



Food and Agriculture  
Organization of the  
United Nations



The International Treaty  
ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE



# Decision-making tool for national implementation of the Plant Treaty's multilateral system of access and benefit-sharing



Joint Capacity Building Programme for Developing Countries on Implementation of the ITPGRFA and its Multilateral System of Access and Benefit-sharing.



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The **Joint Capacity Building Programme for Developing Countries on Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and its Multilateral System of Access and Benefit-sharing (Joint Capacity Building Programme)** has the objective to improve knowledge of the structure and mechanisms of the multilateral system among regional and national stakeholders, and upgrade the institutional, legal and administrative infrastructure for operation of the multilateral system. The programme has been designed and implemented to respond to requests for assistance by developing countries, based on priorities established by the Governing Body and available funding. The programme is coordinated by the Secretary of the ITPGRFA and jointly executed by FAO and Bioversity International.

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**Citation:** Joint Capacity Building Programme (2018). Decision-making tool for national implementation of the Plant Treaty's multilateral system of access and benefit-sharing. Bioversity International, Rome, Italy.

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Design and Layout: Luca Pierotti

ISBN: 978-92-9255-082-0

## Acknowledgements

The Joint Capacity Building Programme acknowledges support of the following projects and programmes in the development of this tool:

The **Genetic Resources Policy Initiative: Strengthening National Capacities to implement the International Treaty on Plant Genetic Resources for Food and Agriculture' (GRPI)** funded by the Directorate-General for International Cooperation, Ministry of Foreign Affairs, the Netherlands. GRPI was managed by Bioversity International under the overall framework of the Joint Capacity Building Programme (<https://grpi2.wordpress.com/>)

The **CGIAR Research Program on Climate Change Agriculture and Food Security (CCAFS)** led by CIAT ([www.ccafs.cgiar.org](http://www.ccafs.cgiar.org)) and the **CGIAR Genebank Platform** ([www.genebanks.org](http://www.genebanks.org)).



RESEARCH PROGRAM ON  
**Climate Change,  
Agriculture and  
Food Security**



Genebank  
Platform



Ministry of Economic Affairs of the  
Netherlands

## Foreword

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) is one of the most important achievements of the international community in the last decades. It recognizes the crucial importance of plant genetic resources for ensuring food and nutrition security, and puts in place mechanisms that facilitate international cooperation for the conservation, exchange and sustainable use of crop and forage diversity and for sharing benefits derived from the use of those resources. Among these mechanisms, the ITPGRFA's multilateral system of access and benefit-sharing creates a virtual pool of plant genetic resources available at no cost (or minimal administrative costs) for research, breeding and training activities in all countries that are parties to the ITPGRFA.

The national and regional implementation of the ITPGRFA's multilateral system requires extensive capacity building at different policy and administrative levels. Many countries that are Contracting Parties to the ITPGRFA seek assistance in developing the necessary institutional, legal, policy and administrative measures or mechanisms to implement the ITPGRFA's multilateral system. The FAO/Bioversity/ITPGRFA Secretariat Joint Capacity Building Programme for Developing Countries on Implementation of the ITPGRFA and its Multilateral System of Access and Benefit-sharing (Joint Capacity Building Programme) has been designed and implemented to respond to some of those requests for assistance, based on priorities established by the Governing Body of the ITPGRFA.

This decision-making tool is a product of the Joint Capacity Building Programme. It is designed to assist national-level policy actors identify appropriate measures to implement the multilateral system within their country, taking into consideration the fact that a growing number of countries that are Contracting Parties to the ITPGRFA are also parties to the Nagoya Protocol on access and benefit-sharing. It is based on experiences gained working with national partners in a number of countries over the past eight years developing national policies and systems to implement the multilateral system. In retrospect, this kind of tool should have been developed years ago to provide assistance and options for all countries in putting such systems in place. However, without those years spent accumulating experiences and lessons learned, it would not have been possible to put together a decision-making tool like this one, that is so straightforward, logical, and sensitive to the kinds of challenges that policy makers and other stakeholders face when developing such systems.

I very much hope that all Contracting Parties to the ITPGRFA will familiarize themselves with this publication, and that those who have not yet put a full package of measures in place to implement the multilateral system will find it helpful in doing so.

**Kent Nnadozie,**  
**Secretariat of the International Treaty on Plant Genetic Resources**  
**for Food and Agriculture**

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## List of acronyms

<b>ABS</b>	Access and benefit-sharing
<b>CBD</b>	Convention on Biological Diversity
<b>CCAFS</b>	CGIAR Research Program on Climate Change, Agriculture and Food Security
<b>CGIAR</b>	The name CGIAR comes from the acronym for the Consultative Group on International Agricultural Research. In 2008, CGIAR underwent a major transformation. To reflect this and yet retain its roots, it has kept CGIAR as its name.
<b>CIAT</b>	International Center for Tropical Agriculture
<b>CIMMYT</b>	International Maize and Wheat Improvement Center
<b>CIP</b>	International Potato Center
<b>DOIs</b>	Digital object identifiers
<b>GLIS</b>	Global information system
<b>GPA</b>	Global Plan of Action for the Conservation and Sustainable Use of PGRFA
<b>ICRAF</b>	World Agroforestry Centre
<b>ICRISAT</b>	International Crops Research Institute for the Semi-Arid Tropics
<b>IITA</b>	International Institute of Tropical Agriculture
<b>ILRI</b>	International Livestock Research Institute
<b>IRRI</b>	International Rice Research Institute
<b>ITPGRFA</b>	International Treaty on Plant Genetic Resources for Food and Agriculture
<b>Multilateral system or MLS</b>	Multilateral system of access and benefit-sharing
<b>PGRFA</b>	Plant genetic resources for food and agriculture
<b>SMTA</b>	Standard Material Transfer Agreement

# Introduction

In the exercise of their sovereign rights over plant genetic resources for food and agriculture (PGRFA), the Contracting Parties of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) agreed to create the multilateral system of access and benefit-sharing (multilateral system).<sup>1</sup> They also undertook to take ‘legal or other appropriate measures’ to implement the multilateral system at the national level (Article 12.2 of the ITPGRFA). The objective of this tool was to help national-level policy actors identify and develop these measures.

The ITPGRFA entered into force in June 2004. As of January 2018, 144 Contracting Parties (including the European Union) had ratified or acceded to it. With the ultimate goal of achieving sustainable agriculture and global food security, the ITPGRFA pursues the following three main objectives:

- Conservation of PGRFA
- Sustainable use of PGRFA
- The fair and equitable sharing of benefits arising from the use of PGRFA.

The multilateral system contributes to the realization of all three of these objectives.

Through the multilateral system, Contracting Parties agree to virtually pool and exchange the genetic resources of 64 crops and forages for the purposes of ‘utilization and conservation for research, breeding and training for food and agriculture’ (Article 12.3(a) of the ITPGRFA). Those crops and forages – which are listed in Annex 1 of the ITPGRFA – were selected on the basis of their importance to food security and countries’ interdependence. This interdependence is a result of the fact that, over the course of millennia, food crops and forages have been moved around the world, driven by, or in the wake of, human migration, colonialization, international trade, research and development, shifting consumer demands, climate change and so on. Today, humans and farm animals eat plants that were domesticated, in some cases, many thousands of years ago on other continents. And the evolution of these crops and forages is not fixed; they continue to evolve through selection by the environment, plant breeders, farmers and natural resource managers. As new stresses emerge, and market demands change, these same actors need access to the diversity of genetic resources currently spread around the world as inputs into their research and in crop enhancement efforts.

The multilateral system includes genetic resources in Annex 1 of the ITPGRFA that are:

- ‘Under the management and control of the Contracting Parties and in the public domain’
- Voluntarily included by natural and legal persons
- Part of collections hosted by international institutions that have signed agreements with the Governing Body of the ITPGRFA.

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<sup>1</sup> International Treaty on Plant Genetic Resources for Food and Agriculture, 29 June 2004, [http://www.planttreaty.org/texts\\_en.htm](http://www.planttreaty.org/texts_en.htm) (accessed 24 October 2017) (ITPGRFA).

All materials in the multilateral system are transferred using the Standard Material Transfer Agreement (SMTA), which was adopted by the Governing Body in 2006.<sup>2</sup> Under the SMTA, providers undertake to make the materials available free of charge or for minimal costs, and to report all transfers to the Governing Body. Among other things, recipients agree:

- To use the materials for the purposes of utilization and conservation for research, breeding and training and not for 'non-food/feed industrial purposes'
- Not to seek intellectual property rights that would limit others' access to the materials 'in the form received'
- To make payments to the ITPGRFA's Benefit-sharing Fund if they commercialize new PGRFA products that incorporate materials from the multilateral system and prohibit others from using them for further research or breeding
- That the so-called third party beneficiary (which represents the interests of the multilateral system) may request information from them related to their compliance with the SMTA and commence dispute settlement procedures against them concerning alleged non-compliance with the terms of the SMTA.

While the purpose of this decision-making tool is to help policy actors develop measures to implement the multilateral system, we know that such measures will not, on their own, make the multilateral system a success. Considerable additional efforts are necessary to build the capacity of all potential users, including public and private sector breeders, genebanks, universities, farmers' organizations and non-governmental organizations, to take advantage of the multilateral system to access genetic diversity and associated information. The success of the multilateral system also depends on increased awareness of its potential contributions to a range of development goals, including climate change adaptation, enhanced livelihoods and the empowerment of indigenous peoples and local communities, including farmers. While this subject is beyond the scope of this decision-making tool, a brief overview of national development strategies, plans and programmes to which the multilateral system can make important contributions is provided in Appendix 1 of this document.

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<sup>2</sup> Standard Material Transfer Agreement, 16 June 2006, <ftp://ftp.fao.org/ag/agp/planttreaty/agreements/smta/SMTAe.pdf> (accessed 24 October 2017) (SMTA).

## **Are new laws necessary to implement the multilateral system?**

In many countries, it is not considered necessary to create new policies or laws (in the form of legislation, regulations or ministerial orders or decrees) as part of the process of implementing the multilateral system. In those countries, existing government departments are expected to have the capacity to move things forward based on existing distributions of authority, decision-making powers, profile and influence. So, for example, the authorities responsible for the national genebank are expected to identify, on the basis of their existing mandates, which of the materials in their collection are included in the multilateral system (following the formula set out in Article 11 of the ITPGRFA) and facilitate access to those materials using the SMTA. Similarly, bureaucrats in the Ministry of Agriculture or national research institutions, on the basis of their existing mandates, responsibilities and convening capacity, are expected to organize consultations with universities, civil society and farmers' organizations, companies or any other natural or legal persons who hold Annex 1 PGRFA in the country to encourage them to include this material in the multilateral system.

In part, this 'no-new-law' approach is possible because so much of the difficult decision-making related to the multilateral system was completed by the negotiators of the ITPGRFA and the SMTA. As reflected in the texts of the ITPGRFA and the SMTA, the negotiators agreed on what materials are to be automatically included in the multilateral system, as well as on all of the conditions for each transfer of germplasm related to access, benefit-sharing, reporting, dispute resolution and information-sharing conditions that apply to each transaction. With all of this 'heavy lifting' already completed and agreed to at the highest levels of international negotiations and, subsequently, the ratification by Contracting Parties, it is a relatively simple matter in many countries for the relevant organizations to make decisions and adopt processes to implement the multilateral system based on their existing mandates and authority.

In general, this situation – where the national policy actors can implement the multilateral system on the basis of existing mandates and capacities without the creation of new laws – is desirable. In this situation, public authorities can make decisions and adopt procedures without the delays and high transaction costs associated with developing new laws. In light of these advantages, public authorities should proactively explore and promote mechanisms for implementing the multilateral system that can be done without new laws.

On the other hand, experience over the last 11 years (since the ITPGRFA's Governing Body adopted the SMTA in 2006) has demonstrated that, in some countries, public authorities and functionaries are unable or unwilling to make the necessary decisions for the day-to-day operation of the multilateral system in the absence of new laws that back up their responsibility or mandate to do so. For example, it has been argued that, in some countries, in the absence of a ministerial order that formally appoints a competent national authority for the ITPGRFA and explicitly sets out

its responsibilities and mandate, no agency would have the authority or 'license' to convene meetings and promote requisite decision making. National genebank managers in some countries have also indicated that without some sort of high-level public policy affirmation of their right to provide facilitated access to materials in their collections, they are uncomfortable doing so.

## **Mutually supportive implementation with the Convention on Biological Diversity (CBD) and the Nagoya Protocol**

One of the most significant developments in the 'external environment' as far as the multilateral system is concerned has been the adoption and coming into force of the Nagoya Protocol to the CBD.<sup>3</sup> The ITPGRFA was negotiated taking into full consideration the CBD, and the Nagoya Protocol was negotiated taking into full consideration the ITPGRFA. Decision X/1, through which the Conference of the Parties to the CBD adopted the Nagoya Protocol, recognizes 'that the International Regime is constituted of the Convention on Biological Diversity, the Nagoya Protocol [...] as well as complementary instruments, including the International Treaty on Plant Genetic Resources for Food and Agriculture.'

These agreements are meant to be implemented in coordinated and mutually supportive ways. The scope of genetic resources covered by the Protocol is much broader than the scope of the ITPGRFA's multilateral system. While subject to a number of caveats,<sup>4</sup> it will often be the case that materials and purposes not covered by the multilateral system are by default covered by the Nagoya Protocol. Thus, the border between the systems implementing the two agreements needs to be clear to the administrators of these systems. From a technical legal point of view, it is a relatively straightforward matter to work out when a genetic resource, or a use of a genetic resource, falls under one system or another. The greater challenge appears to be getting the competent authorities for the respective agreements (often different ministries) to coordinate their efforts so that the boundaries between the two systems are clear to the people responsible for their day-to-day administration

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<sup>3</sup> Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (CBD). Nagoya Protocol on Access and Benefit-sharing and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, 29 October 2012, <http://www.cbd.int/abs/text/> (accessed 24 October 2017) (Nagoya Protocol).

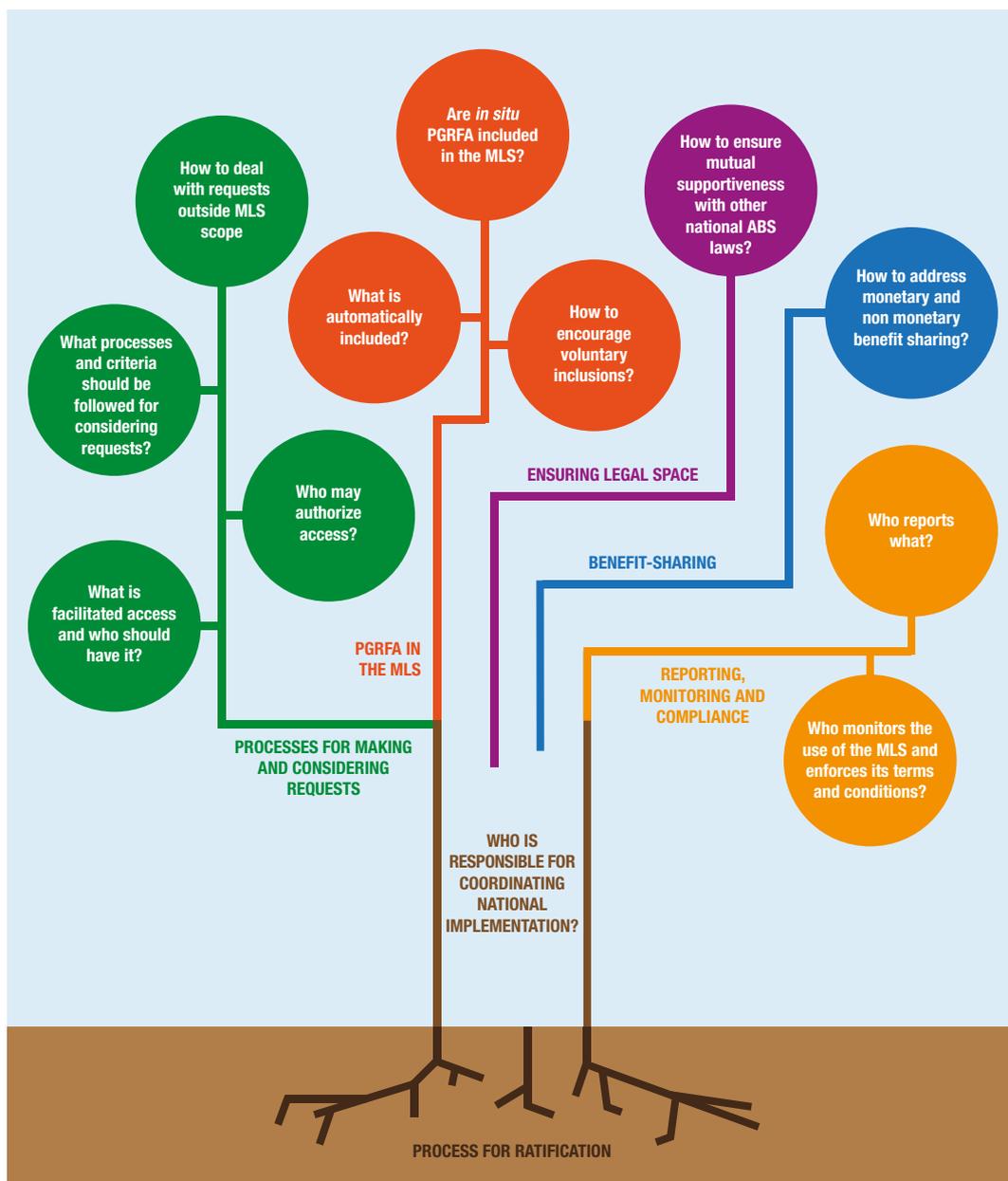
<sup>4</sup> Of course, it could happen that a purpose for which access is sought may not fall within the scope of either the ITPGRFA or the Nagoya Protocol. This could be the case if the access seeker wants to access materials for direct use in production, which is not one of the purposes of use covered by the multilateral system for access and benefit-sharing (multilateral system) and arguably not by the Nagoya Protocol either. The Nagoya Protocol regulates 'utilization,' which means 'to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology' (Art. 2(c)). It could be argued that direct use of seed for agricultural production and harvesting does not involve 'research and development on the genetic and/or biochemical composition' of the varieties of the crop in question, and, therefore, accessing seed for this purpose would not fall under the scope of the Nagoya Protocol. In the 'Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture' welcomed by CGRFA and included in the Fifteenth Regular Session of the Commission on Genetic Resources for Food and Agriculture, Doc. CGRFA-15/15/Report (19–23 January 2015) <http://www.fao.org/3/a-mm660e.pdf> (accessed 13 March 2015), para. 46, which states: 'If the activities triggering access provisions are limited to "utilization" within the meaning of the Nagoya Protocol, certain typical uses of GRFA, for example the growing of seeds for subsequently using the harvested products for human consumption clearly do not qualify as utilization and therefore do not trigger the application of access provisions.'

and to assure them that they have requisite political support to make day-to-day decisions. This decision-making tool highlights the questions that need to be addressed to promote such clarity; it also provides some optional responses to those questions for the reader's consideration.

Adopting and implementing administrative or policy measures are a necessary part of the national implementation of the Nagoya Protocol. This fact appears to further strengthen the view of many policy actors that similar formal legal instruments are necessary for the implementation of the multilateral system in some countries in order to put it on the same legal footing, raise its political profile and provide actors with the authority to make decisions that they would otherwise be reluctant to make.

## The structure and intended use of this decision-making tool

This decision-making tool is divided into sections corresponding to the issues that national-level policy actors need to address when implementing the multilateral system. We have organized and ordered the sections in a way that we think will make sense to people who will read through the entire text from beginning to end. However, we acknowledge that it is not absolutely necessary to follow this sequence; different readers will be interested in different starting points, depending upon the state of policy development in their countries. The issues covered and their organic relationship to one another are represented in Figure 1.



**Figure 1:** Diagram illustrating how issues addressed in this decision-making tool are organized and presented

Considering that some readers may prefer to move from section to section, in no given order, we have tried to make each section as self-contained as possible. The downside to this approach is that we have had to repeat some text addressing key concepts that we would otherwise have eliminated if readers were to read the full text from beginning to end.

Each section is presented in question-and-answer format to make it easier for readers to locate issues of particular concern to them and to quickly access the information they need. In each section, we ask (and answer) different combinations of questions. However, in most sections, we consider the following common questions:

- Are there different ways to approach the issues raised, depending upon the political-legal cultures of the countries concerned, and the various degrees of decentralization or centralization of the systems countries want to put in place?
- Is it possible to address these issues without creating new laws? What are the circumstances within a particular country that might make it necessary or more expedient to adopt a new law?
- Is there an important connection to other parts of the ITPGRFA, for example, conservation (Article 5), sustainable use (Article 6), Farmers' Rights (Article 9) or the global information system (Article 17)?
- Are there important issues to consider related to the mutually supportive implementation of the Nagoya Protocol?

At the end of some of the sections (or subsections), we provide draft provisions that could be adapted and incorporated into new laws or administrative guidelines, if and when they are considered to be useful. By including these draft provisions, we are not suggesting that new legal instruments are necessary. To be clear, we highlight once more that many of the countries that have made the most progress implementing the multilateral system have done so without creating any new laws. For the purposes of this decision-making tool, we intend the term 'law' to include legislation, regulations, ministerial decrees, ministerial orders or administrative guidelines that have been adopted by a competent national authority.

It is possible that countries may decide that they only need new laws to address one or two issues – for example, formally appointing a competent national authority and empowering it to convene meetings and coordinate with users (both providers and recipients) of materials in the multilateral system. Once appointed, the competent national authority can perhaps drive the rest of the process of implementation without the addition of new laws. Other countries may need to formally address a broader set of issues, through a more comprehensive policy instrument (or portfolio of instruments) that recognizes and empowers a range of actors, confirming their responsibilities, rights and discretions. Based on their needs, people using this tool can assemble draft clauses in different combinations to form the basis of a first rough draft of the law they need.

Appendix 1 explores options for integrating the use of the multilateral system in high-level national strategies and plans concerning issues such as climate change adaptation and rural development. Finally, Appendix 2 is dedicated to decision making concerning national ITPGRFA ratification or accession. It includes questions and answers concerning why and how countries ratify or accede to the ITPGRFA. It also includes a draft text of a national ratification instrument. While we assume that most of the people who use this tool will be in countries that have already ratified or accessed the ITPGRFA, we hope that Appendix 2 will be useful to people in countries that have not yet done so.



## Who is responsible for promoting and coordinating national implementation?



An office, department or ministry in each Contracting Party will be responsible for promoting the national implementation of the ITPGRFA, including its multilateral system. In many countries, it is not considered necessary to officially sanction these responsibilities through the creation of new titles, terms of reference, policies, offices or even budgets. In such countries, existing government departments are expected to move things forward based on the existing distributions of authority, decision-making powers, profile and influence. However, as noted in the introduction, this ability to implement the multilateral system without the creation of new offices, new powers and/or new laws may not be possible in all countries. In some countries, it may be necessary to appoint and empower a government department with a new title, official duties and associated mandate and budget in order to effectively promote the national implementation of the ITPGRFA. Such roles, mandates and departments can potentially be called anything. However, since the entities executing similar responsibilities in many countries are called ‘national competent authorities,’ we will use this term here. More important than the name, however, are the responsibilities and powers that this organization will have, and the activities it will carry out to implement the multilateral system.

## 1.A Regarding competent national authorities

### Are ITPGRFA Contracting Parties obliged to appoint competent national authorities?

The ITPGRFA does not mention the need for, or the appointment of, a competent national authority (or authorities) to support its domestic implementation. Thus, countries are under no obligation to formally appoint a competent national authority under the ITPGRFA. That said, if an ITPGRFA Contracting Party wants to appoint a competent national authority, it is free to do so.

### Should the competent national authority be an organization or an individual?

Under other international agreements, government offices, and not individuals, are most often appointed as national competent authorities. Organizations can provide continuity that would otherwise be lost when individuals change positions.

### Why do some biodiversity-related conventions require the appointment of competent national authorities and others do not?

Interestingly, like the ITPGRFA, neither the CBD nor the Ramsar Convention require (or even mention) the appointment of competent national authorities.<sup>5</sup> On the other hand, the Nagoya Protocol, the Cartagena Protocol on Biosafety and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) all include obligations for Contracting Parties to appoint competent national authorities.<sup>6</sup>

<sup>5</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, 996 UNTS 245.

<sup>6</sup> Cartagena Protocol on Biosafety, 29 January 2000, 2226 UNTS 208 (Cartagena Protocol); Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243.

Furthermore, they describe the roles that those competent national authorities are expected to fulfil. The obligation to appoint competent national authorities is linked to the fact that, pursuant to these agreements, it is expected that systems will be set up to receive, process and decide upon applications in line with the standards and objectives of these agreements.

Under Section IV of the ITPGRFA (regarding the multilateral system), it is clearly anticipated that systems for receiving, processing and deciding upon requests for access to PGRFA will be established. However, the ITPGRFA does not oblige countries to create a competent national authority with centralized decision making powers. Perhaps the ITPGRFA negotiators felt that it was not necessary to obligate countries to appoint competent national authorities with specific duties related to access applications because, as noted in the introduction, so much of the decision-making that is necessary under the multilateral system was already negotiated and pre-agreed in the texts of the ITPGRFA and the SMTA. Perhaps they also anticipated that decision making would be, or should be, more decentralized under the ITPGRFA since, again, the terms of access and benefit sharing (ABS) were all basically pre-agreed under the ITPGRFA and SMTA.

### **Why would a country consider appointing a competent national authority as part of its plan for implementing the multilateral system?**

Despite the agreement of Contracting Parties on the fundamental elements of the multilateral system, the last 11 years of national implementation have demonstrated that, in some countries, it has been necessary to formally appoint a competent national authority and explicitly empower such a person or organization to carry out a range of activities related to implementation at the national level. In the absence of such formalized appointments and mandates, in some countries, no organization or individual will have the legal and institutional legitimacy, authority, profile, convening power or budget to coordinate the activities necessary for developing policies, laws and systems and for making decisions linked to implementing the multilateral system.

The fact that a country is appointing a competent national authority for ABS issues under the CBD/Nagoya Protocol will potentially increase the importance of following a similar process for appointing a competent national authority to implement the multilateral system.

### **If a country decides to appoint a competent national authority for the implementation of the multilateral system, what level of formality or what kind of instrument is required?**

The political and legal culture of a country will determine if a formal appointment of a competent national authority for the implementation of the multilateral system is necessary; it will also influence what kind of policy instrument is necessary, as well as the level of government that needs to adopt or issue such an instrument for optimal effect. Countries can adopt relatively quick processes for appointing a competent

national authority – for example, ministerial decrees that do not require a lengthy process for developing legislation (parliamentary proceedings and approval).<sup>7</sup>

A number of countries, including Madagascar, Burkina Faso, Ivory Coast and Nepal, are developing draft laws as part of their implementation strategy for the multilateral system. These laws include clauses appointing the competent national authority and setting out specific tasks and mandates to further develop policy or legal measures to facilitate and promote the operationalization of the multilateral system. Some of the draft provisions regarding competent national authorities included in Box 1 below are based on these countries' draft laws.

### How much detail should be included in such instruments regarding the roles and responsibilities of the competent national authorities?

Typical functions assigned to a competent national authority can vary depending on whether the country is putting systems in place that concentrate power in a single office or disperse it across many entities. Some core responsibilities associated with the multilateral system could include:

- Coordinating policy development processes related to the implementation of the multilateral system
- Coordinating consultations with different public organizations to identify the Annex 1 PGRFA that are automatically included in the multilateral system
- Coordinating processes to raise awareness of natural and legal persons about the possibility of voluntarily including PGRFA in the multilateral system and to encourage them to do so
- Coordinating with the environmental authorities in charge of ABS in the execution of their duties, including on information sharing.

If the country concerned wants to establish more centralized systems for implementing the multilateral system, it might be useful for the country to state that it is doing so explicitly in the law – for example by stating that the competent national authority will:

- Receive applications for facilitated access to materials in the multilateral system and decide on those requests
- Delegate the authority to receive requests and to make decisions for the other entities.

<sup>7</sup> In Costa Rica, for example, the National Seed Office, which was appointed as the ITPGRFA national focal point through an administrative decision, is the organization that coordinates the necessary activities for the implementation of the ITPGRFA and its multilateral system and acts as the competent national authority. In the longer term, this role may be officially recognized in a revised version of the national Seed Law (national legislation that is ultimately approved by the national parliament) since, at the present time, only the National Commission for Biodiversity Management has the authority to deal with access and benefit-sharing (ABS) issues at the national level. Reglamento 33697-MINAE, published in the official newspaper La Gaceta on 18 April 2007, provides that 'unless a different norm is approved, the designation for the implementation of the ABS system of the ITPGRFA will be the National Commission for the Biodiversity Management (CONAGEBIO) the ABS NCA under the CBD of the Ministry of Environment and Energy, which could benefit from the advice of the National Commission on Plant Genetic Resources (CONAREFI) (Transitorio II/transitory provision II).' See also Jorge Cabrera Medaglia, *La implementación del Tratado Internacional de Recursos Fitogenéticos para la alimentación y la agricultura en Costa Rica: recomendaciones legales y de política*, CONAREFI/Bioiversity, San José, 2014.

Box 1 includes draft provisions regarding the standard roles played by a competent national authority, with additional optional provisions reflecting increasingly centralized implementation systems. These draft provisions refer to the national focal point for the ITPGRFA. National focal points are discussed in Section 1.C below).

### **BOX 1: Draft provisions regarding competent national authorities**

1. The competent national authority will perform the following functions:
  - a. Disseminate information and raise awareness related to the ITPGRFA's multilateral system with stakeholders in the country
  - b. Promote capacity-building activities to support the implementation of the multilateral system
  - c. Coordinate the development of policies and procedures for the implementation of the multilateral system
  - d. Coordinate with the relevant institutions/bodies dealing with the implementation of ABS activities under the CBD/Nagoya Protocol or other relevant laws
  - e. Consult stakeholders to develop national positions on issues being considered by the Governing Body of the ITPGRFA and other relevant international fora
  - f. Convene and support the advisory committee referred to in Article X.y [see Box 2 below]
  - g. Coordinate the nomination of delegates to attend meetings of the Governing Body of the ITPGRFA and other meetings convened under the ITPGRFA framework
  - h. Liaise with the national focal point in the execution of these roles
  - i. Prepare written submissions on behalf of the country in response to calls for information from the Governing Body about the implementation of the multilateral system.
  - j. Coordinate processes within the country to confirm which PGRFA in the country that are automatically available and voluntarily included in the multilateral system and communicate such information to the ITPGRFA's Secretariat/Governing Body
  - k. Promote the adoption of policy measures to create incentives for natural and legal persons to voluntarily include PGRFA included in Annex 1 of the ITPGRFA in the multilateral system
  - l. Facilitate communications between natural and legal persons who want to voluntarily include Annex 1 PGRFA in the multilateral system and

national or international genebanks that may be able to conserve and distribute those materials. In such cases, if there are other national ABS laws that may apply to the Annex 1 PGRFA held by natural and legal persons, the competent national authority will assist those persons in making contact with the relevant national authorities for implementing those laws

- m. Raise awareness among PGRFA providers about their obligation to report transfers of PGRFA under the multilateral system to the ITPGFA Governing Body
- n. Receive and compile information on the transfer of materials using the SMTA by institutions or individuals in the country (without prejudice to each provider's obligation to directly inform the Governing Body about transfers as per Article 5.e of the SMTA)
- o. Coordinate technical assistance for farmer, research and civil society organizations to be able to take advantage of the multilateral system
- p. Promote novel partnerships between farmer, civil society, private sector and public research and development organizations to identify useful PGRFA that is available through the multilateral system and obtain and evaluate that material
- q. Liaise with the national phytosanitary regulatory agency to promote supportive systems for testing and releasing materials that are being received from other countries through the multilateral system
- r. Raise awareness among national stakeholders about funding opportunities under the benefit-sharing fund of the ITPGRFA.

**(Optional additional responsibility for centralized models)**

- s. Delegate authority to entities within the country to receive, consider and approve requests for facilitated access to PGRFA under the multilateral system

**(Optional additional responsibilities for very centralized models)**

- t. Receive and decide upon the requests for facilitated access to PGRFA under the multilateral system
- u. Direct entities holding the materials in question to provide them to the requestor using the SMTA.

## 1.B Regarding a multi-stakeholder advisory committee to assist the competent national authority

Would it be useful to create an advisory committee to allow stakeholders an opportunity to participate in the governance of the system?

Yes, it may be useful to create an advisory committee constituted of different stakeholders to provide guidance in policy formulation, to monitor implementation and to help decide 'difficult cases.' It could also include, and provide, an important link to competent national authorities responsible for implementing the CBD and the Nagoya Protocol.<sup>8</sup> The advisory committee could include representatives from both governmental and non-governmental organizations, including civil society, farmers, and industry, organizations of plant breeding and seed producers, agricultural research institutions and environment, finance and planning departments (see Box 2).<sup>9</sup>

<sup>8</sup> See, for instance, the proposal for the establishment of an inter-ministerial multi-stakeholder coordination mechanism to guide the implementation of ABS norms under the CBD and the ITPGRFA, explained in Michael Halewood et al, Implementing 'mutually supportive' access and benefit-sharing (ABS) mechanisms under the Plant Treaty, Convention on Biological Diversity and the Nagoya Protocol. Law, Environment and Development Journal 9(2) (2013), available at <http://www.lead-journal.org> (accessed 24 October 2017).

<sup>9</sup> Kenya, the Philippines and Rwanda have established multi-stakeholder committees as part of their strategy for implementing the multilateral system. Other countries like Guatemala, Jordan and Uganda have integrated the implementation of the multilateral system in the mandates of already existing consultative bodies. National research organizations (including those hosting the national genebank), representatives of relevant ministries and ministerial agencies and representatives of farmers' organizations are commonly found in the composition of these committees.

### **BOX 2: Draft provisions regarding the creation of a multi-stakeholder committee to support the competent national authority**

1. An advisory committee is hereby created with representatives of the following government agencies and non-governmental stakeholder groups: ministries of agriculture; science and technology; environment; the national focal points and competent national authorities for the CBD, the Nagoya Protocol and the ITPGRFA; the Plant Protection Organization, National Agriculture Research Institution, Seed Office, national universities and civil society organizations active in the field of PGRFA; farmers' and indigenous people's organizations, seed producers and traders; plant breeders [and others as appropriate].
2. The advisory committee shall advise the competent national authority concerning:
  - a. Policy matters related to the multilateral system and SMTA, including access applications referred to it by the competent national authority
  - b. Coordination with national agencies responsible for implementing other ABS laws and policies

- c. National positions to advance a meeting of the ITPGRFA Governing Body and other meetings convened under the ITPGRFA framework.
- 3. Members of the advisory committee shall be nominated by their respective minister and chair of the relevant organization and appointed by the national competent authority's head/minister
- 4. Members shall serve for a period of \_\_\_\_ years and shall meet at least \_\_\_\_ times per year
- 5. The advisory committee, with the approval of the national competent authority, will provide for its internal rules of procedure, including matters related to quorum, conflict of interest, election of the chair and other positions, reappointments and so on.

## 1.C Regarding national focal points

### Is it necessary to have a national focal point under the ITPGRFA?

National focal points are not mentioned in the text of the ITPGRFA, but some Governing Body resolutions make reference to them. There is a clear expectation based on Governing Body practices and decisions that Contracting Parties should appoint national focal points. The Secretary maintains a list of the national focal points already designated by the Contracting Parties.<sup>10</sup> Again, this is very different from the situation with the Cartagena and Nagoya Protocols, which explicitly list the roles and responsibilities of both the national focal points and the competent national authorities.

### What is the expected role of a national focal point under the ITPGRFA?

Based on the Governing Body decisions that mention national focal points, the Secretariat of the ITPGRFA treats the national focal point as a mechanism to pass on information to the country and to require from the country specific information, including proposals from the country in response to calls for proposals for projects to be funded by the Benefit-sharing Fund of the ITPGRFA (see Box 3). Under the Nagoya Protocol, the national focal point's functions are defined in the same way: they are a medium for official communications between the country and the Secretariat (see Article 13, Annex 1 of the Nagoya Protocol).

### Can the roles of the competent national authority(ies) and the national focal point(s) be combined and carried out by a single office or institution?

Yes, but it is important to recognize that the national focal points are frequently individuals and competent national authorities are usually government departments,

<sup>10</sup> See <http://www.fao.org/plant-treaty/countries/national-focal-points/en/> (last accessed 11 December 2017)

for the reasons cited above. If the roles are united, it makes sense that they should be vested in a department, not an individual. It is entirely up to the implementing country to decide who will undertake the different responsibilities.

1

### **BOX 3: Draft provisions regarding the appointment of a national focal point, and its functions**

1. A national focal point for the ITPGRFA is hereby established. [Name of organization or individual] is hereby designated to be the ITPGRFA focal point.
2. The main function of the national focal point is to liaise with the Secretariat of the ITPGRFA
3. The national focal point shall:
  - a. Receive information and communicate and respond to information and other requests from the Secretariat of the ITPGFA related to the ITPGRFA's implementation
  - b. Convey the information request when appropriate to the relevant institutions and other stakeholders
  - c. Submit and follow up on proposals for the Benefit-sharing Fund of the ITPGRFA's calls for proposals
  - d. Support the competent national authority, including through consultations for the designation of national representatives to international meetings under the framework of the ITPGRFA, depending on their nature
  - e. Participate in the advisory committee created by this measure
  - f. Participate in sessions of the ITPGRFA Governing Body



**What is facilitated access to PGRFA under the multilateral system and who has the right to facilitated access?**



Facilitated access is not explicitly defined in the ITPGRFA. Article 12 states that facilitated access will be in accordance with the provisions of the ITPGRFA, including those provisions described in the Introduction above – that is, that access will be provided expeditiously, without obligations to track subsequent use, under the SMTA, free of charge or at minimal cost, for the purposes of research, breeding and training for food and agriculture, and subject to monetary benefit-sharing obligations, limitations of seeking intellectual property rights, and so on.

Providers and recipients of PGRFA included in the multilateral system cannot change the terms and conditions of the SMTA and cannot negotiate additional ones, except when they provide ‘PGRFA under development,’ which we will address later in this document. The undertaking of the Contracting Parties to ensure facilitated access was meant to keep transaction costs low and to increase predictability and transparency for ABS arrangements.

### What PGRFA are supposed to be subject to facilitated access?

The Contracting Parties agree that facilitated access shall be provided to PGRFA in the multilateral system for the purposes of ‘utilization and conservation for research, breeding and training for food and agriculture’ (Article 12.3(a) of the ITPGRFA). PGRFA in the multilateral system come from three basic sources:

- PGRFA listed in Annex 1 of the ITPGRFA that are ‘under the management and control of Contracting Parties and in the public domain’ (Article 11.2 of the ITPGRFA). Such PGRFA located in Contracting Parties are automatically included in the multilateral system by virtue of a country ratifying or acceding to the ITPGRFA
- PGRFA of the species listed in Annex 1 of the ITPGRFA that are voluntarily included in the multilateral system by natural and legal persons. The ITPGRFA invites natural and legal persons to voluntarily include such PGRFA (Article 11.2), and the Contracting Parties undertake to take policy measures to encourage them to do so (Article 11.3)
- Annex 1 PGRFA in *ex situ* collections held in trust by those international institutions that have signed Article 15 agreements with the Governing Body.<sup>11</sup> Pursuant to their Article 15 agreements, these international institutions undertake to provide Annex 1 materials held in trust using the SMTA. During its second session in 2009, the Governing Body agreed that Article 15 international institutions could use the SMTA when distributing non-Annex 1 materials held in trust.

<sup>11</sup> At the time of writing this document, the following international centres had signed agreements with the Governing Body of the ITPGRFA under the auspices of Article 15: the Centre for Pacific Crops and Trees of the South Pacific Community; the International Cocoa Genebank; the Mutant Germplasm Repository of the Food and Agriculture Organization (FAO)/International Atomic Energy Agency Joint Division; the International Coconut Genebanks for the South Pacific and for Africa and India Ocean; the Tropical Agricultural Research and Higher Education Centre; the World Agroforestry Centre (ICRAF); the International Rice Research Institute (IRRI); the International Potato Center (CIP); the International Livestock Research Institute (ILRI); the International Institute of Tropical Agriculture (IITA); the International Crops Research Institute for the Semi-Arid Tropics (ICRISAT); the International Centre for Agricultural Research in the Dry Areas; the International Maize and Wheat Improvement Center (CIMMYT); International Center for Tropical Agriculture (CIAT); Bioversity International and the Africa Rice Centre. The genebanks of the international centres of CGIAR (that is, Africa Rice Center, Bioversity, CIAT, CIMMYT, ICRISAT, IITA, ILRI, CIP, IRRI and ICRAF) maintain close to 700,000 accessions, which form part of the multilateral system since the signature of the Article 15 agreements between these centres and the Governing Body of the ITPGRFA.

## What does the national government need to do in practical terms with regard to PGRFA included in the multilateral system

For PGRFA that are automatically included in the multilateral system, the national government needs to ensure that one or several public entities are actually empowered to provide facilitated access to these PGRFA and that they actually do so. These responsibilities are elaborated in the following sections of this document. Furthermore, the government is responsible for proactively encouraging natural and legal persons to voluntarily include their PGRFA of species listed in Annex 1 of the ITPGRFA in the multilateral system.

The voluntary inclusion of PGRFA in the multilateral system by natural and legal persons can take place in different forms:

- The natural or legal person can start using the SMTA for the transfer of its PGRFA. The natural or legal person can also officially communicate, to the competent national authority and/or the national focal point and also to the Secretariat of the ITPGRFA, its decision to include PGRFA in the multilateral system
- The natural or legal person can put its PGRFA in an *ex situ* collection managed by a national public entity so that it becomes 'under the management and control' of the national government and 'in the public domain' and, thereby, is automatically included in the multilateral system.

In furthering their undertaking to create policy measures to encourage such voluntary inclusions, Contracting Parties should remove policy obstacles that may create disincentives for natural and legal persons to make such voluntary deposits.

## Who has the right to facilitated access under the multilateral system?

Contracting Parties agree to provide facilitated access to other Contracting Parties and to all natural and legal persons located in other Contracting Parties.<sup>12</sup> This means that in addition to national research organizations and national genebanks, public and private companies, community genebanks, farmers' and civil society associations and private individuals (including hobby gardeners and farmers) can also request and obtain facilitated access to PGRFA under the multilateral system from providers in their own countries and in other Contracting Parties.<sup>13</sup> All such access seekers should be able to send requests for PGRFA directly to whichever organization(s) or individuals are responsible for receiving and processing requests to PGRFA under the multilateral system. These access seekers should not need to make requests to other countries intermediary organizations within their own countries, such as national genebanks or

<sup>12</sup> As Art. 12.2 specifies, the Contracting Parties agree to take the necessary legal or other appropriate measures to provide such access to other Contracting Parties through the multilateral system. To this effect, such access shall also be provided to legal and natural persons under the jurisdiction of any Contracting Party, subject to the provisions of Art. 11.4.

<sup>13</sup> The ITPGRFA spells out a process to revise the rights of natural and legal persons such as commercial companies to access PGRFA under the multilateral system. Art. 11.4 of the ITPGRFA states: 'Within two years of the entry into force of the Treaty, the Governing Body shall 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.' This review has been postponed repeatedly, again until the seventh session of the Governing Body in 2017.

national research organizations, as this would limit facilitated access. Of course, such organizations could provide (often much needed) assistance for natural and legal persons within their territories to use available information systems to locate potentially useful PGRFA in the multilateral system; however, their intervention should not be considered mandatory. (Draft provisions regarding who has the right of facilitated access under the multilateral system are set out in Box 4).

### **Can commercial users have facilitated access to PGRFA under the multilateral system?**

Yes, commercial users have the right to facilitated access to PGRFA under the multilateral system, and they can incorporate PGRFA received from the multilateral system in new ‘PGRFA products’ (for example, plant varieties) that they commercialize. They may also subject these new products to intellectual property right protection, as long as they comply with the provisions of the SMTA. Section 11 of this document presents the mechanisms that the ITPGRFA has put in place to monitor and enforce the rights and obligations of providers and recipients of PGRFA under the multilateral system, including benefit-sharing obligations.

### **Can companies or public organizations commercialize PGRFA they receive ‘as is’ (in the form received) from the multilateral system?**

No, they cannot. Recipients of PGRFA under the multilateral system cannot simply multiply and sell reproductive material of germplasm they have received under the SMTA. Materials received under the SMTA can only be used for the purposes of ‘utilization and conservation for research, breeding and training for food and agriculture’ (Article 12.3(a) of the ITPGRFA). However, as stated above, recipients can commercialize new PGRFA products that are derived from the materials they receive under the SMTA. For more information concerning possible uses of materials outside the scope of the SMTA, see Section 5 of this document (‘How to deal with requests for purposes that are (or may be) beyond the scope of the multilateral system?’).

### **Can PGRFA users in countries that are not Contracting Parties to the ITPGRFA have access to PGRFA under the multilateral system?**

The ITPGRFA is silent with respect to non-Contracting Parties. Thus, Contracting Parties can adopt a policy to refuse to provide facilitated access to constituents located in non-Contracting Parties. One reason for adopting this policy is that it may create an incentive for non-Contracting Parties to join the ITPGRFA. Alternatively, Contracting Parties can adopt a policy to provide PGRFA using the SMTA to requestors from non-Contracting Parties. One reason for adopting this policy is that recipients in non-Contracting Parties are nonetheless bound by the benefit-sharing provisions in the SMTA. To date, it seems that most ITPGRFA Contracting Parties have adopted the latter policy.

### Should the SMTA be used for domestic transfers of PGRFA?

Most Contracting Parties use the SMTA for transfers to recipients within their countries and for international transfers.<sup>14</sup> A number of experts and commentators have pointed out that the SMTA is to be used for domestic transfers. If providers of PGRFA did not use the SMTA for domestic transfers, the first recipients of a domestic transfer would not be bound to make subsequent transfers outside the country using the SMTA. The only way to address this potentially huge loophole is to use the SMTA for domestic transfers.

### Is it possible to use a shorter version of the SMTA for domestic transfers of PGRFA under the multilateral system?

No. The development of shorter versions is not considered in the ITPGRFA or in the SMTA itself. No country has the authority to develop an alternative shortened version. The whole idea behind developing a 'standard' material transfer agreement is that it should always be the single instrument that is used for all transfers of PGRFA under the multilateral system, contributing to simplicity and predictability for all users worldwide.

### Who pays for transfer costs? How much can the provider charge?

Article 12.3(b) of the ITPGRFA and Article 5.a. of the SMTA state that access shall be provided free of charge or for minimum administrative costs. The Technical Advisory Committee of the multilateral system and the SMTA of the ITPGRFA advise that with respect to minimum administrative costs 'the factors involved in calculating fees should be limited as far as possible, thus to cover only mailing or shipping costs and not germplasm producing and conservation costs.'<sup>15</sup>

### What happens if providers do not have enough accessions of PGRFA to meet all of the requests for facilitated access?

The ITPGRFA and SMTA do not create obligations on providers to make available PGRFA that they do not have, or do not have in sufficient quantities, to meet all requests. In cases of requests for unreasonable quantities of PGRFA or limited supplies, immediate availability of materials cannot be guaranteed.

### Is there a need for a new law in order to ensure facilitated access?

There is no requirement to adopt new laws under the multilateral system if a country can implement it effectively without them. Most countries that are currently reporting the largest number of transfers using the SMTA have not put in place new laws. Instead, they are operating on the basis of existing mandates, rights, obligations and decision-making powers. However, depending on the country, in the absence of a law clearly establishing

<sup>14</sup> G Moore, W Tymowski, Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture, International Union for the Conservation of Nature, Gland, Switzerland, and Cambridge, UK, 2005; S Louafi, S Bhatti, Efforts to get the Multilateral System up and running: a review of activities coordinated by the Treaty's Secretariat, in M Halewood, I López Noriega, S Louafi, Creating a global crop commons, Routledge, New York, 2013.

<sup>15</sup> ITPGRFA's Ad Hoc Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System (Technical Advisory Committee), Advise 13: Fees for germplasm distribution: minimal cost involved, in Opinions and Advice of the Ad Hoc Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System, FAO, Rome, 2015.

the range of actors who are entitled to facilitate the access of PGRFA under the multilateral system, providers may get the impression that they do not need to consider requests from certain types of access seekers. For example, a national genebank may only consider a request from a farmers' organization in another country if it is passed through the national genebank in that other country. A national law stating that requests from all individuals and organizations in ITPGRFA Contracting Parties – including one's own country – could help to address this issue.

### Facilitated access and farmers' rights

It is arguable that farmers' facilitated access to PGRFA under the multilateral system should be considered a component of farmers' rights. In any case, as natural and legal persons, farmers have the right to facilitated access under the multilateral system (to Annex 1 materials for the purposes set out in the SMTA). Contracting Parties that deny farmers access to PGRFA in the multilateral system are contravening their obligations under the ITPGRFA. To help address the disparate capacities of different groups of users to take advantage of the multilateral system Contracting Parties should consider developing programmes to assist farmers' organizations to identify and access germplasm in the multilateral system.

#### **BOX 4: Draft provisions regarding who is entitled to facilitated access of PGRFA under the multilateral system**

##### **(Core text)**

1. All natural and legal persons in all ITPGRFA Contracting Parties, including those located in [implementing country] have the right of facilitated access to PGRFA under the multilateral system

##### **(Optional additional clause regarding applicants from non-Contracting Parties)**

2. Natural and legal persons in non-ITPGRFA Contracting Parties do not have a right of facilitated access to PGRFA under the multilateral system in [implementing country]. They must follow procedures for applying for access as set out in other national laws, including [insert the name of the national ABS law, if one exists]

## Who may authorize access to PGRFA under the multilateral system?

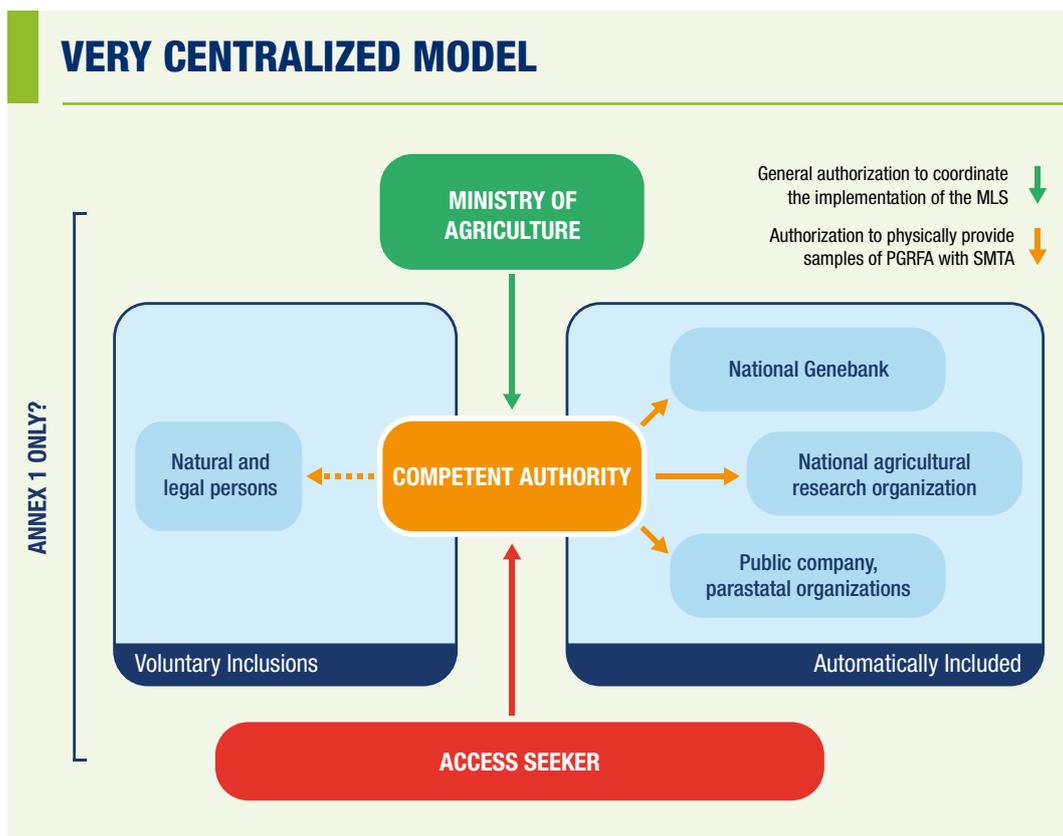


The ITPGRFA is silent on who should be empowered within the Contracting Parties to authorize access to PGRFA under the multilateral system. Countries therefore have considerable flexibility in how they approach this issue in terms of the numbers and range of entities that are authorized to consider and grant access to PGRFA under the multilateral system.

**How many and what kind of entities can be responsible for authorizing access to PGRFA under the multilateral system?**

Ultimately, it is up to the countries to decide how centralized or decentralized a system should be for the implementation of the multilateral system and also how many organizations or people should be able to consider and decide on applications for access. In the following paragraphs, we consider three models (from more to less centralized).

Under a **very centralized model**, a country may appoint a single competent national authority under the ITPGRFA and require that office (or person) to consider all requests for PGRFA under the multilateral system (see Figure 2).



**Figure 2:** Representation of a very centralized model for the implementation of the multilateral system at the national level

To date, no country has adopted legislation, regulations or ministerial decrees to put such a system in place. A variation of the very centralized model requires approvals by both the competent national authority and some other entity, often the organization that actually manages the PGRFA in question (for example, the national genebank).

In a slightly less centralized system (what we have called the **centralized model**), the competent national authority delegates authority to other entities in the country to consider requests for facilitated access to PGRFA under the multilateral system – for example, to the national genebank (with respect to materials in the genebank) and to universities and national agricultural research organizations (with respect to collections they conserve or other PGRFA they are researching or breeding). Once this initial delegation is made, the competent national authority is not required to consider and approve requests (see Figure 3).

While public entities are often the first candidates that come to mind in this context, countries could also decide that it is desirable to delegate decision-making authority with respect to some PGRFA listed in Annex 1 of the ITPGRFA to non-governmental entities, such as communities, civil society organizations, private universities, companies, farmers' organizations or individual farmers.

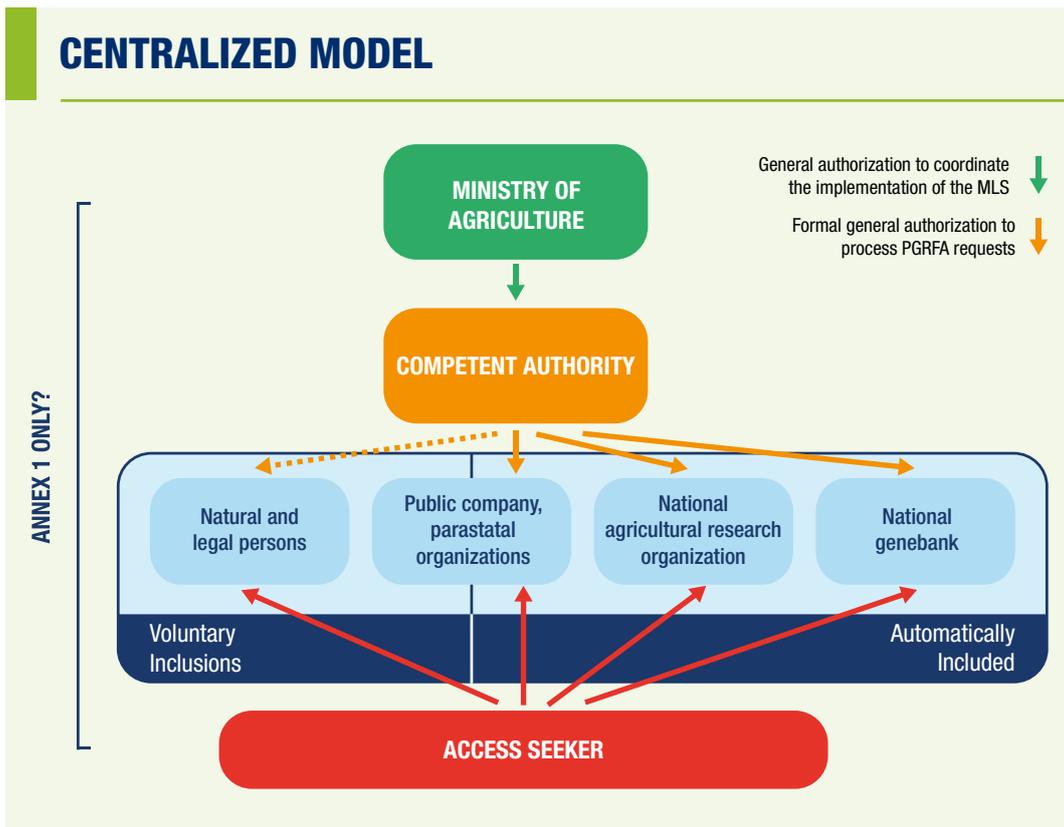
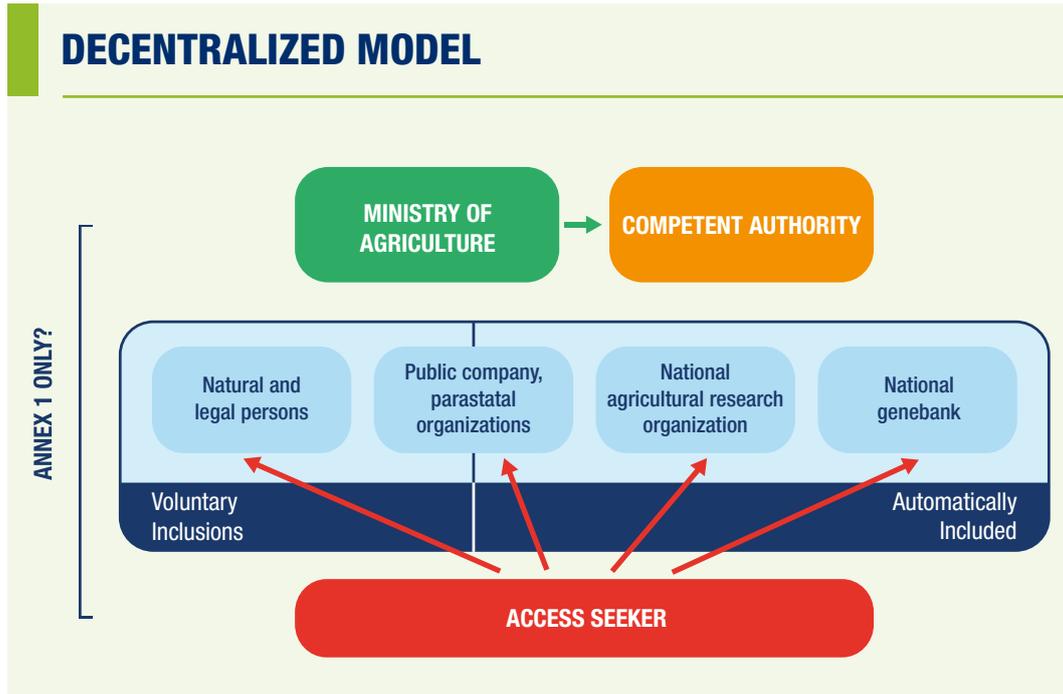


Figure 3: Representation of a centralized model for the implementation of the multilateral system

Alternatively, under a **decentralized model**, any public entity is authorized to provide PGRFA that are under the management and control of the Contracting Party and in the public domain. They do not need a formally delegated authority from a competent national authority. This is the approach taken in Canada and Germany, among other countries (see Figure 4). The issue of natural and legal persons providing materials in the multilateral system is also addressed in more detail in Section 7 in this document ('How to encourage voluntary inclusions by natural and legal persons').

3

## DECENTRALIZED MODEL



**Figure 4:** Representation of a decentralized model for the implementation of the multilateral system

Draft provisions concerning who is responsible for considering requests and authorizing access under the multilateral system are included in Box 5.

## **BOX 5: Draft provisions regarding who is responsible for considering and authorizing requests for facilitated access to PGRFA under the multilateral system**

### **(Option 1: Very centralized model)**

The competent national authority or competent national authorities appointed pursuant to [this law] [another law] is/[are] empowered to approve or reject requests for facilitated access to PGRFA under the multilateral system, subject to criteria set out in [see the text in Box 8].

### **(Option 2: Centralized model)**

The competent national authority shall periodically approve and publish a list of entities that are empowered to approve or reject requests for facilitated access to PGRFA under the multilateral system, subject to the criteria set out in [see the text in Box 8].

### **(Option 3: Decentralized model)**

- All national public organizations holding PGRFA under the multilateral system are empowered to approve or reject requests for facilitated access to PGRFA under the multilateral system subject to the criteria set out in [see the text in Box 8].
- Natural and legal persons holding Annex 1 PGRFA may receive, approve or reject requests for access to such PGRFA, subject to restrictions that may exist pursuant to other applicable ABS laws.

3

### **Is a new law necessary to identify who can receive and authorize requests for access to PGRFA under the multilateral system?**

To date, most of the Contracting Parties that appear to be the most actively engaged in implementing the multilateral system have done so without any new laws, including countries that have adopted decentralized approaches.

On the other hand, in the absence of a law confirming who can receive, authorize and provide PGRFA under the multilateral system, some providers may feel that it is too risky to decide to send materials using the multilateral system, especially in countries where ABS issues are contentious and subject to public debate. New legal measures could address the situation of natural and legal persons, explicitly encouraging them to provide access to PGRFA using the SMTA in furtherance of the country's commitments under Articles 11.2 and 11.3 of the ITPGRFA.<sup>16</sup>

<sup>16</sup> ITPGRFA, Art. 11.2 states: 'The Multilateral System, as identified in Art. 11.1, 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. With a view to achieving the fullest possible coverage of the Multilateral System, the Contracting Parties invite all other holders of the plant genetic resources for food and agriculture listed in Annex I to include these plant genetic resources for food and agriculture in the Multilateral System.' Art. 11.3 states: '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 I to include such plant genetic resources for food and agriculture in the Multilateral System.'

### How to deal with ‘PGRFA under development’?

According to the SMTA, PGRFA under development ‘means material that is not yet ready for commercialization and which the developer intends to further develop or to transfer to another person or entity for further development.’ PGRFA under development therefore refers to breeding material – PGRFA that is in the process of being improved in some of its traits and has not yet been released as a variety. Article 12.3(e) of the ITPGRFA and paragraph 5.c of the SMTA state that users (for example, breeders) have the discretion to decide if and when to make PGRFA under development available during the period of its development. Thus, they can deny access if they are asked while it is still under development. But when they do decide to make it available, it has to be under the SMTA, with the possibility of adding additional terms and conditions (that are consistent with the SMTA).<sup>17</sup>

### Responsibility to grant access to PGRFA in the multilateral system and farmers’ rights

The ability of indigenous peoples and local communities, including farmers, to make decisions about what they do with PGRFA and information under their control is an important aspect of their autonomy and is recognized in Article 9 of the ITPGRFA. Consequently, they may desire to be allowed to have access requests directed to them whenever such requests refer to PGRFA found in their farms. They may also desire to have the capacity to voluntarily include PGRFA that they maintain in their farms and in their community seed banks under the multilateral system in the same way as any other natural and legal person. The best-known example of indigenous peoples exercising this right was the voluntary inclusion of potato germplasm by the indigenous Quechua communities, who manage the Parque de la Papa in Cuzco, Peru.<sup>18</sup>

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<sup>17</sup> SMTA, Art. 2 (Definitions).

<sup>18</sup> See the notification submitted by the association ANDES to the Secretariat of the ITPGRFA on behalf of the six communities living within the Potato Park, available at <http://www.fao.org/3/a-bb861e.pdf> (accessed 24 October 2017).

**What processes and criteria should be followed to consider requests for PGRFA included in the multilateral system?**



The ITPGRFA does not set out details concerning processes for making requests for PGRFA under the multilateral system or explicit criteria for considering these requests. Addressing procedural issues can be relatively simple. Contracting Parties have considerable flexibility when developing these processes and criteria as long as they are consistent with their obligations regarding the multilateral system.

## 4.A What process should access seekers follow to make requests for PGRFA under the multilateral system?

### What are the options?

4

The answer to this questions depends on how centralized the system is that a Contracting Party puts in place for implementing the multilateral system. In a very centralized model, the access seeker would direct requests to the single competent national authority in the provider country (Figure 2). In the centralized model, requests would be sent to the entity delegated by the competent national authority as the decision-making authority (Figure 3). In the decentralized model, access seekers should direct requests to the entities that are known to control, manage or own the PGRFA to which they desire facilitated access (Figure 4)

### Is a new law necessary?

No, a new law is not necessary under the ITPGRFA framework if countries have adequate measures in place to implement it. Most countries that are currently recording and reporting the largest number of transfers using the SMTA do not have new laws in place explicitly setting out procedures for access seekers to follow. Instead, these countries are relying on the access seekers to send requests to the authorities and administrators associated with collections or *in situ* PGRFA. In these countries, national functionaries make decisions on the basis of existing mandates, rights, obligations, decision-making powers and an appreciation of the commitments the country has made under the ITPGRFA. People wanting to access materials held in the national genebank will usually send an access request to the genebank. They do not need a law to inform them to do so. In turn, if the genebank has the authority to consider the request, it will do so, without having to ask for permission from the competent national authority.

### Under what circumstances might a new law (or other policy measure) be potentially useful?

Even if a new law is not necessary, there are several reasons for which having a law addressing how access seekers should make requests might be beneficial:

- To increase the system's transparency. Access seekers sometimes complain that they do not get answers to their requests for access, leading them to wonder if they have sent their applications to the right place. A formal policy document setting out procedures for access seekers (including the offices to whom their requests can or

should be directed and the authorities responsible for addressing request-related queries) could address these concerns, making the system easier to understand and to work through.

- To empower access seekers who traditionally have not enjoyed facilitated access to domestic or international collections and other sources of germplasm. Underscoring that they may make applications in a formal policy document may help in the longer term to empower them as users and beneficiaries of the multilateral system. In section 2 of this document, we have presented the case for farmers. Other PGRFA users such as seed companies may not have enjoyed access to national collections in certain jurisdictions before the ITPGRFA.
- To address providers' sense of vulnerability and discomfort with 'taking the risk' of authorizing the application. A formal policy document setting out procedures and information requirements for access seekers will lower the burden experienced by the entities that have the responsibility for making such decisions.

## **BOX 6: Draft provisions regarding who receives requests for access to PGRFA under the multilateral system**

### **(Option 1: Very centralized model)**

All requests for access to PGRFA under the multilateral system of the ITPGRFA shall be directed to the competent national authority (or the single agency to which it delegates such authority).

### **(Option 2: Centralized model)**

Requests for access to PGRFA under the multilateral system may be directed to any of the entities that have been approved by the competent national authority subject to section [see Box 1].

### **(Option 3: Decentralized model)**

The access seekers may direct requests for PGRFA in the multilateral system of the ITPGRFA to any entity holding these PGRFA within the country or:

- The access seekers may direct requests to all national public organizations holding PGRFA in the multilateral system.
- The access seekers may direct requests to natural and legal persons holding PGRFA in the multilateral system, subject to restrictions that may exist pursuant to other applicable ABS laws.

## 4.B What processes should decision-makers follow to consider requests for PGRFA under the multilateral system?

### What is the range of options?

The range of options regarding decision-making processes will be largely informed by the degree of (de)centralization of the system that a Contracting Party wants to put in place. In a very centralized model, the single, appointed competent national authority will decide. However, the competent national authority will not have all of the information it needs to make a decision and will need to get information from the actual PGRFA holders. For example, the competent national authority will need to know if the requested accessions of PGRFA are actually being conserved and if there are sufficient stocks to satisfy requests. It is relatively easy to imagine such a system encountering delays with potentially numerous communications between the single competent national authority and the holder of the PGRFA in question. National policymakers need to critically assess whether they have the resources to ensure that a very centralized model does not end up being cumbersome and slow.

In more decentralized models, the entities who receive the requests will be more likely to have the information they need to make the decisions since they will also be the entities physically conserving the resources. Under both centralized and decentralized systems, the entities with decision-making authority may encounter 'difficult cases' where they are not sure about the status of the PGRFA being requested. They would benefit from being able to refer such cases to an expert committee for advice (as specified in Box 2, for example).

### Is a new law necessary?

No, a new law is not necessary. Most countries that are currently reporting the largest number of transfers using the SMTA do not have new laws in place explicitly setting out procedures for decision-makers to follow.

### Why might you want a law?

It may be useful in some countries to set out the decision-making processes in order to overcome providers' sense of vulnerability, to increase system transparency and to empower traditionally disempowered access seekers. It may be particularly useful in the case of *in situ* PGRFA on national public lands to have the rules for applying and for decision-making spelled out in a law. This particular issue is addressed in more detail in Section 9.

### Linkages between the processes to consider requests for PGRFA in the multilateral system and the Nagoya Protocol

In cases where the person deciding whether or not to provide access is uncertain which set of rules to apply (that is, those linked to implementing the multilateral system or under the CBD and the Nagoya Protocol), it would be useful to have a mechanism for quick consultation with functionaries responsible for the administration of those systems (a draft text of such a mechanism is shown in Box 7).

## **BOX 7: Draft provisions regarding processes to be followed by decision-makers when considering requests for PGRFA in the multilateral system**

### **(Optional clauses, potentially for all models: very centralized, centralized and decentralized)**

1. The authorizing entity will send a message to the access seeker acknowledging receipt of the request for access.
2. The authorizing entity will communicate its decision to the access seeker within [45] days of receiving the request.
3. In cases of doubt regarding the status of the requested PGRFA, the authorizing entity will consult with [the advisory committee created (see Box 2)] [the competent national authority(ies) appointed under the CBD and the Nagoya Protocol.]

### **(Option additional clause for very centralized model only)**

4. The competent national authority will consult with the holders of PGRFA to confirm their status *vis-à-vis* the multilateral system and other issues set out in [see Box 8] before authorizing the holder to facilitate the access of the PGRFA using the SMTA.

## 4.C What criteria can providers use to decide whether or not to authorize access under the multilateral system?

The multilateral system was purposefully designed to lower the number of variables that need to be considered by both access seekers and providers. In the end, once ratified, the ITPGRFA leaves very few issues for consideration or negotiation between the access seeker and the potential provider. Contracting Parties have undertaken to provide facilitated access to PGRFA under the multilateral system using the SMTA for free or minimum administrative costs. Potential providers have relatively few grounds for turning down requests, including the following:

- The provider knows the recipient will not use the material for the purposes set out in Article 12.3 of the ITPGRFA and the SMTA (that is, research, breeding and training for food and agriculture)
- The recipient refuses to accept the PGRFA under the conditions of the SMTA
- The holder does not have sufficient samples of the PGRFA accessions requested to be able to provide them
- The recipient is not willing to pay the minimal administrative fees (if the provider decides to request it)
- The recipient is not located in an ITPGRFA Contracting Party (depending on the provider country's policy *vis-à-vis* non-Contracting Parties)

There may be additional considerations when it comes to applications for access to PGRFA under the management and control of the national government that is *in situ* (this issue is addressed in more detail in Section 9).

The situation is slightly different with respect to the developers of PGRFA under development, who are not obliged to provide access to such resources as long as they are under development. They may require additional terms to those included in the SMTA, and those additional terms could be negotiated between the developer/provider and the recipient.

## **BOX 8: Draft provisions regarding criteria to be applied when considering requests for facilitated access<sup>19</sup>**

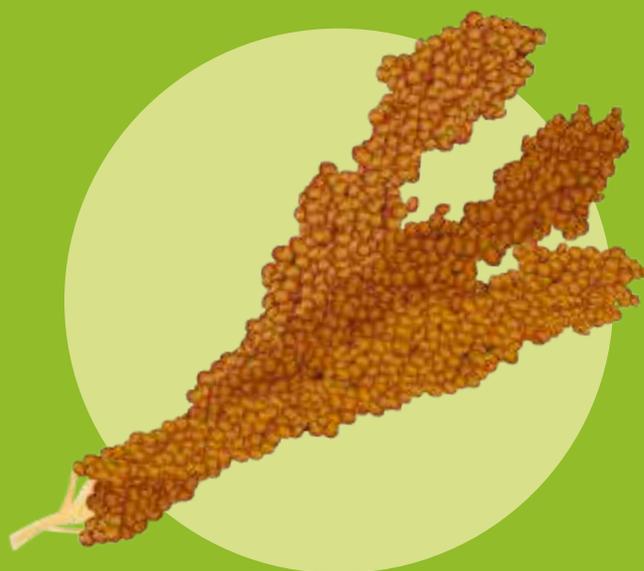
1. Holders of Annex 1 PGRFA that are in the multilateral system shall provide the requested materials, using the SMTA, subject to the following considerations:
  - a. It is for the purposes listed in Article 12.3 of the ITPGRFA
  - b. The recipient agrees to receive PGRFA under the SMTA
  - c. The holder has sufficient samples of the accessions requested to be able to provide samples of these accessions; and the recipient is willing to pay minimal administrative fees [if the provider decides to request payment]
  - d. The recipient is located in a Contracting Party of the ITPGRFA [depending on the provider country's policy *vis-à-vis* non-Contracting Parties]
2. Without prejudice to clause 1 immediately above, access to *in situ* PGRFA under the multilateral system may be subject to additional conditions, as set out in [Boxes 9 and 10].
3. Developers of PGRFA under development are not obliged to provide access to such resources. However, when they do decide to provide access, it must be transferred under the SMTA. The provider may require additional terms to those included in the SMTA.
4. Natural and legal persons holding Annex 1 PGRFA that are not yet included in the multilateral system are not obliged to provide access to such materials when they are requested; however, they are encouraged to include those resources in the multilateral system and facilitate their access using the SMTA.
5. In the event that Annex 1 PGRFA not under the multilateral system are subject to a national ABS law, the providers and recipients must first obtain requisite approval subject to that law.

<sup>19</sup> The text in Box 8 is suitable for the decentralized and centralized models. For the very centralized model the only change that would be necessary to adapt the text would be to change the first introductory sentence to 'For PGRFA that are in the multilateral system, the competent national authority shall authorize access, under the SMTA, subject to the following considerations.'



# 5

**How to deal with requests for purposes that are (or may be) beyond the scope of the multilateral system?**



Article 12.3(a) of the ITPGRFA states that '[a]ccess [to Annex 1 PGRFA under the multilateral system] shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.' Where a person requesting access to PGRFA under the multilateral system has not disclosed their intended purpose, the provider is not required to proactively clarify the matter. This is partly because the relevant language of Article 12.3(a) is incorporated as Article 6.1 of the SMTA: 'The Recipient undertakes that the Material shall be used or conserved only for the purposes of research, breeding and training for food and agriculture. Such purposes shall not include chemical, pharmaceutical and/or other non-food/feed industrial uses.' The limitations on the allowable uses of the PGRFA are, therefore, a binding obligation upon recipients.<sup>20</sup>

By way of corollary, ITPGRFA Contracting Parties are only obliged to provide facilitated access to PGRFA under the multilateral system when the conditions in Article 12.3(a) are met. This excludes a number of purposes for which access may be sought including for non-food/non-feed purposes, for direct use and for direct commercialization.

## 5

### Which regime should be applied for access to PGRFA for non-food/non-feed purposes?

Requests for access to PGRFA for non-food/non-feed purposes (for example, the production of biofuels or pharmaceutical or cosmetic products) are, in effect, no longer requests for PGRFA under the multilateral system. Therefore, it would not be appropriate to transfer plant genetic resources for non-food/non-feed purposes using the SMTA since the SMTA prohibits the recipient from using the transferred materials for these purposes.

Where a country has ABS laws implementing the CBD or Nagoya Protocol, the authorities in charge of implementing the multilateral system could look at the scope of these measures and determine whether they cover Annex 1 PGRFA for uses beyond the scope of the multilateral system. If so, the request for access should then be referred to the competent national authority under the general ABS measures, or the access seeker should be instructed to make the appropriate application pursuant to those laws or national regulations.

### Which regime should be applied for access to PGRFA by farmers for direct use for cultivation?

The uses that smallholder farmers make of PGRFA they receive from genebanks and research organizations can sometimes be hard to define, including a mix of research, breeding and direct use for cultivation. Research and breeding do fall within the scope of the multilateral system, but direct use for cultivation does not. As in the case of possible non-food/feed uses, it is not the responsibility of the provider to take extra steps to ensure that the recipient farmers' use will fall 100% within the scope of the multilateral

<sup>20</sup> In this context, it is also worth noting that there is not an onus on the provider to monitor compliance by the recipient with this limited range of uses. Art. 12.3 of the ITPGRFA states that access to PGRFA under the multilateral system shall be 'accorded expeditiously, without the need to track individual accessions.'

system. The burden of compliance is on the recipients by virtue of Article 6.1 of the SMTA. That said, when it is clear that the PGRFA will be used directly in cultivation, the SMTA is not appropriate to transfer the resource in question. The ITPGRFA's Ad Hoc Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System (Technical Advisory Committee) have addressed this issue, and its response is quoted in the following section.

### **If the SMTA cannot be used, what instrument is appropriate to facilitate access to PGRFA?**

The ITPGRFA's Technical Advisory Committee has suggested that PGRFA distributed to farmers for direct use in cultivation be accompanied by the statement: 'This material can be used by the recipient directly for cultivation, and can be passed on to others for direct cultivation.' This prevents them from using the PGRFA for research and breeding and for transferring the PGRFA to others for these same purposes. The conditions under which farmers can access PGRFA for cultivation in their farms may be determined by the ABS laws in force in the country. National laws implementing the Nagoya Protocol may not extend in scope to farmers' direct use of PGRFA. However, countries may take a broader approach and include access for direct use within the scope of their ABS law, even though it may exceed the scope of the Nagoya Protocol.

### **Which regime should be applied to the transfer of PGRFA for direct commercialization?**

The transfer of PGRFA for direct commercialization – that is, with no further improvement before selling seeds or other reproductive material – also does not fall among the purposes of research, breeding and training specified in Article 12.3(a) of the ITPGRFA and Article 6.a. of the SMTA. Most of what is written above with respect to direct use also applies to commercialization.

Commercialization of new PGRFA products (that incorporate, but are different from, PGRFA obtained from the multilateral system using the SMTA) is anticipated under the ITPGRFA and the multilateral system. Often the developer of the new PGRFA will not actually be the commercializer. They are often separate organizations. In this case, the benefit-sharing obligations that the developer accepted when accessing germplasm from the multilateral system should be passed on to the commercializer as part of the license agreement. Otherwise, the benefit-sharing aspect of the multilateral system will not be realized. While this final transfer in the development chain may not be subject to a SMTA, it is still governed by the ITPGRFA, and the benefit-sharing obligations will need to be passed on and respected.

### **How can coordination between lead agencies of the ITPGRFA, the CBD and the Nagoya Protocol contribute to the efficiency of the system?**

Coordination between individuals and organizations responsible for the ITPGRFA, the CBD and the Nagoya Protocol is critical if the three agreements are to be implemented successfully and coherently. Different countries have taken different approaches to coordinating their implementation. In some countries, the same ministry is responsible

for both instruments, sometimes even with the same person serving as the national focal point for both the ITPGRFA and the CBD/Nagoya Protocol (for example, Rwanda and the United Kingdom). Other countries have created coordination committees that bring together those involved in the implementation of the two instruments for regular discussions (for example, Uganda, Benin and Madagascar).

Given the differences between countries, there is no single model for the mutually supportive implementation of the Nagoya Protocol and the ITPGRFA. What is key, however, is communication and cooperation between the actors involved. It is important that when a provider of PGRFA under the multilateral system (for instance, a national genebank) receives a request for access that falls outside the multilateral system, they know who to contact for information on how to proceed. Similarly, when a provider of PGRFA that usually falls under the CBD's or the Nagoya Protocol's implementing rules receives a request for genetic resources that they think may fall within the multilateral system, they also need to know who to contact or to whom to refer the access seeker in order to process the request.

## 5

### Is there a new law necessary to clarify how to deal with requests for PGRFA outside of the multilateral system?

This answer requires consideration of optional mechanisms to implement both the multilateral system and the Nagoya Protocol. As stated in other sections, a number of countries have chosen not to adopt any new laws to implement the ITPGRFA. In these countries, it is expected that people who manage PGRFA in the multilateral system will exercise their judgement when requests are made for access to PGRFA for purposes clearly outside the scope of the ITPGRFA. In such cases, the authority concerned should simply decline to provide the resources using the SMTA and either provide them under some other agreement (if the provider had the legal authority to do so) or direct the applicant to other appropriate authorities. If, on the other hand, not having a law promoting cooperation between lead agencies leads to requests 'falling through the cracks,' then it may be appropriate to develop one to remedy the situation.

**What PGRFA are automatically included in the multilateral system?**



## 6.A What is the general approach?

According to Article 11 of the ITPGRFA, the multilateral system ‘shall include all plant genetic resources for food and agriculture listed in Annex 1 that are under the management and control of the Contracting Parties and in the public domain.’

What do ‘management and control’ and ‘in the public domain’ mean?

The Technical Advisory Committee has provided guidance on the legal interpretation of these terms:

[T]he expression ‘under the management of’ means that a Contracting Party has the power to undertake acts of conservation and utilization in relation to the material: it refers to the capacity to determine how the material is handled and not to the legal rights to dispose of the PGRFA. The ordinary meaning of ‘control’ in this context focuses on the legal power to dispose of the material. In other words, it is not sufficient that the PGRFA be ‘managed’ by a Contracting Party (e.g. through conservation in a genebank); it must also have the power to decide on the treatment to be given to such resources. [...] the expression, ‘of the Contracting Parties,’ obviously includes material held by structures of the central national administration, such as government departments and national genebanks. It may or may not cover material held by autonomous or quasi-autonomous entities normally considered to be part of the national plant genetic resources system. Likewise, special issues may arise in the case of Federal States. There is an expectation on the part of Contracting Parties that all such material, that is not automatically included, should be brought within the Multilateral System through positive action.<sup>21</sup>

PGRFA of species listed in Annex 1 of the ITPGRFA that meet these criteria are automatically included in the ITPGRFA multilateral system.

### What materials are under the management and control and in the public domain within the country?

For the effective implementation of the multilateral system at the national level, the competent national authority, or a similar body, should identify the collections that are automatically included, in consultation with experts and authorities in charge of the collections, applying the legal interpretation of the Technical Advisory Committee quoted above. Based on this legal interpretation, accessions of PGRFA listed in Annex 1 of the ITPGRFA that are conserved in national genebanks will generally be automatically included in the multilateral system. The same will likely be true of materials held by national public research organizations and national public universities. An exception may be collections deposited in national genebanks that are subject to special conditions that limit their further distribution. Materials managed by farmers or companies or other natural or legal persons in most countries would generally not be automatically included

<sup>21</sup> Report of the First Meeting of the Ad Hoc Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System, Doc. IT/AC-SMTA-MLS 1/10/Report (18–19 January 2010), available at [http://www.planttreaty.org/sites/default/files/ac\\_smta\\_mls1\\_repe.pdf](http://www.planttreaty.org/sites/default/files/ac_smta_mls1_repe.pdf) (accessed 24 October 2017), Appendix 3.

since they are managed or controlled by the farmers or companies and not by organs associated with the central government.

### What to do when there is uncertainty about who is 'managing' and 'controlling' the materials concerned?

If decision-makers are in doubt as to whether or not some subset of materials are under the management and control of the Contracting Party and in the public domain, they can ask themselves the following questions (which are taken from a different decision-making tool, developed by Gurdial Singh Nijar in 2012):

- Does the organization holding the collection carry out the functions of a government department?
- Is the overarching policy and management of the organization holding the PGRFA prescribed by, or subject to, the direction of the government?
- Is the management board of the organization holding the PGRFA appointed by, or subject to, the approval of the government?
- Is the funding of the organization holding the material subject to governmental approval?

The combined answers to these questions should shed light on whether the PGRFA held by the organizations in question are 'under the management and control' of the national government. It is important to note that not all of these criteria may be applicable or reliable in all countries.

### What is the situation of PGRFA under the management and control of provincial or regional governments in federated states?

The ITPGRFA refers to Contracting Parties. As noted in the opinion of the Technical Advisory Committee, quoted above, 'Contracting Parties,' refers to 'structures of the central national administration, such as government departments and national genebanks [...] special issues may arise in the case of Federal States.' Whether or not PGRFA managed by provincial or municipal governments are automatically included by virtue of the reference to 'Contracting Parties' will depend largely upon the distribution of powers between the levels of government in the country.

### How do users learn about the PGRFA that are in the multilateral system in each country?

Many organizations hosting PGRFA collections include accession-level information on open public databases, including whether or not such collections are included in the multilateral system. They also include options for requesting this germplasm and providing information to be included in the SMTA when the material is eventually transferred.

The CGIAR Centres and an increasing number of national and regional organizations are providing accession-level information about their collections (including whether they

are available through the multilateral system) through Genesys.<sup>22</sup> As of October 2017, Genesys includes information about over 3.6 million accessions worldwide held by over 430 institutes.

Pursuant to Article 17 of the ITPGRFA, there is considerable work being done to develop a global information system (GLIS) that will help to link dispersed information about materials both inside and outside the multilateral system. Among other things, through GLIS, it will be possible to obtain digital object identifiers (DOIs), which constitute unique identification numbers for PGRFA accessions around the world. DOIs will help in tracing the movement of materials and to link research results back to these materials.

National public authorities have been invited to notify the Secretary of the ITPGRFA about the national collections that are included in the multilateral system. The Secretary has posted a draft, generic letter for national authorities to use to make such notifications. It is available in English, Spanish, French and Arabic at the following website: <http://www.fao.org/plant-treaty/areas-of-work/the-multilateral-system/collections/en/>. As part of a national implementation strategy, managers of collections should pursue some combination, or all, of these avenues for sharing information about the materials that are included in the multilateral system in their country.

### Are crop wild relatives included in the multilateral system?

Wild relatives of PGRFA listed in Annex I of the ITPGRFA are included in the multilateral system if they belong to the genus specified in the Annex for each crop, except for cases where the observations indicate that they are exempted (for example, *Zea diploperennis*).

### Can new accessions of PGRFA be added to collections concerning which information has been shared with the ITPGRFA's Governing Body? Can accessions be dropped from these collections?

Yes. New accessions of PGRFA can be included in collections that were originally included in the multilateral system, thereby becoming included in the multilateral system. Likewise, accessions that were originally part of the multilateral system may be found to be duplicates of other materials previously believed to be distinct, or they may have lost their viability or be affected by diseases or other problems that make it advisable to remove them from the collections initially identified as multilateral system material. Ideally, in the latter cases, healthy samples of these materials could be regenerated and continue to be made available. In such cases, it would be very useful to communicate these changes to the Secretariat of the ITPGRFA so that records of accessions of PGRFA actually available in the multilateral system are updated.

### Is a new law necessary to define the PGRFA that are included in the multilateral system?

In many countries, all of these procedures, from identifying the collections of PGRFA under the multilateral system to notifying them to the ITPGRFA Secretariat, can be (and are) coordinated by national public functionaries in the execution of their regular duties

<sup>22</sup> Genesys, available at <https://www.genesys-pgr.org/welcome> (accessed 24 October 2017).

in relation to the conservation and use of plant genetic resources within the country. In many cases, only administrative acts will be necessary to complete all of the steps described above, without having to pass a law describing the process and assigning responsibilities.

However, in some cases, Contracting Parties may feel it is necessary to explicitly empower a public authority (perhaps a so-called competent national authority, as described in Box 1) to coordinate procedures across the country to confirm what collections of PGRFA are automatically included in the multilateral system and to work with natural and legal persons to encourage their voluntary inclusion.

### **Does the list of collections or accessions included in the multilateral system need to be approved, recognized or confirmed by a national public authority?**

There is no such obligation included in the text of the ITPGRFA. Indeed, the formula 'management and control of Contracting Parties and in the public domain' describes PGRFA that are automatically included by virtue of a country's ratification of the ITPGRFA. Nonetheless, it is very useful for countries to publish lists of collections or accessions of PGRFA (including through the ITPGRFA website) that are included in the multilateral system, as described above.

National policymakers should guard against the possibility that the compilation of these lists, and the procedures for bringing these lists to the attention of the national authorities (if it is decided that this is a process that they want to follow in the country concerned), do not become obstacles to implementation. Materials that are 'under the management and control of Contracting Parties and in the public domain' are automatically included in the multilateral system. If the lists are to be shared with, confirmed or even approved by higher-level national authorities, it should not be done in a way that creates the possibility of introducing or applying alternative criteria.

### **Would it be useful to develop guidelines setting out processes for confirming the collections of PGRFA that are included in the multilateral system?**

Guidelines may be useful to help public authorities and functionaries work through considerations and processes. They could include a combination of the guidance provided by the Technical Advisory Committee, quoted above, and the step-by-step questions to guide decision-making in cases where decision-makers are not sure if the materials concerned are under the management and control of the Contracting Party.

## 6.B Are *in situ* PGRFA included in the multilateral system?

The portions of text dealing with the multilateral system in the ITPGRFA are silent with respect to whether materials are *ex situ* or *in situ*, except for Article 12.3(h), which states: ‘Without prejudice to the other provisions under this Article, the Contracting Parties agree that access to plant genetic resources for food and agriculture 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.’ So far, the Governing Body of the ITPGRFA has not set up standards for access to plant genetic resources found in *in situ* conditions.

As a result, most commentators agree that *in situ* PGRFA that is ‘under the management and control’ of the Contracting Party and ‘in the public domain’ are automatically included in the multilateral system. And they interpret Article 12.3(h) within the overall framework of the multilateral system. According to this interpretation, the ITPGRFA requires access seekers to follow existing national rules on the collection of PGRFA but assumes that the access permit, once granted, will take the form of the SMTA. This understanding with respect to *in situ* PGRFA is reflected in Box 9 regarding access to *in situ* PGRFA included in the multilateral system.<sup>23</sup>

On the other hand, some countries interpret Article 12.3(h) to support the idea that *in situ* Annex 1 PGRFA (even that which is ‘under the management and control’ of the Contracting Party and ‘in the public domain’) are not included in the multilateral system. The opinion and guidance of the Technical Advisory Committee are useful for governments to develop their policies and legislation for implementing the multilateral system.

### What *in situ* Annex 1 PGRFA would be considered ‘under the management and control’ of the Contracting Party?

*In situ* PGRFA of Annex 1 crops and forages that are ‘under the management and control’ of the government and ‘in the public domain’ would be automatically included in the multilateral system. PGRFA that would meet this criteria, for example, would be PGRFA found in national parks and other protected areas that are managed by agencies belonging to a country’s central government (such as departments or directorates of the Ministry of Environment and commissions of natural protected areas hosted by a ministry). In many countries, PGRFA managed by farmers, even if on national public land, would not be automatically included in the multilateral system since they are considered to be under the management and/or control of the farmers.

<sup>23</sup> This interpretation is in accordance with the opinion of the Technical Advisory Committee, which, at its first meeting, pointed out that many countries already have the capacity within their domestic frameworks to provide facilitated access in accordance with the multilateral system and that Art. 12.3(h) should not be seen as preventing the provision of such access. The Committee also clarified that national legislation is not a pre-condition in order to provide facilitated access to *in situ* PGRFA under the multilateral system. Appendix E: International code of conduct for plant germplasm collecting and transfer, available at <http://www.fao.org/docrep/x5586e/x5586e0k.htm> (accessed 24 October 2017).

### What other laws can potentially affect access to the *in situ* PGRFA included in the multilateral system?

In many countries, collecting plant samples from natural areas is subject to regulations concerning environmental protection, trespass to property, conservation, and so on. Collecting plants in protected territories is often regulated to avoid damage to natural habitats and endangered species. Often it is necessary to obtain approval from the protected area's director, and national conservation officers are required to accompany the collecting mission.

### What should the process of providing access to *in situ* PGRFA look like?

Facilitated access to *in situ* PGRFA under the multilateral system is to be granted without prejudice to the regulations mentioned in the previous paragraph concerning environmental protection, property regulations, conservation and plant health. While only the agencies of the central government may be involved in implementing these regulations in some countries; in other countries where the management of public lands and natural protected areas are in the hands of regional and local governments, these institutions may have to be involved as well. Governments that adopt a very centralized model, in which all of the PGRFA requests have to be considered and approved by a competent national authority, may decide to preserve the existing authority of their national park managers, for example, over the PGRFA found *in situ* within the territories of the parks that they manage and recognize their capacity to sign the SMTAs accompanying those PGRFA. Otherwise, an agreement can be reached between these managers and the competent national authority, according to which the collecting mission can be approved by the national park managers, and, once all of the requirements for collecting activities have been met, access to the collected PGRFA can be considered and approved by the competent national authority, in accordance with the provisions governing the multilateral system.

### Is a new law necessary to guarantee facilitated access to *in situ* PGRFA in the multilateral system?

A law is not necessary, but if countries decide to adopt a law introducing general principles, responsibilities and procedures for the implementation of the multilateral system, this law could include some provisions calling for coordination mechanisms that guarantee access to *in situ* PGRFA under the terms and conditions of the multilateral system while, at the same time, respecting existing laws and regulations on nature conservation, land property rights and phytosanitary measures (see Box 10).

In addition, it may be necessary to amend other policies, laws or administrative guidelines concerning the management of protected areas to establish that, when Annex 1 PGRFA under the multilateral system are requested, the PGRFA will ultimately be made available under the SMTA, assuming that all of the other standards in the law are satisfied by the collecting mission. The draft text of such a provision is included in Box 10.

### **BOX 9: Draft provisions regarding access to *in situ* PGRFA included in the multilateral system**

1. Access seekers may direct applications for access to *in situ* PGRFA in the multilateral system to [competent national authority] [and] [lead agencies with responsibility for managing areas where these resources are located].<sup>24</sup>
2. The [competent national authority] [lead agency] will consider the access request subject to norms regulating the management of PGRFA in those areas.
3. If and when conditions are satisfied, and collecting is approved, PGRFA will be transferred to the access seeker using the SMTA.

<sup>24</sup> For the centralized approach, the law would refer to the competent national authority. For a more decentralized approach, the law would refer instead to the lead agencies.

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### **BOX 10: Draft provisions regarding access to *in situ* PGRFA to be included in other laws addressing habitat preservation and the collection of living specimens**

The access to samples of PGRFA included in the multilateral system in accordance with law [XXX] and found in *in situ* conditions will be subject to the use of the SMTA approved under the framework of the ITPGRFA.

## How to encourage voluntary inclusions by natural and legal persons?



Article 11.2 of the ITPGRFA states that ‘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.’ Article 11.3 of the ITPGRFA says that Contracting Parties will take appropriate measures to encourage natural and legal persons within their jurisdiction to include the PGRFA that they hold in the multilateral system. Natural legal persons include research organizations, private companies, foundations, civil society organizations, individual collectors, individual breeders, farmers and hobby gardeners.<sup>25</sup>

### Practically speaking, how can a natural or legal person include materials in the multilateral system?

One way for a natural or legal person to include material in the multilateral system is simply to provide it to a recipient using the SMTA. That recipient will have the right, under the SMTA, to pass it on using the SMTA. In this way, the material concerned can circulate through the multilateral system. Another very practical way of voluntarily including PGRFA in the multilateral system is to deposit it in a public national or international genebank that will agree to conserve it and make it available using the SMTA. In this way, the recipient genebank shoulders the costs of maintaining and distributing the material concerned.

### Can natural and legal persons decide independently to place Annex 1 PGRFA in the multilateral system?

The answer to this question depends on the combined laws and policies of the implementing country. In theory, given each Contracting Party’s undertaking to create policy incentives for voluntary inclusions in the multilateral system, it should make it easy for natural and legal persons to either transfer Annex 1 PGRFA using the SMTA or to deposit material in a public national or international collection that will subsequently use the SMTA.

In the decentralized implementation model (depicted in Figure 4), natural and legal persons clearly have the right to be providers of Annex 1 materials using the SMTA. However, they also may have the right under the other two models (very centralized and centralized models, depicted in Figures 2 and 3). The very centralized implementation model and the centralized implementation model establish who has the authority to consider requests and provide access to Annex 1 PGRFA that are ‘under the management and control’ of the Contracting Party and ‘in the public domain.’ Both of these models do not necessarily extend this authority to materials held by natural and legal persons. Thus, even under these two systems, natural and legal persons could have the right to autonomously decide whether or not to include materials in the multilateral system. Ultimately, the freedom of natural and legal persons to voluntarily include Annex 1 PGRFA in the multilateral system depends more on the national laws in place in the particular country, including national ABS laws implementing the CBD or Nagoya Protocol, as considered in the next question.

<sup>25</sup> Art. 11.4 establishes that the Governing Body of the ITPGRA shall decide whether access shall continue to be facilitated to natural and legal persons that have not included their PGRFA in the multilateral system.

## How can national laws implementing the Nagoya Protocol affect the ability of natural or legal persons to voluntarily include PGRFA in the multilateral system?

The clearest scenario under which a national ABS law would affect a natural or legal person's ability to include material in the multilateral system is when the recipient is outside the country and national ABS law: (1) extends in scope to Annex 1 PGRFA held by natural and legal persons, and (2) requires them to get consent from a competent national authority before providing the materials to recipients outside the country. In such cases, the natural and legal person concerned will have to follow the procedures established by the national law to get the requisite permissions.

Some national ABS laws may not be flexible enough to permit natural or legal persons to transfer their Annex 1 PGRFA under the SMTA or to deposit them with a collection that will subsequently make it available using the SMTA. Some national ABS laws may require inclusion of conditions in ABS agreements that would not be consistent with the SMTA. In such cases, one could argue that the Contracting Party is contravening its undertaking under Article 11.3 to encourage natural and legal persons to include materials in the multilateral system and that adjustments to national policy frameworks are necessary to promote their complementarity.

Some countries that have ratified the Nagoya Protocol have opted not to put in place systems for requiring prior informed consent from a competent national authority for access to genetic resources. Other countries have explicit or implicit exemptions to allow natural and legal persons to voluntarily provide access to PGRFA using the SMTA without getting approval from the competent national authority appointed under the ABS law (for example, Costa Rica).<sup>26</sup> In both cases, the ABS law does not create barriers to natural and legal persons voluntarily including PGRFA in the multilateral system.

The Nagoya Protocol and the CBD were designed to regulate international transfers of genetic resources and traditional knowledge, not domestic transfers. Thus, national ABS laws implementing the Nagoya Protocol or CBD may not affect within-country transfers from natural and legal persons to recipients using the SMTA or deposits of materials in national public organizations hosting *ex situ* PGRFA collections that are in the multilateral system. In such cases, national ABS laws would not affect the ability of natural and legal persons to include Annex 1 PGRFA in the multilateral system through this means. That said, national ABS laws may be designed to require natural and legal persons to obtain permission from a competent legal authority for domestic and international transfers.

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<sup>26</sup> Costa Rica has a national ABS law inspired by the CBD, but natural and legal persons are allowed to provide access to Annex 1 PGRFA without seeking authority from the CBD's competent authority. It has taken this approach because it considers that the country's undertakings pursuant to Arts 11.2 and 11.3 of the ITPGRFA are in line with voluntary inclusion of Annex 1 crops by natural and legal persons. This is not written in any policy documents in Costa Rica, but it is the common understanding among the implementing agencies for the CBD, Nagoya Protocol and ITPGRFA in the country.

### What kinds of measures can the government take to encourage voluntary contributions by natural and legal persons?

Perhaps the most effective measure is to ensure that natural and legal persons have the right to voluntarily provide Annex 1 PGRFA using the SMTA to recipients both inside and outside their own country and to ensure that they know that they have this right. In its first meeting, the Technical Advisory Committee considered a broad range of additional measures that Contracting Parties can take, including the following:

- Fiscal incentives – for example, some costs involved in the maintenance of private collections could be exempted from taxes if the collections are included in the multilateral system.
- Financial incentives – for example, natural and legal persons are eligible for public funding on the condition that their collections of PGRFA listed in Annex 1 of the ITPGRFA are included in the multilateral system.
- Awareness-raising efforts, including communication campaigns about the ITPGRFA, the issues involved in organizations' interdependence on plant genetic resources and so on.

In relation to voluntary inclusions by public organizations that have conservation and research responsibilities in federated or semi-federated states, a potentially effective measure to encourage the inclusion of PGRFA in the multilateral system is a policy or strategy for the coordinated management of public collections of PGRFA, held by both the central bodies and the organizations in federated or semi-federated states. This policy or strategy can envisage the inclusion of federated states' collections in the multilateral system and the use of the SMTA for the transfer of PGRFA coming out of these collections. This measure has been adopted by Australia, Brazil, Spain and Switzerland.

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### Is a new law necessary to encourage voluntary contributions by natural and legal persons?

No, a new law is not necessary. These incentive measures do not need to be spelled out in a law. However, in those countries where the responsibilities of the competent national authority are described in a formal policy instrument, these responsibilities could include the obligation to encourage voluntary contributions by natural and legal persons. The text proposed in Box 11 could be added to the national legislation regulating the implementation of the multilateral system.

## **BOX 11: Draft provisions regarding materials included in the multilateral system**

### **(Standard scope, covering Annex 1 crops)**

1. This law/regulation/order/guideline applies to the PGRFA of genera listed in Annex 1 of the ITPGRFA that are included in the multilateral system.
2. Annex 1 PGRFA are included in the multilateral system when:
  - a. they are under the management and control of the government and in the public domain
  - b. they are voluntarily included in the multilateral system by natural and legal persons.
3. Without prejudice to Articles 1 and 2, access to *in situ* PGRFA that is under the management and control of the government and in the public domain may also be subject to additional laws governing the management of the natural resources and lands in question. When all of the conditions of those laws are satisfied, the PGRFA in question will be provided using the SMTA.

### **(Optional extended scope, covering non-Annex 1 crops)**

4. Notwithstanding Article 1 above, this law/regulation/order/guideline also applies to PGRFA that are not listed in Annex 1 of the ITPGRFA that are under the management and control of the government and in the public domain as well as non-Annex 1 PGRFA that are voluntarily made available using the SMTA by natural and legal persons.

### **(Additional supportive text concerning voluntary inclusion)**

5. All natural and legal persons are encouraged to include [Annex 1] PGRFA in the multilateral system.
6. The [name of the agency or Competent National Authority], in consultation with the relevant authorities, will propose legal, administrative and incentive mechanisms to encourage natural and legal persons who hold PGRFA [listed in Annex 1 of the ITPGRFA] to include those materials in the multilateral system.



## How to ensure legal space for the implementation of the multilateral system?



A clear condition precedent for the operation of the multilateral system is that there are no other laws that contradict or overlap with its functioning; there must be legal space for the operation of the multilateral system. Perhaps the first kind of laws to consider in this regard are pre-existing ABS laws implementing the CBD or those that are developed (more recently) to implement the Nagoya Protocol.

### **If existing national ABS rules hinder the implementation of the multilateral system, what options are there for addressing this problem?**

A number of countries developed ABS legislation to implement the CBD before they ratified the ITPGRFA, with the result that these laws actually prohibit people in the country from providing access to PGRFA as anticipated under the ITPGRFA.<sup>27</sup> In these cases, the national ABS laws will have to be amended to provide the necessary space for people to implement and operate under the multilateral system. The most straightforward approach is to exempt plant genetic resources included in the multilateral system from the ABS laws in question. Several countries have followed this approach. Some countries have exempted all PGRFA covered by the ITPGRFA from ABS laws, while others have included a qualified exception limited to the crops and forages listed in Annex 1 of the ITPGRFA.<sup>28</sup>

Some countries extend this exemption to genetic resources whose ABS regime is, or will be, defined by an international convention to which the country is a Contracting Party. This approach echoes Article 4.4 of the Nagoya Protocol, which does not refer particularly to the ITPGRFA but, rather, to specialized regimes in general.<sup>29</sup> In other countries, there is not a unique law establishing the national ABS regime, but the ABS regime is spread across a number of laws or regulations dealing with different issues, which may include nature protection, seed production, commercialization and so on.

The provision creating legal space for the implementation of the multilateral system could be included in any of these laws.<sup>30</sup>

<sup>27</sup> In a number of countries, the national legislation implementing the CBD makes the access to genetic resources conditional on one or more of the following obligations: the user of the genetic resources must share with the provider of the resources the results of the research done and/or the technology developed with the resources; the user of the genetic resources must engage with national scientists in the research and development projects that involve the use of the genetic resources; the user of the genetic resources cannot share the genetic resources with third users without written consent of the provider; the user of the genetic resources cannot use them for commercial purposes without written consent of the provider; a percentage of the monetary benefits arising from the use of the genetic resources must be negotiated between the provider and the user and paid to the provider. These mandatory ABS terms are inconsistent with the terms and conditions of the multilateral system as well as with the use of the SMTA for the exchange of plant genetic material included in the multilateral system.

<sup>28</sup> The Peruvian regulation on ABS, adopted in 2008 (Ministerial Resolution 087-2008-MINAM, which was later converted into National Decree No. 003-2009-MINAM (Art. 5), covers all genetic resources for which Peru is the country of origin, their derivative products, their intangible components and the migratory species found for natural reasons in the Peruvian territory, and it declares excluded from the regulations, among others, 'the species included in Annex I of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).' Ecuador has a similar provision in its ABS regulation (Reglamento Nacional al Régimen Común sobre Acceso a los Recursos Genéticos en aplicación de la Decisión 391 de la Comunidad Andina, Decreto No. 905, Art. 2, para. 3). Also Bhutan, whose Biodiversity Act 2003, section 4(d) exempts genetic resources covered by the multilateral system from the provisions related to ABS, 'especially in the case of plant genetic resources for food and agriculture in accordance with international law.'

<sup>29</sup> For example, EU Regulation No. 511/2014, adopted on 16 April 2014, Art. 2, exempts 'genetic resources for which ABS is governed by specialized international instruments that are consistent with, and do not run counter to the objectives of the Convention and the Nagoya Protocol.' Brazil Provisional Act 2186-16/2001 (23 August 2001) states that access to genetic resources is subject to facilitated exchange according to the international agreements to which Brazil is a party.

<sup>30</sup> In Spain, Law 30/2006 (26 July 2006) on seeds, nurseries, and plant genetic resources states that the crops included in the multilateral system of the ITPGRFA are exempted from the ABS requirements spelled out in the law for access seekers who are in countries that are also Contracting Parties to the ITPGRFA (Art. 45.3).

## **BOX 12: Draft provision exempting PGRFA under the multilateral system from the scope of other national ABS laws**

Pursuant to the obligations established by the ITPGRFA, access to and the transfer of plant genetic resources for food and agriculture of the crops covered by the ITPGRFA shall only be subject to the conditions set out in Part IV of the said Treaty.<sup>31</sup> This exception shall only apply where access is requested solely for the purposes of utilization and conservation for research, breeding or training for food and agriculture.

<sup>31</sup> This text was suggested by the ITPGRFA's Technical Advisory Committee as reported in Creating legal space for the implementation of the Treaty in the context of access and benefit-sharing, Doc. IT/AC-SMTA-MLS 3/12/5, para. 6, available at <http://www.planttreaty.org/sites/default/files/AC-SMTA-MLS%203-5%20Creating%20legal%20space%20for%20Treaty%20under%20ABS.pdf> (accessed 24 October 2017). The Committee added that, '[i]n order to clarify that the proposed exception would only be applicable for the uses of PGRFA specifically allowed under the multilateral system, the following may be added: This exception shall only apply where access is requested solely for purposes of utilization and conservation for research, breeding or training for food and agriculture.'

### **In the absence of an earlier ABS law conflicting with the multilateral system, is it still useful to have a new law creating space for the operation of the multilateral system?**

Most countries that are currently reporting the largest number of transfers of PGRFA under the multilateral system do not have new laws in place related to the implementation of the multilateral system. However, policy actors in a number of countries have reported that the simple absence of an ABS law does not give them enough space for giving facilitated access to Annex 1 PGRFA. They would like to see positive legal enactments explicitly empowering them to act as providers of PGRFA under the multilateral system. All of the enactments considered in all of the sections of this decision-making tool are potentially relevant in this regard. Acting as a recipient from other countries does not appear to be an issue that needs to be addressed through a new formal policy document.

In this context, it is important to note that some countries have made the decision to allow or empower public bodies and natural and legal persons to make non-Annex 1 materials available using the SMTA.

### **Is it possible to develop a single national law that implements both the Nagoya Protocol and the ITPGRFA's multilateral system?**

A few countries have approved, or are in the process of developing, national laws that deal with the conservation and sustainable use of all genetic resources in an integrated manner but that apply different ABS rules to different types of genetic resources, including those under the multilateral system of the ITPGRFA. The legal basis for

implementation of the multilateral system is therefore defined, or at least anticipated, in these omnibus laws.<sup>32</sup>

### What kinds of coordination mechanisms can be put in place between agencies implementing the multilateral system and the Nagoya Protocol?

The development, implementation and enforcement of ABS regulatory frameworks under the Nagoya Protocol will have to be consistent and mutually supportive with the ITPGRFA. Coordination initiatives need to be promoted among the agencies in charge of implementing the CBD and the Nagoya Protocol and among agencies in charge of implementing the ITPGRFA. Usually, the former initiatives fall under the Ministry of Environment, while the latter are hosted by the Ministry of Agriculture. Some possible measures taken from different countries' experiences include:

- Regular meetings between the ABS national focal point under the CBD and/or the Nagoya Protocol and the competent national authority for the implementation of the multilateral system
- Advisory committees or commissions, including representatives from governmental and non-governmental organizations, involved in the conservation and use of genetic resources
- Joint development of policies and laws that implement, simultaneously, both the Nagoya Protocol and the ITPGRFA's multilateral system

How to deal with requests for access to PGRFA when there are no systems in place to implement the multilateral system, the CBD or the Nagoya Protocol (but the country has ratified them all)?

In these cases, some of the coordination mechanisms mentioned above may become particularly relevant and useful. Fluid communication and effective cooperation among agencies in charge of the ITPGRFA and agencies in charge of the CBD are necessary in order to deal with requests for access to PGRFA in those 'borderline' cases when it is not clear to the people involved which regime should apply.

<sup>32</sup> Benin has recently passed an executive order establishing a set of interim measures that reflect this basic approach. Norway's Act No. 100 of 19 June 2009 Relating to the Management of Biological, Geological and Landscape Diversity is also an example. Section 61, entitled 'Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture' states: 'The King may make regulations regarding the implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture of 3 November 2001 in Norwegian law. The regulations may make further clarifications and exemptions from the provisions of this chapter.' In addition, section 59, states: 'With regard to the removal of genetic material covered by the International Treaty on Plant Genetic Resources for Food and Agriculture of 3 November 2001 or by another international agreement, the standard conditions laid down under the agreement shall apply.' Section 60 states: 'When genetic material covered by the International Treaty on Plant Genetic Resources for Food and Agriculture of 3 November 2001 is utilised in Norway for research or commercial purposes, it shall be accompanied by information to the effect that the material has been acquired in accordance with the Standard Material Transfer Agreement established under the Treaty.'

## How to address benefit-sharing?



Facilitated access to PGRFA under the multilateral system is arguably the most important benefit that the multilateral system aims to generate. Other forms of benefit sharing under the multilateral system include monetary benefit sharing through the international Benefit-sharing Fund, technology transfer, information exchange and capacity building as described in Article 13.2 of the ITPGRFA.

### What are the terms for monetary benefit-sharing?

The benefit-sharing provisions (Article 6.7) under the SMTA state that recipients must pay to the Benefit-sharing Fund 1.1% of gross sales (minus 30%) of new PGRFA products (for example, a plant variety) that incorporate PGRFA from the multilateral system if those new products are not available without restriction for others to use for further research and breeding. Alternatively, under Article 6.11, recipients can opt to pay 0.5% of their sales of all products of the same crop or forage that they access, regardless of whether those products actually incorporate PGRFA from the multilateral system and regardless of whether access to them for further use is restricted in any way. The SMTA also includes a provision encouraging voluntary monetary benefit-sharing (Article 6.8 of the SMTA).

### How are funds dispersed from the Benefit-sharing Fund?

Funds from the Benefit-sharing Fund are dispensed to support conservation and sustainable use-related activities in developing countries and countries with economies in transition that are Contracting Parties of the ITPGRFA. To date, these funds have been administered through competitive bidding processes. By 2017, three rounds of projects had been selected by regionally balanced expert panels appointed by the Bureau of the ITPGRFA.

### Who may apply to the Benefit-sharing Fund?

Both governmental and non-governmental organizations in the Contracting Parties, including farmers and farmers' organizations, research institutions and academia, may develop proposals for funding in response to periodic calls for proposals from the Secretariat of the ITPGRFA related to the availability of funds from the Benefit-sharing Fund. The Governing Body of the ITPGRFA has decided that all proposals for support from the Benefit-sharing Fund should be submitted to the ITPGRFA Secretary by the ITPGRFA's national focal point or a competent national authority (that is, the Ministry of Agriculture or the permanent representatives to the Food and Agriculture Organization [FAO]), regardless of who in the country concerned actually develops these proposals. This is to ensure that the established channels of communication between Contracting Parties and the Governing Body are effectively used.

If a formal policy document is created to appoint the national focal point, or the competent national authority, it would be useful to explicitly state that they have the responsibility to raise awareness about funding opportunities under the Benefit-sharing Fund and to encourage nationals to develop proposals to submit to the Benefit-sharing Fund (see Box 1).

## What is the role of national public authorities in relation to non-monetary benefit-sharing?

Under Article 13 of the ITPGRFA, Contracting Parties undertake to take measures to facilitate the sharing of non-monetary benefits including facilitated access, exchanging information, transferring technology and strengthening capacity for sustainable use and conservation of PGRFA. The successful utilization of the multilateral system in countries depends upon the access to non-monetary benefits such as information, capacities and technologies related to the conservation and use of PGRFA. So while their duties are not spelled out in the ITPGRFA, it is incumbent upon national public authorities to be proactive and creative in developing programmes, dedicating and raising funds and engaging stakeholders to make these benefits available to PGRFA users and beneficiaries.

### Is a new law necessary?

No, it is not necessary with respect to monetary benefit-sharing since the monetary benefit-sharing obligations are all set out and legally binding under the SMTA. Countries that want to put comprehensive laws in place could simply refer to the SMTA. With respect to non-monetary benefit-sharing, there is certainly no obligation under the ITPGRFA for the Contracting Parties to develop particular laws and regulations. Ultimately, the answer to this question will depend upon the kinds of activities that the public authorities want to encourage within the country to boost constituents' capacities to use the multilateral system.

Article 14 of the ITPGRFA refers to the Global Plan of Action (GPA) for the Conservation and Sustainable Use of PGRFA to provide a framework for non-monetary benefit-sharing. The second GPA's priority activities concern *in situ* conservation and management, *ex situ* conservation, sustainable use and building sustainable institutional and human capacities. Countries may want to use the second GPA to identify their most pressing needs in terms of information, technologies and capacities and to put in place measures encouraging national and international actors to invest in generating and sharing these benefits.



# 10

**How to deal with reporting obligations regarding transfers and sales?**



The SMTA requires providers of PGRFA within the multilateral system to report to the Governing Body about the SMTAs they have transferred. It also requires recipients to provide information about the sales of products derived from germplasm obtained from the multilateral system. In addition, the SMTA requires notifications concerning the possibility of opting for the benefit-sharing scheme under Article 6.11.

### Who is responsible for reporting transfers of PGRFA under the multilateral system?

This is an obligation for the natural and legal persons who appear as the ‘provider’ in the SMTA.

### What information should the reports concerning transfers include, and how is this information used?

In a decision adopted in 2009,<sup>33</sup> the Governing Body specifies that the reports should include one of the following: (1) a copy of the SMTA or SMTAs entered into or (2) 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 SMTA and, in the case of a shrink-wrap agreement, 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; and (e) the identification of each accession transferred with the SMTA and the crop to which the accessions belongs. They must also indicate where the SMTA or SMTAs in question are stored and ensure that the complete SMTAs are at the disposal of the third party beneficiary for monitoring and enforcement purposes (see Section 11). All of this information is treated as confidential and kept encrypted in a data store whose access is strictly restricted to the third party beneficiary for the only purpose of investigating possible cases of non-compliance with the terms and conditions of the multilateral system.

The reports should be sent in paper or digital format to the Secretariat of the ITPGRFA. The physical address is included in the SMTA, footnote 5.

### Is there a tool to help report transfers of germplasm from the multilateral system?

Yes, the ITPGRFA Secretariat has developed two digital tools through which providers of PGRFA under the multilateral system can first generate and then send digital copies of SMTAs to the Governing Body online and in a semi-automated manner. These two tools are presented as a package that is entitled Easy-SMTA, and providers of PGRFA can use them in the five languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish) by registering on the Easy-SMTA homepage, available at <https://mls.planttreaty.org/itt/>.<sup>34</sup>

<sup>33</sup> Governing Body Resolution 5/2009, ‘Procedures for the Third Party Beneficiary,’ available at <http://www.fao.org/3/a-be066e.pdf> (accessed 1 December 2017).

<sup>34</sup> Accessed 24 October 2017.

### How often should the reporting of transfers take place and to where should the reports be sent?

In its 2009 decision regarding reporting obligations, the Governing Body decided that providers should send this information to the ITPGRFA's Governing Body at least once every two calendar years. That said, by using the Easy-SMTA website, providers can generate and send reports to the Governing Body immediately after the transfers are completed.

### Who must report sales of products containing PGRFA accessed from the multilateral system?

The SMTA requests that recipients of PGRFA from the multilateral system inform the ITPGRFA's Governing Body about sales of products that incorporate PGRFA obtained from the multilateral system that are commercialized by the recipient itself, its affiliates, contractors, licensees and lessees. The recipient must also provide information about the restrictions in the use of the products for further research and breeding and indicate the amount that should be paid to the Benefit-sharing Fund of the ITPGRFA if the benefit-sharing obligations of the multilateral system are actually triggered.

### What could be the role of the competent national authorities in relation to the obligation to report transfers under the multilateral system?

As stated above, the reporting obligation is for the provider listed in the SMTA. The SMTA does not anticipate a centralized government authority taking over this role. That said, there may be countries in which the public authorities would also like to collect information about the PGRFA being sent out of their countries by all of the providers, including PGRFA under the SMTA. They could therefore create a system whereby providers using the SMTA are also asked to provide the competent national authority with some form of notification after they have made a transfer. All of this information may be useful for national authorities so that they are aware of the extent to which they are participating in the multilateral system as providers. This option is anticipated in Box 1. Since providers and recipients of PGRFA within the multilateral system may be reluctant to share copies of their SMTAs or details about the transfers because of confidentiality issues, the competent national authorities may ask them to prepare summaries of the transfers into which they have entered.



**Who monitors the use of PGRFA under the multilateral system and enforces the multilateral system's terms and conditions?**



In the multilateral system, monetary benefits do not flow directly back to individual providers but, rather, to the multilateral system itself. In this way, the multilateral system is the beneficiary of the SMTA's monetary benefit-sharing provisions of the SMTA, not the providers. Providers, therefore, do not have a direct interest in monitoring or enforcing recipients' compliance with the SMTA, in general, or its monetary benefit-sharing conditions, in particular. Out of recognition of this fact, the negotiators of the SMTA agreed to appoint an organization to represent the interests of the third party beneficiary of the multilateral system. Accordingly, under the SMTA, providers and recipients agree that the representative of the third party beneficiary has the power to monitor usage and initiate dispute settlement proceedings. At its first session, the Governing Body of the ITPGRFA requested the FAO to act as the third party beneficiary. The FAO subsequently agreed.

### What can the third party beneficiary do?

The FAO, acting as the third party beneficiary of all SMTAs, investigates any cases in which providers and recipients of PGRFA under the multilateral system are alleged to not be in compliance with their obligations as defined in the ITPGRFA and the SMTA. Article 4.4 of the SMTA gives broad powers to the third party beneficiary to monitor performance by the parties of their obligations under the SMTA in general. The third party beneficiary can initiate dispute settlement procedures and request all of the necessary information to evaluate the extent to which parties of the SMTA have met their obligations.

Any natural and legal person can bring matters to the FAO's attention when there are reasonable grounds to believe that the terms and conditions of the multilateral system, as spelled out in the SMTA, are not being observed by a particular provider or recipient. Funds are reserved to support the operation of the third party beneficiary in the biannual budget of the ITPGRFA. One of the tasks of the competent national authorities or the national focal points for the ITPGRFA could be to facilitate communication between the PGRFA users within their countries and the third party beneficiary whenever this is necessary.

# Appendix 1

**Scaling up and scaling out:  
embedding the multilateral  
system in national development  
strategies, plans and programmes**

## A.1

In this Appendix, we want to introduce some considerations on how the use of the multilateral system could be promoted by including it in national plans, strategies, policy and programmes addressing a range of issues, including climate change, rural development, indigenous and local peoples' empowerment and national economic development. PGRFA are strategic in reaching more sustainable agriculture, and, in this way, they play a very important role in advances toward the Sustainable Development Goals adopted by all countries of the United Nations in 2015 and, in particular, the following goals:



The implementation of the ITPGRFA and its multilateral system allow the Contracting Parties to align conservation and sustainable use of PGRFA and benefit-sharing with broader efforts to achieve the Sustainable Development Goals within their countries. However, the possible contributions of the multilateral system to these goals are often overlooked, and the full potential of the multilateral system is not fully realized. Every country has a wide range of different policies, plans and strategies that are potentially relevant. We focus here on a few that are common to most countries in order to help readers think in creative directions.

## National adaptation programmes of action (NAPAs) and national adaptation plans (NAPs)

Genetic resources can increase the adaptive capacities of crops, forages and trees to environmental changes, including climatic ones. Putting systems in place to facilitate access to, and the use of broad genetic diversity of crops, forages and tree gene pools can and should be a component of NAPAs and NAPs. This is highlighted in the Voluntary Guidelines to Support the Integration of Genetic Diversity into National Climate Change Adaptation Planning, which were adopted by the fifteenth session of the Commission on Genetic Resources for Food and Agriculture in 2015.<sup>35</sup>

## National biodiversity strategies and action plans (NBSAPs)

NBSAPs include agricultural biological diversity. As the multilateral system of the ITPGRFA provides the legal and administrative basis for intra- and international

<sup>35</sup> Voluntary Guidelines to Support the Integration of Genetic Diversity into National Climate Change Adaptation Planning, available at <http://www.fao.org/documents/card/en/c/290cd085-98f3-43df-99a9-250cec270867/> (accessed 24 October 2017).

cooperation for the *in situ* and *ex situ* conservation, sustainable use and exchange of PGRFA, and as it establishes the sharing associated benefits, it can play an important role in NBSAPs. Indeed, a growing number of NBSAPs are including the implementation of the ITPGRFA, and the multilateral system, in particular, in their action plans, along with the implementation of the Nagoya Protocol.

## Rural development strategies

Improved crop varieties are critical for the economic development of rural populations. Accessing and evaluating a broad range of the genetic diversity of the crops in question is a key part of the process to identify, enhance and breed varieties. Given that the multilateral system was designed to ensure facilitated access to a broad range of intra-specific diversity of the 64 listed crops and forages, it is logical that its implementation is included as a component of rural development strategies.

## National strategies for enhancing the rights of indigenous and local communities and farmers

As repeatedly stated throughout this tool, facilitated access to PGRFA as inputs into their innovation and production systems should be considered a key component of farmers' rights and, by extension, of the rights of indigenous peoples and local communities, who are often farmers. Putting systems in place to allow farmers to learn about the multilateral system and how it works, to identify potentially useful materials that are available through it and to order, receive and test those materials, would represent an important step in farmers' empowerment as managers and creators of PGRFA.

Another way in which the multilateral system contributes to farmers' rights could be promoting the protection of traditional knowledge, innovations and practices.

## National agriculture development plans and national development strategies

In light of the aforementioned comments concerning the role of the multilateral system for climate change adaptation, rural development, empowerment of farmers and indigenous and local peoples, it stands to reason that it should also be reflected in higher-level planning documents such as national agricultural development plans and strategies.



# Appendix 2

**How to ratify or accede  
to the ITPGRFA: questions,  
answers and a draft instrument  
for national ratification**

## How may a country become a Contracting Party to the ITPGRFA?

The ITPGRFA was open for signature from 3 November 2001 until 4 November 2004. However, signature alone is not sufficient to bind the country legally. This requires the signatory country to make a further formal expression of commitment to be legally bound.

Where a country has already signed the ITPGRFA within the stipulated time limit, then the correct procedure will be for the signatory country to deposit a formal instrument of ratification, acceptance or approval with the director general of the FAO, as the official depositary of the ITPGRFA. A model of a formal instrument of ratification is presented in Box A below.

### BOX A: Model instrument of ratification/acceptance/approval\*

The Government of [name of country or regional economic integration organization] has the honour to refer to the International Treaty on Plant Genetic Resources for Food and Agriculture, which was approved by the FAO Conference at its Thirty-first Session in November 2001, and to inform the Director-General of the Food and Agriculture Organization of the United Nations that [name of country or regional economic integration organization] hereby [ratifies] [accepts] [approves]\* the aforesaid Treaty pursuant to its Article 26 and undertakes to abide by its provisions.

Date and signature by one of the following authorities:

- Head of State
- Head of Government
- Minister of Foreign Affairs
- Minister of department concerned

[Seal]

\* Only one of these terms needs be chosen, depending on the term most commonly used by the states submitting the instrument. Ratification is the term most frequently used.

Where a country is not a signatory to the ITPGRFA, then the correct procedure will be for the country to accede to the ITPGRFA. A model of a formal instrument of ratification is presented in Box B.

## BOX B: Draft instrument of accession

The Government of [name of country] has the honour to refer to the International Treaty on Plant Genetic Resources for Food and Agriculture, which was approved by the FAO Conference at its Thirty-first Session in November 2001, and to inform the Director-General of the Food and Agriculture Organization of the United Nations that [name of country] hereby accedes to the aforesaid Treaty pursuant to its Article 27 and undertakes to abide by its provisions.

Date and signature by one of the following authorities:

- Head of State
- Head of Government
- Minister of Foreign Affairs
- Minister of department concerned

[Seal]

## At what level must the formal instrument of ratification or accession be signed?

As noted in the model instruments above, the instrument of ratification or accession must be signed and sealed by one of the following national authorities:

- Head of State
- Head of Government
- Minister of Foreign Affairs
- Minister of department concerned

## What government authority or institution needs to approve the ratification or accession?

Since the deposit of a formal instrument of ratification or accession formally binds the country to abide by all of the provisions of the ITPGRFA, the ratification or accession must be approved by the national Parliament before it is signed, sealed and deposited.

## What processes are normally undertaken for Parliament to approve ratification or accession to the ITPGRFA?

A request for ratification or accession is normally drafted by the competent departmental ministry or competent national authority or by the Ministry of Justice, requesting a decision by the Cabinet. Such a request would normally cover at least the following points:

- An analysis of the objectives and contents of the ITPGRFA
- The obligations that would be incurred under the ITPGRFA, including any financial obligations
- What legal impediments may exist to ratification or accession and how these legal impediments may be overcome
- The potential benefits to be derived by the country from becoming a party to the ITPGRFA and whether these outweigh the obligations. These potential benefits would include, for example:
  - o Facilitated access to some of the most important PGRFA from other countries and regions, which will help to protect and develop the country's agriculture and food security
  - o Benefits to be derived from benefit-sharing under the multilateral system established by the ITPGRFA
  - o Benefits to be derived from the funding strategy, including the Global Crop Diversity Trust.
- The fact that the FAO Conference has invited all states to become parties to the ITPGRFA at the earliest possible opportunity.

The Cabinet would be requested to authorize the relevant minister to deposit an instrument of ratification or accession of the ITPGRFA.

## Can help be obtained in drawing up a request for a Cabinet decision?

The drawing up of a request for a Cabinet submission is essentially a task for the competent ministry or competent national authority. Each country will have its own view on how such a request should be drafted and what it should contain.





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ISBN: 978-92-9255-082-0

