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COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Item 4.1 of the Provisional Agenda

Eighteenth Regular Session

27 September – 1 October 2021

REPORT OF THE FIFTH SESSION OF THE TEAM OF TECHNICAL AND LEGAL EXPERTS ON ACCESS AND BENEFIT-SHARING

Note by the Secretariat

The Commission on Genetic Resources for Food and Agriculture (Commission), at its last session, requested its Secretary to prepare an up-to-date survey of existing legislative, administrative and policy approaches, including best practices, for ABS for the different subsectors of GRFA and traditional knowledge associated with GRFA held by indigenous peoples and local communities, with the aim of identifying typical approaches and lessons learned from their implementation, as well as challenges and possible solutions.

The Commission requested the Team of Technical and Legal Experts on Access and Benefit-sharing (ABS Expert Team) to contribute to the preparation of the survey and, following the review by the Commission's intergovernmental technical working groups, to review and provide technical and legal inputs to the survey.

The ABS Expert Team held its Fifth Session virtually from 20 to 22 July 2021. The report of the meeting is contained in this document, for consideration by the Commission.

Documents can be consulted at www.fao.org



**Food and Agriculture
Organization of the
United Nations**

COMMISSION ON
GENETIC RESOURCES
FOR FOOD AND
AGRICULTURE

CGRFA/TTLE-ABS-5/21/Report

Fifth Session of the Team of Technical and Legal Experts on Access and Benefit-sharing

20–22 July 2021

CGRFA/TITLE-ABS-5/21/Report

COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

**REPORT OF THE FIFTH
SESSION OF THE TEAM OF
TECHNICAL AND LEGAL EXPERTS
ON ACCESS AND BENEFIT-SHARING**

20–22 July 2021

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Rome, 2021

The documents prepared for the Fifth Session of the Team of Technical and Legal Experts on Access and Benefit-sharing of the Commission on Genetic Resources for Food and Agriculture are available on the Internet at the following address:

<http://www.fao.org/cgrfa/meetings/ttle-abs/en/>

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I. OPENING OF THE MEETING

1. The Fifth Session of the Team of Technical and Legal Experts on Access and Benefit-sharing (ABS Expert Team) established by the Commission on Genetic Resources for Food and Agriculture (Commission), was held from 20 to 22 July 2021. The list of experts is given in *Appendix A* to this report.
2. The meeting was convened virtually, on an exceptional basis, in light of the global COVID-19 pandemic and the associated public-health concerns and constraints. This followed consultations by the Commission's Bureau on the arrangements for the holding of the meeting virtually and the endorsement of the arrangements by the members of the ABS Expert Team.
3. Prior to beginning its deliberations, the ABS Expert Team confirmed that the virtual meeting constituted a formal regular session of the ABS Expert Team. The ABS Expert Team agreed to apply its normal rules and practices to the conduct of the meeting and to suspend any rules that may be incompatible with the virtual mode used for the purposes of the meeting. The ABS Expert Team also agreed to the application of any special procedures or amended working modalities required for the efficient conduct of the meeting.
4. Mr Mnaouer Djemali (Africa) *Rapporteur* of the Fourth Session of the ABS Expert Team, welcomed all participants.
5. The Secretary of the Commission, Ms Irene Hoffmann, welcomed the members of the ABS Expert Team. She noted that exactly ten years ago, in July 2011, the Commission had established an Ad Hoc Technical Working Group on Access and Benefit-sharing for Genetic Resources for Food and Agriculture, which in 2013 was replaced by the ABS Expert Team. She stressed that over the years the ABS Expert Team has been instrumental in considering options to accommodate the distinctive features of genetic resources for food and agriculture (GRFA) in access and benefit-sharing (ABS) measures. She highlighted that the draft Survey to be discussed by the ABS Expert Team provided an important step towards collecting ABS country measures that aim or happen to accommodate the distinctive features of genetic resources for food and agriculture.

II. ELECTION OF CO-CHAIRS AND *RAPPORTEUR*

6. The ABS Expert Team elected Mr Javad Mozafari (Near East) and Ms Nina Sæther (Europe) as Co-Chairs. Mr Manouer Djemali (Africa) was re-elected *Rapporteur*.

III. ADOPTION OF THE AGENDA

7. The ABS Expert Team adopted the Agenda, as given in *Appendix B*.

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

8. The ABS Expert Team considered the document *Review of the Draft Survey of Access and Benefit-sharing Country Measures Accommodating the Distinctive Features of Genetic Resources for Food and Agriculture and Associated Traditional Knowledge*¹ and took note of the *Draft survey of access and benefit-sharing country measures accommodating distinctive features of genetic resources for food and agriculture and associated traditional knowledge*² and the *Inputs by Members on Access and Benefit-sharing for Genetic Resources for Food and Agriculture*.³ Furthermore, the ABS Expert

¹ CGRFA/TTLE-ABS-5/21/2.

² CGRFA/TTLE-ABS-5/21/Inf.2.

³ CGRFA/TTLE-ABS-5/21/Inf.3.

Team also took note of the outcomes of the meetings of the intergovernmental technical working groups.⁴

General comments

9. The ABS Expert Team welcomed the draft Survey and commended it as informative and useful. It recommended that the Survey clarify in the introduction the type of ABS measures the Survey analyses as well as the type of measures it does not address. It noted that the laws of some countries require, for example, permits for accessing biodiversity on indigenous land even though these laws are often neither considered nor named “ABS” laws. The Survey should therefore clarify that it focuses on ABS country measures identified as such and point out that there are also a range of other measures, including guidelines, principles, research protocols and codes of conduct that may have relevance for ABS for genetic resources for food and agriculture (GRFA) even though they are not considered by the Survey.

10. The ABS Expert Team further recommended that the Survey clarify the difference between ABS measures through which countries regulate access to their genetic resources and ABS measures through which countries implement compliance measures.

11. The ABS Expert Team noted that the Survey does not aim to assess the global status of development and implementation of ABS measures. The authors of the Survey searched for ABS measures in all United Nations member countries and finally examined ABS measures of 47 countries that were relevant to the type of regulatory options identified in the *Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture – with explanatory notes* (ABS Elements).⁵ The ABS measures of the 47 countries are in no way representative of all ABS measures taken by countries. The ABS Expert Team recommended that the Survey more clearly describe how the 47 countries were selected.

12. The ABS Expert Team further recommended that the Survey acknowledge the information provided by the ABS Clearing-House and specify the usefulness as well as the limitations of that information for the purposes of the Survey. It further noted that only Parties to the Nagoya Protocol have to make available to the ABS Clearing-House information on their legislative, administrative and policy measures on ABS.

13. The ABS Expert Team recommended that the conclusions of each of the five Elements and the conclusions of the Survey be limited to a summary of relevant findings and refrain from making recommendations.

Literature review

14. The ABS Expert Team considered the literature review and noted, as the key finding, that there is a significant lack of examples and analysis about how ABS measures accommodate GRFA and associated traditional knowledge, which is a gap the Survey aims to fill. It further noted the finding that there were relatively few publications on national-level ABS legislation and very little work on ABS for GRFA and traditional knowledge associated with GRFA (TKGRFA). The two biggest gaps were empirical studies or evidence about: (i) how ABS measures contribute to the conservation of GRFA and TKGRFA; and (ii) how ABS measures accommodate access to, use of, and the sharing of benefits from GRFA and TKGRFA.

15. The ABS Expert Team recommended that the Survey clarify that the literature review focuses on GRFA, rather than genetic resources in general. It furthermore recommended that the Survey use agreed terminology to the extent possible.

⁴ CGRFA-TTLE-ABS-5/21/Inf.4; CGRFA-TTLE-ABS-5/21/Inf.5; CGRFA-TTLE-ABS-5/21/Inf.6; CGRFA-TTLE-ABS-5/21/Inf.7.

⁵ FAO. 2019. *ABS Elements: Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture with Explanatory Notes*. Rome. 84 pp. Licence: CC BY-NC-SA 3.0 IGO. (also available at <http://www.fao.org/3/ca5088en/ca5088en.pdf>).

Element 1: Institutional arrangements

16. The ABS Expert Team stressed the importance of distinguishing between the different roles competent authorities may have for ABS. They may administer ABS measures (i.e. grant access permits) and/or act as check-points to monitor user compliance (see also Element 5). It noted that Germany's competent authority is an example of a "one-stop shop" for compliance checks, working together with relevant sectoral agencies.

17. The ABS Expert Team noted that the institutional arrangements of countries mentioned in the Survey would be double-checked prior to the finalization of the Survey. It took note that Malaysia became a Party of the Nagoya Protocol in 2019 and, in Argentina, the responsibility for the implementation of ABS lies with the different provinces, rather than with a single competent authority.

18. The ABS Expert Team noted that the analysis of country experiences with the different institutional arrangements was outside the scope of the Survey. However, it considered the compilation and analysis of such country experiences important and endorsed, in this context, the recommendation of the Commission's intergovernmental technical working groups to consider (at some point) the preparation of a report that, based on a pre-tested questionnaire, explores the actual implementation of ABS country measures in the different subsectors of GRFA, with a view to identifying the actual effects of ABS measures on the utilization and conservation of the different subsectors of GRFA and TKGRFA and the fair and equitable sharing of benefits.⁶

Element 2: Access to and utilization of genetic resources for food and agriculture

19. The ABS Expert Team took note of the range of options countries have in defining the materials that are subject to or are excluded from ABS obligations, the uses that trigger or do not trigger ABS obligations and the administrative procedures that apply to specific uses of specified materials. It noted that ABS measures of some countries also distinguish between domestic and foreign users.

20. The ABS Expert Team recommended to clarify that exemptions of plant genetic resources for food and agriculture (PGRFA) from the scope of "bilateral" ABS measures are usually motivated by the existence of a specialized instrument⁷ for PGRFA: the International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty) with its Multilateral System of Access and Benefit-sharing. It further recommended to add, if possible, to Box 10, further examples of exemptions of GRFA from the scope of ABS measures.

21. The ABS Expert Team noted that the Micro-Organisms Sustainable use and Access regulation International Code of Conduct (MOSAICC) was launched by the Belgian Co-ordinated Collections of Micro-organisms (BCCM) as a tool to support the implementation of the Convention on Biological Diversity at the microbial level.⁸

Element 3: Access to and utilization of traditional knowledge associated with genetic resources for food and agriculture

22. The ABS Expert Team noted that many of the issues raised and authorization procedures described under Element 2 are equally relevant to access to and utilization of TKGRFA. However, ABS for TKGRFA raises additional issues, such as the definition of TKGRFA, the identification of the traditional knowledge-holders and the procedures to be used for: (i) obtaining access to TKGRFA through PIC or approval and involvement of indigenous peoples and local communities (IPLC); and (ii) for establishing mutually agreed terms (MAT).

23. The ABS Expert Team noted the existence of some specific arrangements or mechanisms to obtain PIC and MAT for traditional knowledge from the relevant IPLCs. However, it noted that review of the implementation of these specific arrangements or mechanisms was beyond the scope of the Survey. It further noted that the Survey found a significant gap in analysis of how countries

⁶ CGRFA-TTLE-ABS-5/21/Inf.4, paragraph 24; CGRFA-TTLE-ABS-5/21/Inf.5, paragraph 30; CGRFA-TTLE-ABS-5/21/Inf.6, paragraph 29; CGRFA-TTLE-ABS-5/21/Inf.7, paragraph 42.

⁷ See Nagoya Protocol, Article 4.4.

⁸ <https://bccm.belspo.be/projects/mosaicc>

specifically address ABS for TKGRFA and that empirical studies would be necessary to fill this gap. It also noted that this gap could be due, in part, to the fact that literature about ABS for TKGRFA may be published in local languages or dialects and as a result such literature is not easily identified and taken note of. It noted that patent database searches could help to identify examples of TKGRFA used for research and development.

Element 4: Fair and equitable sharing of benefits

24. The ABS Expert Team took note of the varied and evolving nature of measures aimed at facilitating the sharing of benefits derived from the utilization of genetic resources. Benefit-sharing clauses are often not disclosed and where they are, it is often not clear how representative they are of the benefit-sharing arrangements commonly used in a specific sector or subsector of genetic resources. The ABS Expert Team agreed that it would be useful to collect model benefit-sharing agreements as well as concrete examples of benefit-sharing arrangements for genetic resources, including GRFA, as these could serve as a source of inspiration for future benefit-sharing arrangements, including the formulation of model benefit-sharing clauses for GRFA.

25. The ABS Expert Team recommended that the Survey refrain from making recommendations regarding a multilateral benefit-sharing mechanism, be it a mechanism that could be established under Article 10 of the Nagoya Protocol or any other multilateral benefit-sharing mechanism.⁹ Furthermore, the Multilateral System of the Treaty should not be presented as an example of implementing Article 10 of the Nagoya Protocol; instead it could be presented as an example of a multilateral mechanism that could inspire the creation and modalities of a mechanism under Article 10 of the Nagoya Protocol.

26. The ABS Expert Team recommended that the Survey clarify that the Standard Material Transfer Agreement (SMTA) of the Treaty is not considered a model contractual clause, code of conduct or guideline.¹⁰ However, the benefit-sharing clauses contained in the SMTA could inspire the formulation of standard benefit-sharing clauses for (specific subsectors of) GRFA or for TKGRFA.

Element 5: Monitoring and compliance

27. The ABS Expert Team noted that the draft Survey focuses on so-called user-country measures in the context of monitoring and compliance. It took note that relatively few countries have introduced “check-points”. Of those “check-points”-relatively few have mandates closely related to the food and agriculture sector. The ABS Expert Team noted that the involvement of such entities could be helpful to also improve the communication between countries and allow check-points to verify whether the utilization of a GRFA notified through a check-point communicate to the ABS Clearing-House complies with PIC and MAT, as originally granted.

28. The ABS Expert Team noted that the Survey concentrated on measures labelled as “ABS” and found that compliance measures falling under Article 18 of the Nagoya Protocol (compliance with MAT) were often not addressed in these “ABS” measures. The ABS Expert Team also noted however that such compliance measures may be addressed in other areas of domestic law and/or regulations.

Executive Summary, including Survey conclusion

29. The ABS Expert Team recommended that the Executive Summary reflect the findings of the different chapters of the Survey and clarify which type of measures the Survey explored. It also recommended that the Survey note the importance of building a shared understanding as different terms are used across the different sectors of GRFA.

⁹ CGRFA/TTLE-ABS-5/21/Inf.2, section 4.6 & 4.7.

¹⁰ CGRFA/TTLE-ABS-5/21/Inf.2, Box 23.

Next steps

30. The ABS Expert Team recommended that the results of the Survey be translated into a concrete tool, for easy use by policy- and decision-makers. It therefore recommended that an annex to the ABS Elements be developed reflecting specific examples of ABS country measures that accommodate the distinctive features of GRFA and/or TKGRFA, for review by the Commission's intergovernmental technical working groups and the ABS Expert Team. The tool could build upon the analysis of country experiences with the implementation of ABS country measures in the different subsectors of GRFA (see paragraph 18).

31. The ABS Expert Team took further note of the relevance of "Digital Sequence Information" (DSI)¹¹ on GRFA for ABS, of the separate workstream the Commission established for DSI at its Sixteenth Regular Session,¹² and of ongoing discussions on DSI in other fora. It recommended that the Commission consider the preparation of a document reflecting common practices and experiences with how DSI on GRFA is generated, accessed and used, for review by the Commission's intergovernmental technical working groups and the ABS Expert Team at their next sessions.

V. CLOSING REMARKS

32. Mr Dan Leskien, Senior Liaison Officer, Secretariat of the Commission on Genetic Resources for Food and Agriculture, congratulated the ABS Expert Team on the very rich and fruitful discussions that will lead to the fine-tuning and refinement of the Survey to be reviewed by the Commission at its next Session.

33. The Co-Chair thanked her Co-Chair, the *Rapporteur*, the Secretariat and the team of authors of the draft Survey. She thanked the members of the ABS Expert Team for their hard work, good spirit, clarity and willingness to compromise.

¹¹ The term is taken from decision CBD COP XIII/16 and is subject to further discussion. There is a recognition that there are a multiplicity of terms that have been used in this area (including, inter alia, "genetic sequence data", "genetic sequence information", "genetic information", "dematerialized genetic resources", "in silico utilization", etc.) and that further consideration is needed regarding the appropriate term or terms to be used.

¹² CGRFA-16/17/Report Rev.1, paragraph 86.

APPENDIX A
LIST OF EXPERTS

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APPENDIX B**AGENDA OF THE FIFTH SESSION OF THE TEAM OF TECHNICAL AND LEGAL EXPERTS ON ACCESS AND BENEFIT-SHARING**

1. Election of Chair, Vice-Chair(s) and *Rapporteur*
2. Adoption of the agenda and timetable
3. Review of the draft *Survey of access and benefit-sharing country measures accommodating the distinctive features of genetic resources for food and agriculture and associated traditional knowledge*
4. Any other matters
5. Adoption of the Report

APPENDIX C

LIST OF DOCUMENTS

Working documents

CGRFA/TTLE-ABS-5/21/1 Rev.1	Provisional agenda and time-table
CGRFA/TTLE-ABS-5/21/2	Review of the draft survey of access and benefit-sharing country measures accommodating the distinctive features of genetic resources for food and agriculture and associated traditional knowledge

Information documents

CGRFA/TTLE-ABS-5/21/Inf.1 Rev.1	Members of the Team of Technical and Legal Experts on Access and Benefit-Sharing
CGRFA/TTLE-ABS-5/21/Inf.2	Draft survey of access and benefit-sharing country measures accommodating the distinctive features of genetic resources for food and agriculture and associated traditional knowledge
. CGRFA/TTLE-ABS-5/21/Inf.3	. Inputs by Members on access and benefit-sharing for genetic resources for food and agriculture
. CGRFA/TTLE-ABS-5/21/Inf.4	. Report of the Sixth Session of the Intergovernmental Technical Working Group on Forest Genetic Resources
. CGRFA/TTLE-ABS-5/21/Inf.5	. Report of the Third Session of the Intergovernmental Technical Working Group on Aquatic Genetic Resources for Food and Agriculture
. CGRFA/TTLE-ABS-5/21/Inf.6	. Report of the Eleventh Session of the Intergovernmental Technical Working Group on Animal Genetic Resources for Food and Agriculture
. CGRFA/TTLE-ABS-5/21/Inf.7	. Report of the Tenth Session of the Intergovernmental Technical Working Group on Plant Genetic Resources for Food and Agriculture
. CGRFA/TTLE-ABS-5/21/Inf.8	. Information for participants
. CGRFA/TTLE-ABS-5/21/Inf.9	. List of documents