have the established right to grant access to such resources;

- Different options as to how, in accordance with domestic law, PIC or approval and involvement of indigenous and local communities may be obtained and mutually agreed terms be established for the different subsectors of GRFA where traditional knowledge associated with GRFA is held by indigenous and local communities;
- Subsector-specific considerations related to PIC and MAT reflecting specificities of the different subsectors of GRFA,
- Subsector-specific mechanisms or model clauses for sharing the benefits derived from the utilization of the different subsectors of GRFA, including mechanisms or model clauses accommodating the incremental nature of the innovation process typical of many GRFA;
- Possible options for subsectoral compliance standards which do not discourage the utilization of GRFA; and
- The scope of subsector specific ABS elements for GRFA should such elements be developed.

60. With regard to PGRFA, the ABS Expert Team may wish to recommend that:

- The Secretaries of the Commission and the Governing Body of the Treaty continue strengthening collaboration to promote coherence in the development and implementation of the respective programmes of work of the two bodies with regard to access and benefit-sharing;
- The Commission invite the Governing Body of the Treaty, in its continued governance of PGRFA according to Article 3 of the Treaty, to continue to closely coordinate with the Commission, in order to address in a complementary way the distinctive features and specific uses of PGRFA, bearing in mind the ongoing activities and processes under the Treaty, including the current process to enhance the functioning of the MLS and the on-going cooperation to support the harmonious implementation of the Treaty, the CBD and the Nagoya Protocol; and
- The Commission invite the Governing Body to inform the Commission at regular intervals on the process to enhance the MLS with a view to avoid duplication of efforts.

61. The ABS Expert Team may also wish to make recommendation to the Commission regarding future work of the ABS Expert Team on subsector-specific ABS elements and, as appropriate, future sessions of the ABS Expert Team.

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**APPENDIX****EXTRACTS FROM THE REPORTS OF THE INTERGOVERNMENTAL TECHNICAL  
WORKING GROUPS**

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**REPORT OF THE FOURTH SESSION OF THE INTERGOVERNMENTAL TECHNICAL  
WORKING GROUP ON FOREST GENETIC RESOURCES  
(ROME, 10 -12 MAY 2016)****IV. ACCESS AND BENEFIT-SHARING FOR FOREST GENETIC RESOURCES**

22. The Working Group considered the document *Elaboration of subsector-specific elements for access and benefit-sharing for genetic resources for food and agriculture*.<sup>8</sup>

23. The Working Group requested that input sought from this group with regard to access and benefit-sharing should be limited to technical expertise on forest genetic resources, for instance with regard to the elaboration of typical uses or distinctive properties of forest genetic resources.

24. The Working Group recalled its work during previous sessions on access and benefit-sharing, in particular on the distinctive features of forest genetic resources<sup>9</sup> and on aspects of forest genetic resources that should be considered by countries when dealing with access and benefit-sharing<sup>10</sup>, at the national level. It invited the Team of Technical and Legal Experts on Access and Benefit-Sharing (ABS Expert Team) to take this work into consideration.

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<sup>8</sup> CGRFA/WG-FGR-4/16/6.

<sup>9</sup> CGRFA/WG-FGR-2/13/Report, paragraph 21.

<sup>10</sup> CGRFA/WG-FGR-3/14/Report, *Appendix D*.

**REPORT OF THE EIGHTH SESSION OF THE INTERGOVERNMENTAL TECHNICAL  
WORKING GROUP ON PLANT GENETIC RESOURCES FOR FOOD AND  
AGRICULTURE  
(ROME, 8-10 JUNE 2016)**

**V. ACCESS AND BENEFIT-SHARING FOR PLANT GENETIC RESOURCES FOR  
FOOD AND AGRICULTURE**

23. The Working Group considered the document *Elaboration of subsector-specific elements for access and benefit-sharing for genetic resources for food and agriculture*<sup>11</sup>. The Working Group commended the Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture, as welcomed by the Commission and the FAO Conference.

24. It recommended that with regard to the utilization and distinctive properties of PGRFA, the Team of Technical and Legal Experts on Access and Benefit-Sharing review and analyse existing use and exchange practices typical of the plant sector under existing frameworks, including model contractual clauses, codes of conduct, guidelines, best practises, community protocols and standards. It further recommended to collect country experiences with existing access and benefit-sharing frameworks providing special provisions for genetic resources for food and agriculture, including those held by indigenous peoples and local communities, and traditional knowledge associated with PGRFA.

25. The Working Group recommended that the Commission request FAO to support countries, upon request from governments, in the development of awareness-raising, capacity-building and policy implementation activities addressing access and benefit-sharing for PGRFA.

26. The Working Group recommended that:

- The Secretaries of the Commission and the Governing Body of the Treaty continue strengthening collaboration to promote coherence in the development and implementation of the respective programmes of work of the two bodies with regard to access and benefit-sharing;
- The Commission invite the Governing Body of the Treaty, in its continued governance of PGRFA according to Article 3 of the Treaty, to continue to closely coordinate with the Commission, in order to address in a complementary way the distinctive features and specific uses of PGRFA, bearing in mind the ongoing activities and processes under the Treaty, including the current process to enhance the functioning of the Multilateral System of Access and Benefit-Sharing (MLS) and the on-going cooperation to support the harmonious implementation of the Treaty, the Convention on Biological Diversity (CBD) and the Nagoya Protocol;
- The Commission invite the Governing Body to inform the Commission at regular intervals on the process to enhance the MLS with a view to avoid duplication of efforts.

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<sup>11</sup> CGRFA/WG-PGR-8/16/5.

**REPORT OF THE FIRST SESSION OF THE AD HOC INTERGOVERNMENTAL  
TECHNICAL WORKING GROUP ON AQUATIC GENETIC RESOURCES FOR FOOD AND  
AGRICULTURE  
(ROME, 20-22 JUNE 2016)**

**V. ACCESS AND BENEFIT-SHARING FOR AQUATIC GENETIC RESOURCES**

17. The Working Group considered the document *Elaboration of subsector-specific elements for access and benefit-sharing for genetic resources for food and agriculture*.<sup>5</sup> The Working Group commended the Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture, as welcomed by the Commission and the FAO Conference.

18. The Working Group recommended that the Team of Technical and Legal Experts on Access and Benefit-Sharing consider existing use and exchange practices typical of the AqGR sector under existing frameworks. It further recommended that the Commission collect, for consideration by the Working Group at its next session, country experiences with existing access and benefit-sharing frameworks providing special provisions for AqGR, including those held by indigenous peoples and local communities, and traditional knowledge associated with AqGR.

19. The Working Group recommended that the Secretary of the Commission continue strengthening information exchange and collaboration with other relevant bodies and instruments, including the Convention on Biological Diversity, 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, the International Treaty on Plant Genetic Resources for Food and Agriculture and the United Nations Convention on the Law of the Sea.

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<sup>5</sup> CGRFA/WG-AqGR-1/16/4.



**REPORT OF THE NINTH SESSION OF THE INTERGOVERNMENTAL TECHNICAL  
WORKING GROUP ON ANIMAL GENETIC RESOURCES FOR FOOD AND  
AGRICULTURE  
(ROME, 6-8 JULY 2016)**

**V. ACCESS AND BENEFIT-SHARING FOR ANIMAL GENETIC RESOURCES**

25. The Working Group considered the document *Elaboration of subsector-specific elements for access and benefit-sharing for genetic resources for food and agriculture*.<sup>12</sup> The Working Group observed that implementation of ABS measures in the livestock sector requires development of a common understanding of the technical terms used in this context. It recalled its work during previous sessions on ABS<sup>13</sup> and commended the *Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture*,<sup>14</sup> as welcomed by the Commission and the Conference.

26. The Working Group *recommended* that, with regard to the utilization and distinctive features and properties of animal genetic resources, the Team of Technical and Legal Experts on Access and Benefit-Sharing consider in their work the existing use and exchange practices typical of the livestock sector under existing frameworks, as well as the clarification of relevant technical terms.

27. The Working Group recalled that the Commission, at its Seventeenth Regular Session, will review existing ABS instruments and their impact on genetic resources for food and agriculture. It recommended that the Commission request its Secretary to continue collecting information and experiences submitted by Members concerning use and exchange practices, taking into account that most animal genetic resources are privately owned.

28. The Working Group recommended that the Commission request its Secretary to continue strengthening information exchange and collaboration with other relevant bodies and instruments.

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<sup>12</sup> CGRFA/WG-AnGR-9/16/4.

<sup>13</sup> CGRFA/WG-AnGR-7/12/Report, paragraphs 30-33; CGRFA/WG-AnGR-8/14/Report, paragraphs 19-25.

<sup>14</sup> <http://www.fao.org/3/a-i5033e.pdf>.