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COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Items 3 & 6 of the Provisional Agenda
TEAM OF TECHNICAL AND LEGAL EXPERTS ON ACCESS AND BENEFIT-SHARING
First Session
Rome, 8 - 11 July 2014
PLANT GENETIC RESOURCES AND ACCESS AND BENEFIT-SHARING

The Commission, at its Fourteenth Regular Session, requested the Team of Technical and Legal Experts on Access and Benefit-Sharing (TTLE ABS) to help prepare the intergovernmental technical working group meetings, and based on input from the regions, prepare written materials and propose guidance for the intergovernmental technical working groups.¹

This document contains the document, *Plant genetic resources and access and benefit-sharing*, prepared with the help of the Team of Technical and Legal Experts for the Third Session of the Commission's Intergovernmental Technical Working Group on Forest Genetic Resources (Working Group).

As requested by the Commission, the TTLE ABS will participate in the Third Session of the Working Group to help inform and shape the discussions and output of the Working Group.² In line with the Commission's request, the TTLE ABS is invited to compile the outputs of the Working Group into *Draft Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture*.³

¹ CGRFA-14/13/Report, paragraph 40 xiii.

² CGRFA-14/13/Report, paragraph 40 xiii.

³ CGRFA-14/13/Report, paragraph 40 xiii.

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COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Item 8 of the Provisional Agenda
INTERGOVERNMENTAL TECHNICAL WORKING GROUP ON FOREST GENETIC RESOURCES
Seventh Session
Rome, 9 – 11 July 2014
PLANT GENETIC RESOURCES AND ACCESS AND BENEFIT-SHARING

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I. INTRODUCTION

1. At its last Session in April 2013, the Commission on Genetic Resources for Food and Agriculture (the Commission) considered the need for and modalities of access and benefit-sharing (ABS) arrangements for genetic resources for food and agriculture (GRFA). The Commission put in place a process the final output of which it requested to be *Draft Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture (Draft Elements)*, taking into account relevant international instruments on ABS⁴. As part of this process, the Commission requested its intergovernmental technical working groups on animal, forest and plant genetic resources to explore ABS issues for their respective subsectors.⁵

2. The Commission established a Team of Technical and Legal Experts on Access and Benefit-sharing (TTLE ABS) consisting of up to two representatives from each of the seven FAO regions. The TTLE ABS was mandated to:

- Coordinate, with the assistance of the Secretariat, by electronic means as appropriate, to help prepare the intergovernmental technical working group meetings, and based on input from their regions to prepare written materials and propose guidance for the intergovernmental technical working groups;⁶
- Participate in designated portions of the intergovernmental technical working group meetings dedicated to addressing ABS issues, to help inform and shape the intergovernmental technical working group discussions and output;⁷ and
- Work after each intergovernmental technical working group meeting with the Secretariat to compile the intergovernmental technical working group outputs into the *Draft Elements*, and communicate the *Draft Elements* to their regions for information.⁸

3. The Commission requested its Secretary to develop explanatory notes to the distinctive features of GRFA identified in *Appendix E* to the Commission's report, for review by the Working Groups and consideration by the Commission.⁹ In addition, it invited countries and stakeholders to report on use and exchange practices and relevant voluntary codes of conduct, guidelines and best practices, and/or standards on ABS, respectively, for consideration of the Working Groups and the Commission.¹⁰ The explanatory notes and country and stakeholder reports are contained in information documents provided for this agenda item.¹¹

4. This document briefly summarizes the Commission's work on ABS related to plant genetic resources for food and agriculture (PGRFA) and gives an overview of the key mechanism for the global exchange of PGRFA, the *Multilateral System of Access and Benefit-sharing* (MLS) of the *International Treaty on Plant Genetic Resources for Food and Agriculture* (Treaty). In a second step, the document outlines some relevant provisions of the Treaty and the *Nagoya Protocol on Access to Genetic Resources and the Fair Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Protocol). Subsequently the document reports on recent developments under the Treaty, in particular the decision of the Governing Body to explore measures that will enhance the functioning of the Multilateral System and, finally, seeks the Working Group's guidance with regard to the Commission's future work on ABS for PGRFA following the decisions of the Commission at its Fourteenth Regular Session, and taking into account on-going work under the Treaty and the mandate of its Governing Body.

⁴ CGRFA-14/13/Report, paragraph 40 (xv).

⁵ CGRFA-14/13/Report, paragraph 40 (xii).

⁶ CGRFA-14/13/Report, paragraph 40 (xiii).

⁷ CGRFA-14/13/Report, paragraph 40 (xiii).

⁸ CGRFA-14/13/Report, paragraph 40 (xv).

⁹ CGRFA-14/13/Report, paragraph 40 (x).

¹⁰ CGRFA-14/13/Report, paragraph 40 (viii); (ix).

¹¹ CGRFA/WG-PGR/7/14/Inf. 6; CGRFA/WG-PGR/7/14/Inf. 7; CGRFA/WG-PGR/7/14/Inf. 8. See also UNEP/CBD/ICNP/3/10; UNEP/CBD/ICNP/3/INF/2; and: <http://www.cbd.int/icnp3/submissions/>.

II. BACKGROUND

5. FAO and its Commission have a longstanding history of dealing with issues related to ABS for GRFA, in particular PGRFA. In 1983, the FAO Conference adopted the *International Undertaking on Plant Genetic Resources for Food and Agriculture* (International Undertaking), which provided a policy and planning framework for the Commission with respect to plant genetic resources. During the following years, the Commission negotiated further resolutions that interpreted the International Undertaking, and in 1994, started revising the International Undertaking. As a result of this process, the FAO Conference in 2001 adopted the Treaty, the first legally binding and fully operational international instrument for ABS for PGRFA.

6. In the same year, 2001, the Convention on Biological Diversity (CBD) convened the first meeting of its *Ad Hoc* Open-Ended Working Group on Access and Benefit-sharing which produced the draft *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*. In 2002, the Conference of the Parties of the CBD adopted the *Bonn Guidelines*. Shortly thereafter, the World Summit on Sustainable Development set a process in motion which, in 2010, led to the adoption of the Protocol.

7. The Treaty, the CBD and the Protocol recognize the authority of governments to determine, subject to national legislation, access to genetic resources, and acknowledge that this authority flows from the sovereign rights of States over their natural resources. The Treaty represents the agreement of its Contracting Parties to exercise these sovereign rights through the *Multilateral System of Access and Benefit-sharing* (MLS), by facilitating access and the sharing of monetary and non-monetary benefits arising from the use of PGRFA through standardized conditions, as set out in the Standard Material Transfer Agreement (SMTA). The ABS mechanism of the Treaty is thus different from the bilateral, case-by-case approach primarily envisaged by the CBD and the Protocol.

8. In adopting the Protocol, the Conference of the Parties of the CBD recognized the Treaty as one of the “complementary instruments” that constitute the International Regime on ABS and recognized that the objectives of the Treaty are the conservation and sustainable use of PGRFA and the fair and equitable sharing of the benefits arising out of their use, in harmony with the CBD, for sustainable agriculture and food security.¹² The Governing Body of the Treaty, at its Fifth Session, called on Contracting Parties to ensure that any legislative, administrative or policy measures taken for the implementation of both the Treaty and the CBD or its Protocol, are consistent and mutually supportive.¹³

The Treaty’s Multilateral System of Access and Benefit-Sharing

9. As acknowledged in the Preamble to the Treaty, all countries depend very largely on PGRFA that originated elsewhere.¹⁴ Moreover, PGRFA have been widely and over millennia exchanged across communities, countries and regions which makes it often difficult, if not impossible, to attribute them to a specific country of origin.¹⁵ There is, in addition, agreement that PGRFA are the raw material indispensable for crop genetic improvement and essential in adapting to unpredictable environmental changes and future human needs and, thus, their exchange across national boundaries is of pivotal importance to global food security. It is mainly for these reasons, that FAO Members agreed on the Treaty’s MLS.

¹² Decision X/1. *Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization*.

¹³ Resolution 5/2013, paragraph 3.

¹⁴ See, Flores Palacios. Contribution to the estimation of countries' interdependence in the area of plant genetic resources. Background Study Paper No. 7 Rev.1.

¹⁵ See, Hardon et al., Identifying genetic resources and their origin: the capabilities and limitations of modern biochemical and legal systems. Background Study Paper No. 4; Schloen et al., Access and benefit-sharing for genetic resources for food and agriculture – current use and exchange practices, commonalities, differences and user community needs – Report from a multi-stakeholder dialogue. Background Study Paper No. 59, p. 19.

10. Under the MLS, Contracting Parties are required to provide access to PGRFA listed in Annex I of the Treaty for the purposes of utilization and conservation for research, breeding and training for food and agriculture, provided the PGRFA are under their management and control and in the public domain.¹⁶ Access shall be granted in accordance with standardized conditions and be accorded “expeditiously without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved.” ABS under the Treaty’s MLS are thus not a matter for negotiation on a case-by-case basis; they follow a set of standardized, pre-defined conditions, as laid down in the SMTA adopted by the Governing Body. The Treaty explicitly recognizes that this “facilitated access” to PGRFA constitutes itself a major benefit of the MLS.¹⁷ Monetary benefits accrued in the Multilateral System are not shared bilaterally between provider and recipient, as generally envisioned by the CBD and the Protocol. Instead, they are paid by the recipient into a trust fund (the Benefit-sharing Fund) established for receiving financial resources and utilizing them primarily for the direct or indirect benefit of farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainably use PGRFA.¹⁸

11. The Treaty, with its standardized ABS conditions creates an obligation for countries to provide facilitated access in accordance with the conditions laid down in the Treaty. While under the CBD, Parties shall “endeavour to create conditions to facilitate access to genetic resources”¹⁹ and Parties of the Protocol shall, inter alia, “create conditions to promote and encourage research,”²⁰ neither of the two instruments creates any (conditional or unconditional) obligations to provide or right to access genetic resources. ABS, as envisioned by the CBD and the Protocol, are ultimately a matter for bilateral agreements on a case-by-case basis.

III. PLANT GENETIC RESOURCES AND ACCESS AND BENEFIT-SHARING

12. The Protocol applies to genetic resources generally. The Treaty applies to all PGRFA, even though its MLS only applies mandatorily to PGRFA listed in Annex I of the Treaty that are under the management and control of a Contracting Party, are in the public domain and are solely provided for the purpose of utilization and conservation for research, breeding and training for food and agriculture (except chemical, pharmaceutical and/or other non-food/feed industrial uses).

13. The MLS also includes all PGRFA listed in Annex I held in the *ex situ* collections of the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR)²¹ or in other international institutions the Governing Body has concluded agreements with.²² At its Second Session, the Governing Body endorsed the use of the SMTA by the IARCs, for PGRFA other than those listed in Annex I of the Treaty and collected before its entry into force, with an interpretative footnote or series of footnotes.²³ Article 11.3 of the Treaty also recognizes that natural and legal persons within the jurisdiction of Contracting Parties who hold PGRFA listed in Annex I can also include such PGRFA in the Multilateral System. Some countries apply, on a voluntary basis, the SMTA to non-Annex I PGRFA.

The Treaty as specialized instrument

14. Both instruments, the Treaty and the Protocol, address certain types of genetic resources and may overlap in their scope of application. The Protocol itself addresses the relationship between the

¹⁶ Treaty Articles 12.2; 11.2.

¹⁷ Treaty, Article 13.1.

¹⁸ Treaty, Article 13.3.

¹⁹ CBD, Article 15.2

²⁰ Protocol, Article 8a.

²¹ Treaty, Article 11.5.

²² Treaty, Articles 11.5; 15.5; see <http://planttreaty.org/content/agreements-concluded-under-article-15>.

²³ IT/GB-2/07/Report, paragraph 68.

Treaty and the Protocol. First of all, the Protocol, in its Preamble, acknowledges the interdependence of all countries with regard to GRFA as well as their special nature and importance for achieving food security worldwide and for sustainable development, and it acknowledges the role of the Treaty and the Commission in this regard. More specifically, Article 4.4 of the Protocol clarifies that the Protocol does not apply where a specialized international ABS agreement, such as the Treaty, applies:

Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.

15. Thus, the Treaty, as a specialized international ABS instrument which is consistent with and does not run counter to the objectives of the CBD and the Protocol, will take priority whenever MLS PGRFA are exchanged between Contracting Parties of the Treaty for the purposes of the Treaty, i.e., for the purpose of utilization and conservation for research, breeding and training for food and agriculture, (excluding chemical, pharmaceutical and/or other non-food/feed industrial uses). Even where a Protocol Party is not a Party to the Treaty, it will have to abide by the rules of the MLS with regard to MLS PGRFA, as these are only available upon acceptance of the SMTA.

IV. MEASURES TO ENHANCE THE FUNCTIONING OF THE TREATY'S MULTILATERAL SYSTEM

16. The Governing Body, at its Fifth Session, decided to establish an *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing with the mandate to develop a range of measures that will: (a) increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and (b) enhance the functioning of the MLS by additional measures.²⁴ The Governing Body is to consider and decide on these measures at its Sixth Session.²⁵

17. The *Ad Hoc* Open-ended Working Group was established upon recommendation by the *Ad Hoc* Advisory Committee on the Funding Strategy²⁶ which, at the request of the Governing Body, had explored the issue of resource mobilization for the Benefit-sharing Fund, with a particular focus on “innovative approaches.” The Advisory Committee identified a number of such potential innovative approaches, including “the possibility to expand the coverage of the Multilateral System,” which could be effected by a change of the Treaty or the adoption of a Protocol to the Treaty.²⁷

V. GUIDANCE SOUGHT

18. The Working Group may wish to review the explanatory notes to the distinctive features of GRFA, taking into account current use and exchange practices, relevant voluntary codes of conduct, guidelines and best practices, and/or standards on ABS, as reported to the Commission Secretariat.

19. The Working Group may wish to recommend that with regard to PGRFA the *Draft Elements to Facilitate Domestic Implementation of Access and Benefit-Sharing for Different Subsectors of Genetic Resources for Food and Agriculture*:

²⁴ IT/GB-5/13/Report, Appendix A.2, Part IV.

²⁵ IT/GB/5/13/Report, Resolution 2/2013.

²⁶ IT/GB-5/13/Inf.4 Add.2.

²⁷ IT/GB-5/13/Inf.4 Add.2, paragraphs 26-29.

- (i) Refer to the MLS of the Treaty and encourage countries that have not done so, to consider the option of ratifying or acceding the International Treaty as soon as possible, to promote its full implementation in regard to PGRFA and to recognize the importance of providing support to countries for this purpose, in particular through the capacity-building activities under the International Treaty; and
- (ii) Refer to the on-going process under the Treaty to develop a range of measures that will: (a) increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and (b) enhance the functioning of the MLS by additional measures.²⁸
- (iii) Refer to the *Distinctive Features of Genetic Resources for Food and Agriculture* and associated explanatory notes, and encourage countries in their domestic ABS regimes implementing the Treaty and the Protocol to ensure that (a) these distinctive features are adequately recognized; (b) appropriate ministries, including for agriculture and GRFA issues, are closely involved in the development of domestic ABS regimes for genetic resources more generally; (c) the development of domestic ABS regimes is done in coordination with appropriate stakeholders, including users of GRFA across various subsectors, to ensure the distinctive features and various customs regarding GRFA are taken into account; and (d) exchange across national boundaries is enhanced given its pivotal importance to global food security.

²⁸ IT/GB-5/13/Report, Appendix A.2, Part IV.