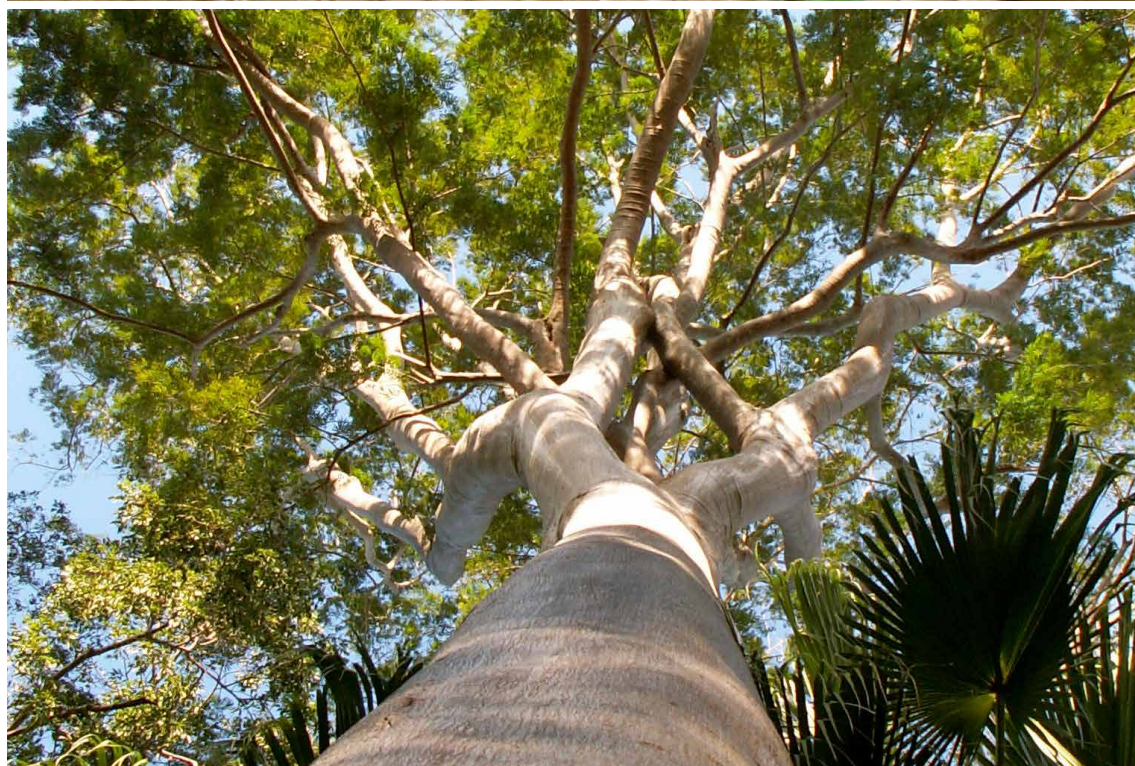


Mutually supportive implementation of the Plant Treaty and the Nagoya Protocol

A primer for national focal points and other stakeholders

Discussion draft

Please send comments to Michael Halewood,
corresponding editor (m.halewood@cgiar.org)



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Bioversity International is a global research-for-development organization. We have a vision – that agricultural biodiversity nourishes people and sustains the planet. We deliver scientific evidence, management practices and policy options to use and safeguard agricultural and tree biodiversity to attain sustainable global food and nutrition security. We work with partners in low-income countries in different regions where agricultural and tree biodiversity can contribute to improved nutrition, resilience, productivity and climate change adaptation.

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The ABS Capacity Development Initiative aims to contribute to poverty reduction, food security, technology transfer, social development including equity and rights, and biodiversity conservation through implementing the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization and the third objective of the Convention on Biological Diversity. Established in 2006, the ABS Capacity Development Initiative is hosted by the German Federal Ministry for Economic Cooperation and Development, implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and funded by the governments of Germany, Norway and Denmark, the Institut de la Francophonie pour le développement durable and the European Union.

www.abs-initiative.info/

The International Treaty on Plant Genetic Resources for Food and Agriculture is a crucial instrument in the fight against hunger and poverty in an era of climate change and food crisis. No country is self-sufficient in plant genetic resources; all depend on genetic diversity in crops from other countries and regions. International cooperation and open exchange of genetic resources are therefore essential for food security. The fair sharing of benefits arising from the use of these resources has for the first time been practically implemented at the international level through the International Treaty, its Standard Material Transfer Agreement and the Benefit-sharing Fund.
www.planttreaty.org

The **Convention on Biological Diversity** opened for signature at the Earth Summit in Rio de Janeiro in 1992, and entered into force in December 1993. The Convention on Biological Diversity is an international treaty for the conservation of biodiversity, the sustainable use of the components of biodiversity and the equitable sharing of the benefits derived from the use of genetic resources. With 196 Parties up to now, the Convention has near universal participation among countries. The Convention seeks to address all threats to biodiversity and ecosystem services, including threats from climate change, through scientific assessments, the development of tools, incentives and processes, the transfer of technologies and good practices and the full and active involvement of relevant stakeholders including indigenous peoples and local communities, youth, non-governmental organizations, women and the business community. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Nagoya Protocol) is a supplementary agreement to the Convention. The Nagoya Protocol aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies. It entered into force on 12 October 2014 and to date has been ratified by 59 Parties.

www.cbd.int/abs/about/

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Contents

Acknowledgments.....	v
List of Acronyms	vii
1. Introduction	1
2. Setting the scene: the CBD's Nagoya Protocol, the ITPGRFA's multilateral system, and the imperative of mutual supportiveness and national coordination challenges	6
3. Stakeholders' experiences at the intersection of the CBD/NP and ITPGRFA/MLS	13
4. Highlights of how national governments and regional organizations are addressing the implementation of the CBD/NP and the ITPGRFA.....	19
5. Working through scenarios to address grey areas in policy formulation, implementation and coordination	28
6. Options for improved coordination between lead agencies and with non-governmental stakeholders.....	50
7. Looking forward	52
Annex 1: Revised agenda for tandem workshop	54
Annex 2 List of participants in the tandem workshop.....	57
Annex 3: PowerPoint presentations made during the tandem workshop	62
Annex 4: Cross-references between the CBD, the Nagoya Protocol and the ITPGRFA recognizing complementarity and mutually supportiveness.....	64
Annex 5: Survey for ABS tandem workshop participants.....	68

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This publication is based largely upon a structured set of interactions – a survey, a workshop, follow-up analysis – involving a fairly large number of national focal points for the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the Convention on Biological Diversity (CBD) and the Nagoya Protocol (NP), independent experts and stakeholders whose daily activities are effected by access and benefit-sharing (ABS) regulations. We wish to thank them for their dedicated participation. There are too many to mention here, but they are listed in Annex 2 of the report. Additional thanks are due to the following people who made contributions to, and comments on, this publication, which attempts to provide an overall synthesis of the relevant activities: Kathryn Garforth, Kent Nnadozie, Andreas Drews, Lena Fey, Jorge Cabrera, Ruairaidh Sackville-Hamilton, Evelyn Clancy, Ana Bedmar, Lily O. Rodriguez, Hannes Dempewolf, Madhu Ghimire, Anke van den Hurk, Clark Peteru, Logotonu Meleisea Waqainabete, Valerie Saena Tuia, Cenon Padolina, Rosa Miriam de Vasconcelos, Henry Ibanez de Novion, Bidya Pandey, Shakeel Bhatti, John Mulumba Wasswa, Francis Ogwal, Mahlet Teshome, Isabel Lopez-Noriega, Monipher Musasa, Gemedo Dalle Tussie, Jean Gapusi, Amadou Sidibé, Aline Njebarikanuye, Céline Karugu and Nolipher Khaki-Mponya.

This discussion draft is being circulated to additional stakeholders and policy experts (who did not participate in the workshop) for comments and suggestions. The final version will be published later in 2015.

The activities described in this report were organized by Bioversity International and the ABS Capacity Development Initiative (ABS Initiative) in close consultation with the Secretariats of the CBD and the ITPGRFA. The ABS Initiative has been supporting national implementation of the ABS provisions of the CBD on the African continent since 2006, expanding its regional scope to the Caribbean and Pacific regions in 2011. It is a multi-donor initiative funded, at the time of the workshop, by Germany, Norway, Denmark, the European Union and the Institut de la Francophonie pour le développement durable. Bioversity International has been supporting national implementation of the multilateral system of the ITPGRFA, since 2007, under the umbrella of the Food and Agriculture Organization/Treaty Secretariat/Bioversity International Joint Capacity Building Programme for Developing Countries on Implementation of the Treaty and Its Multilateral System of

Access and Benefit-sharing. For the last four years, this work has been financed by the government of the Netherlands through the Genetic Resources Policy Initiative¹ and the CGIAR Research Program on Climate Change, Agriculture and Food Security (CCAFS) and the CGIAR Research Program on Policies, Institutions, and Markets (PIM). We wish to thank all of the donors who have contributed to this publication, and the activities upon which it is based, through their support for Bioversity International/Genetic Resources Policy Initiative and the ABS Initiative.

Front cover top photo: Diversity of vegetables and herbs produced in home gardens, Nepal. Credit: LI-BIRD/A. Subedi; Front cover bottom photo: *Albizia caribea* in Pamplémousses Botanical Gardens, Mauritius. Credit: Bioversity International/P. Bordoni; Inside photo: Participants in the tandem workshop, Rome, 3-6 June 2014. Credit: Bioversity International/S. Landersz.

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¹ For more about GRPI-2, see <<https://grpi2.wordpress.com/about/grpi-2/>> (accessed 28 February 2015).

List of Acronyms

ABS	access and benefit-sharing
ABSCH	Access and Benefit-sharing Clearing-house
AMCEN	African Ministerial Conference on the Environment
AU	African Union
CBD	Convention on Biological Diversity
CCAFS	CGIAR Research Program on Climate Change, Agriculture and Food Security
CePaCT	Centre of Pacific Crops and Trees
CGEN	Council for the Management of Genetic Heritage (Brazil)
CGIAR	Consultative Group on International Agricultural Research
CGRFA	Commission on Genetic Resources for Food and Agriculture
COP	Conference of the Parties
DHRST	Department of Human Resources, Science and Technology (African Union)
EU	European Union
FAO	Food and Agriculture Organization of the UN
GCDT	Global Crop Diversity Trust
GEF	Global Environment Facility
GRFA	genetic resources for food and agriculture
ILCs	indigenous and local communities
IP	intellectual property
IRRI	International Rice Research Institute
ISF	International Seed Federation
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
MAT	mutually agreed terms
MLS	multilateral system on access and benefit-sharing
MTA	material transfer agreement
NARO	National Agricultural Research Organization (Uganda)
NBSAPs	National Biodiversity Strategies and Action Plans
NEMA	National Environment Management Authority (Uganda)
NP	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity (the Nagoya Protocol)
PGRFA	plant genetic resources for food and agriculture
PIC	prior informed consent
SMTA	standard material transfer agreement

SPC	Secretariat of the Pacific Community
SPREP	Secretariat of the Pacific Regional Environment Programme
UNEP	United Nations Environment Programme

1. Introduction

Background

The objectives of the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) are basically identical – the conservation and sustainable use of genetic resources and the equitable sharing of benefits derived from their use.² However, the access and benefit sharing (ABS) systems that these agreements require member states to implement are very different in orientation. The ITPGRFA creates a multilateral system of access and benefit sharing (MLS) whereby countries agree to virtually pool and share the genetic resources of 64 crops and forages listed in Annex 1 of the treaty, for agriculture and food-related purposes. The CBD and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (NP) create mechanisms for the negotiation and enforcement of bilateral ABS agreements.³ The CBD/NP and the ITPGRFA/MLS are meant to be implemented in mutually supportive ways. However, many national policy actors are uncertain about how to actually implement these agreements so that they really are mutually supportive. One of the factors contributing to this uncertainty is that, in most countries, different lead agencies have responsibility for implementing the respective agreements and these agencies have not had sufficient opportunities to coordinate their activities with one another. The agency responsible for implementing the CBD/NP often has a very low level of familiarity with the ITPGRFA and vice versa. Many policy actors perceive ‘grey areas’ where it is not clear which regulatory system should apply. And the lead agencies often do not have mechanisms in place to facilitate interaction and exchange of information between them for the purposes of addressing and clarifying those ‘grey areas’ in the day-to-day implementation of the CBD/NP and ITPGRFA/MLS.

² Convention on Biological Diversity, 31 ILM 818 (1992). See <http://www.cbd.int/convention/text/> (accessed 28 February 2015). International Treaty on Plant Genetic Resources for Food and Agriculture, 29 June 2004, <http://www.planttreaty.org/texts_en.htm> (accessed 28 February 2015).

³ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity (the Nagoya Protocol), 29 October 2012, <<http://www.cbd.int/abs/text/>> (accessed 28 February 2015).

Objectives

The overall objective of this report – and the survey, workshop and follow-up analysis upon which it is based - is to provide national policy actors with a tool to increase their ability and confidence to implement the CBD/NP and ITPGRFA/MLS in mutually supportive ways.

Methodology/Process

The Tandem Workshop for National Focal Points, 3-6 June 2014, brought together national focal points for both the CBD/NP and the ITPGRFA from 20 countries, representatives of the Secretariats of both instruments, independent experts and representatives of stakeholder groups whose daily activities of conserving, providing, accessing and using genetic resources often cut across the regulatory division between the CBD/NP and the ITPGRFA/MLS. The workshop sought to demystify perceptions of 'grey area issues' by providing the national focal points opportunities to work through practical problems related to these issues together, arriving at clear, operable solutions. It also sought to provide participants with the opportunity to consider options for coordination mechanisms and practices 'back home' to be able to address such issues on an ongoing basis.

The basic chronology of the workshop was as follows: Experts provided introductions to the CBD/NP and ITPGRFA, with descriptions of their objectives, mechanics, state of implementation and outstanding challenges. Representatives of different stakeholder groups – seed companies, conservation organizations, farmer organizations, public research organizations and international and national genebanks – provided accounts of their experiences operating under the framework of the CBD/NP and ITPGRFA/MLS. Where relevant, they highlighted their experiences 'at the interface' of the two regimes. These presentations were meant to increase the national focal points' appreciation of the practical consequences that flow from the manner in which the CBD/NP and ITPGRFA are implemented (or not implemented, in many cases). Thereafter, 'tandems' (the national focal points for the CBD/NP and ITPGRFA from a single country working together as a team) from a few countries provided accounts of their experiences to date implementing both instruments. These were complemented by presentations from the African Union Commission and the Secretariat of the Pacific Community concerning their efforts at regional levels to support implementation of both instruments.

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With the scene thus set, the participants spent 1.5 days in small groups working through hypothetical cases that ‘teased out’ technical issues that could cause confusion at the intersection of national strategies/mechanisms to implement the CBD/NP and ITPGRFA/MLS. These case scenarios were based on issues raised in relevant literature, in national ABS policy implementation projects, in questions that have been directed to the workshop organizers over the last years and in a survey of all of the participants that was conducted prior to the workshop. On the last day of the workshop, the participants engaged in a highly participatory exercise to identify good practices for the lead agencies responsible for implementing the CBD/NP and the ITPGRFA to coordinate with one another and with other stakeholders who play important roles in the day-to-day roll out and implementation of both instruments.

While immediately useful for all of the workshop participants, the organizers’ intention was (and is) to use the feedback from the participatory sessions to develop a set of fact sheets/decision-making tools and/or policy briefs for open access publication. The workshop was organized by Bioversity International and the ABS Capacity Development Initiative (ABS Initiative) in close consultation with the Secretariats of the CBD and the ITPGRFA. It was the second workshop in a planned series of workshops to address various aspects of mutually supportive implementation. The first workshop – principally for experts to work together examining technical and legal interface issues – was held in January 2013.⁴ One of the recommendations of the expert workshop was that a ‘tandem workshop’ should be organized, dedicated to bringing together CBD/NP and ITPGRFA national focal points from the same countries to focus on practical national implementation issues including policy, legal, coordination and capacity strengthening aspects.

In March 2014, the organizers circulated a notice about the tandem workshop to the relevant national focal points in Africa, Caribbean and Pacific countries that had ratified the ITPGRFA and the CBD/NP at that time. They were invited to consider submitting expressions of interest to attend the meeting. The notice included an application form that

⁴ The expert workshop ‘The International Treaty and the Nagoya Protocol: Towards mutual supportiveness in the implementation of both instruments at the national level’ was organized by the ABS Capacity Development Initiative, in collaboration with the Secretariat of the Convention on Biological Diversity (CBD) and the Secretariat of the International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA) and hosted by Bioversity International. The workshop report is available at <<http://www.abs-initiative.info/629.html>> (accessed 28 February 2015).

had to be filled in by both the national focal point for the CBD/NP and the national focal point for the ITPGRFA from a single country (that is, a tandem application) in order to be considered. It also requested information about implementation successes and challenges in applicants' countries and why the applicants felt participation in the workshop would be beneficial to their domestic implementation efforts. The same invitations to consider submitting expressions of interest were sent to the national focal points in Asian and Central and South American countries that were known to be in the process of addressing related issues. Ultimately, the organizers received more applications than there were spaces in the workshop; so they had to make hard choices about which teams to invite, based on the information provided in the expressions of interest.

To ensure that the workshop was tailored to meet the outstanding needs of the participants, the organizers developed an online survey for the participants to fill in in order to get in-depth feedback about implementation challenges and successes, coordination mechanisms, factors contributing to the current state of coordination in the countries concerned and so on. The results were used to develop hypothetical case scenarios and workshop design. They were also presented back to the participants in the introductory session. The surveys also provided a useful base line against which future progress in each of the countries concerned could be measured. To ensure that participants came to the workshop with a common understanding of the issues to be addressed, they were provided, one month in advance, with two published papers addressing interface issues and other introductory materials concerning the CBD/NP and ITPGRFA/MLS.⁵ To ensure that all participants were equally able to participate in the meeting, simultaneous French/English interpretation was provided.

⁵ One of the papers was Cabrera Medaglia, J, WalløeTvedt, M, Perron-Welch, F, Jørem, A and Phillips, F-K. 2013. The interface between the Nagoya Protocol on ABS and the ITPGRFA at the international level: Potential issues for consideration in supporting mutually supportive implementation at the national level, FNI Report 1/2013 (Lysaker, Norway: Fridtjof Nansen Institute). Available at <<http://www.abs-initiative.info/629.html>> (accessed 28 February 2015). The other paper was Halewood, M; Andrieux, E; Crisson, L; Gapusi, JR; Wasswa Mulumba, J; Koffi, EK; Yangzome Dorji, T; Bhatta, MR; Balma, D. 2013. 'Implementing 'mutually supportive' access and benefit sharing mechanisms under the Plant Treaty, Convention on Biological Diversity, and Nagoya Protocol,' *Law, Environment and Development Journal* 9(1) (2013): 68–97 (also available on the same website in French and Spanish). [available at <http://www.lead-journal.org/content/13068.pdf>] (accessed 28 February 2015).

The text that follows is meant to capture those contributions by participants, both individually and collectively, that were most directly related to promoting the national implementation of the CBD/NP and ITPGRFA/MLS in mutually supportive ways. Time and space will not allow for summaries of the presentations and discussions – while interesting in their own right – that were tangentially related to the central theme of the workshop. (Links to all presentations that were made are available in Annex 3 to this report.) In this way, we hope this report will constitute an accessible, easy-to-follow resource for policy actors in all countries to use when they are considering options for national implementation of the CBD/NP and ITPGRFA/MLS.

2. Setting the scene: the CBD's Nagoya Protocol, the ITPGRFA's multilateral system, and the imperative of mutual supportiveness and national coordination challenges

2.1. Introduction to the ITPGRFA and the Multilateral System of Access and Benefit Sharing

Presentation by Shakeel Bhatti, Secretary of the ITPGRFA

The ITPGRFA came into force in 2004, and, as of June 2014, it had 132 contracting parties. The MLS created by the ITPGRFA has been operational since 2007. In addition to undertaking to implement and participate in the MLS, the ITPGRFA contracting parties agree to take actions with respect to conserving, exploring, collecting, characterizing and documenting plant genetic resources for food and agriculture (PGRFA), to promote the sustainable use of those resources and to promote farmers' rights, pursuant to national policy measures. They also agree to cooperate in developing a global PGRFA information system through which, among other things, users can share non-confidential scientific information about PGRFA they have obtained through the MLS, thereby adding value to the system as a whole. Through the MLS, contracting parties agree to provide facilitated access to PGRFA of 64 crops and forages included in Annex 1 of the ITPGRFA, 'for 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.' Annex 1 PGRFA that are 'under the management and control of contracting parties and in the public domain' are automatically included in the MLS. Contracting parties also undertake to create policy incentives for natural and legal persons within their borders to voluntarily include additional PGRFA in the MLS. A third source of germplasm in the MLS is international institutions, which sign agreements with the governing body of the ITPGRFA to place collections under the ITPGRFA's framework.

All MLS materials are transferred using the standard material transfer agreement (SMTA) adopted by the ITPGRFA governing body in 2006. The SMTA includes mandatory financial benefit-sharing clauses and prohibits recipients from seeking rights that would limit access to materials 'in the form received, from the multilateral system.' All transfers are reported to

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a confidential data base that can be accessed by the Food and Agriculture Organization of the UN (FAO), which has been accepted to represent the third party beneficiary interests of the MLS, with the authority to monitor transactions and initiate legal actions in the event of suspected non-compliance by recipients of SMTA conditions.

2.2. Introduction to the Nagoya Protocol

Presentation by Kathryn Garforth, CBD Secretariat (prerecorded), and Susanne Heitmüller, ABS Initiative

The Nagoya Protocol includes a number of linkages to the ITPGRFA including in its preamble and in Article 8 where the parties are required to consider the importance of genetic resources for food and agriculture (GRFA) and their special role for food security in the development and implementation of their ABS measures. Furthermore, paragraph 4 of Article 4 provides, in part, that where a specialized international ABS instrument applies, the Nagoya Protocol does not apply for the party or parties to the specialized instrument in respect of specific genetic resources covered by and for the purpose of the specialized instrument. This was intended to address the relationship between the ITPGRFA and the Nagoya Protocol.

The Nagoya Protocol's obligations are focused on three aspects:

- Access – users seeking access to genetic resources must get permission from the provider country (known as prior informed consent or PIC), unless otherwise determined by that country. The Protocol's provisions on access go beyond the CBD by providing for the establishment of clear and transparent procedures for access in order to create greater legal certainty. Furthermore, where indigenous and local communities (ILCs) have an established right to grant access to genetic resources, Parties are to take measures with the aim of ensuring that the prior informed consent of the ILCs is obtained for access to such resources.
- Benefit-sharing – providers and users must negotiate an agreement to share benefits resulting from the use of a genetic resource (known as mutually agreed terms or MAT).
- Compliance – the Protocol obliges Parties to put systems in place to require users in its jurisdiction to comply with the ABS requirements of the country providing access

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to genetic resources. To support compliance, the Protocol also provides for monitoring of the utilization of genetic resources, which is done primarily through checkpoints and the internationally recognized certificate of compliance.

The Protocol also addresses traditional knowledge associated with genetic resources. Parties are required to take measures with the aim of ensuring that traditional knowledge associated with genetic resources that is held by ILCs is accessed with the prior informed consent of those ILCs and that mutually agreed terms have been established.

The Nagoya Protocol establishes an ABS Clearing-House for the sharing of information on ABS. The Clearing-House will also contribute to improving clarity, transparency and legal certainty. It plays a central role in monitoring the utilization of genetic resources. A permit submitted to the ABS Clearing-House will constitute an internationally recognized certificate of compliance. Checkpoints collect or receive information related to the utilization of genetic resources from users. The information collected or received by the checkpoint is then submitted to the ABS Clearing-House, which transmits it to the country that provided access to the genetic resources, enabling verification that the MAT are being complied with.

As of 1 June 2014, the Nagoya Protocol had received 36 ratifications. It required 50 ratifications in order to enter into force, and the objective was to have entry into force in time for the first Meeting of the Parties to the Protocol, to be held concurrently with the twelfth Conference of the Parties (COP) to the CBD. COP-12 was to be held on 6-17 October 2014 in Pyeongchang, Republic of Korea.⁶ Entry into force of the Protocol would go a long way towards meeting Aichi Target 16 of the Strategic Plan for Biodiversity 2011-2020, which provides that 'by 2015, the Nagoya Protocol is in force and operational, consistent with national legislation.'

⁶ The Nagoya Protocol received the necessary number of ratifications on 19 July 2014. The Protocol thus entered into force on 12 October 2014, allowing the first Meeting of the Parties to the Protocol to be convened on 13-17 October in Pyeongchang, Republic of Korea, concurrently with the second week of COP-12.

2.3. The imperative of implementing the ITPGRFA and the Nagoya Protocol in coordinated, mutually supportive ways

Common messages from the presentations by Shakeel Bhatti, Secretary of the ITPGRFA, and Kathryn Garforth, CBD Secretariat and Susanne Heitmüller, ABS Initiative

There are numerous cross-references between the CBD, the Nagoya Protocol and the ITPGRFA recognizing their complementarity and expressing contracting parties' collective intention that they should be implemented in mutually supportive ways. A number of the preambular paragraphs of the Nagoya Protocol recognize and recall the importance of the ITPGRFA and the MLS and the fact that they are in harmony with the CBD. Article 4 of the Nagoya Protocol states that the 'Protocol does not apply for the Party or Parties to [...] specialized [ABS] instrument in respect of the specific genetic resources covered by and for the purposes of that instrument.' It also states that the Nagoya Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to it. The text of the CBD's COP Decision X/1 (2010) adopting the text of the Nagoya Protocol states that the ITPGRFA is one of the 'complementary instruments' that 'constitutes' the overarching International Regime on access and benefit-sharing (along with the CBD, the Nagoya Protocol and the Bonn Guidelines). Older decisions of the CBD COP that were taken during the negotiations of the ITPGRFA (for example, CBD/COP Decision V/26) recognized the importance of the ongoing negotiations of the MLS under the aegis of the FAO's Commission on Genetic Resources for Food and Agriculture (CGRFA) and taking them into account in the context of the work of the COP on ABS. The ITPGRFA explicitly states that it is in harmony with the CBD and that its objectives will be best attained by linking closely with the FAO and the CBD. The ITPGRFA's governing body has adopted resolutions calling on its own contracting parties to ratify the Nagoya Protocol and implement it in mutually supportive ways with the MLS. They also call on national focal points for both the CBD/NP and the ITPGRFA to enhance their collaboration as well as on the Secretariats of both instruments to work closely together. (The full text of these paragraphs, articles and resolutions is reproduced in Annex 4 of this report.)

Indeed, the Secretariats of the CBD and the ITPGRFA have signed a memorandum of cooperation to share information, coordinate technical assistance, hold workshops, and so on. To this end, they have also worked together – and with the ABS Initiative and Bioversity

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International – in organizing this workshop. They are also both members of the Biodiversity Liaison Group with five more biodiversity-related conventions.

2.4. Baseline survey on the state of coordination between CBD/NP and ITPGRFA focal points

Presentation by Michael Halewood, Bioversity International

The text of the online survey instrument – which was published in both French and English – is included in Annex 5. Thirty-six national focal points responded to the survey. For 16 countries, independent responses were received from both the focal point for the ITPGRFA and the focal point for the CBD/NP, which provided an opportunity to compare different perspectives within the same countries on coordination issues. Most of the tandems (12/16 or 75 percent) had at least one respondent who described the state of coordination between the lead agencies responsible for the implementation of the ITPGRFA and the CBD/NP as ‘very limited’ or ‘limited.’ They identified the following contributing factors:

- the lead agencies have a long history of working independently of one another, with little information flow back and forth and with low levels of awareness about each other’s activities, including their activities related to the implementation of either the CBD/NP or the ITPGRFA;
- there are very few mechanisms – formal or informal – for interagency coordination for harmonized implementation or, if they exist, they are not active;
- there is a lack of human and financial resources for coordination;
- there are low levels of political commitment to coordination with other agencies and high staff turn-over in lead agencies;
- there is an inequality in status and capacities of the two lead agencies;
- the national focal points are powerless to act in absence of executive orders or regulations confirming their mandates;
- there is a low level of stakeholders’ awareness and demand for the instruments to be implemented;
- there is a lack of clarity about the technical inter-linkages between the instruments, and
- there are pre-existing national ABS laws that do not leave room for the implementation of the MLS.

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Three tandems agreed that the state of coordination was 'adequate'; one reported that interagency coordination was 'strong.' They cited the following factors as having a positive influence:

- the same lead agency is responsible for implementing both instruments;
- both national focal points (for CBD/NP and the ITPGRFA) participate in national biodiversity and genetic resources committees, including those that had previously been struck to develop national biodiversity strategic action plans (NBSAP) under the CBD framework;
- the CBD focal point attends international ITPGRFA meetings, and the ITPGRFA focal point attends international CBD meetings;
- there is a high level of stakeholder awareness about the issues and instruments;
- some stakeholders have the ability to play a role in implementation, and
- there are clear national policies and laws setting out rights, responsibilities and processes.

Three country tandems reported the existence of official mechanisms for coordinating implementation of the CBD/NP and the ITPGRFA/MLS. They cited multi-agency and sometimes multi-stakeholder committees that had been created to support the implementation of the CBD (with participation from the lead agency for the ITPGFA/MLS) and national commissions for biodiversity and genetic resources. Half of the respondents reported the existence of various forms of informal coordination mechanisms including occasional meetings of focal points, consultations supported by capacity-building projects, the joint participation of local people in activities related to the implementation of both the CBD and the ITPGRFA and non-governmental organizations making functional connections between the lead agencies in their roles as partners in implementation projects for the CBD/NP or the ITPGRFA. Slightly less than half of the respondents reported that there had been awareness-raising sessions within the lead agencies for the CBD about the ITPGRFA and vice versa.

Only one tandem team agreed that there were established procedures for referring requests for access from one lead agency to the other (in cases where the request was sent to the wrong agency or where the recipient of the request was unsure about who had authority to

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consider the request). No tandems confirmed that the lead agencies had worked together to develop joint awareness-raising materials about the CBD/NP and ITPGRFA or implementation guidelines or tools.

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3. Stakeholders' experiences at the intersection of the CBD/NP and ITPGRFA/MLS

3.1. International Rice Research Institute

Presentation by Ruairaidh Sackville Hamilton, International Rice Research Institute (IRRI)

IRRI is one of 15 international agricultural research organizations included in the Consultative Group on International Agricultural Research (CGIAR) Consortium. It hosts an international rice collection with 124,000 accessions of cultivated and wild rice. IRRI signed an agreement with the governing body of the ITPGRFA in 2006, placing the collection under the ITPGRFA framework. In the last five years, the genebank at IRRI has distributed 131,283 samples to 664 recipients in 64 countries using the SMTA under the MLS, while breeders and other researchers at IRRI have distributed almost twice that number of breeding and research materials (242,920) with the SMTA to recipients in 89 countries. In the same period, IRRI has received 36,303 samples for the MLS in 272 shipments from 42 countries, including nine countries that are not party to the ITPGRFA, again the majority being for breeding and research rather than conservation and distribution. These providers include almost all of IRRI's collaborators in current projects on rice breeding and research, indicating almost universal buy-in to the ITPGRFA. Providers in non-party countries provide material either with an SMTA or with a letter authorizing IRRI to distribute material under the MLS.

IRRI's distribution of rice genetic resources falls under the 2006 agreement between IRRI and the governing body of the ITPGRFA, so there are not many associated 'interface issues.' However, interface issues have sometimes arisen for people or organizations wanting to provide rice samples to the IRRI genebank, and, in a few cases, these issues have delayed or prevented the transfer of material. They may not know which laws, implementing which international agreement, apply to the materials in question, so they do not know who has the authority to approve a transfer and under what conditions. They may not be certain if the materials are 'under the management and control' of the contracting party 'and in the public domain' and, therefore, whether they are automatically included in the MLS. If they are not in the MLS, then the provider's actions will be governed by laws

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implementing the CBD and the Nagoya Protocol. In such cases, some form of consultation with, and advice from, relevant organizations/authorities will be necessary.

Another interface issue concerns natural or legal persons wanting to voluntarily provide rice to IRRI. Do they have the right to simply decide to send them to IRRI? Or do they need to get permission from a national competent authority? On the one hand, the transfer might be subject to a national ABS law implementing the CBD/NP with procedures for processing requests and approving agreements. On the other hand, as stated in earlier presentations, under the ITPGRFA contracting parties agree to 'take appropriate measures to encourage natural and legal persons within their jurisdiction who hold Annex 1 PGRFA' to include it in the MLS. Presumably, to comply with this obligation, the national ABS law will need to include some form of accommodation to expedite or provide blanket approvals for natural or legal persons wishing to voluntarily include Annex 1 materials in the MLS. Some would-be providers are being blocked from voluntarily including materials in the MLS (through IRRI's genebank) where this issue is not addressed and clarified.

Other examples of interface uncertainties arise for providers with respect to knowing what rules apply with respect to *in situ* Annex 1 materials and for research organizations providing materials they have developed. In IRRI's experience, the greatest difficulties are experienced when the would-be provider is a farmer who wishes to have his/her varieties conserved and shared with others and the national authority prevents the farmer from doing so. Therefore, IRRI no longer conducts or participates in collecting missions and no longer accepts materials directly from farmers unless specifically approved by the national authorities. National partners are responsible for ensuring compliance with farmers' rights, protection of traditional knowledge and national ABS laws, confirming what materials are automatically or voluntarily included in the MLS and so on. IRRI provides materials directly to farmers using the SMTA when they will be further researching/experimenting with the materials or with a simple agreement for direct use.

3.2. German Research Foundation

Presentation by Lily O. Rodriguez, Institute for Food and Resource Economics, University of Bonn

Food and agricultural research chains can involve rich networks of public and private research, national and international organizations and a wide range of genetic resources (including elite lines, wild relatives and farmers' varieties) from different sources (including farmers, genebanks and public and private research organizations). As part of these chains, genetic resources and related information are transferred multiple times, across international borders. The same research and development chain will involve contributions and movements of materials subject at some points in time to national ABS laws implementing the CBD/NP and at other points subject to the ITPGRFA and made available through the MLS. This illustrates the importance of coordination between the lead agencies, a clear understanding of each other's mandates and the need for mechanisms to address challenging interface issues that may arise in daily practice.

A survey made in Germany of around 80 university researchers that have collected biological material from the wild under the CBD/NP and other regulations, found that 80 percent required a collecting permit, 78 percent required an export permit, 69 percent needed a special permit to work in a protected area, 63 percent required a research permit, 28 percent required ABS contracts and 20 percent required all of the above permits. The research chain that was presented illustrates the numerous interactions and connections requiring coordination with agencies that are responsible for granting these kinds of permits. It is very important that funds for research and coordination between the lead agencies for the CBD/NP and the ITPGRFA are made available. It was also noted that at every step of the research chain, it is important that specific benefits, both monetary and non-monetary, are identified taking into account the different types of providers of genetic resources.

3.3. Global Crop Diversity Trust

Presentation by Hannes Dempewolf, Global Crop Diversity Trust

The Global Crop Diversity Trust (GCDT) is an independent international organization, founded by the FAO and the CGIAR in 2004. It signed a relationship agreement with the

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governing body of the ITPGRFA, which recognizes it as an essential element of the ITPGRFA's funding strategy. The GCDT hosts an endowment fund to ensure long-term *ex-situ* conservation and availability of PGRFA collections for global food security. The GCDT recently supported the regeneration of 80,000 'at-risk' PGRFA accessions of Annex 1 crops located in 78 countries; 48,000 duplicates of those regenerated accessions (from 58 countries) were sent for safety back-up in other collections, on the understanding that they could be made further available by the recipients through the MLS. Some of the countries were not members of the ITPGRFA, and many of the ITPGRFA member states had not yet put systems in place to implement the Treaty. Nonetheless, in both cases, the countries exercised their sovereignty, pursuant to the applicable national laws, to decide to allow the recipients of the safety back-up materials to further distribute them through the MLS. Ultimately, compliance with phytosanitary and export/import procedures proved to be more challenging than working through the ABS issues.

The GCDT is currently supporting countries to collect crop wild relatives of Annex 1 crops, conserve them in their national genebanks and make them available for research and breeding. The project operates through national partner organizations, which are responsible for the collecting and availability of germplasm. The GCDT appreciates the complexities that partner organizations sometimes face in working through regulatory issues and, hence, the importance of workshops such as this one to develop awareness, capacity and tools to lighten national counterparts' burdens in research and conservation projects

3.4. International Seed Federation

Presentation of Anke van den Hurk, Plantum, International Seed Federation (ISF)

The plant breeding sector now has many years' experience seeking access to PGRFA from countries that have ratified either the CBD (and, more recently, the Nagoya Protocol) and/or the ITPGRFA, but it has had little success. Only in the case of some collections from the MLS has it been successful. Ultimately, for breeders/seed companies, the biggest overall challenge concerns the lack of legal certainty about what rules apply to the materials they are seeking access to, where to direct requests, who will actually make the decisions, according to what criteria, when the decision will be made, who then has the right to physically provide the resources and where to go if there is no reply at all to a request. Many

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countries still have not appointed competent authorities responsible for administering either the CBD (and now the Nagoya Protocol) or the ITPGRFA. Additionally, there appears to be no coordination between competent authorities (for the respective instruments) to make decisions about where requests should be directed (and who has right to decide) in borderline cases, with the overall result that requests are left unanswered/undecided indefinitely, and neither agreement seems to be de facto implemented/operational. It is essential that authorities are appointed and empowered to make decisions. For the plant breeding sector, the ITPGRFA's MLS is the preferred approach, in as much as it is designed to minimize transaction costs and recognizes the spill-over benefit of the breeders' exemption to all. That said, plant breeding companies are prepared to work through national laws implementing the CBD/NP, provided they are operable, reasonable and can lead relatively quickly to decisions by competent authorities. However, decision makers not familiar with the plant breeding sector need to understand the complexity of the pedigrees of modern varieties, with hundreds of ancestors identifiable in their ancestry, and the challenges associated with identifying the marginal value that each ancestor provides to the new varieties.

3.5. Via Campesina

Presentation by Guy Kastler, Via Campesina

Via Campesina includes 164 farmer organizations from 73 countries representing 200 million farmers worldwide, most of whom produce their own seed. Such small farmers produce 70 percent of food worldwide with only 30 percent of the arable land. Via Campesina was hesitant to attend this meeting because for 30 years the CBD has not led to any benefits for farmers, and, while the ITPGRFA has given small levels of financial support to farmers from the Benefit-sharing Fund, that money has come from national governments and not from the commercial users who should be sharing financial benefits. Via Campesina does not like the fact that financial benefit-sharing under the ITPGRFA/MLS hinges on patenting. Peasant farmers do not want any patenting because it stops them from exchanging seeds. Benefit-sharing should be triggered by any form of commercialization of new varieties, not just by patenting. Via Campesina is also concerned that neither the CBD nor the ITPGRFA appears to have made it any easier for farmers to get germplasm from national governments, including from national genebanks. Farmers' requests for access to germplasm are routinely

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ignored or turned down in many countries without any explanation. There is no apparent accountability despite the fact that farmers are clearly the anticipated recipients of materials under both international agreements. This even applies for those PGRFA that are pretty obviously in the MLS – not just borderline cases where it is not clear if the CBD/NP or the ITPGRFA should apply. Alternatively, national governments continue to seek access to PGRFA from farmers, often without any formal agreements, under either the national laws implementing the CBD or the ITPGRFA. Via Campesina has high hopes that the Nagoya Protocol, if effectively implemented, will provide a basis for farmers to effectively negotiate ABS agreements, including the conditions under which they might be willing to put their own materials in the MLS. However, they are concerned that the European Union regulations for implementing the Nagoya Protocol will not actually address the concerns expressed in this presentation. The difficulties of monitoring and enforcing users' compliance with either the SMTA or agreements under the CBD and Nagoya Protocol are also a cause of significant concern for Via Campesina, an issue that has also been raised by a number of would-be provider countries.

4. Highlights of how national governments and regional organizations are addressing the implementation of the CBD/NP and the ITPGRFA

4.1. Regarding the Pacific Region

Presentation by Clark Peteru, Secretariat of the Pacific Regional Environment Programme (SPREP)

As of the date of the workshop, 14 Pacific Island countries had ratified the CBD, five had ratified the ITPGRFA and three had ratified the Nagoya Protocol. At the regional level, SPREP has the mandate for the CBD/NP and genetic resources generally, while the Secretariat of the Pacific Community (SPC) has a mandate for the ITPGRFA and PGRFA. In general, at both the regional level and within countries, the agencies responsible for environment and agriculture have worked in isolation, not coordinating their efforts to raise awareness about, promote ratification of or harmonize implementation of the CBD/NP and the ITPGRFA. Regarding the CBD, a regional model ABS law was adopted in 2002 that exempts 'plant genetic resources for food and agriculture covered by a policy approved by the Secretariat of the Pacific Community.' The model law is not being followed very closely by the island states. For example, the national ABS laws of Vanuatu and the Solomon Islands do not mention the ITPGRFA or PGRFA. The ABS Initiative has supported regional meetings with a diversity of stakeholders focused on the CBD/NP. A Global Environment Fund (GEF) medium sized proposal for the Pacific Region is expected to be finalized in 2015. It will assist Pacific island countries in becoming parties, commence start up activities, and will address the relationship between the CBD/NP and ITPGRFA.

Presentation by Logotonu Meleisea Waqainabete, Secretariat of the Pacific Community (SPC)

In 2010, the regional Heads of Agriculture and Forest Services endorsed the policy that the SPC would act as an agent for the contracting parties in the region to address their needs *vis-à-vis* the ITPGRFA. The SPC is responsible for ensuring its 22 Pacific island countries and territories are food and nutrition secure. Thus, access to resilient gene pools of PGRFA

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available in the MLS of the ITPGRFA is vital. The SPC hosts a crop genetic resources collection in the Centre of Pacific Crops and Trees (CePaCT), and a tree seed germplasm collection in the Pacific Tree Seed Centre. The SPC signed an agreement with the governing body of the ITPGRFA placing the CePaCT collection under the ITPGRFA framework. It receives financial support from the GCDT to maintain taro and yam collections in particular. For trees and other species not included in Annex 1 of the ITPGRFA, the SPC continues to use the SPC material transfer agreement (MTA), which was in use prior to the SPC's agreement with the governing body of the ITPGRFA. The SPC has distributed over 60,000 plantlets under a combination of both the SMTA and the SPC MTA. Thus, while it is an international organization, the SPC operates under the ABS frameworks of both the CBD and the ITPGRFA, depending on the materials involved and the purposes for which they are be acquired or provided.

There are a number of challenges to implementing the CBD/NP and ITPGRFA in the region, including a general lack of knowledge of genetic resources that fall under each instrument, restricted access to PGRFA due to some countries not acceding yet to the ITPGRFA, a lack of resources for capacity building and coordination and a preference in some countries to implement one of the instruments instead of the other (for example, preferring the Nagoya Protocol over the ITPGRFA because, under the former, financial benefits are to be shared directly with the provider countries and not routed through an international benefit-sharing fund, as in the case under the ITPGRFA). Some options for improving the coordinated implementation of the agreements in the region would be to have the Secretariats of the ITPGRFA and Nagoya Protocol continue to provide support for the implementation of the two instruments in the region; to have the FAO and the CBD make a short video promoting mutual implementation; to hold more capacity-building meetings for the national focal points for both instruments; to encourage the SPC and SPREP to work more closely together and to have all of the agencies make extra efforts to reach out to non-contracting parties.

4.2. Regarding the European Union

Presentation by Léontine Crisson, ABS National Focal Point (CBD), Netherlands Ministry of Economic Affairs

Over the course of 2013, the EU countries negotiated regulations to implement the Nagoya Protocol. Regulation 511 (or ABS regulation) was formally adopted in 2014 and is scheduled to enter into force upon the entry into force of the Nagoya Protocol.⁷ The EU regulation aims to ensure that all genetic resources falling under its scope are accessed in accordance with applicable ABS legislation. It implements the Protocol within the EU's competence. It relates to user measures only, as the regulation of access within the EU is a matter of national prerogative. For the EU, it is important to have regulations: the EU wants its users to access and use genetic resources in a professional and responsible way, share benefits as agreed and be trustworthy partners both as users and providers of genetic resources.

The user measures create mechanisms to monitor and track the utilization in the EU of genetic resources within the scope of the EU regulation. The regulations create 'due diligence' obligations to record information about transfers, providing requisite information to checkpoints. The regulations also create enforcement measures to be applied when users do not comply with their obligations under the regulation. It applies to genetic resources over which the parties concerned exercise sovereign rights, acquired after the entry into force of the Nagoya Protocol, from other parties to the Protocol. The regulations do not cover genetic resources that fall under the scope of other international instruments (in particular, the ITPGRFA).

The interface between the Protocol and the ITPGRFA is acknowledged and implemented in the EU regulation. Most importantly, when countries decide to transfer non-Annex 1 PGRFA under the SMTA, the transferor/transferee will be deemed to have fulfilled their due diligence obligations.

⁷ Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union. Formally published on 20 May 2014. Can be found in several languages at <<http://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:32014R0511&rid=3>> (accessed 28 February 2015)

4.3. Regarding the African region

Presentation by Mahlet Teshome, Department of Human Resources, Science and Technology (DHRST), African Union Commission, and Gilles Ogandaga, Department of Rural Economy and Agriculture (DREA), African Union Commission

The Organization of African Unity (now the African Union (AU)) developed the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources, 1988,⁸ (AU Model Law) prior to the adoption of the ITPGRFA, the Nagoya Protocol and regional initiatives on intellectual property rights (that is, the African Regional Intellectual Property Organization, the Organisation Africaine de la Propriété Intellectuelle and the Pan African Intellectual Property Organization). The AU Model Law provided a basis and standard for African countries to develop their own laws and regulations on access and benefit-sharing, farmers' rights and other laws with common elements. After the adoption of the Nagoya Protocol in October 2010, the DHRST commissioned, with the support of the ABS Initiative, a review of the Model Law to assess whether it was sufficient to guide African member states in the implementation of the Protocol at the national level. Upon presentation of the findings, the African Ministerial Conference on the Environment (AMCEN) concluded that the Model Law was still useful and relevant, but it adopted a decision requesting the DHRST to develop guidelines for the coherent implementation of the Nagoya Protocol in its member states that reflect the relevant policy developments since 1998. In January 2013, the AU Assembly of Heads of State and Government adopted AMCEN's report, including the process on the development of the guidelines. At the time of the workshop, it was anticipated that AMCEN would endorse the draft guidelines later in 2014 and that they would be endorsed by the AU Assembly in 2015.⁹

The draft AU guidelines on ABS will include a step-by-step guide for competent national authorities and related organs of AU member states to implement the Nagoya Protocol. As far as 'interface issues' are concerned, the draft guidelines recognize the ITPGRFA as pre-existing the Protocol and state that both instruments should be implemented in a mutually

⁸ African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources

⁹ Due to the Ebola crisis, the AMCEN meeting was re-scheduled to February 2015.

supported way, subject to Article 4 of the Protocol. The draft guidelines highlight the fact that states implementing the Nagoya Protocol should be aware of the scope of the ITPGRFA/MLS. It also notes that when AU member states are members of both the CBD/NP and the ITPGRFA, they have a choice to limit the application of the ITPGRFA to Annex 1 materials, or they can choose to expand its coverage to all PGRFA. The draft guidelines call on national focal points for the CBD/NP to engage national counterparts for the ITPGRFA and to agree on a coherent national approach.

4.4. Regarding Uganda

Presentation by Francis Ogwal Sabino, national focal point for the CBD, National Environment Management Authority (NEMA) and John Mulumba Wasswa, national focal point for the ITPGRFA, Botanical Gardens of Uganda, National Agricultural Research Organization (NARO)

The national regulations on ABS were approved in 2005, and they apply to all genetic resources or parts of genetic resources whether naturally occurring or naturalized, whether in *in-situ* conditions or *ex-situ* conditions. According to the regulations, no access to genetic resources is granted unless PIC has been obtained from the lead agencies, local communities and owners of the genetic resources and a MTA and access permit has been issued by the Ugandan National Council for Science and Technology, which is the competent national authority for the implementation of the ABS regulations. The Uganda Cabinet approved the ratification of the Nagoya Protocol in April 2014, and the process for the deposition of the ratification instrument has already been initiated.¹⁰

Uganda acceded to the ITPGRFA in 2003, and after an assessment of the policy environment for its implementation, a draft national policy on plant genetic resources was developed through a participatory process in 2008. However, this policy is still pending approval by the government. The efforts to implement the ITPGRFA at the national level have been supported in part by the Genetic Resources Policy Initiative, led by Bioversity International, and have focused on raising awareness about the ITPGRFA and identifying and linking the different actors involved in its implementation.

¹⁰ Uganda subsequently deposited its instrument of accession and became a party to the Nagoya Protocol upon the Protocol's entry into force on 12 October 2014.

The mutually supportive implementation of the Nagoya Protocol and the ITPGRFA presents a number of challenges such as the inadequate capacity of both personnel and structure in the lead agencies, the low level of awareness about ABS at the national level and the lack of clarity about, and harmonization among, the roles of the lead agencies (NARO and NEMA). However, there are also a number of opportunities: (1) there is a strong spirit of collaboration between individuals in the lead agencies; (2) the revision of the ABS regulations for the implementation of the Nagoya Protocol has opened the door for a proper integration of the ITPGRFA in Ugandan ABS legislation and for a clear delimitation of each institution's roles and responsibilities and (3) the coordination and collaboration among the lead agencies and other institutions involved in the implementation of both conventions can be enhanced by the revival of the National Convention Coordination Group, which was established in 2005 with the objective of providing a framework for individual and institutional collaboration for the synergistic implementation of multilateral environmental agreements.

4.5. Regarding Brazil

Presentation by Henry Ibanez de Novion, Regulatory and Benefit Sharing Division of the Department of Genetic Heritage, Ministry of the Environment, and Rosa Miriam de Vasconcelos, Embrapa (Brazilian Corporation of Agricultural Research)

The Ministry of Foreign Affairs is the national focal point for both the ITPGRFA and the CBD, but there are also technical focal points: one for the ITPGRFA from the Ministry of Agriculture and one for the CBD/NP from the Ministry of Environment. The main instrument regulating ABS in Brazil is the Provisional Act 2186/2001, which subjects access to genetic resources and related traditional knowledge to the authorization of the competent national authority.¹¹ The PIC of indigenous and local communities is necessary to process this authorization. The Provisional Act created the Council for the Management of Genetic Heritage (CGEN), which has the mandate to coordinate the implementation of national ABS policies and carry out the technical and administrative activities to grant or deny access permits. Ministries, scientific institutions, private industry, local communities and other civil

¹¹ Provisional Act 2186/2001. <http://www.mma.gov.br/estruturas/sbf_dpg/_arquivos/mp2186i.pdf> (accessed 28 February 2015)

society organizations are represented in the CGEN. Since 2001, the CGEN has approved a number of resolutions and technical orientations that have completed and elaborated the ABS legal framework.

Current Brazilian ABS law covers many of the elements of the Nagoya Protocol, but some aspects of the Protocol need to be better reflected. To this end, it is necessary to have additional checkpoints (such as plant variety registration offices and patent offices), better developed mechanisms for fair and equitable benefits with local peoples, transboundary cooperation and the creation of a clearing-house for information sharing and traditional knowledge protection.

The facilitated exchange of Annex 1 material under the MLS has not required any particular legislation in Brazil, as the Provisional Act 2186/2001 states that access to genetic resources is subject to facilitated exchange according to the international agreements to which Brazil is a party (and will take place in accordance to such international agreements). This Act provides authority to act under the ITPGRFA until new bill(s) are passed that will provide more details/structure for the implementation of both the ITPGRFA and the Nagoya Protocol. In principle, this exception applies only to *ex-situ* PGRFA since access to *in-situ* PGRFA is subject to the terms and conditions of the Provisional Act. It is crucial that Brazilian organizations involved in the implementation of the CBD, the ITPGRFA and the Nagoya Protocol work together to address access requests that involve all three agreements/conventions, including issues related to the operation of the exception created by the Provisional Act for Annex 1 material. Embrapa's position is that national legislation should move towards a situation in which all PGRFA are subject to special ABS conditions, reflecting the special needs and circumstances of the agricultural sector. Two bills have been submitted by the Ministry of Environment to the Brazilian Congress for the integration of both the Nagoya Protocol and the ITPGRFA in the national ABS legislation. These bills should provide the framework for the harmonized implementation of the CBD/NP and ITPGRFA.

4.6. Regarding Nepal

Presentation by Madhu Devi Ghimire, Ministry of Forests and Soil Conservation and Bidya Pandey, Ministry of Agricultural Development

In Nepal, the implementation of the CBD falls under the Ministry of Forests and Soil Conservation. During the last decade, the implementation of the CBD was guided by the National Biodiversity Strategy (2002) and the Implementation Plan (2006–10) until the recent adoption of the Nepal National Biodiversity Strategy and Action Plan (NBSAP) 2014–20.¹² According to the NBSAP, Nepal's objectives in relation to ABS for the next few years are: (1) to ratify and initiate the implementation of the Nagoya Protocol (by 2015); (2) to finish and enact the bill on access to genetic resources and sharing of benefits, which has been in circulation since 2002 but has never been approved (by 2016) – the approval of this bill will provide a much needed legal basis for ABS agreements in Nepal – and (3) to establish an ABS protocol at the local community level. The NBSAP also formally recognizes the need to implement the ITPGRFA, including the MLS. Some of the challenges to reaching these objectives have come from the post-conflict situation of the country. Local governments are still absent, a new constitution has to be approved and some central government agencies have to be aligned with the current government priorities.

The Ministry of Agricultural Development is the ITPGRFA's focal ministry and responsible for its implementation in Nepal. Domestic implementation of the Treaty is guided by the Agrobiodiversity Policy, which was first adopted by the Nepalese government in 2007 (under the overarching framework provided by the National Agriculture Policy in 2004). The ITPGRFA and its provision were not incorporated in the Agrobiodiversity Policy, 2007, so it was revised in 2014 to recognize and include some elements of ITPGRFA's MLS implementation, highlighting the need to: appoint a competent national authority, confirm what PGRFA in Nepal are in the MLS, ensure access to PGRFA diversity for farmers, and promote community biodiversity management. The Agrobiodiversity Policy, 2014¹³ also

¹² MoFSC. 2014. Nepal National Biodiversity Strategy and Action Plan 2014-2020. Ministry of Forest and Soil Conservation, Government of Nepal, Kathmandu Nepal. <http://www.mfsc.gov.np/>. See also <https://www.cbd.int/nbsap/> (accessed 28 February 2015).

¹³ MoAD. 2014. Agrobiodiversity Policy (2007), Revised 2014. Ministry of Agricultural Development, Government of Nepal, Kathmandu, Nepal (in Nepali language). <http://www.moad.gov.np/index.php> (It will be translated into English) (accessed 28 February 2015)

recognizes the role of the national genebank in acquiring and providing PGRFA for the country through the MLS, and the importance of identifying, evaluating and conserving PGRFA that will help the country adapt to climate change. Currently, there are activities in Nepal to (1) identify and raise awareness about the MLS, (2) analyze incentives and challenges for fully implementing the MLS at the national level, (3) identify and notify the ITPGRFA Secretariat about Nepalese Annex 1 PGRFA that are included in the MLS, (4) identify the institutions that have the capacity to respond to access requests that fall under the MLS, and (5) develop policy instruments to support the day-to-day operation/participation in the MLS.

As a result of a comprehensive analysis of the existing legal framework, the Ministry of Agricultural Development has concluded that the implementation of the ITPGRFA requires a legal instrument that is different from the proposed bill on ABS, and, therefore, the Ministry is working on a bill that focuses exclusively on plant genetic resources and the implementation of the MLS. Whatever the final approach is (two separate bills on ABS (one inspired by the CBD/Nagoya Protocol and the other one on the ITPGRFA) or one unique ABS Act dealing with both instruments), it is obvious that better coordination and collaboration between the two ministries is necessary to address ABS issues in a comprehensive way and to implement both instruments in a mutually supportive manner. The Nepal Biodiversity Coordination Committee is probably the best forum for the environment and agricultural actors to effectively work in a coordinated and harmonized manner. A number of ministries, non-governmental organizations, private enterprises and other key actors are part of this committee. The presence of both the Ministry of Forests and the Ministry of Agriculture in all of the subcommittees that are in charge of the more technical work of the committee should facilitate coordination when dealing with ABS regulatory issues.

5. Working through scenarios to address grey areas in policy formulation, implementation and coordination

The participants were divided into four working groups. The working groups met twice, addressing a unique scenario each time, working through a total of eight hypothetical scenarios. Each working group included three to four national tandem teams of CBD/NP focal points and ITPGRFA focal points, stakeholder representatives and resource people. Considerable time was set aside for the small groups to present the outcomes of their discussions to plenary sessions and additional discussions with all of the participants. Thus, all participants were able to provide input on all of the scenarios. The scenarios, and the responses to them, which drew on the collective feedback from the participants, are set out in the following paragraphs. A number of issues came up repeatedly in each of the groups' work on different scenarios. To reduce redundancies, the editors have included expanded discussion of these issues just once, linked to the hypothetical scenario where it is most directly relevant. When answers to other hypothetical scenarios require consideration of the same issue, we make a cross references to the hypothetical case where the issue is 'teased out.' It occurred in a number of cases that the participants raised issues that could not be fully addressed in the context of the workshop. In developing this report, we have taken the liberty of including some expanded consideration of these issues to maximize the utility of this publication as a tool for readers who did not attend the workshop. It is important to note when reading through these scenarios that the participants were told to assume that the countries concerned in the scenarios had already ratified the CBD, the Nagoya Protocol and the ITPGRFA.

5.1. Hypothetical Case A: Biofuels Solutions Incorporated

Biofuels Solutions Incorporated

- A.1. You are the director of a national genebank with a well-known sorghum collection. You receive a request from Biofuels Solutions Inc. asking for a number of accessions for use in their research and development programme. What are your options? What rules apply? How do you ultimately resolve the issue?
- A.2. You have received samples of maize under the SMTA for use in your organization's breeding programme. You have conserved copies of those materials. You receive a request

from Biofuels Solutions Inc. to send on some of the samples of that conserved material.
What rules apply? What do you do?

Regarding A.1: Genebank director

Sorghum is an Annex 1 crop. Since the material requested is in the national genebank, it is likely ‘under the management and control’ of the contracting party and ‘in the public domain’ and, therefore, is automatically included in the MLS.¹⁴ However, it is possible, given the name of the company requesting the material – Biofuels Solutions Incorporated – that it will not use the materials for the purposes set out in the ITPGRFA and for which member states undertake to provide facilitated access – that is, for the ‘utilization and conservation for research, breeding and training for food and agriculture’ and not for ‘chemical, pharmaceutical and/or other non-food/feed industrial uses.’ If the genebank manager is sure the company is going to use the materials for non-food/feed purposes, she should not transfer it using an SMTA and she should instead take steps to ensure that the request is made/considered under the laws implementing the Nagoya Protocol. If the genebank manager has doubts, she could request additional information from the access seeker. She should also draw the recipients’ attention to the relevant sections of the SMTA regarding acceptable uses to ensure that they understand their obligations/restrictions on use. The SMTA includes a legally binding undertaking by recipients that they will not use the transferred PGRFA for non-food/feed purposes. To use materials received under the SMTA for such purposes would break the terms of the contract as well as the national laws implementing both the ITPGRFA and the Nagoya Protocol.

Regarding A.2: Previous SMTA recipient asked to provide access

Recipients of materials under the SMTA who voluntarily conserve them are required to provide facilitated access to such materials under the terms and conditions of the ITPGRFA (subject to conditions such as having enough of the material ‘stocked’ to be able to share samples and so on). Given the name of the requesting company – Biofuels Solutions Incorporated – the provider in this case needs to consider the issues addressed earlier in Hypothetical Case A.1 that are related to the recipients’ prospective uses of materials.

¹⁴ Genebank managers – or any providers, for that matter – who are uncertain about whether certain PGRFA are included in the MLS, can ask themselves, or higher authorities, a number of questions to ascertain their status. These issues are examined in more depth in Hypothetical Case F below and are not examined here.

5.2. Hypothetical Case B: The SMTA and checkpoints

The SMTA and checkpoints

You are in charge of the national plant variety registration office that has been designated as a checkpoint for the purposes of the national strategy for the implementation of the Nagoya Protocol. An applicant who wants to register a new plant variety provides copies of SMTAs as evidence that he legally received materials that are incorporated (by conventional breeding techniques) into the new variety he seeks to register. What do you do?

This section assumes that the country has national legislation in place that implements the Nagoya Protocol, and it discusses the options that are available in the context of operating under that framework. Under Article 17 of the Nagoya Protocol, member states are obliged to create at least one checkpoint as part of the national systems for monitoring and enforcing users' compliance with national ABS laws in the countries from which genetic resources are accessed. Users are required to provide checkpoints as evidence that they have accessed genetic resources subject to PIC and MAT in compliance with the laws of the provider country. Article 17(3) further states that an internationally recognized certificate of compliance will constitute evidence of such compliance. Article 17(2) provides that a permit or its equivalent which is made available to the ABS Clearing House will constitute an internationally recognized certificate of compliance. It is possible to make SMTAs available to the ABS Clearing House so that they will constitute an internationally recognized certificate of compliance, but this is not required or expected. If a checkpoint requires evidence of PIC and MAT for Annex I material being accessed under the ITPGRFA, the SMTA should be sufficient for this purpose as it includes all of the information required. As such, it should be accepted by the checkpoint in this scenario. Of course, the checkpoint or the provider may want to check the authenticity of the SMTA, just as it may want to double-check any of the contracts or other evidence it is offered as proof of PIC and MAT compliance. Such checking is provided for in Article 17.1(a)(iii), which states that copies of the information provided to the checkpoint as evidence of PIC and MAT (in this case, the SMTA) 'will be provided to relevant national authorities, to the Party providing prior informed consent and to the Access and Benefit-sharing Clearing-House, as appropriate.'

In principle, it should not matter if the SMTA that is presented is for PGRFA of crops and forages listed in Annex 1 of the ITPGRFA or not. The second session of the governing body

of the ITPGRFA decided that the CGIAR centres should use the SMTA when distributing non-Annex 1 materials from their collections. So they must, pursuant to a binding international agreement, distribute PGRFA of non-Annex 1 crops using the SMTA (unless the recipient proposes uses outside the scope of the MLS, an issue that is addressed earlier in Hypothetical Case A). In addition, a number of countries have exercised their national sovereignty to decide that they will make a range of non-Annex 1 PGRFA available using the SMTA. They are clearly not required to do so under the ITPGRFA, but they may exercise their sovereignty over genetic resources as recognized under the CBD and the Nagoya Protocol to use any instrument they wish, including the SMTA, for materials not covered by the MLS.

Of course, if the PGRFA that is the subject of a checkpoint review is being used for non-food/feed industrial uses, then the SMTA cannot be acceptable, since it only provides consent for the recipient to use the materials for conservation and use for training research and breeding for food and agriculture (as addressed in Hypothetical Case A).

5.3. Hypothetical Case C: Reporting transfers

Reporting transfers

In the last six months you have sent samples of both Annex 1 and non-Annex 1 materials from collections hosted by the national genebank and national public breeding programmes to recipients outside the country. Where do you report those transfers? How?

Article 5(e) of the SMTA requires the transferee to notify the governing body of the ITPGRFA of the transfer. In 2009, the governing body passed Resolution 5/2009 providing more details about the fields of information required, and a footnote was subsequently added to the SMTA template specifying the address to which the information should be submitted.¹⁵ The ITPGRFA's Secretariat developed software – Easy SMTA – which providers can use to generate SMTAs and report electronically to the governing body.

¹⁵ Resolution 5/2009, Procedures for the Third Party Beneficiary, in the report of the Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, Appendix A.5, Annex 2, part III, 31–2.<<http://www.planttreaty.org/sites/default/files/gb3repe.pdf>> (accessed: 28 February 2015).

Article 6.3(e) of the Nagoya Protocol states that parties will put in place measures to provide access permits and notify the ABS Clearing-House (which itself was created pursuant to Article 14 and can be found at <http://absch.cbd.int>). Among other things, the Clearing-House will include ‘permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.’ Since it is parties that are to issue permits (under Article 6.3(e)) and to make permits available to the ABS Clearing-House (Article 14(2)(c)), it is only the parties – authorized public authorities – that have the ability to submit this information to the ABS Clearing-House. They do this through common formats on the ABS Clearing-House web site. These common formats can only be completed and published by officially designated representatives of a party.

Transfers of Annex 1 PGRFA using the SMTA need to be reported to the governing body of the ITPGRFA following the guidance provided in Resolution 5/2009 summarized earlier.

Regarding access to Annex 1 PGRFA for non-food/feed purposes, if the country has opted to implement a PIC system under the Nagoya Protocol, then a permit would need to be issued following the national provisions, and information would need to be sent to the ABS Clearing House by an authorized public authority.

Transfers of non-Annex 1 materials sent using the SMTA by countries in exercise of their national sovereignty could be reported to the governing body of the ITPGRFA and the ABS Clearing-House. Since Article 5 of the SMTA states that the provider will report transfers using the SMTA, the transferor should also send information about transfers to the governing body, following the methods and schedules described earlier. There are no decisions by the governing body of the ITPGRFA about what it will do with such data from natural and legal persons. The CGIAR centres have been directed to use the SMTA when transferring non-Annex 1 materials from the international collections they host. They report them to the governing body, and the records are maintained in the confidential data storage repository in Geneva, along with information about transfers of Annex 1 materials using the SMTA.

All access to non-Annex 1 materials using instruments other than the SMTA should be reported to the ABS Clearing-House where the material is accessed from countries that have opted to regulate access pursuant to the Nagoya Protocol.

5.4. Hypothetical Case D: *In situ* materials

***In situ* materials**

You have been designated as your country's competent national authority under the regulatory regime for implementing the Nagoya Protocol.

D.1. You receive a request to collect samples from the coconut trees that grow along the country's publicly owned beaches. How do you respond?

D.2. There are wild relatives of teff and cassava growing in some nationally protected areas. An agricultural research organization in another ITPGRFA member state has written requesting permission to organize a collecting mission to gather samples of these plants. What are your options? What rules apply? How, ultimately, do you reply? Why?

Regarding D.1: Coconuts on the beach

The Nagoya Protocol's competent national authority must consider a few threshold questions to ascertain which set of rules applies for this request. Are coconuts one of the crops listed in Annex 1 of the ITPGRFA? If so, are the PGRFA in question under the management and control of the contracting party concerned and in the public domain (and, therefore, automatically included in the MLS)? If not, have they been voluntarily included by whatever body does have management and control of these resources? What other land management or environment protection rules currently exist that may regulate how the coconuts are managed and/or accessed?

Coconuts are an Annex 1 crop. Assuming for the moment that their use falls within the scope of the ITPGRFA, there is still an outstanding question regarding whether or not the coconuts are under the management and control of the contracting party and in the public domain. If the beaches are under national government jurisdiction, it is likely that the coconut genetic resources are under its management and control. However, in some federated states, it could be that the land management and/or coastal areas are under the jurisdiction of subnational governments (for instance, provinces or regions), with the result that the national government may not manage and may not have control over PGRFA in

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these areas. Along the same lines, it is also conceivable that national governments can cede some of their management and control over PGRFA on national public lands to communities or local farmers, or even to companies, as part of natural resources/protected areas co-management schemes. These are issues of national law that may need to be addressed in hard-to-decide cases.

Ultimately, if it is determined that the *in-situ* coconut PGRFA is under the management and control of the national government, in most countries they will be included in the MLS and made available subject to Article 12.3.h (as discussed in the following paragraph).¹⁶ However, there are some countries that have come to the conclusion that, in their own national circumstances, only *ex situ* collections can be interpreted to be ‘under the management and control of the Contracting Parties and in the public domain’ and thus eligible for automatic inclusion in the MLS (for example, Costa Rica). In this case, by default, the *in situ* coconuts would be subject to the national laws implementing the CBD and Nagoya Protocol. There was considerable disagreement about this interpretation among the participants in the tandem workshop.

Assuming the coconuts are located in a country where the *in situ* PGRFA can be considered to be under the management and control of the contracting party and in the public domain (for example, Brazil, Ethiopia, Netherlands), Article 12.3.h of the ITPGRFA specifies that such access is also subject to other national laws concerning access to genetic resources. Presumably, the laws in question would address issues related to the management of the government lands in question (often protected areas), sustainable collecting, involving (or working entirely through) national organizations/competent authorities, mandatory deposits of samples in national collections and so on. The combination of the application of these laws and the ITPGRFA is that if and when a decision is made to allow/facilitate collecting pursuant to the laws applying to the area in question, the PGRFA will eventually need to be transferred under the SMTA. Simultaneous application of these different rules will require close cooperation between the competent authorities involved. (N.B. Coconuts don’t actually grow *in situ* in the Netherlands or Ethiopia, but the analysis would be the same for other crops.)

¹⁶ Most expert commentators and the governing body’s Technical Advisory Committee on the MLS & SMTA appear to agree with this approach.

If the proposed use of the collected coconuts is for non-food/feed industrial purposes or if the coconuts are not under the management and control of the national government and in the public domain, and they were not voluntarily included in the MLS by whomever did have management and control over them, then the national laws and procedures implementing the Nagoya Protocol would apply, including to whom the application should be directed, who needs to provide PIC and MAT and so on.

If the requestor is located in a non-ITPGRFA member country, it is up to the provider country to decide whether to make the material available using the SMTA or to refuse and enter into a separate bilateral negotiation with the requestor subject to the laws implementing the Nagoya Protocol. Ethiopia, Costa Rica and the Netherlands do not distinguish between contracting parties and non-contracting parties. Brazil does.

Regarding D.2: Wild relatives in protected areas

Teff is not included in Annex 1, so access to it would not be subject to decision-making powers defined under the ITPGRFA. The same is true for most of the species of cassava. Annex 1 states that only *Manihot esculenta* is included in the MLS. Usually, *Manihot esculenta* is used to describe domesticated cassava. However, one subspecies of *Manihot esculenta* is a wild relative - that is, *M. esculenta* subspecies *flabellifolia*. Hence, access to the PGRFA of *Manihot esculenta* subspecies *flabellifolia* would be subject to the ITPGRFA (if it is also under the management and control of the contracting party and in the public domain, and requested for the purposes covered by the scope of the ITPGRFA). All other cassava wild relatives would be subject to the Nagoya Protocol.

5.5. Hypothetical Case E: Legal space

Legal space

You are the head of a national crop gene bank. You have received a request from a researcher in a neighbouring country for samples of some chickpeas from your collection. Your country acceded to the CBD in 1998 and ratified the ITPGRFA in 2003 and the Nagoya Protocol in 2013.

E.1. There is no national law implementing any of these agreements.

E.2. There is a national access and benefit-sharing law that says all access to any genetic resources in the country must be subject to the PIC of the competent authority appointed by the minister of the environment and must include a number of mandatory benefit-sharing terms that are not consistent with the SMTA.

For both cases (E.1 and E.2), what do you do? Why?

A key point to note, for both of these cases and for all legal and political situations, is that the SMTA is a contract, which commits both sides of the contract to certain obligations. When a genebank manager provides material with a SMTA, she provides it on behalf of the legal entity that employs the genebank manager (the genebank or its parent organization), not as an individual acting in his or her own capacity. That is, the legal responsibility for compliance rests with the organization. Thus, as a purely internal organizational matter, the genebank manager must first establish who in the organization is authorized by the organization to sign contracts on behalf of the organization. The genebank manager may be the person authorized to sign any contract on behalf of the organization or, for the special case of SMTAs, she may be given authority to accept SMTAs on behalf of the organization or may have to route every SMTA through the organization's contracts management office or equivalent. It may also be noted that the process of clarifying internal lines of authority may help ensure compliance with national regulations.

Regarding E.1: No implementation-related laws

This is still a fairly common scenario in reality. Many countries do not have implementing laws for either the CBD or the ITPGRFA despite having ratified them years previously. A provider receives a request for material and knows that the response to the request is

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subject to the international legal commitments of the countries concerned but is not sure how to act in the absence of positive policy, legal and administrative enactments that set out their obligations and define the limits of their discretion.

Chick pea is an Annex 1 crop and since it is in the national genebank, it is probably automatically included in the MLS under the ITPGRFA (though, of course, this is something the genebank manager needs to be sure of, as explored in Hypothetical Case F below).

The threshold questions that the genebank manager must ask herself are: Do I have authority to act? Does there need to be an implementing law first to be able to use the SMTA? Or can I go ahead in the absence of a national law? The answer depends upon the political culture and legal system of each country. In most of the countries that are currently actively providing PGRFA under the MLS, there are no positive legal enactments empowering genebank managers (or anyone else for that matter) to be providers. It is enough in these countries that: the country has ratified the Treaty; there is no law prohibiting them from acting; and the material in the national genebanks is the clearly included material in the MLS. In these countries, the genebank manager should feel confident that she or he may act and that no one can or will challenge his or her authority for having decided to provide materials pursuant to the Treaty (i.e., using the SMTA). In many countries, genebanks already had the discretion – before ratifying the ITPGRFA – to distribute PGRFA from the genebank if these resources are under the management and control of the government and in the public domain, and they do not now (post ITPGRFA ratification) need a new policy enactment or law to be able to make those materials available using the SMTA.

If the genebank manager is not comfortable making the decision, she would need to consult people higher up in the national system in order to get the required assurance, starting with immediate supervisors through to authorities in the lead agency or ministry. In some cases, there may be mechanisms for inter-departmental/ministerial consultations that can provide an interim ‘green light’ to the genebank manager so that she has the discretion to make decisions with respect to subsets of PGRFA in the genebank or to send a clear message that she should not proceed and must wait for some form of positive policy enactment confirming her ability to act. Again, the appropriate form and content of these enactments will depend upon the political and legal cultures of the countries concerned. They could range from national legislation to ministerial decrees, to regulations or guidelines and to

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official statements issued from a high-level political office. In this scenario, there is no other law implementing the CBD or Nagoya Protocol that could potentially apply as the default. Presumably, the same challenges – perhaps even additional ones, given the nature of the obligations under the Protocol that need to be implemented through legislation – would face anyone seeking to make materials under the Nagoya Protocol available in the absence of positive policy or legal enactments.

Regarding E.2: Conflicting obligations?

The entry-level question in this case involves which legal obligation takes precedence: the older national law or the more recently ratified international agreement? The answer depends upon the political and legal systems of the countries concerned. In some countries, pursuant to the national constitution (for example, Cameroon and South Africa) or to the national legislation (for example, Nepal), domestic legal obligations from ratified international agreements are automatically in force and take precedence over pre-existing domestic laws concerning the same subject matter. In such countries, national authorities are obliged to act in conformity with these international obligations and to encourage/allow/require constituents to do the same, even if there is no positive legal enactment associated with the implementation of these international agreements.

Of course, in most cases, it will be beyond the competence of the genebank manager to make this assessment independently. Ideally, if her country is one where international obligations are automatically binding, she will have received communications from a higher authority, confirming her capacity to act. If not, she may need to initiate such communications. Presumably, once her request for guidance makes its way to the appropriate authority, she will receive advice/instructions to act in conformity with the country's obligations under the ITPGRFA.

In other countries, the situation is the opposite, with pre-existing national laws taking precedence over more recent international commitments, if the latter have not been domesticated through various forms of positive legal enactment. This is the case in some Pacific Island states, for example. In this situation, the genebank managers could take her case to the competent authority for the implementation of ABS provisions under the CBD and the Nagoya Protocol and see if it is possible to get permission to make the materials available using the SMTA. In many countries, there is little awareness of the ITPGRFA within

the lead agencies for the Nagoya Protocol and vice versa. So this effort will often require a considerable amount of information sharing, awareness raising and communications between higher-level operatives in the respective lead agencies.

In the long run, it will be necessary to make amendments to the national ABS law in order to increase legal certainty (for instance, providing an exemption for the regulation of access to Annex 1 materials under the ITPGRFA) and/or to develop other forms of legal enactment that will create space for providers (and recipients) to act in conformance with the countries' obligations under the ITPGRFA. One option is to revise the national ABS law. An increasing number of countries are considering new laws to implement the Nagoya Protocol. These exercises provide opportunities to recognize and create space for the operation of the ITPGRFA (assuming the country has signed or ratified it). In Uganda, a multi-agency meeting headed by the competent national authority for both agreements has decided that the solution in this case is for a ministerial declaration to create space for the ITPGRFA's implementation, where the national ABS law otherwise applies to PGRFA.

5.6. Hypothetical Case F: Genebanker's uncertainty

Genebanker's uncertainty

You are the head of the national genebank. Your genebank holds a wide range of both Annex 1 and non-Annex 1 materials that have been collected over the last 20 years.

F.1. You are pretty sure that most, probably all, of the Annex 1 material in the genebank is in the MLS. But something is holding you back from distributing samples of that Annex 1 material using the SMTA. What is holding you back? How can you get to the bottom of the issue so you feel comfortable making decisions when you get requests?

F.2. There are crop improvement programmes for both Annex 1 and non-Annex 1 crops in the country, which are supported through partnerships (including germplasm and knowledge exchange) with research organizations outside the country. The national genebank supports these crop improvement programmes by acquiring and conserving and evaluating a diverse range of germplasm of those same crops. As part of its activities, the genebank also provides diversity to genebanks and breeders outside the country working on the same crops. You use the SMTA for Annex 1 materials, but you do not know what legal instrument to use when you are distributing the non-Annex 1 PGRFA to recipients both inside and outside the country. As luck would have it, you are having lunch tomorrow with the national focal points for the ITPGRFA and for the CBD/ Nagoya Protocol. You hope that you can urge them to come to a policy decision with respect to requests for non-Annex 1 PGRFA in the genebank. You will need to give them a thorough briefing before they can decide. What are their options? What do you advise is the best way forward? Why? Are there circumstances under which you would provide a different opinion?

Regarding F.1: Why hesitate?

The genebank manager's lingering discomfort – despite fairly high levels of certainty – can be attributed to concerns about the consequences of making a bad decision and needing to feel comfortable that she can defend her actions if she is accused of doing something improper. This discomfort is heightened by the fact that in many countries there are significant legal consequences, including criminal charges – under other laws, such as national ABS laws – for providing access to genetic resources improperly. If the genebank manager makes material available under the framework of the ITPGRFA (using the SMTA)

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that should have been subject to the Nagoya Protocol (and other ABS conditions), she could be in a lot of trouble.

Some of the genebank manager's uncertainties may be attributable to issues already considered in other scenarios and will not be repeated here. For example, she may not be certain that she actually has the authority to provide materials in the absence of a positive policy/legal enactment authorizing her to act (as addressed earlier in Hypothetical Case E) or whether the recipient will use the PGRFA for non-ITPGRFA purposes (as addressed earlier in Hypothetical Case A).

Another potential cause of discomfort concerns her level of certainty that all of the Annex 1 PGRFA in the genebank collection is actually included in the MLS, either automatically or voluntarily. According to the ITPGRFA (Article 11.2), Annex 1 PGRFA that are 'under the management and control of contracting parties and in the public domain' are automatically included in the MLS. The genebank manager may need assistance in interpreting how these terms apply to the materials in her genebank. It appears to be widely accepted that 'under the management' refers to a contracting party's 'capacity to determine how the material is handled' and 'control' refers to the 'legal power to dispose of the material.' 'Contracting party' refers to national governments (not to provincial or municipal governments). It also appears to have been fairly widely accepted that 'public domain' refers to PGRFA that are not subject to intellectual property rights. The Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System has issued (non-binding) opinions along these lines concerning the meaning of these terms. National focal points and other actors within countries can look to reports from that committee for (non-binding) guidance on these and other relevant issues.¹⁷

Pursuant to these interpretations, the genebank manager needs to consider, for each accession for which she has doubts, whether the genebank, operating under the authority, or as an extension, of the national government, has the right to determine how the accession is handled or whether the issue should be directed to someone else to decide.

¹⁷ For information about the Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System and reports of its past meetings, see <http://www.planttreaty.org/node/5851> (accessed 28 February 2015).

The genebank manager can look to the conditions under which the materials were introduced to the genebank. In most cases, given the history and function of national genebanks, it is likely that they will have acquired materials on condition that they can manage and redistribute them. However, if there are uncertainties, the genebank manager will need to proactively investigate whether or not she has the authority to provide access to, or transfer samples of, particular accessions.

Alternatively, sometimes genebanks make agreements to hold materials under ‘black box’ conditions – that is to say, to conserve them on behalf of depositors subject to the condition that they do not distribute them or use them for their own research purposes. Such materials would not be under the management or control of the genebank in the sense intended by the ITPGRFA. Some countries have ABS laws requiring collections of PGRFA from indigenous and local communities to be subject to the PIC and MAT of the national authorities and/or of the indigenous or local community concerned. If an accessioned PGRFA in the genebank was collected from a local community after such a law came into force, and the collection agreement did not include permission to pass the material on to third parties, it would appear once again that the genebank manager/contracting party would not have ‘control’ over this material. Thus, access to those materials would need to be negotiated with the original providers of those materials to the genebank, subject to ABS agreements developed under the authority of the implementing legislation of the CBD and the Nagoya Protocol. The genebank manager would need to communicate that message to the access seeker and/or pass on the request to the original provider and competent national authority.

If the genebank manager ascertains that the material is ‘under the management and control’ of the national government, she still needs to consider if it is subject to intellectual property (IP) rights protections. Only a very small percentage, if any, of the PGRFA in a national genebank would be subject to IP rights. Usually, a genebank manager will know if an accession is subject to an IP right. If she has doubts, she can check with the national plant variety protection or patent offices to be sure.

Another way of checking the status of the PGRFA *vis-à-vis* the MLS is to check the notifications sent by the government of the genebank’s country to the governing body of the ITPGRFA concerning PGRFA from the country included in the MLS. While such notifications

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may not necessarily be up to date, and may not include all of the PGRFA within the country that is in the MLS, the genebank manager can feel secure in making such materials available under the SMTA if the collection or accession in question is explicitly mentioned in such a notice.

Regarding F.2: Non-Annex 1 PGRFA

Contracting parties to the ITPGRFA have no obligations to provide facilitated access to non-Annex 1 materials. They have the discretion/legal right to develop ABS agreements as recipients and providers of such materials pursuant to national laws implementing the Nagoya Protocol. However, there may be cases – such as in this scenario – when it may make sense for the competent authority to exercise her authority under the Nagoya Protocol to authorize the genebank manager to make non-Annex 1 materials available using the SMTA. (This assumes that the national ABS law has the flexibility to allow this; it may not in all countries.) Ultimately, the competent authority under the Nagoya Protocol, taking into consideration information provided by the genebank manager, ITPGRFA focal point and others, needs to decide based partly on the costs/benefits of deciding to make the materials available under the SMTA. Are there significant additional benefits that can be gained by the country in the context of the project beyond those that are already promoted/captured in the project's structure overall? Can these benefits possibly be captured through novel ABS agreements for the transfer of non-Annex 1 materials? Will the transaction costs associated with developing new, different ABS agreements for non-Annex 1 materials with the research partners create disincentives for them and transaction costs on the genebank as well? Will requests for additional benefits – beyond those already built into the project – discourage the research partners? Are the benefits for the country from participating in the project greater than the potential benefits to be gained through different ABS agreements (that is, different than the SMTA) or vice versa?

Such an analysis could contribute to a conclusion that it is useful to use the SMTA for non-Annex 1 materials for the life of the project or for all similar projects in the future. There are countries that have decided to always use the SMTA when making available some or all non-Annex 1 crops and forages. A number of European countries have made such policy decisions. Presumably, this genebank manager is not in such a country; if she were, there would be no outstanding questions.

In the medium to longer term, the country could explore developing its own standardized (or semi-standardized) ABS agreement/material transfer contract for non-Annex 1 materials that could be introduced in such circumstances, an approach that is encouraged under Article 19 of the Nagoya Protocol. Such agreements could include some terms and conditions that are not included in the SMTA that are appealing to the providers and have the potential of relatively low associated transaction costs as it could be shared with partners in early stages of project/proposal development as a standard instrument/component that has already been accepted and used by competent national authorities. The CGRFA has adopted a programme of work that includes exploring draft model clauses for ABS laws and related instruments concerning PGRFA. While still in its early stages, the CGRFA's work should ultimately provide useful resources to assist countries as they think through their implementation options. Clearly all of these approaches require close communication, cooperation and trust between the lead agencies for the ITPGRFA, the CBD/NP and the actual providers and recipients of materials in the country concerned.

5.7. Hypothetical Case G: Farmers' collective wants to share with another farmers' collective in another country

Farmers' collective wants to share with another farmers' collective in another country

You work with a farmers' collective that maintains a collection of maize seeds. Another farmers' group in another country, with which you have close ties, has asked you for some samples. Your country has ratified the ITPGRFA (which says that member states will take policy measures to encourage voluntary inclusions of materials in the MLS) as well as the CBD and the Nagoya Protocol. Your farmers' collective just wants to share the seed and does not care particularly what legal instrument it uses to send the materials. Can it just send the materials to the farmers group using the SMTA? Or some other instrument? Does it need to get permission first? If so, why? From whom?

There is no one single correct answer. The answer depends partly on the political and legal systems of the countries concerned and partly on how the combined state and non-state actors who could be involved in the process prefer to participate. There are three ways the situation could be approached:

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1. The farmers send the materials themselves using an SMTA. The country has adopted a policy (or simply has not put any blocks in the way) to allow farmers' groups, civil society organizations (CSOs) and companies to voluntarily provide Annex 1 PGRFA using the SMTA. This policy furthers the country's undertaking, under the ITPGRFA, to provide incentives for natural and legal persons to voluntarily include Annex 1 PGRFA in the MLS. While the undertaking to create incentives is made under the Treaty, in most countries the extension of the right to voluntarily provide such materials would be a policy developed/allowed pursuant to the CBD/NP. Of course, the farmers have the underlying legal right – pursuant to laws implementing (or not implementing) the CBD/NP and IP laws and contracts – to provide such materials. (Note that in some countries – for example, Ethiopia and Burkina Faso – all PGRFA in the country, including that which is located in farmers' fields, is considered to be under the control and management of the national government. Thus, the collective's maize collection is already in the MLS. In such a case, it appears that the farmers would be sending the materials as authorized providers under the Treaty and not the CBD/NP.)
2. The farmers send the materials themselves, using some other instrument. If the materials are not considered to be automatically included (because they are recognized to be under the management and control of the farmers and not the national government), they fall under the CBD/NP. Therefore, a new agreement could be negotiated pursuant to the laws implementing the CBD/NP, and the transfer instrument would reflect those terms.
3. The farmers' collective deposits the maize PGRFA in their own national genebank, which subsequently sends samples to the farmers' collective in the recipient country, using the SMTA. As in the first approach described above, this constitutes a voluntary inclusion of the materials into the MLS by the farmers. It ensures the long-term conservation of the material in the genebank and allows the government to shoulder the associated costs. This is the preferred approach (over the first approach above) in countries that prefer to maintain centralized systems and to have all of the requests (and responses to requests) channelled through just one, or a small number of, government offices. It assumes that the national genebank has the resources to increase the size of its collection and to distribute the extra material.

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It is important to recall that if the recipients want to use the materials for direct use in production, which is not one of the purposes of use covered by the MLS, the SMTA is not the appropriate instrument.

Although, in most countries, commercial seed is not actually explicitly excluded from the scope of national access laws, in practice, generally speaking, seed sellers and buyers are not required to obtain approval by competent national ABS authorities before commercial seed is sent out of the country. Presumably this is because commercial seed is being treated as a commodity whose movements should not be subject to ABS laws, even though they are arguably still genetic resources. In the Nagoya Protocol “[u]tilization of genetic resources’ means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology’ (Article 2). It could be argued that direct use of purchased seed for agricultural production and harvesting does not involve ‘research and development on the genetic and/or biochemical composition’ of the varieties of the crop in question, and therefore, accessing seed for this purpose would not fall under the scope of the Nagoya Protocol.¹⁸ If this interpretation is correct, countries could still choose to include access to seed of varieties (including farmers varieties) that would be directly used in production within the scope of their national ABS laws. In countries where there were no such regulations, the argument could be made that the farmers’ collective should be treated in the same way as a private commercial company. Assuming these are seeds of materials that the farmers’ collective has developed, the argument can be made that they should be de facto exempted from the ABS laws when they choose to transfer/sell/share their seeds.

In many countries, traditional exchanges between farmers are exempted from the application of national ABS laws. Indeed, Article 12.4 of the Nagoya Protocol states that ‘Parties ... shall, as far as possible, not restrict the customary use and exchange of genetic

¹⁸ In the ‘Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture’ welcomed by the CGRFA and included in the report of its 15th Regular Session, 19-23 January 2015, paragraph 46 states: “If the activities triggering access provisions are limited to “utilization” within the meaning of the Nagoya Protocol, certain typical uses of GRFA, for example the growing of seeds for subsequently using the harvested products for human consumption clearly do not qualify as utilization and therefore do not trigger the application of access provisions.” Available at <http://www.fao.org/3/a-mm660e.pdf> (Accessed March 13, 2015)

resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention. Furthermore, it is relevant to recall, in this context, that Article 9.3 of the ITPGRFA states that “[n]othing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.” These exemptions can only apply within the boundaries of the countries exercising their regulatory jurisdiction; they do not directly address the question of international customary exchanges, and the rules that apply in other countries involved.

5.8. Hypothetical Case H: Smallholder farmer as provider

Smallholder farmer as provider

You are a smallholder farmer who intercropped maize, common bean, banana and coffee.

H.1. The local extension officer from the sub-district office of the national agricultural research organization comes to your house explaining that she is conducting a collecting mission as part of a large research programme involving local, national and international research and development organizations. They are looking into ways to improve these crops so that they perform better under changing climate conditions, both in your country and abroad. She asks if you have seeds or cuttings that you are willing to share.

H.2. A seed breeding company representative stops by and asks you for seeds or cuttings of some of the plants he finds interesting.

H.3. The local extension officer comes by with a master’s student working for the national genebank. They ask if they can have some seeds and cuttings to deposit in the genebank. What do you do in each case? What rules apply?

In most countries, as discussed in Hypothetical Case G (point G.1), materials in farmers’ fields and community genebanks would not be considered to be managed and controlled by the national government and, therefore, not automatically included in the MLS. This analysis assumes that the farmer is in such a country.¹⁹ Accordingly, all three scenarios are governed by the laws that implement the Nagoya Protocol.

¹⁹ If such PGRFA are considered to be in the management and control of the national government, then the Annex 1 crops in this example (maize, common bean, banana) would be in the multilateral

If, like many European countries, the farmer's country has opted not to put in place systems for applying for access requiring the authorization of a competent national authority, the farmers can agree to provide the materials on whatever terms are satisfactory to them. (Assuming, of course, that they have the right to provide it in the first place.) If, on the contrary, the law specifies that other authorities need to be involved in developing and approving ABS agreements, then the farmer and access seekers in the three examples will need to follow the related procedures. The law may require that PIC and MAT be provided by the community of which the farmer is a part and not just by individual farmers. If so, both the farmer and access seekers should approach the appropriate community authority. The law may also require additional conditions for accessing traditional knowledge of the farmer (or farming community) associated with the use of the genetic resources involved.

Frequently, individual farmers approached by people who are interested in their crops are willing to provide samples for free. Indeed, they are often flattered to be asked. Farmers generally know very little, or nothing at all, about ABS laws and their attendant rights and obligations. So they are generally unaware of the fact that they have a legal basis for withholding access unless they are content with the terms that the collector offers. Collectors are likely to be somewhat better informed about ABS laws, but their interests are not the same as the farmers and they cannot (and should not) be counted upon to provide the farmer with all of the background information he or she needs to make an informed decision.

The uses of the collected materials may be important to the farmer and factor into his or her decision to provide (or not provide) the materials. In Hypothetical H.1, the material will be used in crop improvement programmes to meet the needs of farmers in their own countries. The recipients are scientists in public research consortia of the sort that often make their research products freely available to national programmes. These will likely serve as incentives for the farmer to provide samples. It seems likely, in Hypothetical H.1 and H.3, following the regular course of events, that the collected material will end up in the national

system, and facilitated access would need ultimately to be provided either by the farmers directly (as per hypothetical case G, point 1) or from a genebank where they deposit the material (G point 3), or through new collections from *in situ* conditions (as addressed in hypothetical case D). The requests for non-Annex 1 materials would be addressed pursuant to authority/national laws associated with the CBD/NP.

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genebank and from there be made available to third parties. This may appeal to the farmer or it may not. Under Hypothetical H.2, the collector is a private company, and there are no details about the kind of research the material will be used for, where, and how the company will make its research results available.

In all three scenarios, there are a range of conditions that one can imagine farmers would be interested in pursuing, provided that they understand the 'rules of the game' and the fact that they can negotiate ABS terms. Such terms could include ensuring that the materials they provide would be made freely available to other farmers by the recipient (or by the genebank into which it is deposited), providing guarantees that those materials will not be subjected to IP rights, getting information back about research results, getting samples of improved materials for the farmer and/or his community, providing training for how to use the new materials, offering a royalty payment if the material is commercialized (or incorporated in new commercialized product) and so on.

There is clearly a need for institutional support for the farmer to be able to participate meaningfully in his/her communications and negotiations with the collector. Extension workers are in a good position, if they receive training, to at least start the process of sensitizing the farmers and identifying situations where they will need additional support from the specialized agencies. The same applies to local CSOs, farmers' organizations and even municipal offices. The requirement for having the competent authorities finalize the ABS agreements is to provide a safety check that someone has spent sufficient time with the farmer to help him understand his rights and to back him up in his negotiations with the collectors. Depending on where the collected materials are destined to end up in the genebanks and, subsequently, be distributed through the MLS, they could be moving from one regulatory system (under the Nagoya Protocol) to another (the MLS under the ITPGRFA). Such efforts should involve coordinated participation and technical support from the experts involved in the implementation of both systems.

6. Options for improved coordination between lead agencies and with non-governmental stakeholders

On the final day of the meeting, participants met on the FAO's rooftop terrace overlooking the Circus Maximus, the Colosseum and Baths of Caracalla. They were divided into small groups of approximately five to six persons each. This time, the tandems were purposefully separated so that the small groups brought together only national CBD/NP focal points (with one resource person and one stakeholder representative) or only national ITPGRFA focal points (with one resource person and one stakeholder representative). The groups were asked to consider – in light of the previous presentations, discussions and exercises concerning interface issues – what mechanisms would help to achieve desirable levels of cooperation between the lead agencies responsible for implementing the CBD/NP and ITPGRFA and the other stakeholders. After an initial round of discussions, each small group merged with another small group (of non-like focal points) to compare notes and perspectives on coordination mechanisms.

The groups recorded their main mechanisms/recommendations on seven cards, which were presented to the plenary and subsequently clustered into five categories, as set out in the following table.

Mechanisms for coordination between lead agencies and other stakeholders
<u>Awareness raising and capacity building:</u> <ul style="list-style-type: none">• create awareness through the media, meetings and workshops;• organize awareness-raising and capacity-building workshops together;• hold a celebration day for genetic resources;• initiate national fora (seed fairs), events, seminars, use social media and public talks;• follow up on tandem meetings;• write a report on this workshop with recommendations for collaborators;• meet high-level persons to provide feedback on this tandem meeting;• foster in-house capacity (among local lawyers) and• with the FAO and the UN Environment Programme (UNEP), increase the capacity of regional legal specialists in both treaties.

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Centralizing and institutionalizing structures:

- create only one focal point for the ITPGRFA and the Nagoya Protocol on ABS issues;
- empower multiple authorities to consider requests, but have mechanisms to share information in real time between such authorities
- institutionalize a new committee or another coordination structure, or make existing committees more dynamic.

Developing laws and guidelines:

- develop a model law that addresses the interface between the ITPGRFA and the Nagoya Protocol;
- develop/adjust the legal framework (e.g., laws, regulations, administrative guidelines)) for implementation of the Nagoya Protocol and ITPGRFA
- produce guidelines on coordinated national measures in relation to genetic resources and test the guidelines through pilot projects.

Share, exchange information and participate in each other's' events:

- develop road maps and annual plans for joint activities/coordination together;
- initiate cross-participation in stakeholders' meetings;
- hold meetings before going to the meetings of the governing body of the ITPGRFA, the CBD and the Nagoya Protocol and hold debriefing meetings after these meetings;
- prepare and submit project proposals together, for raising joint financial resources funds;
- participate in national and international meetings in tandem;
- compile best practices on the implementation of the Nagoya Protocol and the ITPGRFA; and
- call each other to discuss particular cases of genetic resource requests, law provisions, the status of different documents, policies and so on.

Facilitate sharing of information:

- put in place efficient mechanisms for information exchange and
- develop regional databases

Each tandem team was invited to develop a one-to-two-year plan for the lead agencies to coordinate their implementation efforts with each other and with other stakeholders who need to be involved. The tandems were not asked to share these plans, but it was agreed that a re-survey of the focal points in the following six to 12 months should detect the existence/use of coordination mechanisms that did not exist at the time of the pre-meeting survey.

7. Looking forward

The meeting organizers led a discussion of the plans to follow up and build upon the meeting. Concerning the immediate follow-up on the meeting itself, the following actions were agreed upon.

- Reports of the meeting would be made available to the following intergovernmental fora:
 - Regional Capacity-building Workshop on the Nagoya Protocol on Access and Benefit-sharing for Sub-Saharan Africa, in Kampala, Uganda, June 2014.
 - A UNEP meeting on coordinated capacity building for implementation in Montreal in June 2014.
 - COP-12 to the CBD and COP-MOP-1 to the Nagoya Protocol in Pyeongchang, Korea in October 2014.
 - An intergovernmental technical working group on PGRFA in Rome in July 2014.
 - CGRFA-15 in Rome in January 2015.
- The organizers will develop a workshop report, in French and English, that will serve not only as a record of the meeting but also as a tool to be used by policy actors who did not attend the meeting.
- As an additional way to ‘package’ and diffuse the outcomes of the meeting, the organizers will develop a series of fact sheets for use by national focal points/competent authorities/stakeholders concerning interface issues. As a pilot, they will develop six to eight such sheets, and, if confirmed to be useful, they will develop more.
- The organizers will conduct a follow-up survey of the national focal points who attended the meeting to see how their implementation and coordination efforts are proceeding.
- Concerning longer-term capacity building and research for mutually supportive implementation, the organizers and participants will continue to support ongoing projects in a number of countries to develop mechanisms to implement the MLS and the Nagoya Protocol.
- Possibilities to develop new pilot projects in countries where the Nagoya Protocol and the ITPGRFA focal points want to work together to develop mutually supportive approaches to implementation will be investigated.

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- Possibilities to develop new pilot projects with regional organizations to promote mutually supportive implementation will be investigated. In this context, it was noted that one very interesting option at the level of the AU would be to develop a programme of support for the implementation of the ITGRFA that complemented (and was coordinated with) AU-level support and policy development concerning ratification and implementation of the Nagoya Protocol. It was suggested that similar mechanisms could be explored/supported in other regions.
- Some of this piloting work can be supported through existing funds. The organizers will also develop new proposals for financial support for this work.
- Spin-off products from the ongoing and planned pilot projects will be developed in the form of new awareness-raising materials, guidelines and decision-making tools.
- Additional workshop(s) for national focal points and stakeholders will be developed. In addition to bringing in focal points for the CBD/NP and the ITPGRFA, the meeting(s) will also include some national focal points for the UN Framework Convention on Climate Change and representatives from the Ministries of Finance.

Annex 1: Revised agenda for tandem workshop

The International Treaty and the Nagoya Protocol

A tandem workshop for National Focal Points

3 to 6 June 2014, FAO, Rome, Italy

AGENDA²⁰

Tuesday 3 June 2014 'Setting the scene'	
8.30	Registration
9.00	Welcome and opening <ul style="list-style-type: none">• Ren Wang, ADG, FAO• Shakeel Bhatti, ITPGRFA Secretariat• Matt Worrel, Chair, ITPGRFA• Michael Halewood, Bioversity International• Andreas Drews, ABS Capacity Development Initiative Introduction to the workshop <ul style="list-style-type: none">• Getting to know each other; Programme overview
10.00	Coffee
10.30	Setting the scene: the CBD's Nagoya Protocol, the ITPGRFA's multilateral system, the imperative of mutual supportiveness and national coordination challenges. The International Treaty in a nutshell <ul style="list-style-type: none">• Relevant issues and current status <i>Shakeel Bhatti, IT Secretariat</i> The Nagoya Protocol in a nutshell <ul style="list-style-type: none">• Relevant issues and current status <i>Kathryn Garforth, CBD Secretariat and Susanne Heitmüller, ABS Initiative</i> Mutually supportive implementation: challenges and options Results of survey among National Focal Points <ul style="list-style-type: none">• Background and results of the survey <i>Michael Halewood, Bioversity International</i>
12.30	Lunch

²⁰ Agenda updated at workshop

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14.00	Mutually supportive implementation: challenges and options – views of stakeholders <ul style="list-style-type: none"> • <i>Ruaraidh Sackville Hamilton, International Rice Research Institute (IRRI)</i> • <i>Lily O. Rodriguez, Institute for Food and Resource Economics, University of Bonn</i> • <i>Hannes Dempewolf, Global Crop Diversity Trust</i> • <i>Anke van den Hurk, Plantum, International Seed Federation (ISF)</i> • <i>Guy Kastler, Via Campesina</i>
15.30	Coffee / tea
16.00	Mutually supportive implementation: challenges and options – panel discussion with stakeholders
17.30	End of Session
19.00	Dinner

Wednesday 4 June 2014 Sharing more experiences	
9.00	Mutually supportive implementation: challenges and options Views of representatives of regional organizations <ul style="list-style-type: none"> • Regarding the Pacific Island Region <i>Clark Peteru, Secretariat of the Pacific Regional Environment Programme (SPREP) and Logotonu Meleisea Waqainabete, Secretariat of the Pacific Community (SPC)</i> • Regarding the European Union <i>Léontine Crisson, Senior Policy Officer, ABS National Focal Point (CBD), Netherlands Ministry of Economic Affairs</i> • Regarding the African region <i>Mahlet Teshome, Department of Human Resources, Science and Technology (DHRST), African Union Commission and Gilles Ogandaga, Department of Rural Economy and Agriculture (DREA), African Union Commission</i>
10.30	Coffee / tea
11.00	Mutually supportive implementation: challenges and options Views of country representatives (country cases) <ul style="list-style-type: none"> • Regarding Uganda (joint presentation/Q& A) <i>John Wasswa Mulumba, National Agricultural Research Organization (NARO) and Francis Ogwal Sabino, National Environment Management Authority (NEMA)</i> • Regarding Brazil (joint presentation/Q& A) <i>Henry-Ibanez de Novion, Ministry of the Environment and Rosa Miriam De Vasconcelo, Embrapa (Brazilian Corporation of Agricultural Research)</i> • Regarding Nepal (joint presentation/Q& A) <i>Madhu Devi Ghimire, Ministry of Forests and Soil Conservation and Bidya Pandey, Ministry of Agricultural Development</i>
12.30	Lunch

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14.00	Working through hypothetical case studies to address grey areas in policy formulation, implementation and coordination <ul style="list-style-type: none"> Group work/plenary/ presentations
15.30	Coffee / tea
16.00	Working through case studies cont'd
17.30	End of Session

Thursday, 5 June 2014 Joint work on interface scenarios	
All day	Working through case studies cont'd

Friday, 6 June 2014 Options for solutions and way forward	
8.30	Introduction to the day
9.00	Coordinating implementation between lead agencies and stakeholders (following 'cocktail party' method on terrace, working in groups of 4, 8, 16 respectively)
11.00	Coffee/tea
11.30	Plenary presentation from small groups – plenary discussion Remaining challenges and options for solutions at national level cont'd <ul style="list-style-type: none"> Countries' and stakeholders' perspectives: most important lessons learnt
12.30	Lunch
13.30	Identification of priorities and needs for support <ul style="list-style-type: none"> Conclusions and recommendations to different groups Next steps <ul style="list-style-type: none"> <i>Andreas Drews, ABS Initiative</i> <i>Michael Halewood, Bioversity International</i> Closure <ul style="list-style-type: none"> <i>Shakeel Bhatti, ITPGRFA Secretariat</i> <i>Michael Halewood, Bioversity International</i> <i>Andreas Drews, ABS Initiative</i>
16.00	Coffee/tea

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Group photo



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Annex 3: PowerPoint presentations made during the tandem workshop

Links to the following PowerPoint presentations are available on the Genetic Resources Policy blog at <https://grpi2.wordpress.com/2015/02/27/focal-points-primer/> and www.abs-initiative.info

Setting the scene: the CBD Nagoya Protocol, the ITPGRFA multilateral system, the imperative of mutual supportiveness and national coordination challenges.

- Presentation by Shakeel Bhatti, Secretary of the ITPGRFA: The International Treaty and the Nagoya Protocol: Supporting mutual supportiveness in the implementation of both instruments at the national level.
- Presentation by Kathryn Garforth, CBD Secretariat, and Susanne Heitmüller, ABS Capacity Development Initiative: The Nagoya Protocol in a nutshell.
- Presentation by Michael Halewood (and Isabel Lopez-Noriega and Evelyn Clancy): Mutually supportive implementation challenges and options: results of survey among National Focal Points.

Stakeholders' experiences at the intersection of the CBD/NP and ITPGRFA/MLS

- Presentation by Ruairaidh Sackville Hamilton, International Rice Research Institute (IRRI): Experiences with material transfers to IRRI.
- Presentation by Lily O. Rodriguez, Institute for Food and Research Economics, University of Bonn, Germany: Research in plant genetic resources for food and agriculture (and their wild relatives).
- Presentation by Hannes Dempewolf, Global Crop Diversity Trust: Conserving crop diversity forever.
- Presentation of Anke van den Hurk, Plantum, International Seed Federation (ISF): Interface IT PGRFA and the Nagoya Protocol; needs for the breeding sector.
- Presentation by Guy Kastler, Via Campesina (oral presentation)

Highlights of how national governments and regional organizations are addressing implementation of the CBD/NP and the ITPGRFA

Regarding the Pacific Island Region

Please send comments to Michael Halewood, corresponding editor (m.halewood@cgiar.org)

- Clark Peteru, Secretariat of the Pacific Regional Environment Programme (SPREP).
- Logotonu Meleisea Waqainabete (and Valerie Saena Tuia and Cenon Padolina), Secretariat of the Pacific Community (SPC)

Regarding the European Union

- Léontine Crisson ABS National Focal Point (CBD), Netherlands Ministry of Economic Affairs: EU-ABS-regulation: implementation CBD Nagoya Protocol

Regarding the African region

- Mahlet Teshome, Department of Human Resources, Science and Technology (DHRST), African Union Commission and Gilles Ogandaga, Department of Rural Economy and Agriculture (DREA), African Union Commission: An AU perspective.

Regarding Uganda

- Francis Ogwal Sabino, national focal point for the CBD, National Environment Management Authority (NEMA) and John Mulumba Wasswa, national focal point for the ITPGRFA, Director of the Botanical Gardens of Uganda National Agricultural Research Organization (NARO) : A Uganda perspective.

Regarding Brazil

- Henry Ibanez de Novion, Regulatory and Benefit Sharing Division of the Department of Genetic Heritage, Ministry of the Environment, and Rosa Miriam de Vasconcelos, Embrapa (Brazilian Corporation of Agricultural Research: A Brazil perspective.

Regarding Nepal

- Madhu Devi Ghimire, Ministry of Forests and Soil Conservation: Mutually supportive implementation, challenges and options. The ITPGRFA and the Nagoya Protocol.
- Bidya Pandey, Ministry of Agricultural Development: Implementation of ITPGRFA in Nepal - Current status and Challenges.

Please send comments to Michael Halewood, corresponding editor (m.halewood@cgiar.org)

Annex 4: Cross-references between the CBD, the Nagoya Protocol and the ITPGRFA recognizing complementarity and mutually supportiveness

Nagoya Protocol preambular statements ...

Recognizing the interdependence of all countries with regard to genetic resources for food and agriculture as well as their special nature and importance for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change and acknowledging the fundamental role of the International Treaty on Plant Genetic Resources for Food and Agriculture and the FAO Commission on Genetic Resources for Food and Agriculture in this regard,

Acknowledging ongoing work in other international forums relating to access and benefit-sharing,

Recalling the Multilateral System of Access and Benefit-sharing established under the International Treaty on Plant Genetic Resources for Food and Agriculture developed in harmony with the Convention,

Recognizing that international instruments related to access and benefit-sharing should be mutually supportive with a view to achieving the objectives of the Convention

NP article 4: Relationship with other agreements and instruments

1. The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.

2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.

3. This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.

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4. This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this 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.

NP Article 8: Special considerations

In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall: ...

(c) Consider the importance of genetic resources for food and agriculture and their special role for food security.

CBD/COP Decision X/1, 2010, adopting NG text ...

Recognizing that the International Regime is constituted of the Convention on Biological Diversity, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, as well as complementary instruments, including the International Treaty on Plant Genetic Resources for Food and Agriculture and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization

[...]

Recognizing that the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security

ITPGRFA article 1: Objectives

1.1 The objectives of this Treaty are the conservation and sustainable use of plant genetic

resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.

1.2 These objectives will be attained by closely linking this Treaty to the Food and Agriculture Organization of the United Nations and to the Convention on Biological Diversity.

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Governing Body resolution 8/2011

Congratulates the COP on the adoption of the Nagoya Protocol;

Appeals to Contracting Parties to sign and ratify;

Takes note of the Memorandum of Cooperation;

Requests the Secretary to explore with the SCBD on, practical means and activities to give effect to this cooperation;

Requests the Secretary to strengthen collaboration with the SCBD;

Calls on Contracting Parties to ensure mutual supportiveness in the implementation of the Treaty and the Nagoya protocol.

Governing Body resolution 5/2013

Looks forward to the entry into force of the Nagoya Protocol and its full implementation, in harmony with the Treaty;

Again, calls on Contracting Parties to ensure that any legislative, administrative or policy measures taken for the implementation of both the Treaty and the Convention on Biological Diversity or its Nagoya Protocol, are consistent and mutually supportive;

Requests the NFPs of the Treaty to enhance their collaboration and coordination with their counterpart NFPs for the CBD on all relevant processes, in particular in the review and updating of their National Biodiversity Strategies and Action Plans in order to take into account the objectives of the Treaty and the updated Global Plan of Action on Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture; NBSAPs;

Welcomes the efforts to bring together stakeholders and experts involved in the implementation of the Treaty, the Convention, and the Nagoya Protocol, and requests the Secretary to continue facilitating such interaction.

CBD COP decision V/26

7. Stresses that it is important that, in developing national legislation on access, Parties take into account and allow for the development of a multilateral system to

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facilitate access and benefit-sharing in the context of the International Undertaking on Plant Genetic Resources, which is currently being revised;

8. Notes the report of the Chairman of the Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations (UNEP/CBD/COP/5/INF/12) and urges the Commission to finalize its work as soon as possible. The International Undertaking is envisaged to play a crucial role in the implementation of the Convention on Biological Diversity. The Conference of the Parties affirms its willingness to consider a decision by the Conference of the Food and Agriculture Organization of the United Nations that the International Undertaking become a legally binding instrument with strong links to both the Food and Agriculture Organization of the United Nations and the Convention on Biological Diversity, and calls upon Parties to coordinate their positions in both forums;

Annex 5: Survey for ABS tandem workshop participants

[In English: <https://www.surveymonkey.com/s/L8KNR3H>;

En français: <https://www.surveymonkey.com/s/2QPHQJS>]

Introduction

Welcome!

This survey is designed for the participants attending 'The International Treaty and the Nagoya Protocol: a tandem workshop for national participants' June 3-6, 2014, Rome, Italy. It should only take approximately 20 minutes to complete. We would like to ask you to please complete this survey by Monday May 19, 2014.

The results of the survey will be used to identify issues that will be considered during the workshop, and to identify capacity building tools and information that will be useful to develop in the longer term. Responses will be treated confidentially. No respondents or countries will be named in any report based on these responses.

A summary of the responses will be presented to the workshop participants on June 3, 2006. Please note we want separate responses both the Treaty and CBD/NP focal points in each country (or people closely related to either the CBD or TIPGRFA if focal points are not attending), That means that we need two responses from each country.

If you have any questions or difficulties filling in the survey, please contact Michael Halewood at m.halewood@cgiar.org

Thank you very much.

Sincerely,

Michael Halewood , Bioversity International, and Andreas Drews, ABS Capacity Building Initiative

Please send comments to Michael Halewood, corresponding editor (m.halewood@cgiar.org)

1. Name
2. Organization and country
3. I am the national focal point for the :

[choose among the following]

- ITPGRFA
- CBD/NP
- Both
- Neither

4. If you are not a national focal point, please indicate which agreement you are most closely associated with

[choose among the following]

- ITPGRFA
- CBD/NP

5. Do you believe it is important to have close coordination between the agencies responsible for the implementation of the CBD/NP and the ITPGRFA?

Yes/no

6. Please explain why you wrote yes or no to the previous question (number 5)

7. select one of the following words to describe the state of coordination between the lead agencies responsible for the national implementation of the ITPGRFA and the CBD/NP:

- Non-existent
- very weak
- weak
- adequate
- strong
- very strong

8. Please briefly describe the factors that have contributed to the state of coordination which you selected in question 7.

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9. Please describe challenges, in any, you have faced in coordinating implementation of the ITPGRFA and the CBD/NP.

10. Please describe efforts that have been made to address the challenges you described in previous question (number 9).

11. Is there a **formal** institutional mechanism for coordination between the lead agency for implementation of the CBD/NP and the lead agency for implementation of the ITPGRFA/MLS?

Yes/no.

12. If you answered yes to question 11,, please provide the name of the mechanism (if it has one) and describe it and summarize it's progress.

13. Are there **informal ways** in which you work out coordination between the agencies responsible for implementing the two agreements

Yes/no.

14. If you answered yes to the previous question (number 13) please describe them.

15. Do you have an agreed process or policy for referring requests for materials from one lead agency to the other in cases where i) requests are sent to the wrong agency, or ii) where it is not clear which agency actually has the authority to respond? (For example, if a request for uses of materials for animal genetic resources are sent to the competent authority for the ITPGRFA, or requests are sent to the competent authority for the CBD/NP for materials in the multilateral system)

Yes/no.

16. If you indicated yes to the previous question (number 15), please describe the process or policy.

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17. Have there been awareness raising activities ***within the agency responsible for the CBD/NP*** regarding the ITPGRFA?

Yes/no/don't know

18. If you replied yes to the previous question (number 17), please describe them

19. Have there been awareness raising activities ***within the agency responsible for the ITPGRFA*** regarding the CBD/NP?

Yes/no/don't know

20. If you answered yes, to the previous question (number 19) please describe them

21. Have the lead agencies for the CBD/NP and the ITPGRFA ever developed joint awareness raising materials or guidelines to assist stakeholders?

Yes/no

22. If you answered yes to the previous question (number 21), please describe

Thank you very much for completing this survey.

Please send comments to Michael Halewood, corresponding editor (m.halewood@cgiar.org)

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