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The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 7 of the Draft Provisional Agenda

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

Rome, Italy, 6-7 November 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 (ABS). It 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.²
2. At its third meeting, in June 2012, the Committee began re-examining the issue in the light of the major developments that occurred in regard to the global governance of ABS, 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, including on possible processes or practical approaches to ensure the harmonious implementation of the Nagoya Protocol with the Multilateral System, and, in accordance with the request of the Committee, re-submits the issue of model provisions that may be inserted in national ABS legislation, for the further consideration 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.

II. PREVIOUS WORK BY THE COMMITTEE

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 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 Treaty. 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 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. At its third meeting in June 2012, the Committee considered document IT/AC-SMTA-MLS/3/12/5, which reviewed the relevant provisions of the Nagoya Protocol, the related decision of the Conference of the Parties to the CBD, Resolution 8/2011 of the Governing Body of the Treaty, and informed about cooperation between the Secretariats of the CBD and the Treaty on capacity building, in particular to promote mutual supportiveness and harmonious implementation of the Nagoya Protocol and the Treaty.⁴

8. In the document, it was noted that the recommendation made by the Committee as to model provisions in domestic ABS legislation was 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, it was noted that, with the adoption of the Nagoya Protocol and its possible implementation in the near future, 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 implied that the regime for those resources would be legislated separately, could not be the only possible solution. This is so, because of the presence of a range of policy, functional and practical

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

⁴ IT/AC-SMTA-MLS 3/12/5, *Creating legal space for the Treaty in the context of access and benefit-sharing*, available at <http://www.planttreaty.org/sites/default/files/AC-SMTA-MLS%203-5%20Creating%20legal%20space%20for%20Treaty%20under%20ABS.pdf>

interfaces in the governance of plant genetic resources for food and agriculture, especially at the national level.

9. Furthermore, it was noted that a range of policy and operational issues had been identified by some Contracting Parties and users of the Multilateral System on how mutual supportiveness and harmonious implementation could 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 included, *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.

10. In the document, it was recalled that the Committee had 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).⁵ In that context as well, the Committee was invited to consider the implications of, and whether or not an exclusion from scope, as already developed by the Committee, would be enabling enough to the construction of a practical interface between general ABS requirements and the operation of the Multilateral System.

11. In the document, it was also noted that, 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 coordination between the Treaty's and the Nagoya Protocol's constituencies and processes. In this regard, it was recalled that one of the joint capacity building workshops organised by the two Secretariats had called for 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 Treaty.⁶

12. At the meeting, the Committee noted that Contracting Parties, many of whom lack capacity, would benefit from the continued provision of support and advice that could assist them in fulfilling their obligations under the respective agreements in a coherent manner.

13. The Committee emphasized that a necessary step for Contracting Parties to implement the Multilateral System would be to determine what plant genetic resources for food and agriculture of *Annex I* crops and forages are under the management and control of the government, and in the public domain.

14. The Committee was of the view that nothing in the Nagoya Protocol would prevent Contracting Parties to the Treaty that will also be Parties to the Nagoya Protocol from implementing the Treaty and its Multilateral System. The Committee emphasized that practical and harmonious interfaces between general ABS requirements and the operation of the Treaty and its Multilateral System would have to be created in positive and constructive ways, both nationally and internationally. In that regard, the Committee encouraged the Secretariat of the Treaty to continue its collaboration with the Secretariat of the CBD and, based on available resources, to promote the establishment of a joint group of experts to compile a checklist of issues that are important in achieving mutual supportiveness between the two instruments.

⁵ 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

⁶ The other recommendations of the workshop were:

- 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.

15. The Committee emphasized the need for the continued interaction between the different constituencies of the Treaty and the CBD, especially at the national level in the course of their implementation. It also agreed to continue reviewing the matter of the interface between the two agreements as the situation evolves and countries gain more experience in such implementation.

16. With regard to possible model provisions that may be inserted in national ABS legislation, the Committee considered the following new draft text, for further consideration by the Committee at this meeting:

“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 covered by the Treaty, and sharing the benefits arising from their utilization, should only be subject to the conditions set out in the said Treaty, as applicable.”⁷

III. RECENT DEVELOPMENTS

17. After the last meeting of the Committee, and in line with its recommendation, the Secretariat explored the possibility of convening a joint group of experts to advise on mutual supportiveness and harmonious implementation.

18. An exploratory expert workshop on “The International Treaty and the Nagoya Protocol: Supporting mutual supportiveness in the implementation of both instruments at the national level” is being planned to be held in the near future. The workshop is organized by the ABS Capacity Development Initiative (managed by GIZ), in collaboration with the Secretariats of the CBD and the Treaty, and may be hosted by Bioversity International.

19. The objective of the expert workshop is to increase the understanding of the interfaces between the Nagoya Protocol and the Treaty with a view to supporting their implementation in a mutually supportive manner by regulators and other relevant actors involved in national implementation processes. It is expected that the outcomes of the workshop will be utilized in future capacity development activities of the workshop organizers.

20. The expert workshop will seek to clarify some of the potential issues for consideration with a view to promoting harmonious implementation and, in addition to that, will endeavor to identify some basic parameters for national measures to achieve mutual supportiveness in the implementation of the two instruments. Thus, from the Treaty’s perspective, it will create awareness and ensure that, in the formulation of national ABS measures, a more comprehensive approach is taken or otherwise appropriate allowance is made for the fulfilment of the Treaty’s objectives and obligations. This includes the situations where countries are either not in a position or have chosen not to elaborate an legislative route in the implementation of the Multilateral System.

21. With a view to informing the discussions during the workshop, a background paper will be developed to outline the interfaces between the Nagoya Protocol and the Treaty. The paper will also elaborate on approaches taken by countries to implement the Treaty at national level, and highlight issues for consideration in order to ensure mutual supportiveness and harmonious implementation of both instruments.

22. A limited number of participants are anticipated to attend the workshop, featuring a

⁷ IT/AC-SMTA-MLS/12/3/Report, paras. 27-31. The report is available at <http://www.planttreaty.org/sites/default/files/ACSMTA3re.pdf>

balanced representation of stakeholders from both Nagoya Protocol and Treaty communities, including a number of participants from countries receiving technical assistance, private sector, and legal experts, all acting in their personal capacity.

IV. ADVICE SOUGHT

23. The Committee is invited to:
- a) continue reviewing the matter of the interface between the Nagoya Protocol and the Treaty, including the current and possible future initiatives by the Secretariat of the Treaty, and support and advice that could assist Contracting Parties in fulfilling their obligations under the respective agreements in a coherent manner;
 - b) consider the new draft text of model provisions that may be inserted in national ABS legislation, as provided in paragraph 16 above.