

January 2010



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 5.5 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

IN SITU MATERIAL AND THE MULTILATERAL SYSTEM: STANDARDS FOR ACCESS

I. CONTEXT

1. By Article 11.1 of the International Treaty, Contracting Parties have agreed that the Multilateral System of Access and Benefit-sharing (MLS) covers the plant genetic resources for food and agriculture (PGRFA) listed under *Annex I* of the Treaty.
2. According to Article 11.2 of the International Treaty, the MLS shall include *Annex I* PGRFA that are under the management and control of Contracting Parties and in the public domain. Contracting Parties have invited all other holders of *Annex I* PGRFA to include them into the MLS on a voluntary basis. In Article 11.3, Contracting Parties have agreed to encourage such voluntary inclusions.
3. By Article 12.3h of the Treaty, access to PGRFA found in *in situ* conditions will be provided according to national legislation or in the absence of such legislation, in accordance with such standards as may be set by the Governing Body.

II. QUESTIONS OR ISSUES

4. In this context, several Contracting Parties and other stakeholders inquired with the Secretary what possible legislative or other measures could be instituted at the national level to implement Article 12.3h of the Treaty or, in the absence of such measures, what standards the Governing Body could establish with regard to access to *in situ* PGRFA in the Multilateral System, and the Secretary raised this question to the first meeting of experts.
5. The first meeting of the Expert Group noted that, in accordance with Articles 12.3h and 11.2, *Annex I* PGRFA found in *in situ* conditions, which are under the management and control of a Contracting Party, and in the public domain, are automatically in the MLS. In accordance with Article 11.3, Contracting Parties should encourage the placing of other *in situ* materials in the MLS, by their holders. They noted also that Article 12.3h provides that access to such resources is

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to be provided in accordance with national legislation, or in the absence of such legislation, with such standards as may be set by the Governing Body. However, no such standards have yet been set. In considering possible options and approaches for establishing such standards, the Expert Group agreed that the Secretariat should provide the Expert Group with an initial review of the changes that may be required to the existing International Code of Conduct on Plant Germplasm Collecting and Transfer (Code of Conduct).

6. Pursuant to this request, a brief note has been prepared in order to facilitate discussions, and the provision of advice and opinion. The note is attached as *Annex* to this document.

III. ADVICE SOUGHT

7. The Committee's advice is sought on:

- (a) the need for and possible elements of standards by the Governing Body under Article 12.3h of the International Treaty;
- (b) the standards and other international instruments, including the Code of Conduct, which should be taken into account in the possible establishment of standards;
- (c) possible steps of the process for setting standards under Article 12.3h of the International Treaty;
- (d) what needs to be done and which information gathered in preparation for the second meeting of the Committee; and
- (e) which aspects of these questions need to be sent to the Governing Body and what options should be presented for its consideration.

ANNEX

IN SITU MATERIAL AND THE MULTILATERAL SYSTEM: STANDARDS FOR ACCESS

Introduction

According to Article 12.3h of the International Treaty, access to plant genetic resources for food and agriculture (PGRFA) found in *in situ* conditions will be provided according to national legislation or in the absence of such legislation, in accordance with such standards as may be set by the Governing Body. No such standards have yet been set.

At the First Meeting of Experts of the Standard Material Transfer Agreement and the Multilateral System held in Montreal in July 2008, standards under Article 12.3h of the International Treaty were identified as an outstanding issue with a reference made to the existing Code of Conduct on Germplasm Collecting and Transfer (Code of Conduct). It was agreed that the Secretariat should provide further information on this issue.

This note follows up to that request and brings to the attention of the members of the *Ad Hoc* Advisory Technical Committee some considerations on standards under Article 12.3h of the International Treaty and on possible Treaty processes for their development, should the Governing Body consider it desirable.

Requirements of Article 12.3h

Under the Multilateral System of Access and Benefit-sharing (Multilateral System), access is provided not only to PGRFA in *ex situ* collections but also to PGRFA found *in situ*. From the combined reading of Articles 12.3h and 11.2 of the International Treaty, and as noted by the first meeting of experts, *Annex I* PGRFA that are in *ex situ* collections, which are under the management and control of a Contracting Party, and in the public domain, are automatically in the Multilateral System. For other *Annex I* PGRFA in *in situ* conditions, access is to be provided according to national legislation.

Such national legislation might deal primarily with the mechanics of implementation of access, for instance, in cases where *in situ* material falling within the Multilateral System (i.e. *Annex I* material) is in national parks and other protected areas. National legislation may also set forth procedures for plant collecting, provided that the establishment of new requirements or conditions to access should not be inconsistent with the International Treaty. National legislation may also allow for additional protection for the interests of indigenous peoples and local communities. However, the provisions of Article 12.3h are “without prejudice to the other provisions under this Article [12]”.

Therefore, while all PGRFA under the control and management of the Contracting Party as well as in the public domain, (i.e. in the Multilateral System), are to be made available under the Standard Material Transfer Agreement (SMTA), if they are *in situ*, they may be made available under additional and compatible conditions to those of the SMTA.

Since any standards established by the Governing Body will apply in the absence of national legislation, the setting of those standards should generate a self-contained practical instrument that can operate in a national context, in the absence of national legislation.

Relevant International Instruments

The Governing Body, if it decides to adopt standards under Article 12.3h of the International Treaty, may wish to take into account, other international instruments of relevance to the implementation of the Multilateral System.

The International Code of Conduct on for Plant Germplasm Collecting and Transfer

The International Code of Conduct for Plant Germplasm Collecting and Transfer aims to promote the rational collection and sustainable use of plant genetic resources, to prevent genetic erosion, and to protect the interests of both donors and collectors of plant germplasm. The Code was negotiated by the Commission on Genetic Resources for Food and Agriculture and was adopted by the FAO Conference, at its Twenty Seventh Session in 1993.¹ The Code of Conduct regulates the collection and transfer of plant germplasm from their natural habitats or surroundings, and the Commission oversees its implementation.

Article 16.1 of the Code of Conduct provides that “appropriate national authorities and the FAO Commission on Plant Genetic Resources should periodically review the relevance and effectiveness of the Code. The Code should be considered a dynamic text that may be brought up to date as required, to take into account technical, economic, social, ethical and legal developments and constraints”.

In the context of the Article 12.3.h, and the potential relevance of the Code of Conduct to the broader implementation of the Treaty,² and in order to avoid duplication of efforts, a possible option that the Governing Body might consider is to use the Code of Conduct as an important source of information for the establishment of standards under Article 12.3h of the International Treaty.

The Convention on Biological Diversity and the Bonn Guidelines on Access and Benefit-sharing

Any standards for access to PGRFA in *in situ* conditions that the Governing Body may set, whether or not on the basis of the Code of Conduct, would need to be in harmony with the Convention on Biological Diversity (CBD) and other relevant international conventions. In the development of standards, attention should also be paid to rules which are currently under development, such as the rules of the international regime on access and benefit-sharing, which is being negotiated under the auspices of the CBD. Negotiations on the international regime are still ongoing and at a stage where the outcome regarding the nature of any resulting instrument or instruments is not yet determined. It is possible that the instrument or instruments or some parts thereof will be of a legally binding nature. However, since the current text is still under negotiation and contains several different options, it will not be considered in any detail here. But it is to be expected that the final outcome would recognise and take existing international agreements into account, in particular, the International Treaty.

¹ C 1993/REP, paragraph 113 and Appendix E.

² See also paragraphs 29 – 31 of Document IT/GB-3/09/13, *Review of the Implementation of the Multilateral System*.

The Conference of the Parties to the CBD approved the Bonn Guidelines on Access and Benefit-sharing (Bonn Guidelines) at its sixth meeting in 2004 (Decision VI/24). The Bonn Guidelines are a further articulation of the access and benefit-sharing provisions of the CBD, which are based on the principles of prior informed consent and mutually agreed terms (CBD, Article 15). They are voluntary and are designed to provide inputs for Parties when developing legislative, administrative or policy measures on access and benefit-sharing with particular reference to provisions under Articles 8(j), 10 (c), 15, 16 and 19 of the CBD

In developing standards under Article 12.3h, if it so decides, the Governing Body may also consider taking into account provisions of the Bonn Guidelines that are suitable to the nature and specificities of PGRFA and that conform with the provisions of the International Treaty.