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The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 5.4 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

PRACTICAL, AND LEGAL IMPLICATIONS FOR NATURAL AND LEGAL PERSONS PUTTING MATERIAL INTO THE MULTILATERAL SYSTEM

I. CONTEXT

- Under Article 11.3 of the Treaty Contracting, Parties furthermore 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

- The first meeting of Experts examined the implications of natural and legal persons bringing Annex 1 material into the Multilateral System, on a voluntary basis. Since the Treaty does not apply directly to them, and if they have not received the materials under an SMTA, they would have no legal obligations other than those they subsequently enter into as Providers under an SMTA. The Expert Group requested, for review at its next meeting, a short explanatory note that might be given to those considering putting material into the Multilateral System, to clarify the situation.

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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3. 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 as contained in the *Annex* to this document.

III. ADVICE SOUGHT

4. The Committee's advice is sought on:

- (a) the implications of natural and legal persons bringing Annex 1 material into the, including possible elements of how to address them;
- (b) what needs to be done and which information gathered in preparation for the Second Meeting of Experts, 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.

ANNEX

I. Explanatory Note for Natural and Legal Persons Wishing to Include Material in the Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture on a Voluntary Basis

A. Introduction

1. In Article 11.2 of the International Treaty on Plant Genetic Resources for Food and Agriculture (the “Treaty”), the Contracting Parties “*invite all other holders of the plant genetic resources for food and agriculture listed in Annex 1 to include these plant genetic resources for food and agriculture in the Multilateral System*” established in Part IV of the Treaty. In Article 11.3, the “*Contracting Parties also agree 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 1 to include such plant genetic resources for food and agriculture in the Multilateral System*”.
2. While review of this type has not taken place yet, the Governing Body is required, under Article 11.4 of the Treaty, “*to assess the progress in including the plant genetic resources for food and agriculture referred to in paragraph 11.3 in the Multilateral System. Following this assessment, the Governing Body shall decide whether access shall continue to be facilitated to those natural and legal persons referred to in paragraph 11.3 that have not included these plant genetic resources for food and agriculture in the Multilateral System, or take such other measures as it deems appropriate.*”
3. At its Third Session in Tunis 2009, the Governing Body expressed its concern at the present lack of information on the inclusion in the MLS of material by natural and legal persons, and reiterated the urgency of obtaining appropriate information, including the names of holders, crops included and the total number of accessions included.
4. This note is intended to clarify the procedures for voluntary inclusion of material in the Multilateral System (MLS) and the legal implications of such inclusion.

B. Procedures for inclusion of material in the MLS on a voluntary basis

1. Under the Treaty, all plant genetic resources for food and agriculture under the management and control of the **Contracting Parties** and in the public domain are **automatically included** in the MLS. The Treaty is silent on procedures for **natural or legal persons** including material voluntarily in the MLS. However, as noted above, the Governing Body has expressed its need to have information on the identity of the holders of collections, and the crops and total number of accessions included. **While there is no legal requirement to do so, natural and legal persons wishing to include Annex 1 material in the MLS are encouraged to notify such inclusion to the Treaty Secretariat, using the sample letter provided on the Treaty website at http://www.planttreaty.org/inclus_en.htm**

2. While natural or legal persons can include material directly in the Multilateral System, they can also do so indirectly by transferring the material to a genebank whose collection or collections are already part of the Multilateral System, such as any of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research that have signed agreements with the Governing Body under Article 15 of the International Treaty placing the collections they hold in trust within the purview of the Treaty, or the national genebank of a Contracting Party to the Treaty. Such transfers can be carried out under the Standard Material Transfer Agreement (SMTA), in which case they will need to be reported to the Governing Body of the Treaty providing the information listed in footnote 1 below. Since the material is not already in the Multilateral System, there is no legal obligation for the transfer to take place under the SMTA, and the material could be transferred with a simple letter recording the wish of the provider that the material be made available under the terms of the Multilateral System. The recipient Centre or genebank will then take care of all formalities of making the material available to others under the SMTA and reporting thereon to the Governing Body.

C. *Legal Implications of a notification of inclusion of Annex 1 material in the Multilateral System*

1. The notification of inclusion of material in the Multilateral System on a voluntary basis does not in itself create any legal obligations on the natural or legal person making such notification.
2. Such a notification creates an **expectation** that the natural or legal person making the notification will make the material available to the Contracting Parties or other legal and natural persons within the jurisdiction of a Contracting Party under the Standard Material Transfer Agreement. However there is **no legally binding obligation** that the notifier does so.
3. At present such a **notification does not create any legal rights** for the notifier, although this may change should the Governing Body decide that access should not continue to be facilitated to natural and legal persons that have not included these plant genetic resources for food and agriculture in the MLS. See paragraph A.2 above.
4. Placing material in the Multilateral System and notifying the Governing Body may also have the effect of demonstrating the existence of the material in its present form and thus protecting it against patenting.²
5. Legal rights and obligations for a natural or legal person can be created only by the **act of signing the SMTA** granting facilitated access to the plant genetic resources for food and agriculture under the MLS. At that point, the natural or legal person will become a **Provider** of material under the SMTA and will have the following **rights and obligations under the SMTA**:
 - a. Access to the PGRFA must be accorded expeditiously and free of charge, or at minimum cost;
 - b. All available passport data and, subject to applicable law, any other associated available non-confidential descriptive information must also be made available;

² In this connection, the issue arises as to the effect of pre-existing intellectual property rights held by the natural and legal person over the material. In principle, plant breeders' rights, that are UPOV consistent, over the material would not constitute any impediment to placing the material in the Multilateral System, since they would allow for availability for further research and breeding. Patent rights that will preclude such further availability will appear to be inconsistent with the conditions of the SMTA. Such rights would, therefore, need to be waived.

- c. Access to PGRFA under Development is at the discretion of the developer during the period of development;
 - d. Access to PGRFA protected by intellectual and other property rights must be consistent with relevant international agreements and with relevant national laws;
 - e. The Provider must inform the Governing Body periodically about the Material Transfer Agreements entered into on the basis of the SMTA³.
6. Plant genetic resources for food and agriculture in the MLS consist of **individual accessions, samples or other material**, and not all of a particular crop, species or variety. Consequently:
- a. Should the natural or legal person including material in the MLS retain accessions or samples of any material, those **retained accessions or samples are not subject to any legal obligations under the MLS or the SMTA**, including obligations of benefit-sharing, unless the material has been previously received under an SMTA;
 - b. Should the natural or legal person, on the other hand, wish to access accessions or samples from the person to whom he has transferred them under an SMTA (in other words to have the accessions or part of them returned) then the **returned accessions or samples** will be subject to the legal obligations set out in the SMTA.
7. In view of the above, should natural and legal persons wish to continue working with material they hold without incurring any legal obligation for future benefit sharing etc, particularly when they are transferring material to a CG Centre or national genebank, then they may wish to retain sufficient material for their on-going work.

³ At its Third Session in Tunis in 2009, the Governing Body decided that Parties to the SMTA should make the following information available to the Governing Body:

“A. The Provider transmitting a copy of the completed SMTA,

or

B. In the event that the Provider does not transmit a copy of the SMTA

i. ensuring that the completed SMTA is at the disposal of the Third Party Beneficiary as and when needed;

ii. stating where the SMTA in question is stored, and how it may be obtained; and

iii. providing the following information:

a) The identifying symbol or number attributed to the SMTA by the Provider;

b) The name and address of the Provider;

c) The date on which the Provider agreed to or accepted the Standard Material Transfer Agreement, and in the case of shrink-wrap, the date on which the shipment was sent;

d) The name and address of the Recipient, and in the case of a shrink-wrap agreement, the name of the person to whom the shipment was made;

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e) The identification of each accession in *Annex I* to the SMTA, and of the crop to which it belongs.

iv. The Third Party Beneficiary shall at all times ensure the confidentiality of electronic data. This obligation comprises :

- Industry-standard secured environment encryption during data transmission;
- Secure hosting of the datastore in the UN International Computing Centre (UNICC), Geneva; and
- Encryption of the data, with separate encryption in the datastore of Provider and Recipient data, and of accession data.

Access to the datastore shall be strictly restricted to the Third Party Beneficiary, in the context of the possible initiation of dispute settlement. The Third Party Beneficiary shall not provide any data to any other person, except to the persons who need to know in the context of dispute settlement, and dispute settlement proceedings shall, in accordance with normal commercial practice, be confidential.”