



Food and Agriculture
Organization of the
United Nations



The International Treaty
ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

**NINTH MEETING OF THE AD HOC OPEN-ENDED WORKING GROUP TO
ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM**

Rome, Italy, 17-21 June 2019

**REPORT ON SUPPORTIVE MEASURES TO FACILITATE THE
IMPLEMENTATION OF THE POSSIBLE EXPANSION OF THE COVERAGE
OF THE MULTILATERAL SYSTEM**

1. Introduction

1. The ninth meeting of the Ad-Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (Working Group) will be held from 17 to 21 June 2019. In preparing for the ninth meeting, the Working Group requested the Co-Chairs, with support from the Secretariat and legal experts, to explore supportive measures to facilitate the implementation of the possible expansion of the coverage of the Multilateral System, including to

- Propose modalities for expansion that would enable a “fast track” adoption and implementation in as many jurisdictions as possible;
- Include a decision in the Resolution adopting the possible amendment to encourage the provisional application of the expanded coverage by Contracting Parties wishing to do so voluntarily, in order to show their commitment to the enhanced Multilateral System; and,
- Prepare explanatory notes that could be used for the preparation by regions and Contracting Parties for the Eighth Session of the Governing Body.

2. This report provides information to consider in exploring each of the above supportive measures to facilitate the implementation and possible expansion of the coverage of Multilateral System.

2. Modalities for adapting the coverage of the Multilateral System

3. During the last two biennia, the Working Group held extensive discussions on possible modalities for adapting the coverage of the Multilateral System on the basis of various documents and reports.¹ In its report to the Seventh Session of the Governing Body, it stressed the need to identify the most effective, clear, simple and rapid modality to give effect to a possible expansion ([IT/GB-7/17/7](#), para. 8).

¹ See for example, [IT/OWG-EFMLS-6/17/6](#), *Expansion of the Access and Benefit-sharing Provisions of the Treaty*; [IT/OWG-EFMLS-2/14/4](#), *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*; [IT/OWG-EFMLS-3/15/Inf.4](#), *Expansion of the Access and Benefit-sharing Provisions of the International Treaty: Legal Options*; [IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*.

6. The Governing Body requested the Working Group, through Resolution 2/2017, to explore options for possible adaptation of the coverage of the Multilateral System, taking into account, inter alia, proposals presented at the Seventh Session of the Governing Body.

7. At the eighth meeting of the Working Group, the Co-Chairs suggested, for consideration by the Working Group, several amendment options as contained in section 5 of document IT/OWG-EFMLS- 8/18/4, *Enhancement of the Functioning of the Multilateral System: Note by the Co-Chairs*. The following four options were described: (a) an “all PGRFA amendment”, (b) an “all PGRFA amendment” with additional conditions or specifications; (c) an amendment to give the Governing Body the capacity to add further PGRFA; (d) a partial/periodic expansion of *Annex I*. Suggestions were made on possible additional conditions and specifications, for further consideration ([IT/OWG-EFMLS-8/18/Report](#)).

8. Pursuant to Article 23 of the International Treaty, amendments to the International Treaty may be proposed by any Contracting Party for adoption at a session of the Governing Body. The text of any proposed amendment shall be communicated to Contracting Parties by the Secretary at least six months before the session at which it is proposed for adoption.²

9. According to Article 23.3 in conjunction with Article 24.2 of the Treaty, amendments to Annex I shall be adopted by consensus of the Contracting Parties present at a session of the Governing Body. To enter into force, an amendment to the International Treaty requires the deposit of instruments of ratification, acceptance or approval by two-thirds of the Contracting Parties, entering into force (only) among those Contracting Parties on the 90th day thereafter.³ Subsequently, the amendment enters into force for Contracting Parties on the 90th day after the deposit of their instrument of ratification, acceptance or approval of the amendment.⁴

3. Modalities for expansion that would enable a “fast track” adoption and implementation in as many jurisdictions as possible

10. A country’s ability to become a Party to a treaty or amendment is conditional on obtaining the required domestic approval. The nature of this domestic approval depends on each individual country’s national constitution and legal framework. In most countries, cooperation between the legislature and the executive is constitutionally required for the conclusion of treaties. However, there can be an explicit or implicit rule in some countries that permits some “less significant” agreements to be ratified by the executive alone.⁵ Executive authority can be defined constitutionally, or the legislature can authorize the negotiation and signature of certain types of treaties.⁶

² ITPGRFA, Arts. 23.1 and 23.2.

³ ITPGRFA, Art. 23(3) and 23(4).

⁴ ITPGRFA, Art. 23(4).

⁵ FL Morrison, para. 23. Under the French Constitution, the President of the Republic negotiates and ratifies treaties. But Art. 53 French Constitution provides that international treaties relating to any matters on a list of subjects must be approved by law before they can be ratified. These include peace treaties and treaties of commerce, those relating to international organizations, those which involve State finances, those which alter existing laws, those which involve personal status, and those that relate to the annexation or cessation of territory.

⁶ In the United States, international agreements can be joined in a number of different ways, including through the authority of the President, particularly when an agreement is consistent with existing US law. The Paris Agreement provides a valuable case study on the use of executive agreements. Four different factors served as a basis to assert executive prerogative over ratification:

1. **General Preauthorization:** As it was negotiated under the UNFCCC, the Paris agreement was not based on sole executive power, but was instead preauthorized by a duly ratified treaty to which the Senate gave its advice and consent (i.e. negotiated within the scope of the Senate’s original advice and consent to the UNFCCC).
2. **Legal Landscape:** Congress had already expressed its support for climate change negotiations in the Global Climate Protection Act of 1987, which asserted the need for international cooperation aimed at minimizing and responding to adverse climate change; the Clean Air Act (under which the EPA regulated carbon dioxide

11. Executive agreements,⁷ which are agreements that are typically concluded and ratified by the executive branch without formal approval by a legislative body, can be used as a way to expedite national ratification processes. Executive agreements are a common phenomenon in State practice and are used in several circumstances. In some cases, legislative bodies can also approve a broad international policy or objective and empower the executive to implement it.⁸ In some other cases, there can be an exemption to seek the approval from the legislative branch if the ratification concerns a treaty or an amendment whose purpose is to implement an already approved treaty.⁹

12. The boundary is different in every State, and a careful examination of the domestic legal framework is required to obtain a conclusive answer on whether a treaty or amendment can be ratified by the executive alone in any given context.

13. From the brief research undertaken in preparation of this note, it results that amending only Annex I, without amending any provisions of the main body of the International Treaty, might constitute a key element for enabling a “fast-track” adoption. Fast track adoption might be justified, depending on the respective national context, as a possible amendment would not necessarily result in an obligation to alter existing national laws or legislation or national administrative measures in place for the implementation of the International Treaty. Furthermore, in most Contracting Parties, the International Treaty was ratified following extensive national processes involving executive and legislative review and approval. A fast-track ratification of a possible amendment could be justified on the basis that the amendment would not alter the main provisions of the International Treaty but rather provide a means to further support its effective implementation.

4. Provisional application of the expanded coverage by Contracting Parties wishing to do so voluntarily

14. Ratification of a treaty or amendment through a domestic legislative process can be a lengthy process. In accordance with Article 25, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties (hereinafter referred as Vienna Convention) “[a] treaty or a part of a treaty can be

emissions as a pollutant, allowing the President to argue that he could negotiate international agreements as a necessary adjunct to regulating domestic emissions), and s. 115 of the Clean Air Act, which authorized federal action reciprocally with other nations to address international air pollution, namely, transboundary pollution causing damage within the US.

3. Consistent Executive Practice: Presidents of both parties had negotiated similar environmental agreements addressing pollution as executive agreements without express congressional approval.
4. New, But Not Legally Binding, Commitments: the Paris Agreement creates no legally binding emissions caps, declaring only that member states “should” meet such targets. Nor are the financial commitments binding, but rather, only follow “in continuation of the existing obligations under the UNFCCC.” Finally, those relatively few legally binding provisions in the Paris Agreement are largely procedural in nature and in many instances are duplicative of existing US obligations under the UNFCCC, and could therefore be fully implemented based on existing US law.

⁷ The term refers only to the status of the agreement within the domestic law of the State in question. Executive agreements have been particularly important in a number of countries, such as the United States.

⁸ FL Morrison, para. 4. The fast-track” ratification of the Paris Agreement by the European Union provides a good case in point. In the case of the Paris Agreement, the European Council agreed to speed up the process of ratification of the Paris Agreement by endorsing a Council decision on conclusion of the agreement by the EU and asked the European Parliament for its consent. Once the European Parliament agreed, the decision on conclusion was formally adopted by the Council and the EU could then ratify the agreement. Member states would ratify either together with the EU if their national procedures were complete, or as soon as possible thereafter).

⁹ In the Netherlands, the *Kingdom Act on the Approval and Publication of Treaties* of 1994 creates exemptions from approval by Parliament. Article 7(f) indicates that “Unless a treaty contains provisions which conflict with the Constitution or result in such conflict, approval shall not be required... if the purpose of the treaty is to amend an annex which is an integral part of an approved treaty and its contents aim to implement the provisions of the approved treaty of which it is an annex, unless a reservation on this subject has been made in the Act of Parliament approving the treaty.”

applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed”.

15. Provisional application of a Treaty can thus be a way to give effect to a Treaty obligations prior to the state’s formal ratification of or accessions to a treaty. The provisional application of a treaty can be a useful tool to create international legal effects while national ratification/ accession processes are underway.¹⁰

16. Provisional application of a treaty that has not entered into force may occur when a state notifies that it would give effect to the legal obligations specified in that treaty provisionally. These legal obligations are undertaken by a conscious voluntary act of the state consistent with its domestic legal framework.

17. Provisional application might, for example, be justified for the following reasons: 1) the urgency of the matters dealt with in the treaty; 2) the desire to adopt and implement confidence-building measures without delay; or 3) the prevention of legal gaps between successive treaty regimes to ensure a smooth transition.¹¹

18. The Vienna Convention stipulates that a treaty’s provisions on entry into force and, indeed, all matters “arising necessarily before the entry into force of the treaty” apply from the moment the text of the treaty has been adopted.¹² The text of the Vienna Convention also indicates that States may go beyond this, and that they “have a wide margin of discretion to agree on a specific mode for the provisional application of a treaty.”¹³ It can thus be provided for “in a treaty, by an exchange of notes, or in some other manner.”¹⁴ In the case of multilateral treaties, “provisional application ends among Parties for which the treaty enters into force [but] it continues to apply among States that have not become Parties unless they choose to terminate such application.”¹⁵

19. The Vienna Convention stipulates that provisional application may extend to a treaty as a whole or only to a part of it.¹⁶ States can opt out of the provisional application. The insertion of an opt-out clause in a treaty or treaty amendment may be useful if a particular State cannot agree to the provisional application for reasons of national law, and the negotiating States have an interest in encouraging the State concerned to sign the treaty or to vote in favour of the adoption of its text.¹⁷ A State can also opt in to the provisional application of a treaty by declaring that it will apply the treaty provisionally pending its entry into force for that State.¹⁸

¹⁰ Lefeber R, “Treaties, Provisional Application” in *Max Planck Encyclopaedia of Public International Law*, MPEPIL 1486, para. 20. See also RE Dalton, at 239: “The majority of authorities take the view that a provisionally applied treaty constitutes a binding legal instrument, which is consistent with [Vienna Convention] Article 25’s own *travaux préparatoires*.”

¹¹ *ITTA, 1994*, Arts. 40 and 41(3)

¹² Vienna Convention, Art. 24; Klabbbers, “Treaties, Conclusion and Entry into Force”, para. 14.

¹³ Lefeber, para. 3; Vienna Convention, Art 25(1)(b).

¹⁴ RE Dalton, at 221.

¹⁵ *Ibid*, at 232.

¹⁶ Vienna Convention, Art. 25(1)(a).

¹⁷ Lefeber, para. 6. Since the International Treaty requires consensus, this could be a way to encourage consensus if provisional measures are called for by the Parties.

¹⁸ Lefeber, para. 6.

20. The Paris Agreement provides a recent example of a decision affirming the right of States to provisionally apply an international agreement. In Decision 1/CP.21 *Adoption of the Paris Paragraph 5*, “Recognizes that Parties to the Convention may provisionally apply all of the provisions of the Agreement pending its entry into force, and requests Parties to provide notification of any such provisional application to the Depositary.”

Box 3: Examples of Provisional Application of Treaties

Many multilateral treaties contain a clause allowing for provisional application. The clause on provisional application is also typically included in the final clauses of the treaty, either as a separate provision, or within the provision on entry into force. The date from which a treaty is to be applied provisionally can be the date of adoption or signature or whatever the negotiating States agree upon.

Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, in Article 5, provides that “Any Party may, at any time before this Amendment enters into force for it, declare that it will apply provisionally any of the control measures set out in Article 2J, and the corresponding reporting obligations in Article 7, pending such entry into force.”

The *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, in article 7(1), provides that “If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the [UNGA], except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (c) States and entities which consent to its provisional application by so notifying the depositary in writing; (d) States which accede to this Agreement”.

The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* states at Article 41 that “This Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.”

The *Framework Agreement on a multilateral nuclear environmental programme in the Russian Federation* states in article 18, paragraph 7, that it “shall be applied on a provisional basis from the date of its signature.”

The *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* states in article 32(1) that it “shall be applied provisionally by States or regional economic integration organizations which consent to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.”

The *Energy Charter Treaty* states in Article 45 that “Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory... to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

Source: International Law Commission, “Provisional application of treaties” Memorandum by the Secretariat, 69th Session, Geneva, 1 May–2 June and 3 July–4 August 2017; Agreement on Part XI; Agreement on Straddling Fish Stocks; Agreement on a Multilateral Nuclear Environmental Programme; Energy Charter Treaty; Port State Agreement, Kigali Amendment; Paris Agreement.

21. Based on the above analysis, one option that can be considered in the case of the International Treaty is to provide for provisional application in the text of the amendment or for the Governing Body, through a Resolution adopting the possible amendment, to encourage the voluntary provisional application of the expanded coverage by Contracting Parties wishing to do so, in order to show their commitment to the enhanced Multilateral System. The practical effect will be that any Contracting Party making the declaration to agree to the amendment provisionally will act as if the provisions governing the amendment are already in force, during the period between the declaration and the entry into force of the Amendment for that Contracting Party.

22. A possible amendment could lead to a situation that two different versions of the Treaty would be in force, since the amendments would enter into force only for the two thirds of the Contracting Parties that have ratified, accepted or approved such amendments, and for other Contracting Parties only as they ratify, accept or approve them. Provisional application could be a way to lessen or moderate the legal uncertainty that could potentially arise from this situation and to ensure a smoother transition to the new regime.

23. Provisional application of the amendment could also act as a trust building measure to overcome the reluctance of a number of countries, who may only agree to the expansion of the Treaty's crop coverage after benefit-sharing has been shown to work, and of a number of other countries, who maintain that adequate, user-based income for the Benefit-sharing Fund can only be achieved if and once the Treaty's crop coverage has been expanded, preferably to all plant genetic resources for food and agriculture.

5. Preparation of explanatory notes that could be used for the preparation by regions and Contracting Parties for GB 8

24. The Working Group requested the Co- Chairs to prepare explanatory notes that could be used for the preparation by regions and Contracting Parties for the Eighth Session of the Governing Body. As contained in the Report of WG8, the notes could clarify the following:

- The consequences of the Governing Body decision adopting the amendment;
- The consequences of the amendment to those Contracting Parties that would ratify it;
- The practical implications for the operations of the Multilateral System at national level (which PGRFA would be covered, to which PGRFA would facilitated access be provided, etc.).

In preparing these notes, the Co-Chairs could consider using the opinions prepared by the *Ad Hoc* Technical Advisory Committee on the SMTA and the Multilateral System. The Statement made by GRULAC at WG8 could also be taken into account.

The explanatory notes could also provide further background information and analysis of Contracting Parties practices in relation to the ratification of a possible amendment and the feasibility and willingness of Contracting Parties to agree on a provisional application of a possible amendment. The explanatory notes could be a useful tool to use during the regional meetings to prepare for the Governing Body.

25.