



# COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

## Item 6 of the Provisional Agenda

### INTERGOVERNMENTAL TECHNICAL WORKING GROUP ON AQUATIC GENETIC RESOURCES FOR FOOD AND AGRICULTURE

#### Third Session

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### ACCESS AND BENEFIT-SHARING FOR GENETIC RESOURCES FOR FOOD AND AGRICULTURE: REVIEW AND OUTLOOK

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## I. INTRODUCTION

1. Sustainable Development Goal (SDG) Target 2.5 and SDG Target 15.6 aim to “promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed.”
2. The Commission on Genetic Resources for Food and Agriculture (Commission) will review, at its forthcoming Eighteenth Regular Session, its work on access and benefit-sharing (ABS).<sup>1</sup> At its last session, it requested its Secretary to prepare for review by the intergovernmental technical working groups on animal, aquatic, forest and plant genetic resources (Working Groups):
  - (i) a review of the Commission’s work on ABS for genetic resources for food and agriculture (GRFA);
  - (ii) an overview of developments under other international agreements and instruments relevant to ABS for GRFA;
  - (iii) an up-to-date survey of existing legislative, administrative and policy approaches, including best practices, for ABS for the different subsectors of GRFA and traditional knowledge associated with GRFA held by indigenous peoples and local communities, with the aim of identifying typical approaches and lessons learned from their implementation, as well as challenges and possible solutions; and
  - (iv) a proposal for options for future work of the Commission on ABS for the different subsectors of GRFA.<sup>2</sup>
3. This document responds to the above requests and invites the Working Group to review the *Draft Survey of ABS Country Measures Accommodating Distinctive Features of Genetic Resources for Food and Agriculture and Associated Traditional Knowledge*.<sup>3</sup> It also seeks the Working Group’s guidance regarding future work on ABS. Submissions received in response to the Commission’s request for inputs on the above issues are contained in the document *Inputs by Members on access and benefit-sharing for genetic resources for food and agriculture*.<sup>4</sup>

## II. REVIEW OF THE COMMISSION’S WORK ON ACCESS AND BENEFIT-SHARING: 2000–2020

4. The Commission has a longstanding history of dealing with access to GRFA and the fair and equitable sharing of benefits arising from their utilization. Created by the FAO Conference in 1983 to monitor the operation of the International Undertaking on Plant Genetic Resources for Food and Agriculture, for more than two decades the Commission has played a key role in the global governance of plant genetic resources (PGR). In 1993, following the adoption of the Convention on Biological Diversity (CBD), the Commission initiated the revision of the International Undertaking that resulted, in 2001, in the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty), the first legally binding international instrument for ABS for genetic resources. At its Tenth Regular Session in 2004, when the International Treaty had just entered into force, the Commission, whose mandate, in the meantime, had been broadened to cover all GRFA, recommended “that FAO and the Commission contribute to further work on access and benefit-sharing, in order to ensure that it move in a direction supportive of the special needs of the agricultural sector, in regard to all components of biological diversity of interest to food and agriculture.”<sup>5</sup> Since then, the Commission has addressed issues related to ABS for GRFA at each of its sessions.

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<sup>1</sup> See CGRFA-17/19/Report, *Appendix F*, Annex 1.

<sup>2</sup> CGRFA-17/19/Report, paragraph 19.

<sup>3</sup> CGRFA/WG-AqGR-3/21/Inf.12.

<sup>4</sup> CGRFA/WG-AqGR-3/21/Inf.13.

<sup>5</sup> CGRFA-10/04/REP, paragraph 76.

5. Having agreed, in 2007, on the importance of considering ABS in relation to all components of biodiversity for food and agriculture, the Commission considered arrangements and policies for ABS for GRFA at its Twelfth Regular Session in 2009. It took note of a series of background study papers on the use and exchange of GRFA in the different sectors of animal, forest, aquatic, microbial and invertebrate genetic resources<sup>6</sup> and decided to agree on the text of a resolution addressing the then ongoing negotiations under the CBD of an international regime on ABS. The resolution, subsequently adopted by the FAO Conference, stressed the special nature of agricultural biodiversity and invited the Conference of the Parties to the CBD to allow for differential treatment of different sectors or subsectors of genetic resources, of different GRFA, of different activities and of the different purposes for which activities are carried out.<sup>7</sup>

6. Following the adoption 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* (Nagoya Protocol) in 2010, the Commission established an Ad Hoc Technical Working Group on Access and Benefit-sharing for Genetic Resources for Food and Agriculture. It was mandated to identify relevant distinctive features of the different subsectors of GRFA requiring distinctive solutions. The Group was also given the task of developing options that would guide and assist countries in developing legislative, administrative and policy measures that accommodate these features.<sup>8</sup>

7. In response to the report of the Ad Hoc Technical Working Group, the Commission initiated, in 2013, the development of explanatory notes to the distinctive features of GRFA, as identified by the Ad Hoc Technical Working Group.<sup>9</sup> In addition, the Commission decided to replace the Ad Hoc Technical Working Group by the Team of Technical and Legal Experts on Access and Benefit-sharing (ABS Expert Team), consisting of two representatives from each region, to prepare, in consultation with the Working Groups, *Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture* (ABS Elements).<sup>10</sup>

8. In 2014, the ABS Expert Team participated in relevant sections of the meetings of the Working Groups and provided inputs to their discussions. Considering the lessons learnt from each of the subsectors and drawing on a body of submissions by Members and observers, studies, reports and other inputs prepared since 2009, including the results of a multi-stakeholder expert dialogue,<sup>11</sup> the ABS Expert Team prepared the ABS Elements, while noting that “[d]eveloping and implementing ABS measures is a work in progress and so is the development of these ABS Elements.”<sup>12</sup> In 2015, the Commission and the Conference welcomed the ABS Elements and, noting “the complementarity between the work of the Commission and the Nagoya Protocol in regard to access and benefit-sharing for genetic resources,” invited countries to consider and, as appropriate, make use of the ABS Elements.<sup>13</sup>

9. The Commission also requested its Working Groups to develop, in collaboration with the ABS Expert Team, subsector-specific elements for ABS. In 2016, the Commission’s Working Groups,

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<sup>6</sup> Background Study Paper No. 42: *Framework study on food security and access and benefit-sharing for genetic resources for food and agriculture*; Background Study Paper No. 43: *The use and exchange of animal genetic resources for food and agriculture*; Background Study Paper No. 44: *The use and exchange of forest genetic resources for food and agriculture*; Background Study Paper No. 45: *The use and exchange of aquatic genetic resources for food and agriculture*; Background Study Paper No. 46: *The use and exchange of microbial genetic resources for food and agriculture*; Background Study Paper No. 47: *The use and exchange of biological control agents for food and agriculture*.

<sup>7</sup> FAO Conference Resolution 18/2009.

<sup>8</sup> CGRFA-13/11/Report, *Appendix D.1*.

<sup>9</sup> See CGRFA-15/15/Inf.10.

<sup>10</sup> CGRFA-14/13/Report, paragraph 40.

<sup>11</sup> Background Study Paper No. 59: *Access and Benefit-Sharing for Genetic Resources for Food and Agriculture – Current Use and Exchange Practices, Commonalities, Differences and User Community Needs - Report from a Multi-Stakeholder Expert Dialogue*.

<sup>12</sup> ABS Elements, paragraph 25.

<sup>13</sup> CGRFA-15/15/Report, paragraph 22; C 2015/REP, paragraph 52.

including the newly established Ad Hoc Working Group on Aquatic Genetic Resources, considered the elaboration of subsector-specific ABS elements.<sup>14</sup>

10. In 2017, the Commission, in response to the reports of the ABS Expert Team and the Working Groups, agreed to produce “non-prescriptive explanatory notes describing, within the context of the ABS Elements, the distinctive features and specific practices of different subsectors of GRFA, to complement the ABS Elements.”<sup>15</sup> As an early step in the ensuing process, the Commission Secretariat convened in 2018, in collaboration with the Secretariats of the International Treaty and the CBD, the International Workshop on Access and Benefit-Sharing for Genetic Resources for Food and Agriculture<sup>16</sup> to facilitate exchange of information, experiences and views and, more specifically, generate outputs for elaboration into the non-prescriptive explanatory notes.<sup>17</sup> The open-ended workshop was attended, *inter alia*, by representatives of the Commission’s Working Groups, the ABS Expert Team and a small group of seven regionally representative experts for micro-organism and invertebrate GRFA, which subsequently collaborated in the preparation of draft explanatory notes, for consideration by the Commission.

11. At its last session, in 2019, the Commission welcomed the explanatory notes and requested FAO to disseminate in future the ABS Elements with the finalized explanatory notes.<sup>18</sup> The ABS Elements with Explanatory Notes were published at the end of 2019 and are available online in all UN languages.<sup>19</sup> The Commission also requested an up-to-date survey of ABS measures for the different subsectors of GRFA, a draft of which is available to the Working Group<sup>20</sup> and summarized in section IV of this document.

### **III. RECENT DEVELOPMENTS UNDE OTHER INTERNATIONAL AGREEMENTS AND INSTRUMENTS**

12. Matters related to ABS are addressed under various international instruments and in various forums, including the CBD and its Nagoya Protocol, the International Treaty, the United Nations Convention on the Law of the Sea (UNCLOS), the World Health Organization (WHO) and the World Intellectual Property Organization (WIPO).

#### **Convention on Biological Diversity and 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**

13. 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>21</sup> Access to genetic resources shall be subject to prior informed consent (PIC)<sup>22</sup> and, where granted, shall be on mutually agreed terms (MAT).<sup>23</sup> Potential benefits to be shared also include: access to and transfer of technology using genetic 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>24</sup>

<sup>14</sup> CGRFA-16/17/10, paragraphs 17–19; CGRFA-16/17/12, paragraphs 25–28; CGRFA-16/17/15, paragraphs 23–26; CGRFA-16/17/18, paragraphs 22–24.

<sup>15</sup> CGRFA-16/17/Report Rev.1, paragraph 25.

<sup>16</sup> FAO. 2018. *Proceedings of the International Workshop on Access and Benefit-sharing for Genetic Resources for Food and Agriculture*. Rome.

<sup>17</sup> CGRFA-17/19/3.2/Inf.3.

<sup>18</sup> CGRFA-17/19/Report, paragraph 16.

<sup>19</sup> FAO. 2019. *ABS Elements: Elements to facilitate domestic implementation of access and benefit-sharing for different subsectors of genetic resources for food and agriculture – with explanatory notes*. Rome.

<sup>20</sup> CGRFA/WG-AqGR-3/21/Inf.12.

<sup>21</sup> CBD, Article 15.7.

<sup>22</sup> CBD, Article Art. 15.5.

<sup>23</sup> CBD, Article 15.4.

<sup>24</sup> CBD, Articles 15, 16, 19, 20, 21

14. The Nagoya Protocol is the instrument for the implementation of the ABS provisions of the CBD.<sup>25</sup> It covers genetic resources, including GRFA, within the scope of Article 15 of the CBD,<sup>26</sup> as well as associated traditional knowledge, and sets out core obligations for its Parties with regard to: (i) access to genetic resources for their utilization, i.e. research and development on their genetic and/or biochemical composition, and to associated traditional knowledge; (ii) the sharing of benefits derived from such utilization, as well as subsequent applications and commercialization; and (iii) compliance of users of genetic resources with the domestic ABS measures of the Contracting Party that provided the genetic resources and with the contractual obligations providers and users have mutually agreed on.

15. 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 International Treaty and the Commission.<sup>27</sup>

16. 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>28</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>29</sup>

17. 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>30</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>31</sup> One of the instruments explicitly acknowledged in the Preamble of the Nagoya Protocol is the International Treaty, which has been developed in harmony with the CBD.<sup>32</sup> Discussions on criteria that could be used to identify what constitutes a specialized international ABS instrument, and what could be a possible process for recognizing such an instrument, are ongoing.<sup>33</sup>

18. Beyond the openness to other international instruments, the Nagoya Protocol commits its Contracting Parties to paying due regard to relevant ongoing work or practices under other 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>34</sup> The Conference of the Parties serving as the Meeting of the Parties to the Nagoya Protocol therefore seeks close cooperation with and follows developments in relevant international forums, including the International Treaty and the Commission.<sup>35</sup>

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<sup>25</sup> Nagoya Protocol, Article 4.4.

<sup>26</sup> Nagoya Protocol, Article 3.

<sup>27</sup> Nagoya Protocol, Preamble.

<sup>28</sup> Nagoya Protocol, Article 8(c).

<sup>29</sup> Nagoya Protocol, Article 8(a).

<sup>30</sup> Nagoya Protocol, Article 4.2.

<sup>31</sup> Nagoya Protocol, Article 4.4.

<sup>32</sup> International Treaty, Article 1.1.

<sup>33</sup> see CBD/SBI/2/INF/17.

<sup>34</sup> Nagoya Protocol, Article 4.3.

<sup>35</sup> CBD/NP/MOP/DEC/2/5; CBD/NP-MOP/DEC/3/7; CBD/SBI/3/14, paragraphs 33–40.

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

19. The International Treaty, negotiated under the aegis of the Commission, is a specialized ABS instrument that applies to PGR.<sup>36</sup> Its Multilateral System of Access and Benefit-sharing (MLS) covers PGR of crops listed in its Annex 1. In the exercise of their sovereignty, state Contracting Parties provide access to PGR that are under their management and control and in the public domain.<sup>37</sup> The MLS also comprises CGIAR “in trust” materials, materials held by other international institutions that sign agreements with the Governing Body of the International Treaty and materials that individual holders voluntarily make available. Under the MLS, access is provided for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.<sup>38</sup> Materials are accessed and benefits shared under conditions set out in the Standard Material Transfer Agreement (SMTA), which binds the initial provider and recipient as well as subsequent users.<sup>39</sup>

20. In 2013, the Governing Body of the International Treaty launched a process to enhance the MLS by establishing an Ad Hoc Open-ended Working Group, which was tasked, among other issues, with developing measures for the increase in user-based payments and contributions to the Benefit-Sharing Fund in a sustainable and predictable long-term manner. The Working Group considered, among other matters, revisions to the SMTA, as well as possible changes to the coverage of the MLS. As countries’ interdependence in plant genetic resources represents one of the key arguments for the MLS, the basis for considering its enhancement included a fully updated estimation of such interdependence, as provided in a recent study.<sup>40</sup>

21. In the course of the last biennium, the Working Group considered, among other issues, criteria and options for the possible adaptation of coverage of the MLS and supportive measures to facilitate the implementation of the possible expansion of the coverage of the MLS. The Working Group considered a possible process to review the status of: ratifications to the amended Annex I of the International Treaty (i.e. crops and forages covered by the MLS); the level of user-based income accruing to the Benefit-sharing Fund; availability of and access provided to material within the MLS.

22. In 2019, at its Eighth Session, the Governing Body of the International Treaty aimed to reach consensus on measures to enhance the functioning of the MLS, an item that has been under negotiations for six years. Despite intense negotiations, the Governing Body could not reach consensus on the enhancement of the MLS and adopted Resolution 2/2019.<sup>41</sup> It encouraged informal consultations among Contracting Parties and especially national consultations among sectors and relevant stakeholders.

## **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.

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>42</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.

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<sup>36</sup> International Treaty, Article 3.

<sup>37</sup> International Treaty, Article 11.2.

<sup>38</sup> International Treaty, Article 12.3 a.

<sup>39</sup> International Treaty, Article 12.4.

<sup>40</sup> The study is available at: <http://www.fao.org/3/a-bq533e.pdf>.

<sup>41</sup> Resolution 2/2019.

<sup>42</sup> CBD, Article 4(b).

25. 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,<sup>43</sup> the United Nations General Assembly decided in 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. In March 2016, the Preparatory Committee established by the UN General Assembly Resolution 69/292<sup>44</sup> 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.

26. In December 2017, the UN General Assembly, in its Resolution 72/249<sup>45</sup> of 24 December 2017, decided to convene an Intergovernmental Conference on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ),<sup>46</sup> under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee. In accordance with Resolution 72/249, the Intergovernmental Conference addresses: 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. The Intergovernmental Conference, at its third session in August 2019, negotiated, for the first time, text on the basis of a “zero draft” developed by the President of the Conference.

27. A revised draft text of an agreement under the Convention on the Law of the Sea has been prepared by the President for consideration at the Conference’s fourth session.<sup>47</sup> Part II (Articles 7–13) of the revised draft text addresses marine genetic resources, including questions on the sharing of benefits. By decision 74/543 of 11 March 2020, the General Assembly decided to postpone the fourth session of the Conference to the earliest possible available date to be decided by the General Assembly.

### **World Intellectual Property Organization**

28. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore<sup>48</sup> was established by the General Assembly of the WIPO in 2000. It undertakes text-based negotiations to finalize an agreement on an international legal instrument(s) for the protection of traditional knowledge, traditional cultural expressions and genetic resources.

29. At its Fortieth Session, the Intergovernmental Committee agreed that the Chair’s text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources should be transmitted to the 2019 WIPO General Assembly and recommended that its mandate be renewed for the biennium 2020–2021. The WIPO General Assembly, at its Fifty-first session, in 2019, renewed the mandate of the Intergovernmental Committee and agreed on the work plan for the biennium. According to its mandate, the Intergovernmental Committee will continue to expedite its work with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property, which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions.<sup>49</sup>

### **World Health Organization**

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

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<sup>43</sup> <https://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>

<sup>44</sup> Resolution 69/292.

<sup>45</sup> Resolution 72/249.

<sup>46</sup> <https://www.un.org/bbnj/>

<sup>47</sup> A/CONF.232/2020/3.

<sup>48</sup> <https://www.wipo.int/tk/en/igc/>

<sup>49</sup> WO/GA/51/18, paragraph 226.

Other Benefits (PIP Framework). The objective of the PIP Framework is to improve pandemic influenza preparedness and response, and strengthen the protection against 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, on an equal footing, for:

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

31. WHO coordinates the sharing of influenza viruses with pandemic potential through an international network of public health laboratories called the Global Influenza Surveillance and Response System (GISRS). The PIP Framework provides the terms of reference for the sharing of influenza viruses and access to vaccines and other benefits within GISRS (SMTA 1) and with entities outside the system (SMTA 2).<sup>50</sup>

32. In 2016, the Executive Board of WHO agreed that the Secretariat would prepare a study to analyse how the implementation of the Nagoya Protocol might affect the sharing of pathogens, and the potential public health implications. A central conclusion of the study was that: “(1) the Nagoya Protocol has implications for the public health response to infectious diseases, including influenza; and (2) these implications include opportunities to advance both public health and principles of fair and equitable sharing of benefits.”<sup>51</sup> In addition, the report *inter alia* outlined the importance of timely sharing of pathogens relevant to global public health, and examined how the sharing of benefits arising from their use has been, and will increasingly be, important both for public health reasons and in light of the entry into force and implementation of the Nagoya Protocol.

33. Following discussions at the 144th Executive Board, the Seventy-second WHA addressed the PIP Framework and public health implications of implementation of the Nagoya Protocol. The WHA requested the WHO Director-General to *inter alia*: (a) work with the GISRS and other partners, and relevant institutions, to collect, analyse and present data on influenza virus sharing in a way that enables a deeper understanding of the challenges, opportunities and implications for public health associated with virus sharing under the GISRS, including by identifying: specific instances where influenza virus sharing has been hindered; and how such instances may be mitigated; and (b) prepare a report on the treatment of influenza virus sharing and the public health considerations thereof by existing relevant legislation and regulatory measures, including those implementing the Nagoya Protocol.<sup>52</sup> In addition, it requested the Director-General to broaden engagement with Member States, the Secretariat of the CBD, relevant international organizations and relevant stakeholders: (a) to provide information on current pathogen-sharing practices and arrangements, the implementation of ABS measures, as well as the potential public health outcomes and other implications; and (b) to provide a report to the Seventy-fourth WHA.

34. In response to decision WHA72(12), WHO developed a report on influenza virus sharing and a summary on national legislation and regulatory measures related to influenza.<sup>53</sup> In the context of the implementation of decision WHA72(13),<sup>54</sup> WHO developed, in consultation with the Secretariat of the CBD, a survey to collect information on: (a) current pathogen-sharing practices and arrangements; and (b) implementation of ABS measures.<sup>55</sup>

35. The Seventy-third WHA (held in May and November 2020) called, under agenda item 3 on the COVID-19 response, for the universal, timely and equitable access to, and fair distribution of, all quality, safe, efficacious and affordable essential health technologies and products, including their components and precursors, that are required in the response to the COVID-19 pandemic as a global

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<sup>50</sup> WHO. 2011. Pandemic influenza preparedness framework for the sharing of influenza viruses and access to vaccines and other benefits. Geneva, Switzerland.

<sup>51</sup> WHO. 2017. Implementation of the Nagoya Protocol and Pathogen Sharing: Public Health Implications, p.6.

<sup>52</sup> WHA72(12).

<sup>53</sup> See <https://www.who.int/influenza/pip/governance/wha72-12/en/>

<sup>54</sup> WHA72(13).

<sup>55</sup> See [https://www.who.int/publications/m/item/survey-on-wha72\(13\)-public-health-implications-of-the-nagoya-protocol](https://www.who.int/publications/m/item/survey-on-wha72(13)-public-health-implications-of-the-nagoya-protocol)



priority, and the urgent removal of unjustified obstacles thereto.<sup>56</sup> In November 2020, the Director-General of WHO announced the creation of “BioHub,” a new repository for specimens at a secure facility in Switzerland, to facilitate the voluntary sharing of viruses and the rapid development of medical countermeasures<sup>57</sup>. In January 2021, the Executive Board took note of the Director-General’s report on *The public health implications of implementation of the Nagoya Protocol*.<sup>58</sup>

#### **IV. ACCESS AND BENEFIT-SHARING COUNTRY MEASURES ACCOMMODATING THE DISTINCTIVE FEATURES OF GENETIC RESOURCES FOR FOOD AND AGRICULTURE AND ASSOCIATED TRADITIONAL KNOWLEDGE**

36. In response to the Commission’s request, the Secretariat commissioned a survey of ABS country measures accommodating the distinctive features of GRFA and associated traditional knowledge to Griffith University, Australia, for review by the Working Groups and the ABS Expert Team.<sup>59</sup> The survey involved a search for ABS measures in databases of all United Nations member countries and examined the administrative, policy and/or legislative measures or draft laws of 47 countries. It also involved a systematic quantitative literature review for research trends and gaps across geographical scales and GRFA subsectors.

37. The survey comprises a baseline desktop review of legislation, policy and literature. It provides a review of how countries address the distinctive features of GRFA and traditional knowledge associated with genetic resources for food and agriculture (TKGRFA) based on the letter of their ABS legislative, administrative and policy measures rather than on how these are implemented in practice. It does not aim to provide a complete picture of all relevant ABS country measures, nor does it analyse the state of implementation, the challenges involved and possible solutions to these challenges. Instead, the survey aims to provide a typology of the diverse approaches countries have chosen in addressing ABS for GRFA and TKGRFA. The survey provides country examples both of measures that explicitly provide for some kind of special treatment for GRFA and of measures that do not exclusively apply to GRFA but may be particularly relevant for their use and exchange.

38. The survey follows the structure of the five key elements of ABS measures for GRFA identified in FAO’s *ABS Elements*: (1) institutional arrangements; (2) access to and utilization of GRFA; (3) access to and utilization of TKGRFA; (4) benefit-sharing relating to GRFA and TKGRFA; and (5) monitoring and compliance.

##### **Institutional arrangements**

39. The survey identified as the most common institutional approach the single-agency responsibility for ABS. Environmental or science authorities often serve as single competent national authorities (CNA). In a minority of countries, authorities with a primary focus on food, forest and/or agriculture act as single CNA. In other countries, the institutional responsibility for ABS measures is shared between different authorities depending on the type or intended use of the genetic resources. Various countries with shared responsibilities for ABS measures have established coordination mechanisms, for example one-stop-shops or committees, to coordinate ABS activities across sectors and stakeholders.

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<sup>56</sup> [https://apps.who.int/gb/ebwha/pdf\\_files/WHA73/A73\\_R1-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf)

<sup>57</sup> <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board>

<sup>58</sup> EB 148/21.

<sup>59</sup> CGRFA/WG-AqGR-3/21/Inf.12.

## Access to and utilization of genetic resources for food and agriculture

40. Many ABS measures distinguish between different categories of genetic resources and different types of intended activities in relation to the resources, and apply different authorization procedures to them.

### *Categories of genetic resources*

- Some ABS measures only apply to uses of genetic resources accessed after the ABS measure entered into force, others also to new or continuing uses of resources collected or accessed before the ABS measure entered into force.
- Access is usually granted by countries providing genetic resources that are the “country of origin” of such resources. The survey identified different ways in which ABS measures define the circumstances in which genetic resources are considered to have developed “distinctive properties” in a specific country, which qualify the country as the “country of origin” of the genetic resource.
- Many ABS country measures do not seem to distinguish between privately and publicly held genetic resources, implying that they apply to both, including, for example, privately held breeding materials.
- Most ABS measures reviewed are confined in their scope to genetic resources, i.e. the use of biological resources for their *genetic* qualities. Other ABS measures cover biological resources more broadly but may narrow the scope under other provisions, such as excluding those used for purposes of culture or consumption.
- Most ABS measures exclude, in one way or the other, GRFA managed under special multilateral ABS arrangements, such as the Treaty. Some ABS measures exclude whole categories of GRFA, such as domesticated plant species, fish, forestry or livestock genetic resources, or GRFA that are subject to intellectual property protection.

### *Intended activities*

- ABS measures usually address genetic resources for their “utilization”, i.e. “research and development on the genetic and/or biochemical composition of genetic resources (...)”<sup>60</sup> The use of agricultural products for sale or human consumption therefore often falls outside the scope of ABS obligations because “utilization” is not intended, or because it is explicitly excluded from the scope of ABS measures.
- While it will often be difficult to distinguish between food/feed and non-food/feed agricultural products (given that the ultimate use of a product will often be unknown at the research and development phase), some ABS measures seek to make that distinction and provide different procedures for them.
- Some ABS measures make a distinction between commercial and non-commercial research and some provide for specific procedures for situations where the intended use changes. There is no uniform definition of “commercial,” and some ABS measures exclude GRFA or related activities, such as breeding, through the definition of “commercial”.
- Some ABS measures provide for exemptions or simplified procedures for specific activities, such as taxonomic research, conservation, animal/plant-health purposes, exchange of genetic resources within and among local indigenous peoples and local communities (IPLCs), or among farmers and exchanges within research networks.

### *Authorization procedures*

- In many countries, the same authorization procedures apply to GRFA and TKGRFA as any other genetic resource or traditional knowledge. While ABS measures of many countries reflect the International Treaty and contain special provisions for PGR, few ABS measures have special arrangements for other subsectors of GRFA.
- Most ABS measures require PIC at the time of access and/or utilization and/or transfer (export) of genetic resources. However, an alternative approach is to require only registration

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<sup>60</sup> Nagoya Protocol, Article 2(c).

initially, i.e. at the time of collection or research; benefit-sharing requirements kick in when benefits are actually generated.

- Some ABS measures provide for simplified procedures, for example in the form of a simple notification, where access is sought for specific purposes, for example for conservation purposes or in emergency situations relating to human, animal or plant health, or for food security in the case of threats to the life and health of humans, animals or plants. Some laws provide for fast-track processes for specific categories of users, for example locals and growers and cultivators of biodiversity, including IPLCs.
- Some ABS measures prescribe standard terms and conditions for MAT for genetic resources, including GRFA.
- A largely unexplored field are framework authorizations that include, for example, a whole range of genetic resources. However, ABS measures of some countries allow for framework agreements, which may facilitate long-term collaborations, including benefit-sharing.
- The key finding from the survey is that there is no one-size-fits-all approach to accommodating GRFA and TKGRFA under authorization procedures and that further research is needed to determine their practical effects and whether options differ across subsectors.

### **Access to and utilization of traditional knowledge associated with genetic resources for food and agriculture**

41. While ABS measures often treat access to and utilization of TKGRFA similar to GRFA, the survey identified specific requirements or considerations some ABS measures apply uniquely to traditional knowledge.

- ABS measures differ as to the approaches to defining the scope of traditional knowledge; traditional knowledge may be broadly associated with, for example, genetic resources, biological resources, ecological knowledge. Some ABS measures allow the custodians of traditional knowledge to define the traditional knowledge.
- Different approaches exist as to how the correct traditional knowledge- holder may be identified.
- Some ABS measures apply specific procedures to traditional knowledge, including TKGRFA.
- Procedures for involving IPLCs in granting access to traditional knowledge associated with GRFA are diverse. In many countries, they are still under development.
- An increasing number of protocols/guidelines at local, national and international levels exist, that explain the meaning of free, prior and informed consent within a cultural context.

### **Fair and equitable sharing of benefits**

42. ABS measures vary significantly as to the scope and overall design of benefit-sharing obligations for genetic resources and traditional knowledge, the procedures foreseen for reaching MAT and the level of formality required for the agreement.

- Some ABS measures leave it up to the CNA to determine the modalities of benefit-sharing on a case-by-case basis as part of the access permit. Other ABS measures are more prescriptive in that they define minimum benefit-sharing requirements.
- Some ABS measures exempt from benefit-sharing obligations certain categories of users, for example farmers; others provide for simplified benefit-sharing procedures for GRFA research.
- Model contractual clauses, codes of conduct, guidelines or best practices, including for benefit-sharing, have been developed for various subsectors of GRFA, in particular plant and micro-organism GRFA.
- Some ABS measures address situations that may typically arise in the case of GRFA and TKGRFA, for example where the beneficiaries cannot be clearly identified or where there are multiple beneficiaries. Few ABS measures address the role of intermediaries in relation to ABS obligations.
- While ABS measures usually do not provide for GRFA-specific benefit-sharing rules, some ABS measures explicitly identify “non-monetary” benefits relevant to GRFA, such as:

research directed towards food, health and livelihood security; training; and exchange of GRFA within or between communities to sustain food or livelihood systems. Benefit-sharing may also take place in the form of collaborations and partnerships.

- With the exception of the MLS no multilateral benefit-sharing mechanism for ABS for genetic resources has been established. Discussions on the need for and modalities of such a benefit-sharing mechanism under the Nagoya Protocol are ongoing.<sup>61</sup>

### **Monitoring and compliance**

43. ABS measures usually aim to monitor and enhance transparency about the “utilization of genetic resources.” So-called checkpoints are established to collect or receive information related to the legal status of genetic resources. Certificates of compliance are issued to prove that genetic resources have been accessed in line with the domestic ABS measures of the country that provided them.

- While the types of checkpoints vary between countries, some countries have checkpoints that are directly relevant to research, development and commercialization of GRFA, including agricultural, forestry and biocontrol institutions.
- The ABS measures of relatively few countries require that genetic resources and traditional knowledge used within their jurisdictions have been accessed in accordance with PIC and that MAT have been established, as required by the domestic ABS measures of the other Party.

### **Conclusion**

44. Countries have broad scope to accommodate the distinctive features of GRFA within their ABS frameworks. ABS measures for GRFA and TKGRFA may be designed, coordinated and streamlined to address ABS for GRFA and associated traditional knowledge in a way that reflects the particularities of GRFA and TKGRFA, their importance for food security and the relevance of related research and development to a country. Various ABS measures demonstrate the increased awareness of policy-makers and administrators of the implications ABS may have for agricultural research and development and of the need for ABS measures to accommodate the distinctive features of GRFA and facilitate agricultural research and development. There is, however, still room to better adapt ABS measures to the distinctive features of GRFA and TKGRFA. As stated in the ABS Elements, “developing and implementing ABS measures is a *work in progress*.”

45. A compilation of regulatory mechanisms used in ABS country measures to address specific features of GRFA and TKGRFA may serve as a toolbox for policy and decision-makers. The ABS Elements could be complemented by concrete specific country examples, and as countries have gained more experiences, relevant lessons learnt by countries in implementing these mechanisms. These experiences could inform a future report on the effects of ABS measures on the utilization and conservation of GRFA and TKGRFA and the fair and equitable sharing of benefits.

## **V. POSSIBLE FUTURE WORK**

46. The survey provides a first but important step towards a better understanding of how existing ABS measures – explicitly or implicitly – accommodate some of the distinctive features of GRFA or subsectors thereof. However, it does not address the actual implementation of ABS measures and their impact on the use and exchange of GRFA and TKGRFA. The actual implementation of ABS measures and their impact on the use, exchange and conservation of GRFA and TKGRFA and the sharing of benefits could be analysed in a second step to identify ABS approaches with an overall positive impact on the utilization of GRFA and TKGRFA and the fair and equitable sharing of benefits arising from them.

47. The Commission has invested time and resources in the development of the ABS Elements, which it complemented at its last session by the addition of Explanatory Notes. While the development

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<sup>61</sup> see CBD/NP/MOP/DEC/3/13.

of the ABS Elements and the different consultations, including of the Commission's Working Groups and the international workshop held in 2018 in collaboration with the Secretariats of the CBD and the International Treaty, may have contributed to a growing awareness of the relevance of ABS for the utilization of GRFA, many ABS measures still do not reflect this awareness. An assessment of the usefulness of the ABS Elements for the development and implementation of ABS measures, as they apply to the different subsectors of GRFA, could therefore be carried out with the aim of identifying and addressing gaps and weaknesses. Part of such an assessment should contain inputs by Members and observers, including on specific cases where ABS measures facilitated or hindered utilization of GRFA and TKGRFA.

## VI. GUIDANCE SOUGHT

48. The Working Group may wish to:
  - i. commend the Commission's work on ABS for GRFA;
  - ii. take note of developments under other international agreements and instruments relevant to ABS and emphasize the need to avoid duplication of work and ensure consistency; and
  - iii. review the *Draft Survey of ABS Country Measures Accommodating Distinctive Features of Genetic Resources for Food and Agriculture and Associated Traditional Knowledge* and provide guidance in its area of expertise with regard to the finalization of the survey.
49. The Working Group may wish to recommend that the Commission request the Secretariat to:
  - i. complement the ABS Elements by providing references to specific examples of ABS country measures that accommodate the distinctive features of GRFA and/or TKGRFA, for review by relevant Members, the Working Groups and the Commission at its Nineteenth Regular Session;
  - ii. prepare, based on a country questionnaire, a report on the application of ABS country measures to the different subsectors of GRFA in practice, with a view to identify the effects of ABS measures on the utilization and conservation of the different subsectors of GRFA and TKGRFA and the fair and equitable sharing of benefits; and
  - iii. prepare an assessment of the usefulness of the ABS Elements for the development and implementation of ABS measures, as they are applied to the different subsectors of GRFA, with the aim of identifying and addressing gaps and weaknesses, and recommend activities for consideration by the Working Groups and the Commission.
50. The Working Group may wish to make any other recommendations with regard to the Commission's work on ABS for GRFA and TKGRFA.