

May 2012



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 7 of the Draft Provisional Agenda

THIRD MEETING OF THE *AD HOC* ADVISORY TECHNICAL COMMITTEE ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM

New Delhi, India, 26-28 June 2012

CREATING LEGAL SPACE FOR THE TREATY IN THE CONTEXT OF ACCESS AND BENEFIT-SHARING¹

I. INTRODUCTION

1. At its first meeting, in January 2010, the Committee dealt with the issue of creating legal space for the Treaty in the context of access and benefit-sharing. It had examined possible model provisions that could be included in national laws in order to create legal space for the implementation of the Treaty and the operation of its Multilateral System in the context of access and benefit-sharing.²
2. Since the last meeting of the Committee, major developments have occurred in regard to the global governance of access and benefit-sharing, in particular the adoption of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization* (Nagoya Protocol) by the Conference of Parties to the Convention on Biological Diversity (CBD).
3. This document summarizes the previous advice given by the Committee and, in the light of the new international policy and legal developments created by the adoption and possible future implementation of the Nagoya Protocol, re-submits the issue for the further consideration by the Committee, and seeks its advice on possible future processes or practical approaches to ensure the harmonious implementation with the Multilateral System of the Treaty.

II. PREVIOUS WORK BY THE COMMITTEE

¹ In accordance with the request of the *Ad Hoc* Technical Advisory Committee and the Terms of Reference established by the Governing Body, this document was prepared for the exclusive purpose of facilitating the Committee's deliberations. Any opinion or position expressed in the document is not to be attributed to the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture.

² IT/AC-SMTA-MLS 1/10/Report, Appendix 2. The report is available at http://www.planttreaty.org/sites/default/files/ac_smta_mls1_repe.pdf.

4. At its first meeting in September 2010, the Committee considered document IT/AC-SMTA-MLS 1/10/03, which examined how to provide legal space for the operation of the Multilateral System within national access and benefit-sharing (ABS) legislation.³
5. The Committee noted that ABS measures adopted by a number of countries at the national level may, in some cases, interfere with the obligations of these countries under the International Treaty on Plant Genetic Resources for Food and Agriculture. The Committee also noted that there might be other regulations (for instance, phytosanitary measures) that may impact the operation of the Multilateral System.
6. In this regard, the Committee expressed the following opinion:
 - Contracting Parties need to ensure that no substantive or procedural rules unduly hinder the functioning of the Multilateral System.
 - In order to avoid that national laws on ABS conflict with the obligations of Contracting Parties under the International Treaty, national laws could include a provision that exempts access to and transfers of plant genetic resources for food and agriculture covered by the Multilateral System from their scope.
 - Such a provision might be drafted along the following lines:

Pursuant to the obligations established by the International Treaty on Plant Genetic Resources for Food and Agriculture, access to and the transfer of plant genetic resources for food and agriculture of the crops covered by the Treaty shall only be subject to the conditions set out in Part IV of the said Treaty.
 - The implementation of the Multilateral System does not, and should not, exempt providers or recipients of material from the Multilateral System from complying with standard national laws or regulations regarding, for instance, plant health or phytosanitary measures.
7. The Committee took note of the negotiations of an 'International regime' on ABS, which were on going at that time, under the auspices of the CBD, and encouraged the Secretariat to continue working with the Secretary of the CBD, and to continue monitoring the negotiations. It further stressed that it would be important for Contracting Parties participating in those negotiations, to seek that the international regime would not interfere with any obligations countries have under the International Treaty.
8. The Committee also recalled FAO Conference Resolution 18/2009 which had invited the Conference of the Parties to the Convention and its *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing to explore and assess options for the International Regime on ABS that allow for adequate flexibility to acknowledge and accommodate existing and future agreements relating to access and benefit-sharing developed in harmony with the Convention.

III. THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

9. The Tenth meeting of the Conference of Parties to the CBD had, as one of the most significant outcomes, the adoption of the Nagoya Protocol on Access and Benefit-sharing. The objectives of the Nagoya Protocol are to promote fair and equitable benefit-sharing, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

³ IT/AC-SMTA-MLS 1/10/3, *Creating legal space for the Implementation of the Treaty in the Context of Access and Benefit-sharing*, available at http://www.planttreaty.org/sites/default/files/ac_smta_mls1_w3e.pdf

10. In adopting the Nagoya Protocol, the Conference of Parties, *inter alia*, recognized:⁴
- i) the International Treaty as one of the complementary instruments that constitute the International Regime of Access and Benefit-sharing;
 - ii) that the objectives of the International 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.
11. In its preamble, the Nagoya Protocol further recognizes:
- i) the importance of genetic resources for food security, public health, biodiversity conservation, and the mitigation and adaptation to climate change;
 - ii) the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions;
 - iii) the interdependence of all countries with regard to genetic resources for food and agriculture as well as their special natures 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; and
 - iv) that international instruments related to access and benefit-sharing should be mutually supportive with a view to achieving the objectives of the Convention.
12. In its Preamble, the Nagoya Protocol specifically recalls the Multilateral System on Access and Benefit-sharing established under the International Treaty, developed in harmony with the CBD.
13. In its Article 4, the Nagoya Protocol deals with the relationship with international agreements and instruments. In paragraph 3, it is set forth that the 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.*
- Paragraph 4 of Article 4 reads as follows:
- 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 resources covered by and for the purpose of the specialized instrument.*
14. By Resolution 8/2011, the Governing Body called 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.*
15. The Governing Body also welcomed the conclusion of a Memorandum of Cooperation between the Secretariats of the Treaty and the CBD and requested the Secretary
- to explore with the Secretariat of the Convention on Biological Diversity, practical means and activities to give effect to this cooperation, in particular through capacity building for access and benefit-sharing, as related to plant genetic resources for food and*

⁴ Decision X/1, Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization.

agriculture, including through the organization of workshops, seminars and other events, coordination of technical assistance as well as the exchange of information.

16. The Governing Body further requested the Secretary
to continue to foster collaboration with other treaty bodies, especially with the Convention on Biological Diversity in regard to ... access to plant genetic resources for food and agriculture and benefit-sharing in the light of the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, according to the respective mandates, governance structures and agreed programs.
17. The Governing Body, through these requests, has given guidance that the elaboration of the interfaces between the two access and benefit-sharing frameworks be developed through direct collaboration between the Treaty and the Convention on Biological Diversity.

IV. OTHER RECENT DEVELOPMENTS

18. Subsequent to the conclusion of a Memorandum of Cooperation between the Secretariats of the CBD and the Treaty, the Governing Body, at its Fourth Session, requested the Secretary to explore practical means and activities to give effect to such cooperation. (Resolution 8/2011, para. 4).
19. The cooperation between the Secretariats already resulted in two joint capacity building workshops that were organised in June and October 2011, with a third workshop planned back-to-back with the second meeting of the Intergovernmental Committee on the Nagoya Protocol.⁵ The workshops were attended by environmental and agricultural delegates and experts, and, precisely along the lines of the Governing Body's recommendation, provided an opportunity to explore how to promote mutual supportiveness and harmonious implementation of the Nagoya Protocol and the Treaty.
20. In parallel with those events, a number of capacity building initiatives for the ratification and eventual implementation of the Nagoya Protocol are actively underway and a number of capacity building providers, such as GIZ and UNEP, are running programmes of technical assistance regarding national policies and legislation on ABS. Bioversity International is also currently implementing a Treaty capacity building project.⁶ In all these programmes and activities, the mutual supportiveness and coherent implementation of the Protocol and the Treaty have been recurrent issues.⁷

V. ISSUES FOR CONSIDERATIONS

⁵ The report of the first workshop is in document UNEP/CBD/ICNP/1/INF/6, Outcomes of the Capacity-Building Workshop on Access and Benefit-Sharing, available at <https://www.cbd.int/absicnp1/documents/>.

The report of the second workshop is in document UNEP/CBD/ICNP/2/INF/1, Outcomes of the Second Capacity-Building Workshop on Access and Benefit Sharing, available at <https://www.cbd.int/doc/?meeting=WG8J-07>.

⁶ See Announcement of a Capacity Building Project for Developing Countries on the Implementation of the International Treaty and in particular its Multilateral System of Access and Benefit-sharing, and Call for Expressions of Interest, on-line notification available at http://www.planttreaty.org/sites/default/files/NCP_GB5_CBbioversity_en.pdf

⁷ In July and October 2011, the Treaty Secretariat in collaboration with the Secretariat of the Convention organised two conference calls on capacity building coordination where capacity building providers shared this information. The main purpose of the calls was to facilitate coordination at the country level with Bioversity International's project.

21. The recommendation made by the Committee as to model provisions in domestic ABS legislation is certainly a useful step in securing an adequate space for the implementation and practical operations of the Multilateral System in the context of general ABS frameworks (i.e. frameworks covering all sets of genetic resources). In addition, now that the Nagoya Protocol has been adopted and its possible implementation in the near future, the recommendation as well as the broader issue of the interaction between the Multilateral System and ABS frameworks may need to be further elaborated in the light of a number of considerations.

22. The model provisions were based on an exclusion from scope which, indeed, was being discussed at that time by the negotiators of the Nagoya Protocol. In the final text of the Nagoya Protocol, that solution was moderated and Article 4 establishes a more dynamic relationship with other international agreements. In other words, the outright exclusion of plant genetic resources for food and agriculture covered by the Treaty and its Multilateral System from the scope of general ABS legislation, which implies that the regime for those resources is to be legislated separately, is not the only possible solution and, indeed, is not the textual solution followed by the Nagoya Protocol. This is more so because of a range of policy, functional and practical interfaces in the governance of PGRFA, especially at the national level.

23. Furthermore, it will be recalled that the Governing Body, at its fourth session, called on Contracting Parties to ensure that any legislative, administrative or policy measure taken for both the Treaty and the Convention (or its Nagoya Protocol) are consistent and mutually supportive (Resolution 8/2011, paragraph 7). The focus of the Governing Body's recommendation would seem to be on their overall coherence and mutual supportiveness and coherent development through direct interaction between the Treaty and the Convention on Biological Diversity rather than on a clear distinction as to the scope of the implementing measures.

24. In this regard, a range of policy and operational issues have been identified by some Contracting Parties and users of the Multilateral System on how this might be achieved in practice. Some of these practical issues and policy considerations that would need to be addressed by Contracting Parties in the course of implementing their ABS measures at the national level include, *inter alia*, issues related to prior informed consent; mutually agreed terms; internal mandates, authority and processes for granting of access permits, *vis-à-vis* the SMTA; information sharing and clearing house mechanisms; and reporting obligations.

25. It is also worth recalling that the Committee considered the implications of national ABS legislation for access to *in situ* plant genetic resources that are part of the Multilateral System under Article 12.3.h of the Treaty (i.e., in the opinion of the Committee, those *in situ* resources that are under the management and control of Contracting Parties, and in the public domain).⁸ In that context as well, the Committee might wish to consider the implications of, and whether or not an exclusion from scope, as already developed by the Committee, may be enabling enough to the construction of a practical interface between general ABS requirements and the operation of the Multilateral System.

VI. POSSIBLE APPROACHES

26. The ongoing capacity-building initiatives referred to above, as well as others, would benefit not only from political support from Contracting Parties (at their discretion), but also from experts' guidance. In that respect, this Committee is in a position to explore more concrete ways in which mutual supportiveness and harmonious implementation can be realised through practical and concrete solutions.

27. The Memorandum of Cooperation entered into between the Secretariats of the Treaty and the Convention on Biological Diversity is already being operationalized in accordance with the request of the Governing Body, and provides one avenue for the harmonious interaction between

⁸ IT/AC-SMTA-MLS 2/10/Report, paras. 49 and 50. The report is available at http://www.planttreaty.org/sites/default/files/ac_smta_mls2_repe.pdf

the Treaty and the Convention on Biological Diversity. This includes the capacity building workshops jointly organized by the two Secretariats.

28. Bearing in mind the respective but complementary objectives, scope and mandates of the two agreements (i.e. the Nagoya Protocol and the Treaty), such harmonious implementation might be realised, in part, through some form of coordination between the Treaty's and the Nagoya Protocol's constituencies and processes.

29. In this regard, one of the recommendations of the joint capacity building workshops organised by the two Secretariats seems to go in that direction. With regard to mutual supportiveness, the first joint workshop identified a range of capacity building needs and measures to support implementation including, *inter alia*, through the establishment a joint group of experts to compile a checklist of issues that are important in achieving the mutual supportiveness of the Nagoya Protocol and the International Treaty.⁹ The Committee may also consider possible means and ways this, as another approach, may be achieved.

30. In light of the current legal and policy environment, Contracting Parties, many of whom have highlighted their lack of capacity to effectively address these issues, would certainly benefit from the provision of support and advice that could assist them in fulfilling their obligations under the respective agreements in a coherent manner. Similarly, users of the Multilateral System would also benefit from any resultant clarity and efficiency. The advice of the Committee is, therefore, being sought accordingly.

⁹ The other recommendations are:

- Ensuring interactions between ministries competent for the implementation of the Nagoya Protocol and the International Treaty
- Sensitizing policy makers on the respective approaches of the Nagoya Protocol (bilateral/MATs) and the International Treaty (multilateral/SMTAs)
- Building understanding of the relationship between the provisions on farmers' rights of the International Treaty and the provisions of the Nagoya Protocol related to traditional knowledge associated with genetic resources.