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The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 5.3 of the Draft Provisional Agenda

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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

Rome, Italy, 18-19 January 2010

LEGAL AND ADMINISTRATIVE MEASURES TO ENCOURAGE NATURAL AND LEGAL PERSONS TO VOLUNTARILY PLACE MATERIAL IN THE MULTILATERAL SYSTEM

I. CONTEXT

1. Under Article 11.3 of the Treaty Contracting Parties agreed

*“to take appropriate measures to encourage natural and legal persons within their jurisdiction 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”.*¹

II. QUESTIONS OR ISSUES

2. In this context, several Contracting Parties and other stakeholders inquired with the Secretary what sorts of measures Contracting Parties could take to encourage natural and legal persons within their jurisdictions to include PGRFA in the Multilateral System and the Secretary forwarded this question to the first meeting of experts.

¹ By Resolution 2/2006,

“The Governing Body,

7. ***Urges** 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 **urges** Contracting Parties to take appropriate measures, in accordance with Article 11.3 of the Treaty”,*

29 *The Governing Body re-emphasized 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.”*

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Meeting documents are available on Internet at <http://www.planttreaty.org>

3. The first meeting of the Experts was of the opinion that Contracting Parties, by the provisions of the Treaty, are required to remove any obstacles, and, if necessary, provide the necessary legal and administrative measures to allow natural and legal persons to voluntarily place material in the Multilateral System, and make them available to Recipients. The meeting concluded that it would also be useful if the Secretariat could document current good practices in this regard, for review by the Expert Group at its next meeting.²

4. Pursuant to this request, the Secretariat commissioned an input paper on the above issue in order to facilitate discussions, and the provision of advice and opinion. The paper is attached as an *Annex* to this document.

III. ADVICE SOUGHT

5. The Committee's advice is sought on:

- (a) the above question, including possible elements of such measures;
- (b) what needs to be done and which information gathered in preparation for the second meeting of the *Ad Hoc* Advisory Technical Committee, if there is no immediate solution; and
- (c) which aspects of these questions need to be sent to the Governing Body and what options should be presented for its consideration.

² Appendix 6, IT/MOE-SMTA 1/08/REPORT

ANNEX

POSSIBLE MEASURES TO ENCOURAGE NATURAL AND LEGAL PERSONS TO VOLUNTARILY PLACE MATERIAL IN THE MULTILATERAL SYSTEM**Introduction**

According to Article 11.3 of the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty), Contracting Parties agree to take appropriate measures to encourage natural and legal persons within their jurisdiction who hold plant genetic resources for food and agriculture (PGRFA) listed in Annex I to include such PGRFA in the Multilateral System of Access and Benefit-sharing (Multilateral System).

At the First Meeting of Experts of the Standard Material Transfer Agreement and the Multilateral System held in Montreal in July 2008, it was agreed that the Secretariat should provide a review of possible measures to encourage inclusions into the Multilateral System by natural or legal persons.

This document follows up to that recommendation and presents to the attention of the members of the *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System a review of current practices as to measures relating to Article 11.3 of the International Treaty. This review is not intended to be exhaustive. Despite some efforts by the Secretariat to acquire information from various sources, it has not been possible to obtain a complete picture of national practices.³

Article 11.3 in the Context of the Multilateral System of Access and Benefit-sharing

The Multilateral System is composed of two sets of plant genetic material, one that is automatically included by the Contracting Parties by virtue of the obligations in the International Treaty and one that is voluntarily included by those Contracting Parties or entities under their jurisdiction.

According to Article 11.2 of the International Treaty, the Multilateral System covers all Annex I-listed PGRFA that are under the management and control of Contracting Parties (i.e. in the public management and control) as well as in the public domain.

The rationale of Article 11.2 is to limit the obligations of Contracting Parties to material under their control and for which they are directly responsible. Since the obligations attached to the accessions obtained from the Multilateral System are to be passed on through a contractual instrument (i.e. the Standard Material Transfer Agreement), it is inevitable that Contracting Parties can commit only for material that they can directly dispose of.

However, this category of material does not exhaust the list of accessions that are eligible for inclusion in the Multilateral System and transfer through the Standard Material Transfer

³ For instance, it is reported verbally that Brazil, Canada and Switzerland have taken policy (i.e. a new policy setting forth a coordinated management system of *in situ* and *ex situ* PGRFA) administrative (i.e. communications from the central federal government to the States) and financial measures (i.e. conditionality of public funding on inclusion of material in the Multilateral System) under Article 11.3 of the International Treaty. However, the Secretariat was not able to obtain any precise official information on the substance of those measures.

Agreement (SMTA). In the International Treaty, Contracting Parties extend the Multilateral System to accessions that are placed voluntarily in the Multilateral System by their holders, be those holders natural or legal persons under their jurisdiction. Presumably, those holders retain some form of control on the material, for example through property rights, but decide voluntarily to facilitate access and share benefits through the use of SMTA.

Voluntary inclusions in the Multilateral System are addressed twice in the International Treaty:

- All “other holders” of PGRFA listed in Annex I are invited to include those genetic resources in the Multilateral System, with the aim of achieving the fullest possible coverage of the system (Article 11.2)⁴;
- Contracting Parties agree to take measures to encourage natural and legal persons under their jurisdiction to include the PGRFA that they hold (Article 11.3).

In substance, the International Treaty generally encourages voluntary inclusions and also mandates Contracting Parties to promote those inclusions.

The Governing Body of the International Treaty addressed voluntary inclusions. In Resolution 4/2009, the Governing Body expressed its concern that information on inclusions by natural and legal entities under the jurisdiction of Contracting Parties is very limited. Consequently, the Governing Body:

“Encourages Contracting Parties, as appropriate, in reporting on their plant genetic resources for food and agriculture in the Multilateral System, to provide information on the collections of legal persons not part of the government, whom they regard as forming part of their national plant genetic resources systems and who are willing to make such information available.”

and

“Further invites all Contracting Parties to include in their reports on the plant genetic resources for food and agriculture in the Multilateral System information on the appropriate measures that they are taking, in accordance with Article 11.3 of the Treaty, to encourage natural and legal persons within their jurisdictions to include plant genetic resources for food and agriculture in the Multilateral System, according to national capacities;” (Resolution 4/2009 of the Governing Body, paragraphs 10 and 11).

Mandatory vs. Voluntary inclusions

What is mandatory and what is voluntary in terms of inclusions in the Multilateral System? This is the question that Contracting Parties are faced with. Practically, the answer to this question may be found through a combined interpretative exercise, first looking at the terms “under the management and control” and “in the public domain” to determine mandatory inclusions and then categorizing what is not captured by those terms as subject to voluntary inclusions and related incentive measures.

The expression “under the management and control” of a Contracting Party is not defined in the International Treaty. It can be interpreted as a factual as well as a legal qualification. The expression “in the public domain” is a qualification of a legal nature. While the term “public domain” is a widely used term and assumes different technical meaning in different legal

⁴ Article 11.2 refers to “all other holders” of Annex 1 PGRFA. Whether or not this also applies to holders of Annex I PGRFA in a Non-Contracting Party is not dealt with in this background paper.

contexts,⁵ Contracting Parties, in the context of implementing the Multilateral System, are beginning to interpret and apply the term with specific technical meaning.

If the collection is actually managed and controlled by the Contracting Party, and is in the public domain, then this qualification is met and the inclusion in the Multilateral System is automatic based on the provisions of Article 11.2 of the International Treaty. If, on the other hand, the collection is managed and controlled by a separate entity over which the State does not have any control, then the qualification is not met and, as a result, any inclusion in the Multilateral System is to be qualified as voluntary. At the national level, voluntary inclusions might thus be a residual category that derives from the definition of “management”, “control” and “public domain”.

Reportedly, the government of the United Kingdom, through the Department for Environment, Food and Rural Affairs (DEFRA), followed this approach in a two-stage process⁶. First, DEFRA interpreted the concept of “public domain” as covering material that falls under Annex I of the Treaty, and that is in collections either entirely or partly supported by public funds. Second, DEFRA expressed vis-à-vis other holders of material, including material not listed in Annex I, the intention to positively address measures under Article 11.3 of the International Treaty, once the primary commitments to inclusions under the International Treaty had been met.

Review of Possible Incentive Measures

Even if Article 11.3 deals only with the incentives by Contracting Parties, this background document will briefly review all sets of measures that are taken at different levels, from international to regional and national, to encourage natural and legal persons to voluntarily place material in the multilateral system.

Examples of International Incentives

The first incentive measure is one that all Contracting Parties have agreed to. In the International Treaty, there is a built-in review by the Governing Body to assess progress on including PGRFA held by natural and legal persons within the Multilateral System within two years of the entry into force of the International Treaty. Following the review, the Governing Body is to decide whether or not access shall continue to be facilitated to those natural and legal persons that have not included their holdings of PGRFA in the Multilateral System (Article 11.4).

The Secretariat of the International Treaty established a system of official notification of inclusion by Contracting Parties and other entities under their jurisdiction. The system consists of a simple letter of notification to the Secretariat, containing the list of material that will be made available under the SMTA (see Annex I for the sample letter of notification). The system applies both to mandatory, or automatic (i.e. inclusion of material under the management and control of the government as well as in the public domain), and voluntary inclusions. To date, only one letter of notification contains the differentiation between mandatory and voluntary inclusions⁷.

Due to the limited number of notifications received, which makes it impossible for the Governing Body to carry out any assessment of progress, the decision on continuing facilitated access based on Article 11.4 of the International Treaty is currently postponed to the Fourth Session of the Governing Body in 2011 (Resolution 4/2009 of the Governing Body, paragraph 11).

Clearly, the review provisions, and threat of possible exclusion from the benefits of the Multilateral System, are intended to encourage the holders of semi-public and private collections,

⁵ It might be taken to mean, *inter alia*, public property or, in intellectual property law, materials which are not protected by intellectual property rights.

⁶ Personal communication by Mr. Julian Jackson, International Biodiversity Policy Unit, DEFRA.

⁷ See ftp://ftp.fao.org/ag/agp/planttreaty/agreements/inclusion/inclu_switzerland.pdf

such as provincial governments, universities and independent research institutes, and private collectors, to place their PGRFA voluntarily within the Multilateral System.

At the international level, the work of the Global Crop Diversity Trust (GCDDT) is one example of incentives for inclusion of material in the Multilateral System through use of the SMTA. The GCDDT Grant Agreements for regeneration and safety duplication of crop collections are signed with government genebanks as well as with other holders of collections. One of the conditions in the agreements is that all regenerated germplasm be made available or otherwise dealt with through the SMTA. Hence, in cases where the grantee is a private holder of material and the activities of regeneration and safety duplication covered by the agreement are for Annex I-listed crops, one of the practical effects of such an agreement is to include material in the Multilateral System. Obviously, this does not mean that Contracting Parties shall or should be inspired by the example of the GCDDT, which is an international entity with a broad mandate and copious financial resources, rather to point to the importance that financial incentives (i.e. international grants in case of the GCDDT) can have in terms of promoting inclusions in the Multilateral System.

An Example of Regional Incentives

By taking part in any regional initiative for implementation of the International Treaty and its Multilateral System, Contracting Parties might virtually encourage voluntary inclusions. A European Genebank Integrated System, or AEGIS for short, is one example⁸.

Under AEGIS, forty-five countries⁹ of the European Region establish a European Collection of PGRFA, which operates as a virtual genebank. The accessions in the collection are to be made available in accordance with the terms and conditions set out in the International Treaty and, in particular, through the SMTA for Annex I-listed crops.

The legal infrastructure of AEGIS consists of an overarching Memorandum of Understanding (MoU) entered into by governments of eligible countries in the region and, most interestingly for this background paper, a series of Associate Member Agreements (AMA), concluded at the national level with individual genebanks and other institutions holding collections that intend to become part of AEGIS.

AMAs are entered into by the genebanks and other institutions holding collections with the National Coordinator of the European Cooperative Programme for Plant Genetic Resources (ECPGR) for the country concerned. Such National Coordinators are normally government officials undertaking to work with the associate members in implementing AEGIS¹⁰. They are ultimately responsible for overseeing the compliance with the obligations under the AMAs.¹¹

⁸ The explanation of AEGIS is based on material that Mr. Gerald Moore, Honorary Fellow at Bioversity International, has kindly provided.

⁹ Albania; Armenia*; Austria*; Azerbaijan; Belarus; Belgium*; Bosnia and Herzegovina; Bulgaria*; Croatia; Cyprus*; Czech Republic*; Denmark*; Estonia*; Finland*; France*; Georgia; Germany*; Greece*; Hungary*; Iceland*; Ireland*; Israel; Italy*; Latvia*; Lithuania*; Luxembourg*; Macedonia FYR; Malta; Moldova; Montenegro; Netherlands*; Norway*; Poland*; Portugal*; Romania*; Russian Federation; Serbia; Slovakia; Slovenia*; Spain*; Sweden*; Switzerland*; Turkey*; United Kingdom*; Ukraine.

* indicates the country is a Contracting Party to the International Treaty on Plant Genetic Resources for Food and Agriculture.

¹⁰ The list of ECPGR National Coordinators is available at http://www2.bioversityinternational.org/networks/ecpgr/Contacts/ecpgr_nc.asp

¹¹ If a National Coordinator is not satisfied that an Associate Member has complied fully with its obligations, it may serve written notice on the Associate Member specifying the areas in which compliance has been deficient. If the Associate Member fails to remedy the situation within 12 months, the Agreement,

Once AEGIS membership is obtained through AMAs, each member is entitled to propose genebank accessions that are free from any third party obligations or restrictions as part of the European Collection. Accessions enter the European Collection subject to evaluation through various institutional mechanisms within ECPGR.

The task of distributing the Annex I-listed European Accessions under the SMTA lies with the AEGIS Associate Members (i.e. the genebanks and other institutions participating in AEGIS) where those accessions are located. Accessions of non-Annex 1 crops are to be made available under the SMTA with an explanatory note, in the same way as authorized by the Governing Body of the International Treaty for the Centres of the Consultative Group on International Agricultural Research.

Associate Membership to AEGIS is voluntary. Regardless of their status of governmental, para-statal, private or civil society, holders of material can become associate members by signing an AMA. The responsibilities of associate members, as set out in both the AMA and the MoU, include facilitating access to the European Accessions in their institutions and related information, in accordance with the SMTA for Annex I-listed crops.

AEGIS can be seen as a model for regional cooperation with implementation of the International Treaty but also as falling within the scope of Article 11.3 in that Contracting Parties establish secure and stable legal and administrative infrastructures under which they encourage national holders of PGRFA to manage some of their accessions (i.e. the ones qualifying as European accessions) under the SMTA. By becoming part of AEGIS, those holders generate and participate in several benefits, such as cost-efficient conservation activities within and between genebanks and facilitated access to conserved germplasm.

An Example of National Incentives

Distinguishing between material under the control of the government and other material eligible for voluntary inclusion is particularly significant in countries that have a federal system, where genebanks are under state or provincial control. In such countries, it would appear that such collections are not immediately covered by the Multilateral System, and the extension of the system to cover those collections would need to take place with the consent of the institutions (or individuals) concerned. This is the case of Germany¹².

In Germany, the responsibilities for PGRFA are shared between the Federal as well as the Laender authorities and institutions. At the federal level, the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV) holds the responsibility for genetic resources including PGRFA and is *inter alia* the National Focal Point for the International Treaty. The framework for activities of the authorities and the private sector in the field of conservation and sustainable use of plant genetic resources is provided by the National Programme on Plant Genetic Resources of Agricultural and Horticultural Crops (National Programme). The programme was developed under the responsibility of the BMELV and formally established in 2002.

The National Programme is implemented through the combined efforts and individual contributions of the Federal Government, the Laender governments and various public and private institutions, bodies and other stakeholders. In fulfilling its responsibilities for the implementation

and hence the Associate Membership, may be terminated. Associate Membership Agreements are to be deposited with the National Coordinators concerned.

¹² This part of the background paper is based on a document developed and presented at the Second Information Technology Consultation by Mr. Frank Begemann, Head, Information and Coordination Centre for Biological Diversity (IBV), Federal Agency for Agriculture and Food (see IT/GB-3/TCIT-2/08/Inf.1)

of the programme as designated by the Federal Government, the BMELV is assisted by the Advisory and Co-ordinating Committee for Agricultural and Horticultural Crops (BEKO). The BEKO consists of representatives of the Federal and Laender governments as well as research institutions, breeders and non-governmental organisations. Besides its task to advise BMELV, BEKO represents the relevant platform for broad stakeholder involvement. The Information and Coordination Centre for Biological Diversity (IBV) of the Federal Agency for Agriculture and Food (BLE) provides information and advice for all actors and maintaining the National Inventory for Plant Genetic Resources.

BMELV took a series of coordinated actions for implementation of the Multilateral System.

- a) It published the SMTA together with explanatory notes and frequently asked questions to facilitate the broad information of all relevant stakeholders in Germany.
- b) It addressed a written communication to all competent authorities, relevant public institutions as well as the private sector through its associations on the SMTA and the rights and obligations arising from its use. In addition to that, all stakeholders of the National Programme were informed especially through various and early communications in the BEKO.
- c) It identified all holders of Annex I crops (genebanks, other collections etc.) based on the National Inventory on Plant Genetic Resources.
- d) It followed a differentiated approach for:
 - Collection holders under the direct control of the Federal Ministry (i.e. BMELV), which were instructed to introduce the SMTA.
 - Collections under the control of the Laender and/or local authorities, which were requested to introduce the SMTA.
 - All other collection holder (mixed, private), which were invited to use the SMTA as appropriate.

Reportedly, this series of actions produced a number of inclusions. In 2007, the German Fruit Genebank, coordinated by the Federal Research Centre for Cultivated Plants – Julius Kuehn Institute, introduced the SMTA for some of their collections. The Genebank of the Leibniz Institute of Plant Genetics and Crop Plant Research (IPK) introduced the SMTA in its administrative practices through amendments to the IPK Genebank Statutes and, in parallel, started the process of designation of material for the Multilateral System.

The government designated inclusions in the Multilateral System within the National Inventory for Plant Genetic Resources and subsequently notified in writing the Secretariat of the International Treaty.

This offers an example of a holistic approach by the government to inclusions in the Multilateral System, whereby automatic and voluntary inclusions are dealt with in a differentiated manner but in one process. The process consists of two key steps, namely delivering by the central government authorities of comprehensive information on the national implementation of the Multilateral System and the SMTA to all relevant national stakeholders; and utilizing a pre-existing infrastructure for national plant genetic resources systems to generate inclusions (in the case of Germany, the National Programme).

Elements for Consideration by this Advisory Technical Committee

Based on the information above, this Committee may wish to note that:

- Measures under Article 11.3 of the International Treaty apply to material which, according to the national interpretation of “under the management and control” and “in the public domain”, is not categorized as subject to mandatory (or, automatic) inclusion in the Multilateral System according to the obligations that Contracting Parties have under Article 11.2.
- Measures under Article 11.3 of the International Treaty may be addressed to a broad range of holders of material, from State genebanks in federal countries and semi-public genebanks partially integrated in administrative structures of governments to private genebanks.
- Contracting Parties may want to provide different sets of measures under Article 11.3 of the International Treaty at different times for different categories of holders (i.e. public, semi-public, private) or deal with those categories in one unified process that may also cover mandatory inclusions under Article 11.2 of the International Treaty.
- Any decision on the type and content of measures under Article 11.3 of the International Treaty is left to the discretion of Contracting Parties; those measures might consist of policy or legal upgrading as well as administrative actions and financial incentives; as a result, any advice that this Committee may wish to give should be in the form of recommended practices that Contracting Parties may follow on a voluntary basis.
- Regional initiatives for implementation of facilitated access under the Multilateral System may result in a coordinated effort by several Contracting Parties to encourage voluntary inclusions in the Multilateral System.
- Voluntary inclusions in the Multilateral System should be communicated to the Secretariat of the International Treaty using the sample letter of notification available on the International Treaty website in order to provide comprehensive information to the Governing Body in accordance with Resolution 4/2009.
- The official or unofficial information available to the Secretariat (and, in general, to the International Treaty community) as to measures in accordance with Article 11.3 is very limited. The members of this Committee may wish to gather more information from governments within their respective regions and share such information at the second meeting of this Committee.

**SAMPLE LETTER OF NOTIFICATION OF INCLUSION OF MATERIAL IN THE
MULTILATERAL SYSTEM**

To the Secretary of the International Treaty
on Plant Genetic Resources for Food and Agriculture
Mr. Shakeel Bhatti
Food and Agriculture Organization of the United Nations
Viale delle Terme di Caracalla 1
00153 Rome, Italy

Subject: notification regarding the contribution of the [name of the CP/Natural or Legal person] to the Multilateral System

The International Treaty on Plant Genetic Resources for Food and Agriculture has established a Multilateral System of Access and Benefit-sharing.

Regarding the coverage of the Multilateral System, Article 11 specifies that the Multilateral System shall include all plant genetic resources for food and agriculture listed in *Annex I* that are under the management and control of the Contracting Parties and in the public domain, and that Contracting Parties invite other holders of the plant genetic resources for food and agriculture listed in *Annex I* to include these in the Multilateral System.

Herewith, the [name of the CP/Natural or Legal person] wishes to notify to you that the following plant genetic resources for food and agriculture listed in *Annex I* and maintained in [name of the CP] have been included in the Multilateral System.

1. The collections held by [name of the collection centre], [name of the country], located in XX. Through the website [url address] detailed data on the composition of the collection and user procedures to order samples are readily available.
2. The [name of species] collection held by the [name of the collection centre] located in XX [and consisting of...]. The website [url address] provides access to the collection's database.

Germplasm held in the collections listed above will be made available to users under the conditions of the Standard Material Transfer Agreement of the International Treaty on Plant Genetic Resources for Food and Agriculture.