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### SUBSIDIARY BODY ON IMPLEMENTATION

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Item 6 of the provisional agenda\*

### GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM (ARTICLE 10 OF THE NAGOYA PROTOCOL)

*Note by the Executive Secretary*

#### INTRODUCTION

1. Article 10 of the Nagoya Protocol provides as follows:

Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.

2. At its second meeting, the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol adopted decision [NP-2/10](#) on the need for and modalities of a global multilateral benefit-sharing mechanism (Article 10). Among other things, the decision noted that further information and experience is needed with the implementation of the Nagoya Protocol, “including that which is necessary in order to inform deliberations under Article 10” (para. 1).

3. The decision called for the provision of information on different aspects related to Article 10 as follows:

(a) Parties were invited, with the full and effective participation of indigenous peoples and local communities, to pay particular attention to providing information on the implementation of the provisions of the Protocol related to traditional knowledge associated with genetic resources held by indigenous peoples and local communities when preparing and submitting their interim national reports (para. 3);

(b) Indigenous peoples and local communities were also invited to submit such information to the Executive Secretary (para. 3);

(c) Parties, other Governments, indigenous peoples and local communities and stakeholders, including *ex situ* collections, were invited to submit information, including practical experiences if any, on situations in which it is not possible to grant or obtain prior informed consent in relation to *in situ* or *ex situ* genetic resources and associated traditional knowledge (para. 4);

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\* [CBD/SBI/2/1](#).

(d) Parties, other Governments, indigenous peoples and local communities and stakeholders were invited to submit views on the way forward in relation to Article 10 (para. 5).

4. The decision requested the Executive Secretary to compile and/or synthesize the above information as well as:

(a) Information provided through the interim national reports and the Access and Benefit-sharing Clearing-House of relevance to Article 10 (para. 6(a));

(b) Information available on developments in relevant international processes and organizations with a view to informing future discussions on Article 10 (para. 6(b)).

5. The information is to be submitted for consideration by the Subsidiary Body on Implementation and the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol.

6. Furthermore, the meeting of the Parties requested the Subsidiary Body on Implementation to explore the need for a global multilateral benefit-sharing mechanism and make recommendations for consideration by the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (para. 7).

7. By notification 2017-017 (23 February 2017),<sup>1</sup> Parties were invited to submit their interim national report on the implementation of the Nagoya Protocol. Among other things, the notification invited Parties to pay particular attention to the information referred to in paragraph 3(a) above when preparing and submitting their interim national reports.

8. Notification 2017-094 (20 September 2017)<sup>2</sup> invited the submission of views and information further to decision NP-2/10, specifically regarding the aspects referred to in paragraphs 3(b), (c) and (d) above. Submissions were received from four Parties to the Protocol, one non-Party, one intergovernmental organization and eight organizations or stakeholders. The submissions have been made available online.<sup>3</sup>

9. Section I of the present document summarizes relevant information from the interim national reports and the Access and Benefit-sharing Clearing-House with regard to implementation of the provisions of the Protocol related to traditional knowledge associated with genetic resources and Article 11. Section II presents information from the submissions on situations in which it is not possible to grant or obtain prior informed consent in relation to *in situ* or *ex situ* genetic resources and associated traditional knowledge. Section III summarizes information on developments in relevant international processes while section IV summarizes the views submitted on the way forward in relation to Article 10. Finally, section V invites the Subsidiary Body on Implementation to explore the need for a global multilateral benefit-sharing mechanism and make recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol.

## **I. RELEVANT INFORMATION FROM THE INTERIM NATIONAL REPORTS AND THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE**

10. The information in this section is drawn from the analysis of information contained in the interim national reports and information published in the Access and Benefit-sharing Clearing-House (CBD/SBI/2/INF/3) which has been prepared to support the assessment and review of the Protocol to be considered by the Subsidiary Body on Implementation. The analysis is based on information available as of 22 February 2018. The information document should be consulted for further details including on the methodology used in preparing the analysis and examples elaborating the information provided below.

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<sup>1</sup> <https://www.cbd.int/doc/notifications/2017/ntf-2017-017-absch-en.pdf>.

<sup>2</sup> <https://www.cbd.int/doc/notifications/2017/ntf-2017-094-abs-en.pdf>.

<sup>3</sup> <https://www.cbd.int/abs/submissions-np-2-10/default.shtml>.

**A. Information on the implementation of the provisions of the Protocol related to traditional knowledge associated with genetic resources held by indigenous peoples and local communities**

11. As described above, in decision NP-2/10, paragraph 3, the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol recognized that there was “limited information available on the implementation of the provisions of the Protocol related to traditional knowledge associated with genetic resources held by indigenous peoples and local communities” and it invited Parties to pay particular attention to this aspect in the preparation and submission of their interim national reports.

12. The main provisions of the Nagoya Protocol that address traditional knowledge associated with genetic resources held by indigenous peoples and local communities are: Article 5, paragraph 5; Article 7; Article 12; and Article 16.

13. Accordingly, relevant information from the analysis document on these provisions is summarized below.

1. *Has your country taken legislative, administrative or policy measures in order that benefits arising from the utilization of traditional knowledge associated with genetic resources are shared with indigenous and local communities holding such knowledge as provided in Article 5.5? (question 22 of the format for the interim national report)*

14. A total of 41 Parties and 5 non-Parties responded that they have taken measures to implement Article 5.5, while 28 Parties and 1 non-Party reported not having taken such measures.

15. Among the countries that answered “yes” to this question, many referred to the measures requiring benefit-sharing from the utilization of traditional knowledge in their country.<sup>4</sup> In some countries, the measures dealing with benefit-sharing from the utilization of associated traditional knowledge are measures which have the protection of traditional knowledge as their primary objective.<sup>5</sup> Some countries referred to their plans or work to put necessary or additional measures in place to implement Article 5.5.<sup>6</sup>

16. Among the countries that answered “no” to this question, two<sup>7</sup> countries indicated that their countries do not have indigenous peoples and local communities, and another<sup>8</sup> clarified that they only have local communities. Another country<sup>9</sup> explained that the benefits are to be shared equally among all citizens. Several countries also indicated that they plan to address this issue.<sup>10</sup>

17. In question 23, countries were invited to provide a summary of the main difficulties and challenges for putting measures in place. Difficulties specific to associated traditional knowledge included:

(a) Challenges in clarifying what the term “indigenous peoples and local communities” meant in the national context, including providing clarity on indigenous peoples’ and local communities’ ownership of traditional knowledge associated with genetic resources. Many Parties experienced difficulties in identifying the different groups of indigenous peoples and local communities, understanding the way they are organized, and being able to link traditional knowledge with the holder/s of such knowledge;

<sup>4</sup> Albania, Antigua and Barbuda, Benin, Bhutan, Burkina Faso, Burundi, Democratic Republic of the Congo, Ethiopia, Finland, Honduras, India, Indonesia, Japan, Kenya, Kyrgyzstan, Lao People’s Democratic Republic, Madagascar, Malawi, Malta, Netherlands, Norway, Panama, Peru, South Africa, Swaziland, Switzerland.

<sup>5</sup> Kenya, Kyrgyzstan, Lao People’s Democratic Republic, Madagascar, Norway, Peru.

<sup>6</sup> Albania, Burundi, Morocco.

<sup>7</sup> Bulgaria, Rwanda.

<sup>8</sup> China.

<sup>9</sup> Cuba.

<sup>10</sup> Belarus, Botswana, Cameroon, China, Comoros, Guinea Bissau, Kazakhstan, Mexico, Mongolia, Niger, Pakistan, Sao Tome and Principe, Senegal, Sudan, Uruguay.

(b) The need to build capacity at the institutional level on issues related to traditional knowledge associated with genetic resources and indigenous peoples and local communities. The difficulty of developing measures that will ensure that all indigenous peoples and local communities issues in the Protocol are dealt with appropriately was raised and some noted the lack of experiences or examples that could be used;

(c) The need for capacity-building and awareness-raising about ABS for indigenous peoples and local communities;

(d) The need to develop inventories, studies and/or transcriptions of traditional knowledge and to valorize it. A country explained that even though they had legislation in place, they were of the view that the measures were not well known or understood by institutions, communities, or users, and this could partly explain the fact that no permits for access to associated traditional knowledge had been granted so far.<sup>11</sup>

2. *Benefits received since entry into force of the Protocol for your country from the utilization of: genetic resources (monetary and non-monetary) and traditional knowledge associated with genetic resources (monetary and non-monetary) (question 18 of the format for the interim national reports)*

18. While question 18 in the format for the interim national reports addressed both genetic resources and traditional knowledge associated with genetic resources, only the information on the latter has been included here.

19. A total of 17 Parties and 1 non-Party reported having received benefits from the utilization of associated traditional knowledge. A total of 6 countries reported having received monetary benefits from utilization of associated traditional knowledge while 15 countries reported having received non-monetary benefits from the utilization of associated traditional knowledge.

20. Very few countries provided additional information on monetary benefits related to traditional knowledge. The most common non-monetary benefit mentioned was capacity development on different issues related to traditional knowledge (e.g. documentation of traditional knowledge, community protocols, or sustainable use of genetic resources based on traditional knowledge).<sup>12</sup> Other non-monetary benefits mentioned were: (a) access to information about the research on traditional knowledge;<sup>13</sup> (b) joint publications;<sup>14</sup> (d) development of pilot community protocols;<sup>15</sup> (d) conservation of the sociocultural heritage;<sup>16</sup> (e) awareness-raising;<sup>17</sup> (f) implementation of community projects, including festivals and meetings between communities;<sup>18</sup> (g) databases;<sup>19</sup> and (h) research.<sup>20</sup>

21. In question 19, countries were invited to provide a summary of the main difficulties and challenges. Difficulties specific to associated traditional knowledge included: the need to develop an inventory of associated traditional knowledge; the absence of relevant measures; and difficulties to ascertain whether traditional knowledge was involved.

3. *Has your country taken appropriate, effective and proportionate legislative, administrative or policy measures to ensure that traditional knowledge associated with genetic resources utilized*

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<sup>11</sup> Peru

<sup>12</sup> Benin, Bhutan, Lao People's Democratic Republic, Mauritania, Sao Tome and Principe

<sup>13</sup> Albania, Benin

<sup>14</sup> Lao People's Democratic Republic

<sup>15</sup> Benin

<sup>16</sup> Guinea Bissau

<sup>17</sup> Benin

<sup>18</sup> South Africa, Cuba

<sup>19</sup> Cuba

<sup>20</sup> Venezuela (Bolivarian Republic of)

*within your jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established as required by the domestic ABS legislation or regulatory requirements of the other Party where such indigenous and local communities are located as provided in Article 16.1? (question 25)*

22. A total of 33 Parties and 4 non-Parties responded that they have taken measures to implement Article 16.1 of the Protocol, while 35 Parties and 2 non-Parties reported not having taken measures.

23. Among the countries that answered “yes” to this question, some referred to relevant existing measures<sup>21</sup>, or draft measures or processes under way.<sup>22</sup> Very few countries provided additional information.

24. Among the countries that answered “no” to this question, many indicated that they were planning to address this issue.<sup>23</sup> One country stated that the question was not applicable as the country does not have indigenous and local communities<sup>24</sup> and another expressed the need to clarify the notion of indigenous and local communities in their national context.<sup>25</sup>

25. The 33 Parties and 4 non-Parties that responded “yes” to question 25 also answered two sub-questions:

(a) Indicate whether your country has taken measures to address situations of non-compliance with those measures as provided in Article 16.2. A total of 28 Parties and 4 non-Parties reported having taken measures to address situations of non-compliance with measures provided in Article 16.2;

(b) Has your country cooperated in specific cases of alleged violation of ABS measures as provided in Article 16.3? A total of 10 countries<sup>26</sup> reported not being aware of any cases of alleged violation. Only two countries reported having cooperated in specific cases of alleged violation of ABS measures as provided in Article 16.3. Several countries<sup>27</sup> provided information on the relevant legislation.

26. Questions 39 to 44 of the format for the interim national report related to Articles 7 and 12 of the Protocol. These questions were only completed by the 49 countries that indicated having indigenous peoples and local communities.

4. *In accordance with domestic law has your country taken measures with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities within your country is accessed with the prior informed consent or approval and involvement of these indigenous and local communities and that mutually agreed terms have been established as provided in Article 7? (question 39)*

27. A total of 21 Parties and two non-Parties specified that they have taken such measures to implement Article 7, while 26 Parties reported not having taken such measures.

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<sup>21</sup> Antigua and Barbuda Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Malta, Netherlands, Peru, Poland, Portugal, Slovakia, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, Viet Nam.

<sup>22</sup> Albania.

<sup>23</sup> Burkina Faso, Benin, Botswana, Democratic Republic of the Congo, Côte d’Ivoire, Cameroon, Ethiopia, Guinea, Guinea Bissau, India, Lao People’s Democratic Republic, Pakistan, South Africa.

<sup>24</sup> Rwanda.

<sup>25</sup> Togo.

<sup>26</sup> Bhutan, Burundi, Finland, Japan, Kenya, Madagascar, Malta, Sweden, Switzerland, Uganda.

<sup>27</sup> Japan, Morocco, Netherlands, Norway, Portugal, Spain.

28. Countries that answered “yes” to this question referred to existing relevant measures<sup>28</sup> addressing this issue or to draft measures under development or approval.<sup>29</sup> Some countries<sup>30</sup> provided further details on measures taken.

29. A number of countries<sup>31</sup> that answered “no” to this question indicated that they were planning to address this issue in the development or review of their ABS measures.

*5.1 In implementing the Protocol and in accordance with your domestic law, is your country taking into consideration indigenous and local communities' customary laws, community protocols and procedures with respect to traditional knowledge associated with genetic resources as provided in Article 12.1? (question 40)*

30. A total of 24 Parties and 1 non-Party specified that they have taken into consideration indigenous and local communities' customary laws, community protocols and procedures with respect to traditional knowledge associated with genetic resources, while 24 Parties and 1 non-Party reported not having done so.

31. Some of the countries that answered “yes” to this question provided information on relevant laws providing recognition of customary law<sup>32</sup> and some also indicated having recognized customary laws in their ABS measures.<sup>33</sup> One country<sup>34</sup> provided information on the recognition of community protocols. A number of countries<sup>35</sup> indicated that they were planning to address this issue of customary laws and/or community protocols in the development or review of their ABS measures.

32. Among the countries that answered “no” to this question, 10 countries<sup>36</sup> indicated that they were planning to address the issue of customary laws or community protocols in the development or review of their ABS measures.

*5.2 Has your country established mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations as provided in Article 12.2? (question 41)*

33. A total of 19 Parties and two non-Parties specified that they have established mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, while 28 Parties reported not having established such mechanisms.

34. Among the countries that answered “yes” to this question, some<sup>37</sup> indicated that they planned to address or that they already addressed this issue in their ABS measures.

35. A number of countries shared details on activities conducted to inform potential users about their obligations, such as awareness-raising activities<sup>38</sup> or the development and implementation of a communication plan.<sup>39</sup> Other countries indicated using the ABS Clearing-House,<sup>40</sup> websites,<sup>41</sup> or the national clearing-house<sup>42</sup> to inform users of associated traditional knowledge about their obligations.

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<sup>28</sup> Antigua and Barbuda, Benin, Bhutan, Burkina Faso, Democratic Republic of the Congo, Ethiopia, Finland, France, India, Kenya, Madagascar, Mexico, Morocco, Norway, Panama, Peru, Swaziland.

<sup>29</sup> Mexico.

<sup>30</sup> Benin, China, Finland, India, Norway, Peru.

<sup>31</sup> Burundi, Cameroon, Côte d'Ivoire, Dominican Republic, Guinea, Guinea-Bissau, Mongolia, Niger, Pakistan, Senegal, Sudan, Togo.

<sup>32</sup> Benin, Cameroon, Democratic Republic of the Congo, Kenya.

<sup>33</sup> Bhutan, Ethiopia, India, Swaziland, Peru.

<sup>34</sup> Benin.

<sup>35</sup> Burkina Faso, Burundi, Democratic Republic of the Congo, Malawi, Mexico, Sweden, Uganda.

<sup>36</sup> Botswana, Côte d'Ivoire, Guinea, Guinea-Bissau, Mauritania, Mongolia, Niger, Pakistan, Sudan, Uruguay.

<sup>37</sup> Benin, Burkina Faso, Cameroon, Ethiopia, India, Malawi, Morocco, South Africa.

<sup>38</sup> Antigua and Barbuda, Benin, Bhutan, Ethiopia, India, Peru.

<sup>39</sup> Benin.

36. Among the countries that answered “no” to this question, a number<sup>43</sup> indicated that they were planning to address this issue. Nevertheless, two countries<sup>44</sup> reported having conducted awareness-raising activities and two countries shared their plans to develop a national ABS clearing-house or other types of information platforms.<sup>45</sup>

*5.3 Is your country supporting the development by indigenous and local communities of community protocols, minimum requirements for mutually agreed terms and model contractual clauses as provided in Article 12.3? (question 42)*

37. Thirty Parties and one non-Party responded that they were supporting the development of community protocols; 27 Parties and one non-Party indicated they are supporting the development of minimum requirements for mutually agreed terms; and 22 Parties and 1 non-Party are supporting the development of model contractual clauses.

*6. Additional information: summary of the main difficulties and challenges (question 44)*

38. Countries were invited to provide a summary of the main difficulties and challenges for putting measures in place in relation to traditional knowledge associated with genetic resources. A number of countries indicated that there was a need to raise the awareness and capacity of traditional knowledge holders, and it was noted that the lack of appropriate tools and the limited access to information was an added challenge.

39. Some countries reported difficulties in identifying the different groups of indigenous peoples and local communities, understanding the way they are organized, and being able to link traditional knowledge with the holder/s of such knowledge.

40. Several countries highlighted the importance of documenting genetic resources, traditional knowledge or its use, in particular in view of the loss of traditional knowledge. Some countries had difficulties to address the relationship between traditional knowledge and intellectual property rights.

41. Other challenges identified are the following: (a) the fact that industries have resistance to conclude benefit-sharing agreements with traditional knowledge holders; (b) making community protocols clear for users; and (c) the need for legal expertise in contracts dealing with traditional knowledge.

**B. Synthesis of information provided through the interim national reports and the Access and Benefit-sharing Clearing-House on Article 11 of the Nagoya Protocol**

42. As indicated above, paragraph 6(a) of the decision on Article 10 requested the Executive Secretary to synthesize information provided through the interim national reports and the Access and Benefit-sharing Clearing-House of relevance to Article 10.

43. Genetic resources and traditional knowledge associated with genetic resources that may be found in situ in more than one Party are often raised in discussions on Article 10 of the Nagoya Protocol.<sup>46</sup> Given that this issue is covered by Article 11 of the Protocol on “transboundary cooperation”, relevant information on the implementation of Article 11 is presented below.

*1. Is your country endeavouring to cooperate, with the involvement of indigenous and local communities concerned, with a view to implementing the Protocol in instances where the same*

<sup>40</sup> Burundi, Cameroon, China, India, Kenya.

<sup>41</sup> Comoros, Ethiopia, India, Norway.

<sup>42</sup> Finland.

<sup>43</sup> Botswana, China, Comoros, Côte d’Ivoire, Dominican Republic, Lao People’s Democratic Republic, Mexico, Senegal, Togo, Uruguay.

<sup>44</sup> Mexico, Niger.

<sup>45</sup> China, Comoros.

<sup>46</sup> See for example the submission from Mexico and the “Report of the Expert Group Meeting on Article 10 of the Nagoya Protocol on Access and Benefit-Sharing” ([UNEP/CBD/NP/COP-MOP/2/10](https://www.unep.org/nagoya/sites/default/files/2016-09/UNEP/CBD/NP/COP-MOP/2/10.pdf)), paras. 32-34.

*genetic resources are found in situ within the territory of more than one Party as provided in Article 11.1? (question 48 of the format for the interim national reports)*

44. A total of 30 Parties and 1 non-Party responded that they endeavour to cooperate, while 39 Parties and five non-Parties answered that they do not.

*(a) Countries that answered “yes”*

45. Some countries<sup>47</sup> said that if the case arises they endeavour to cooperate, and two of them noted that the situation would be dealt on a case-by-case basis.<sup>48</sup> Some countries<sup>49</sup> explained that they were planning to incorporate this aspect in their ABS measures.

46. One country<sup>50</sup> suggested that the issue could be taken up by regional economic organizations through multilateral agreements, and another<sup>51</sup> explained that as part of a regional project on the Nagoya Protocol a regional ABS clearing-house was planned to acknowledge commonalities across territories.

47. Some countries<sup>52</sup> provided information on other cooperation initiatives, organizations, and instruments they are part of, noting that the experience acquired through these initiatives could be useful for transboundary cooperation in the context of the Nagoya Protocol.<sup>53</sup> For example:

(a) Uganda explained that cooperation was done through the East Africa Community Protocol on Environment and Natural Resources Management which has provisions on ABS<sup>54</sup> and through a number of trans-boundary projects, programmes, and agreements between Uganda and neighbouring countries;<sup>55</sup>

(b) India reported on cooperation projects with other countries of the region, such as the Kailash Landscape Project (a transboundary holy site) and Bay of Bengal Large Marine Ecosystem Project (a protected marine and coastal area);

(c) Belarus has implemented joint projects within the framework of the Cross-border Cooperation Programme, Poland-Belarus-Ukraine 2014-2020.

*(b) Countries that answered “no”*

48. Some countries<sup>56</sup> clarified that the question was not applicable for them as they have no access requirements in place and/or there are no indigenous peoples and local communities in their countries. Some countries<sup>57</sup> said that if the case arises they endeavour to cooperate and other countries explained that they were planning to incorporate this aspect in their ABS measures.<sup>58</sup> Some provided information on their experiences in managing regional parks or other regional cooperation projects.<sup>59</sup>

<sup>47</sup> Belarus, France, Malta, Norway Viet Nam.

<sup>48</sup> France, Malta.

<sup>49</sup> Burkina Faso, Mongolia, Pakistan, South Africa.

<sup>50</sup> Malawi.

<sup>51</sup> Antigua and Barbuda.

<sup>52</sup> Cameroon, Comoros, Kenya, Mauritania, Senegal, Mexico, Uganda.

<sup>53</sup> Mexico.

<sup>54</sup> The Protocol on Environment and Natural Resources Management was signed by Kenya, Uganda and the United Republic of Tanzania on 3 April 2006.

<sup>55</sup> For example the Lake Victoria Environment Management Project (Uganda, Kenya, United Republic of Tanzania); Lake Victoria Fisheries Organization (Uganda, Kenya, United Republic of Tanzania); Virunga Trans-boundary Cooperation (Uganda, Democratic Republic of Congo, Rwanda and United Republic of Tanzania); Man and Biosphere Reserve (for Mount Elgon - Uganda and Kenya); and Collaborative Cross Border Wildlife Management (Uganda and South Sudan).

<sup>56</sup> Bulgaria, European Union, Finland, Germany, Netherlands, Poland, Republic of Moldova, Slovakia, United Kingdom of Great Britain and Northern Ireland.

<sup>57</sup> Burundi, Sweden.

<sup>58</sup> Botswana, Ethiopia, Guinea-Bissau, Madagascar, Mexico, Niger, Panama, Uruguay.

<sup>59</sup> Burundi, Côte d'Ivoire, Guinea, Togo, Sudan.



49. The subregional strategy on ABS developed by the Central African Forests Commission, (COMIFAC) was mentioned, and a country<sup>60</sup> indicated that they are planning to have a project under GEF-7 with a national and subregional component that could address this issue.

2. *Is your country endeavouring to cooperate with a view to implementing the Protocol in instances where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties as provided in Article 11.2? (question 49)*

50. A total of 27 Parties responded that they are endeavouring to cooperate, while 21 Parties and 1 non-Party answered that they do not, and 21 Parties and 5 non-Parties responded that the question was not applicable.

*(a) Countries that answered “yes”*

51. Several countries reported that, if the case arose, they would endeavour to cooperate,<sup>61</sup> and others explained that they were planning to incorporate this aspect in their ABS measures.<sup>62</sup>

52. Some countries<sup>63</sup> provided information on other cooperation initiatives, organizations, and instruments of which they were a part. For example:

(a) Kenya indicated that there are ongoing efforts in regional cooperation platforms to develop appropriate protocols on resource governance and utilization taking into considerations the requirements of the Nagoya Protocol on Article 11.2 (e.g. Busia County Draft Policy Biodiversity Mainstreaming);

(b) Sudan indicated that they plan to implement the Article in accordance with the Intergovernmental Authority on Development (IGAD) Access and Benefit-Sharing Strategy;

(c) Togo explained that there are mechanisms in place that reinforce the historic links between different communities sharing the same cultural values, such as the Ewe peoples which are located between Benin, Ghana and Togo.

*(b) Countries that answered “no” or “not applicable”*

53. One country<sup>64</sup> stated that if the case arises they endeavour to cooperate, and some other countries<sup>65</sup> explained that they were planning to incorporate this aspect in their ABS measures. In this regard one country<sup>66</sup> indicated that implementation of Article 11.2 of the Protocol will be done according to the Guidelines for a Coordinated Implementation of the Nagoya Protocol of the African Union. Another country<sup>67</sup> additionally identified the ABS regional strategy of COMIFAC and the Treaty for the Establishment of the East African Community as relevant frameworks for the consideration of this issue.

54. Two countries<sup>68</sup> noted that the situation had not yet arisen and two others<sup>69</sup> indicated that they were already cooperating on this aspect.

3. *Additional information: summary of the main difficulties and challenges (question 50)*

55. A total of 21 countries answered this question. In addition to cross-cutting difficulties identified regarding the implementation of a number of different aspects of the Protocol (e.g. lack of capacity and

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<sup>60</sup> Benin.

<sup>61</sup> Bhutan, France, Malawi, Norway, Pakistan.

<sup>62</sup> Botswana, Burkina Faso, Guinea Bissau, Mongolia, South Africa, Sudan.

<sup>63</sup> Burkina Faso, Cameroon, Comoros, India, Kenya, Mauritania.

<sup>64</sup> Sweden.

<sup>65</sup> Ethiopia, Madagascar, Niger, Panama, Uruguay.

<sup>66</sup> Niger.

<sup>67</sup> Burundi.

<sup>68</sup> Indonesia, Morocco.

<sup>69</sup> Côte d'Ivoire, Guinea.

financial resources, need for awareness-raising, etc.), some countries pointed out that it was difficult to implement this article as countries are progressing at different rhythms in the implementation of the Protocol and using different approaches in their legislation, and some noted that many countries have not yet ratified the Protocol.

56. Some noted that reinforcement of the capacity of regional structures would be needed with a view to enabling them to coordinate the implementation of the Protocol. In this regard, a country pointed out that ABS regional policies were not fully implemented at the national level. The need for financial resources to support transboundary cooperation was noted by a number of countries.

57. Some countries indicated that no cases had yet been identified of access to genetic resources or associated traditional knowledge located in the territory of more than one country, and that there was a need to gain more experience on this issue. The importance of sharing information and experience was highlighted. One country was of the view that the experiences acquired in other subregional and bilateral project would be of most relevance to assist in the implementation of Article 11 of the Nagoya Protocol.

58. The need to identify and document shared traditional knowledge was also mentioned by a number of countries, and one country pointed out that their associated traditional knowledge has already been partly documented or widely disseminated.

## **II. INFORMATION ON SITUATIONS IN WHICH IT IS NOT POSSIBLE TO GRANT OR OBTAIN PRIOR INFORMED CONSENT**

59. Pursuant to paragraph 4 of decision NP-2/10, a number of submissions provided views and information on situations in which it is not possible to grant or obtain prior informed consent.

60. Four submissions<sup>70</sup> indicated that they have not identified any situations in which it is not possible to grant or obtain prior informed consent. One of these<sup>71</sup> recognized that there may be practical problems to obtaining prior informed consent related to challenges with national implementation of the Protocol but did not feel this was relevant to Article 10. A Party<sup>72</sup> provided the example of its “Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014” that have been notified under the Biological Diversity Act. These Guidelines provide that, in cases in which beneficiaries are not identified, monetary benefits accruing from commercial utilization will be used to support conservation and sustainable use and to promote livelihoods of the local people living in the area where the biological resources were accessed.

61. Another Party<sup>73</sup> suggested some hypothetical situations in which it might not be possible to grant or obtain prior informed consent: (a) if access is sought to an *ex situ* genetic resource, and as a result of the deposit date, there is no accurate information on the country of origin of the genetic resource; (b) if access is sought to traditional knowledge associated with genetic resources but the original holders of such knowledge are indigenous peoples or local communities that have become extinct; (c) if access is sought to purified DNA/RNA possessed by a Party that does not have precise documentation on the origin of said genetic material.

62. A number of research organizations and *ex situ* collections provided information on their experiences in obtaining prior informed consent. Some of these experiences included:

(a) Challenges to obtaining prior informed consent and the necessary permits due to the absence of measures and/or institutional arrangements in some countries; no response or long delays in

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<sup>70</sup> India, Mexico, International Chamber of Commerce, Japan Bioindustry Association.

<sup>71</sup> International Chamber of Commerce.

<sup>72</sup> India.

<sup>73</sup> Mexico.

receiving responses from national focal points; processes to obtain prior informed consent being bureaucratic and requiring a number of months;<sup>74</sup>

(b) Working with local partners generally facilitated processes for obtaining prior informed consent;<sup>75</sup>

(c) Needing to identify specimens where the country of origin is unknown;<sup>76</sup>

(d) Difficulties to explain the paperwork to local people when doing field work with genetic resources and associated traditional knowledge.<sup>77</sup>

63. Some submissions also shared information on prior informed consent and their collections including:

(a) One microbial collection<sup>78</sup> described its efforts to obtain prior informed consent in order to include deposits of new bacterial species in its collection. To date, it has not received a valid prior informed consent from a depositor and as a result, has had to reject many deposits;

(b) One collection<sup>79</sup> described how it distinguishes between two categories of specimens in its collection:

(i) One category is specimens from a country of origin that has ratified the Protocol and the specimens were recently collected. For these, they do not extract DNA without obtaining prior informed consent;

(ii) The other category is specimens coming from a country of origin that had not ratified the Protocol when the specimen was added to the collection or the specimens were added to the collection before the law on the Nagoya Protocol entered into force in Germany. For these specimens, they do not need any permissions and can extract DNA.

64. Another submission<sup>80</sup> shared information from the culture collections community. It described how it may not be possible to grant or obtain prior informed consent where there is no documentation on the date or place of sampling or the only information is that the sample was deposited in a collection prior to the entry into force of the Protocol. They explained how their code of conduct includes a “regularizing procedure” that enables a culture collection to accept such material while undertaking communications with the relevant competent authority.

### III. INFORMATION ON DEVELOPMENTS IN RELEVANT INTERNATIONAL PROCESSES

65. Further to decision NP-2/10, paragraph 6(b), this section summarizes information on developments in relevant international processes and organizations with a view to informing future discussions on Article 10. The section presents information on recent developments under other multilateral mechanisms compiled by the Executive Secretary or otherwise made available through the submissions. More background may also be found in the “Study on Experiences Gained with the Development and Implementation of the Nagoya Protocol and other Multilateral Mechanisms and the Potential Relevance of Ongoing Work Undertaken by other Processes, Including Case Studies” that was

<sup>74</sup> Gothenburg Botanical Garden, International Plant Exchange Network, Leibniz Institute DSMZ GmbH; Zoological Research Museum Bonn.

<sup>75</sup> Gothenburg Botanical Garden.

<sup>76</sup> Zoological Research Museum Bonn.

<sup>77</sup> Gothenburg Botanical Garden.

<sup>78</sup> Leibniz Institute DSMZ GmbH.

<sup>79</sup> Zoological Research Museum Bonn.

<sup>80</sup> World Federation of Culture Collection.

commissioned by the Executive Secretary pursuant to decision NP-1/10 and reviewed by the 2016 meeting of an expert group on Article 10.<sup>81</sup>

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

66. In December 2017, the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture launched the Fourth Call for Proposals of the Benefit-Sharing Fund of the Treaty. The goal of the Fourth Call for Proposals is “to enable that farmers around the world use and conserve adapted varieties leading to increased productivity and on-farm incomes, increased availability of nutrient-rich food, reduced adverse impacts to the environment, and enhanced resilience to productions shocks.”<sup>82</sup> The Fourth Call for Proposals is expected to invest more than US\$ 5 million in projects. To date, the Benefit-Sharing Fund has been supported by voluntary contributions as commercial benefits arising from the use of plant genetic resources in the Multilateral System of Access and Benefit-Sharing have yet to materialize.

67. Discussions on enhancing the functioning of the Multilateral System of Access and Benefit-Sharing under the Treaty have been ongoing since 2013 when the Governing Body of the Treaty established an Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (“Working Group”) with the task of developing measures aimed at:

(a) Increasing user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner;

(b) Enhancing the functioning of the Multilateral System by additional measures.<sup>83</sup>

68. To this end, the Working Group has been considering revisions to the Standard Material Transfer Agreement as well as possible changes to the coverage of the Multilateral System.

69. At its seventh session, the Governing Body of the Treaty extended the mandate of the Working Group (resolution 2/2017). Two meetings of the Working Group are currently foreseen for the intersessional period: one in October 2018 and one in the first quarter of 2019.

#### **B. United Nations General Assembly – international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction**

70. In its resolution 69/292, the General Assembly decided to develop an international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction under the United Nations Convention on the Law of the Sea. To that end, the General Assembly also decided to establish a Preparatory Committee to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the Convention on the Law of the Sea.

71. The Preparatory Committee completed its work on 21 July 2017 with the adoption of its report, including recommendations to the General Assembly on the elements of a draft text under the Convention on the Law of the Sea ([A/AC.287/2017/PC.4/2](https://www.un.org/Depts/los/convention_agreements/texts/pc4/pc4_2017_0_en.pdf)). Issues related to access to and benefit-sharing arising from the utilization of marine genetic resources of areas beyond national jurisdiction are under consideration by Member States, as reflected in the recommendations of the Preparatory Committee (section III of the above-referenced report) and in the various Chair’s overviews and non-papers prepared in the context of the Preparatory Committee.

72. At its seventy-second session, the General Assembly adopted resolution [72/249](#) on 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>81</sup> <https://www.cbd.int/doc/meetings/abs/abs-a10em-2016-01/official/abs-a10em-2016-01-02-en.pdf>.

<sup>82</sup> [http://www.fao.org/fileadmin/user\\_upload/faoweb/plant-treaty/cfp4/cfp\\_4\\_2017\\_0\\_en.pdf](http://www.fao.org/fileadmin/user_upload/faoweb/plant-treaty/cfp4/cfp_4_2017_0_en.pdf).

<sup>83</sup> Resolution 2/2013, <http://www.fao.org/3/a-be595e.pdf>.

In the resolution, the General Assembly decided to convene a conference to elaborate the text of such an instrument, with a view to developing that framework as soon as possible. Negotiations would address topics identified in the package agreed to in 2011, which includes marine genetic resources, including questions on the sharing of benefits.<sup>84</sup> The conference would convene for four sessions of 10 working days each, with the first taking place in September 2018, the second and third in 2019, and the fourth in the first half of 2020.

### **C. World Health Organization**

73. The Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and other Benefits (“PIP Framework”) was adopted by the World Health Assembly in 2011.

74. Section 7.4 of the PIP Framework addresses the monitoring and review of the Framework and, among other things, it provides that the Framework and its annexes will be reviewed by 2016 with a view to proposing revisions reflecting developments, as appropriate, to the World Health Assembly in 2017 (section 7.4.2). A Review Group established to carry out this work submitted its final report to the WHO Director-General in October 2016 for consideration by the 140th session of the Executive Board of WHO and the Seventieth World Health Assembly (held in May 2017).

75. Among other things, the review of the PIP Framework addressed the issues of expanding the PIP Framework to seasonal influenza and genetic sequence data.

76. Following the report, the Seventieth World Health Assembly adopted decision WHA70(10). The decision included a request to the Director-General, regarding the Review Group’s recommendations concerning seasonal influenza and genetic sequence data, to conduct a thorough and deliberative analysis of the issues raised, including the implications of pursuing or not pursuing possible approaches (para. 8(b)). The World Health Assembly also requested the Director-General to continue consultations with the Secretariat of the Convention on Biological Diversity (para. 8(f)).

77. To implement the request in paragraph 8(b), the Director-General has initiated an analysis to address, the implications of pursuing or not pursuing possible approaches to: (a) include seasonal influenza viruses in the PIP Framework; and (b) genetic sequence data under the PIP Framework. Work on the analysis is under way and a draft is tentatively scheduled to be released in September/October 2018.<sup>85</sup>

78. In addition, the Director-General has prepared a report on progress in implementing decision WHA70(10) that will be considered by the Seventy-first World Health Assembly (held from 21 to 26 May 2018).<sup>86</sup>

## **IV. VIEWS ON THE WAY FORWARD IN RELATION TO ARTICLE 10**

79. Different suggestions on the way forward in relation to Article 10 were made in the submissions. The full compilation of views is available online<sup>87</sup> and the main points are summarized below.

80. Some submissions<sup>88</sup> suggested that the occurrence of genetic resources and associated traditional knowledge in transboundary situations — found in the territory of two or more countries — would not support the need for a global multilateral benefit-sharing mechanism. They noted that the bilateral approach to access and benefit-sharing should be followed wherever possible and that it is the default

<sup>84</sup> The topics in the package agreed to in 2011 are “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”. See the submission from the United Nations Division of Ocean Affairs and the Law of the Sea.

<sup>85</sup> For more information on the process, see [http://www.who.int/influenza/pip/Documents\\_WHA70108b/en/](http://www.who.int/influenza/pip/Documents_WHA70108b/en/).

<sup>86</sup> See [http://apps.who.int/gb/ebwha/pdf\\_files/WHA71/A71\\_24-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA71/A71_24-en.pdf).

<sup>87</sup> <https://www.cbd.int/abs/submissions-np-2-10/default.shtml>.

<sup>88</sup> India, Japan.

approach to ABS under the Nagoya Protocol as recognized in decision NP-2/10. It was pointed out by one Party<sup>89</sup> that the need for a global multilateral benefit-sharing mechanism could be supported only in situations where the countries of origin cannot be identified after making reasonable efforts, and in situations wherein it is impossible to grant or obtain prior informed consent.

81. A Party<sup>90</sup> expressed the view that the sovereign rights of countries over their genetic resources should not be affected by the establishment of a global multilateral benefit-sharing mechanism. Similarly, another Party<sup>91</sup> raised the question of the connection between national law and a global multilateral benefit-sharing mechanism as, in accordance with countries' sovereign rights over their genetic resources, they should be able to choose which genetic resources would be included in a multilateral mechanism in what situations. The Party also stated that a global multilateral benefit-sharing mechanism would not be applicable in geographical areas that are specifically regulated by other international instruments or are subject to ongoing multilateral negotiations.

82. Some<sup>92</sup> expressed the view that the need for a global multilateral benefit-sharing mechanism must be identified first and it was suggested<sup>93</sup> that further discussions are needed on situations in which it is not possible to grant or obtain prior informed consent in order to determine whether or not there is a need for a global multilateral benefit-sharing mechanism.

83. The view was expressed<sup>94</sup> that it is necessary to examine whether a global multilateral benefit-sharing mechanism could be an option for countries that have not yet developed their national ABS measures while another view considered that a global multilateral benefit-sharing mechanism would not apply in such a situation and that such situation should rather be addressed through capacity-building activities.<sup>95</sup> Along similar lines, it was suggested<sup>96</sup> that the current focus should be on implementing the bilateral approach of the Protocol and that the need for a global multilateral benefit-sharing mechanism cannot and should not be addressed until the bilateral system is functioning.

84. Two submissions<sup>97</sup> suggested that consideration of information and lessons learned from other multilateral systems such as the International Treaty on Plant Genetic Resources for Food and Agriculture (Treaty) or the Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and other Benefits (PIP Framework) would be useful. It may be noted that a study on, *inter alia*, experiences with other multilateral mechanisms including both the Treaty and the PIP Framework, was prepared further to decision NP-1/10 as referred to in paragraph 65 above.

85. One submission<sup>98</sup> explored the concept of "bounded openness" as it could apply to traditional knowledge associated with genetic resources and suggested this as the way forward for Article 10.

86. Some Parties<sup>99</sup> suggested it would be worthwhile to consider if and how a global multilateral benefit-sharing mechanism could support conservation and sustainable use of biodiversity. Different aspects were suggested such as schemes for technical assistance, international cooperation, information exchange, technology transfer and capacity-building.

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<sup>89</sup> India.

<sup>90</sup> Mexico.

<sup>91</sup> Argentina.

<sup>92</sup> India, Japan Bioindustry Association.

<sup>93</sup> Japan Bioindustry Association.

<sup>94</sup> Argentina.

<sup>95</sup> Japan. See also para. 60 above.

<sup>96</sup> ICC.

<sup>97</sup> Argentina, Mexico.

<sup>98</sup> Joseph Henry Vogel.

<sup>99</sup> Argentina, India, Mexico.

87. One Party<sup>100</sup> identified other areas where the usefulness of a global multilateral benefit-sharing mechanism should be considered, including the use of digital sequence information where there is no information on the country of origin or in the case of multiple countries of origin, and as a tool for enforcing national legislation and avoiding certain issues being subject to jurisdictions in which legislation is more convenient.

88. A Party<sup>101</sup> noted that implementation of the Nagoya Protocol and learning from this experience, which is an ongoing process, may go hand in hand with discussions on potential situations that may support the creation of a global multilateral benefit-sharing mechanism, and the possible modalities for such a mechanism. Another Party<sup>102</sup> felt it would be appropriate to identify cases and scenarios of genetic resources or associated traditional knowledge that could be the object of such a mechanism and its implications in national legislation.

89. To assist in this, a Party<sup>103</sup> advocated returning to technical discussions on the basis of lists of questions related to issues that need to be analysed.<sup>104</sup>

90. An organization<sup>105</sup> suggested that where the country of origin of a microorganism cannot be unambiguously identified then a global multilateral benefit-sharing mechanism may be useful so long as it is cost efficient.

## V. SUGGESTED RECOMMENDATIONS

91. The Subsidiary Body on Implementation may wish to consider the above information and, pursuant to decision NP-2/10, paragraph 7, explore the need for a global multilateral benefit-sharing mechanism and make recommendations for consideration by the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol at its third meeting.

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<sup>100</sup> Argentina.

<sup>101</sup> India.

<sup>102</sup> Argentina.

<sup>103</sup> Mexico.

<sup>104</sup> See decision XI/1 B and its annex I.

<sup>105</sup> World Federation of Culture Collection.