



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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Item 8.2 of the Provisional Agenda

FIFTH SESSION OF THE GOVERNING BODY

Muscat, Oman, 24-28 September 2013

REVIEWS AND ASSESSMENTS UNDER THE MULTILATERAL SYSTEM, AND OF THE IMPLEMENTATION AND OPERATION OF THE STANDARD MATERIAL TRANSFER AGREEMENT

EXECUTIVE SUMMARY

1. Three reviews provided for in the Treaty have been postponed to this Session: they relate to: (a) the inclusion of materials in the Multilateral System by private and legal persons, and whether to allow access to such person who are not making materials available; (b) levels of payment in the SMTA, with a view to achieving fair and equitable sharing of benefits; and (c) an assessment of whether mandatory payment shall also apply in cases where commercialized products are available without restriction to others for further research and breeding.
2. The Governing Body has repeatedly postponed these reviews, because of a lack of information on which to base its decisions. However, the *Ad Hoc* Advisory Committee on the Funding Strategy, at the request of the Governing Body, has identified a number of possible innovative approaches for its consideration that would involve making voluntary payments mandatory, and applying different levels of payment to different categories of products. This has given an added topicality to the matters dealt with in the review. Moreover, the Committee has recommended the establishment of an *Ad Hoc* Open-ended Working Group to Expand Benefit-sharing and the Scope of the Multilateral System, with the mandate to prepare the various decisions that will be needed to give effect to the package of measures for consideration for adoption of the Governing Body, at its Sixth Session.
3. The centrality of these matters to the functioning of the Treaty suggests that the discussions will be complex and need to be well prepared. It is accordingly recommended that a regionally balanced contact group be established at the time of the adoption of the agenda to meet in the margins to prepare the discussions, including by identifying the objectives of the debate and the possible outcomes, which would then focus the debate.
4. The Secretary was requested to make recommendations on the organization of the reviews. In practical terms, and to facilitate its use of time, the Governing Body may wish to consider scheduling Item 9 of the Draft Provisional Agenda, *Report on the Implementation of the Funding Strategy*, before Item 8, and including in the rescheduled Item any consideration it may wish to make regarding the reviews.

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I. INTRODUCTION

1. The Treaty, provides for the following reviews and assessments to be carried out by the Governing Body, regarding the implementation of the Multilateral System and the operation of the Standard Material Transfer Agreement:

- (a) *Assessment, within two years of the entry into force of the Treaty, of the progress in inclusion of plant genetic resources for food and agriculture in the Multilateral System by natural and legal persons and a decision whether access shall continue to be facilitated to those natural and legal persons that have not included these plant genetic resources for food and agriculture in the Multilateral System (Article 11.4);*
- (b) *Review, from time to time, [of] the levels of payment with a view to achieving fair and equitable sharing of benefit (Article 13.2d(ii)); and*
- (c) *Assessment, within a period of five years from the entry into force of the Treaty, of whether the mandatory payment requirement in the SMTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding (Article 13.2d(ii)).*

2. Time limits were specified for reviews (a) and (c), but the Governing Body has repeatedly postponed the reviews, while awaiting adequate information. A number of circular state letters and notifications have been issued to Contracting Parties, requesting information.

3. At its Fourth Session, it requested the Secretary to compile a report, and for this purpose to request information from Contracting Parties, international institutions that have concluded agreements under Article 15 of the Treaty, and other natural and legal persons, and to identify any additional information necessary. It also:

“requested the Secretary, and make recommendations to the Governing Body on the organisation of the reviews and assessments at its Fifth Session”.

4. The Secretary, accordingly, sent a notification to Contracting Parties on 20 February 2013, requesting information on the measures they had taken to encourage natural and legal persons within their jurisdictions to include plant genetic resources for food and agriculture in the Multilateral System, and other information of relevance to the reviews. At the time of preparing this report, no submissions had been received.

5. This document provides that report. It outlines the relevant provisions of the Treaty and deliberations of the Governing Body, and provides the information currently available. It makes recommendation for the organization of the reviews, as requested by the Governing Body.

II (a)**ASSESSMENT OF PROGRESS IN INCLUSION OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE HELD BY NATURAL AND LEGAL PERSONS IN THE MULTILATERAL SYSTEM OF ACCESS AND BENEFIT-SHARING AND DECISION AS TO WHETHER ACCESS SHALL CONTINUE TO BE FACILITATED FOR NATURAL AND LEGAL PERSONS WHO HAVE NOT INCLUDED RESOURCES IN THE MULTILATERAL SYSTEM****ARTICLE 11.4****Mandate and process to date**

6. By Article 11.3 of the Treaty, Contracting Parties:

“agree to take appropriate measures to encourage natural and legal persons within their jurisdictions who hold plant genetic resources for food and agriculture listed in Annex I to include such plant genetic resources for food and agriculture in the Multilateral System”.

7. Article 11.4 further provides that:

“Within two years of the entry into force of the Treaty, the Governing Body shall assess the progress in including the plant genetic resources for food and agriculture referred to in paragraph 11.3 in the Multilateral System. Following this assessment, the Governing Body shall decide whether access shall continue to be facilitated to those natural and legal persons referred to in paragraph 11.3 that have not included these plant genetic resources for food and agriculture in the Multilateral System, or take such other measures as it deems appropriate.”

8. The Treaty entered into force on 29 June 2004. At its First Session (1 to 6 June 2006), the Governing Body decided to defer this assessment until its Third Session. It:

“Urge[d] all other holders of the plant genetic resources for food and agriculture listed in Annex I to the Treaty to include these plant genetic resources in the Multilateral System, and urge[d] Contracting Parties to take appropriate measures, in accordance with Article 11.3 of the Treaty”, and

“re-emphasised the importance of Contracting Parties taking appropriate measures to encourage natural and legal persons within their jurisdiction, who hold plant genetic resources for food and agriculture listed in Annex I of the Treaty, to include such plant genetic resources for food and agriculture in the Multilateral System”.

9. At its Third Session, however, the Governing Body expressed its concern that information on the inclusion of plant genetic resources for food and agriculture in the Multilateral System by natural and legal persons within the jurisdiction of Contracting Parties was not available. It reiterated the importance of obtaining such information.

10. The *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System considered a number of questions of relevance to the incorporation of material in the Multilateral System¹. It advised that:

“the decision on what measures to establish under Article 11.3 of the International Treaty is left to the discretion of Contracting Parties. Those measures may include, but are not limited to, financial or fiscal incentives to holders of material (e.g. eligibility for public funding schemes). They might also consist of policy and legal measures, administrative

¹ IT/AC-SMTA-MLS 2/10/Report.

actions setting up domestic procedures for inclusions, or awareness raising efforts (especially at the level of farmers),” and

“In sum, it could be considered that a material held by a natural or legal person is ‘in’ the Multilateral System when that person:

- “(i) has undertaken by notification to the Secretary, or equivalent public statement, to make the material available in accordance with the Multilateral System through an SMTA;*
- “(ii) has adequately and publicly documented the material, so that it may be requested for research, breeding and training for food and agriculture; and*
- “(iii) abides by that undertaking, or*
- “(iv) has donated a sample to an institution that has already undertaken to hold material within the Multilateral System.*

“Any material transferred by a legal or natural person under an SMTA is in the Multilateral System.”

11. At its Fourth Session, the Governing Body forwarded all reviews to the current session. The information on material currently known to be available from natural and legal persons is in document IT/GB-5/13/5, *Report on the implementation of the Multilateral System of Access and Benefit-sharing*, Section III.B (paragraphs 35-37).

II (b)

REVIEW OF THE LEVELS OF PAYMENT WITH A VIEW TO ACHIEVING FAIR AND EQUITABLE SHARING OF BENEFITS

ARTICLE 13.2d(ii)

12. Article 13.2d(ii) of the Treaty provided that the Governing Body should agree on *“the level, form and manner of the payment, in line with commercial practice”*. The Governing Body did this at its First Session in 2006, and its decisions on that occasion are incorporated in the current text of the Standard Material Transfer Agreement.

13. Article 13.2d(ii) further provides that:

“The Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products; it may also decide on the need to exempt from such payments small farmers in developing countries and in countries with economies in transition. The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the SMTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding”.

14. In adopting the Standard Material Transfer Agreement, the Governing Body decided *“to review the levels of payment periodically, in conformity with Article 13.2d(ii) of the Treaty, starting from the Third Session of the Governing Body.”*

15. At its Third Session, the Governing Body postponed this review and decided *“to again review the level of payments, with a view to achieving fair and equitable sharing of benefits, at its Fourth Session”*. All reviews, as they fell due, have postponed, most recently to the current session.

16. Article 13.2d(ii) further provides that:

“The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the SMTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding”.

17. In adopting the Standard Material Transfer Agreement by Resolution 2/2006, the Governing Body decided “to review the levels of payment periodically, in conformity with Article 13.2d(ii) of the Treaty, starting from the Third Session of the Governing Body.” All reviews, as they fell due, have been postponed, most recently to the current Session.

18. The only “categories of recipients who commercialize ... products” that the Governing Body has so far established are recipients who pay on the commercialization of a product derived from materials received under an SMTA on a case-by-case basis (Articles 6.7 and 6.8), and recipients who “subscribe” to access to all materials of a specific crop or crops (Article 6.11), who pay, from the time of agreeing to this payment option, on all their products of that crop or crops, whether or not the products incorporate materials received under an SMTA. The levels of payment currently stipulated in the SMTA are given in fig. 1.

Fig. 1. Current levels of payment in the SMTA			
Art.	Nature	Trigger	Level
6.7	Mandatory payment	Products that <i>are not</i> available without restriction to others for further research and breeding	1.1% annually of the sale of Products derived from resources received under an SMTA, less 30%
6.8	Voluntary payment	Products that <i>are</i> available without restriction to others for further research and breeding	Unspecified % annually of the sale of Products derived from resources received under an SMTA, less 30%, of
6.11	“Subscription”	Total annual sales of products of the crop or crops subscribed to	0.5% annually of the sale of all products of the crop of crops “subscribed” to, whether or not derived from SMTA material, effective on signature

19. No payments on products resulting from access under the SMTA have been received at the time of preparing this report.

II (c)

ASSESSMENT OF WHETHER THE MANDATORY PAYMENT REQUIREMENT UNDER THE STANDARD MATERIAL TRANSFER AGREEMENT SHALL ALSO APPLY IN CASES WHERE COMMERCIALIZED PRODUCTS ARE AVAILABLE WITHOUT RESTRICTION TO OTHERS FOR FURTHER RESEARCH AND BREEDING

ARTICLE 13.2d(ii)

20. Article 13.2d(ii) of the Treaty provides that:

“The Governing Body [...] may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding”.

21. The Treaty entered into force on 29 June 2004, and the review mentioned in Article 13.2d(ii) of the Treaty therefore fell due in June 2009. The Third Session of the Governing Body was held from 1 to 5 June 2009. On that occasion, the Governing Body decided

“to postpone the review of whether the mandatory payment requirement shall also apply in cases where commercialized products are available without restriction to others for further research and breeding to its Fourth Session.”

22. At its Fourth Session, the Governing Body forwarded all reviews to its current session.

III. RECENT DISCUSSIONS IN THE AD HOC ADVISORY COMMITTEE ON THE FUNDING STRATEGY

23. Since the Fourth Session, the *Ad Hoc* Advisory Committee on the Funding Strategy has met three times, to carry out the mandate that the Governing Body gave it to explore and identify “innovative approaches” to benefit-sharing, with a view to ensure an adequate and timely flow of resources to the Benefit-sharing Fund.

24. It has recognized that monetary benefits have been slow in coming, for a number of reasons. It has accordingly identified a variety of innovative approaches to improve resource mobilization efforts, which it has forwarded to the Governing Body for consideration, with a view to enhancing the fair and equitable sharing of benefits.² These are:

1. Revisiting Article 6.11 of the SMTA;
2. Revisiting Article 6.7 of the SMTA;
3. Promoting regular seed sales-based contributions by Contracting Parties;
4. Expanding the coverage of the Multilateral System;
5. Novel ways to attract use-based voluntary funding;
6. Upfront payments on access, to be discounted against payments due on the commercialization of a product.

25. A number of these would involve amendments to the SMTA, in ways that concord with the subjects of the reviews, namely: the possibility of making voluntary payments mandatory (Review (c)); and the possibility of applying different levels of payment to different categories of product (Review (b)).

26. The Committee has also recommended the establishment of an *Ad Hoc* Open-ended Working Group to Expand Benefit-sharing and the Scope of the Multilateral System, with the mandate to prepare the various decisions that will be needed to give effect to the package of measures for consideration and adoption by the Governing Body at its Sixth Session.

IV. RECOMMENDATIONS TO THE GOVERNING BODY ON THE ORGANISATION OF THE REVIEWS

27. The Governing Body requested the Secretary to make recommendations on the organisation of the reviews.

28. The recommendations of the *Ad Hoc* Advisory Committee on the Funding Strategy regarding possible innovative approaches to the mobilization of resources for the Benefit-sharing Fund, have given a new topicality to the possible decisions of the Governing Body that are the subject of the reviews. As noted by the Governing Body in its past Sessions, it would appear that, in order to undertake the reviews in an informed manner, the Governing Body would require

² Its reports are contained in documents IT/GB-5/13/Inf.4, IT/GB-5/13/Inf.4/Add.1 and IT/GB-5/13/Inf.4/Add.2.

additional information. Should the Governing Body accept the recommendations of the Ad Hoc Advisory Committee on the Funding Strategy, then the deliberations of the Ad Hoc Open-ended Working Group would surely provide an improved information basis for the Governing Body to conduct the reviews at its next Session. Alternatively, the additional information can also be compiled by the Secretariat from information provided by Contracting Parties and stakeholders. The Governing Body might therefore wish to postpone the three reviews to be undertaken at its Sixth Session.

29. In practical terms, and to facilitate its use of time, the Governing Body may wish to consider scheduling Item 9 of the Draft Provisional Agenda, *Report on the Implementation of the Funding Strategy*, before Item 8, and including in the rescheduled Item any consideration it may wish to make regarding the reviews. The remaining elements of items 8 and 9 might then be addressed afterwards.