May 2015

The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

THIRD MEETING OF THE *AD HOC* OPEN-ENDED WORKING GROUP TO ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM

Brasília, Brazil, 2–5 June 2015

EXPANSION OF THE ACCESS AND BENEFIT-SHARING PROVISIONS OF THE INTERNATIONAL TREATY: LEGAL OPTIONS

I. BACKGROUND

1. At its Fifth Session in September 2013, by Resolution 2/2013, the Governing Body established the *Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing* (the Working Group), mandated *inter alia* "*to develop a range of measures for consideration and decision by the Governing Body at its Sixth Session that will:*

(a) Increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and

(b) Enhance the functioning of the Multilateral System by additional measures".[1]

2. These Studies have been published before the second meeting of the Working Group in December 2014[2] and included a *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*.[3]

3. At its first meeting in May 2014, the Working Group "*reviewed the six innovative approaches identified by the Ad Hoc Advisory Committee on the Funding Strategy ... [and] agreed to keep all approaches under review, in preparation for the second meeting*".[4] It agreed on considering expanding Treaty access and benefit-sharing provisions to enhance the functioning of the Multilateral System,[5] and identified a number of factors to be taken into account in evaluating and further developing the innovative approaches under the Multilateral System. These factors included *inter alia*: the ability of the proposed innovative approaches to increase the use of the Multilateral System, whether their adoption would require any amendments to the Treaty, and their legal and policy

[1] Report of the Fifth Session of the Governing Body, Resolution 2/2013, IT/GB-5/13/Report, Appendix A.2, Part IV, paragraph 23.

[2] See at http://www.planttreaty.org/content/second-meeting-ad-hoc-open-ended-working-group-enhance-functioning-multilateral-system-acces

[3] IT/OWG-EFMLS-2/14/4

[4] IT/OWG-EFMLS-1/14/Report, paragraph 12.

[5] IT/OWG-EFMLS-1/14/Report, paragraph 15.

implications for the Treaty.[6] The FAO Legal Office had prepared an information document for the first meeting of the Working Group, outlining the procedure to amend the Treaty. [7]

4. At its second meeting in December 2014, the Working Group held initial discussions on the possible expansion of the access and benefit-sharing provisions of the International Treaty. Some regions believed that the expansion should cover all plant genetic resources for food and agriculture; others believed the expansion is dependent on measures to increase user-based payments. The FAO Legal Office at the meeting presented briefly the modalities, by which the Governing Body might expand the access and benefit-sharing provisions of the International Treaty, and agreed to prepare a more detailed analysis for the third meeting.[8]

5. This document contains such analysis. It addresses the modalities for expanding the Treaty's legal framework on access and benefit-sharing, taking into account the international legal framework, in particular the *Convention on Biological Diversity* (the CBD)[9] and its *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (the Nagoya Protocol), when and where appropriate.[10] Specifically, **Section II** of this document provides a brief analysis of some of the measures presently under consideration by the Working Group. **Section III** analyses the role of some of the measures in the context of the International Regime on Access to Genetic Resources and Benefit-sharing, taking into account the need for coordination with the other instruments of the International Regime, in order to avoid duplication of efforts. Finally, **Section IV** explores the modalities for implementing the measures under consideration in the legal framework of the Treaty. **Section V** provides some conclusions.

II. MEASURES UNDER CONSIDERATION BY THE WORKING GROUP FOR ENHANCING THE MULTILATERAL SYSTEM

6. Among the measures proposed some could be implemented through a decision of the Governing Body or an amendment of the SMTA. Other proposed measures, instead, introduce fundamental changes to the structure and functioning of the Multilateral System and their implementation might therefore require amending the Treaty or complementing it with a supplementary protocol. Among the measures presently under consideration by the Working Group, the FAO Legal Office has identified two measures whose implementation requires amending the Treaty or adopting of a protocol. However, once the Working Group has determined the measures which it wishes to propose to the Governing Body for decision, the procedures for implementing those measures should be re-assessed.

i. Making the current voluntary payment provided for under Article 6.8 of the SMTA mandatory

7. In accordance with Article 13.2(d)(ii) of the Treaty, "*the Contracting Parties agree that the standard Material Transfer Agreement … shall include a requirement that a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism … an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment*". Accordingly, under Article 6.7 of the Standard Material Transfer Agreement (SMTA), should the recipient wish to commercialize a product that is not available without restriction to others for further research and

[6] IT/OWG-EFMLS-1/14/Report, paragraph 16.

[7] IT/OWG-EFMLS-1/14/Inf. 5

[8] IT/OWG/EFMLS-2/14/Report, paragraphs 16-19

[9] The CBD was adopted on 5 June 1992 and entered into force on 29 December 1993.

[10] The Nagoya Protocol was adopted on 29 October 2010 as to the CBD, and entered into force on 12 October 2014.

breeding, it shall pay a fixed percentage of the sales of the commercialized product into the Benefit-sharing Fund.[11] Conversely, according to Article 6.8 of the SMTA, in case of commercialization of a Product available without restriction to others for further research and breeding, the recipient is encouraged to pay a contribution to the Fund on a voluntary basis.[12]

8. In the context of the last sentence of Art. 13.2d(ii) of the Treaty which provides that the Governing Body may assess, *"within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement … shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding",* the Working Group is exploring the possibility to introduce a payment obligation for accessing to and/or commercializing some, or all, genetic resources available without restriction to others for further research and breeding. The Governing Body having postponed this assessment repeatedly, it is considered that the Governing Body still has the capacity to undertake an assessment and exercise the option granted to it in the last sentence of Art. 13.2d(ii) of the Treaty.

9. The Governing Body could therefore consider extending the applicability of the mandatory payment provisions (See Section IV below).

ii. Extension of the scope of the Multilateral System to all plant genetic resources for food and agriculture (PGRFA)

10. In accordance with Article 11, paragraph 2, of the Treaty, "*The Multilateral System … 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*". The Working Group is exploring the possibility to extend the scope of the Multilateral System to some additional or to all PGRFA, with a view to increasing materials available to recipients and sharing the benefits arising from their utilization.

11. This extension would bring the scope of the Multilateral System in line with the area of application *ratione materiae* of the Treaty, which applies to (all) PGRFA.[13]

12. Since the Treaty applies to all PGRFA, but the Multilateral System currently only applies to PGRFA listed in Annex I, the Working Group may also explore ways of developing access and benefit-sharing provisions that go beyond the current scope of the Multilateral System, and thus apply to PGRFA not included in Annex I. It is worth mentioning that, to date, a number of Contracting Parties have already been reporting on non-Annex I crops, which were transferred using agreements similar to the SMTA, and that the records are being stored on Easy SMTA.[14] This information was provided on a voluntary basis and did not involve any extra costs nor constituted additional burden to the information systems of the Multilateral System, since these information systems are largely automated.

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[11] In accordance with Article 6.7 of the SMTA, "[i]n the case that the Recipient commercializes a Product that is a Plant Genetic Resource for Food and Agriculture and that incorporates Material as referred to in Article 3 of this Agreement, and where such Product is not available without restriction to others for further research and breeding, the Recipient shall pay a fixed percentage of the Sales of the commercialized Product into the mechanism established by the Governing Body for this purpose".

[12] In accordance with Article 6.8 of the SMTA, "[i]n the case that the Recipient commercializes a Product that is a Plant Genetic Resource for Food and Agriculture and that incorporates Material as referred to in Article 3 of this Agreement and where that Product is available without restriction to others for further research and breeding, the Recipient is encouraged to make voluntary payments into the mechanism established by the Governing Body".

[13] In accordance with Article 3 of the Treaty, "the Treaty relates to plant genetic resources for food and agriculture."

[14] It is worth recalling that, with respect to the access from the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) to plant genetic resources of the Multilateral System, the SMTA is used for transferring both Annex I and non-Annex I materials. At its Second Session in October-November 2007, in fact, the Governing Body endorsed the inclusion of an interpretative footnote or series of footnotes to relevant provisions of the SMTA for transfers of non-Annex I material collected before the entry in force of the International Treaty to be used by IARCs. This footnote/these footnotes has/have been included in all versions of the SMTA used by the IARCs under Article 15.1(b), avoiding the need for two versions of the SMTA (Report of the Second Session of the Governing Body, 29 October - 2 November 2007, IT/GB-2/07/Report, paragraph 68.).

13. Expanding the scope of the Multilateral System to all PGRFA will require an amendment of the Treaty, either of Article 11 or of Annex I or, alternatively, the adoption of a protocol in accordance with the procedures illustrated in Section IV below.

III. RELATIONSHIP WITH THE CONVENTION ON BIOLOGICAL DIVERSITY AND ITS NAGOYA PROTOCOL

14. The International Treaty, with its Multilateral System, is a constituent element of the International Regime on Access to Genetic Resources and Benefit-sharing, along with the CBD and the Nagoya Protocol.

15. The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies. In accordance with Article 19.3 of the CBD, "*the Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity*". Accordingly, the Nagoya Protocol was concluded in 2010 and it includes the establishment of an Access and Benefit-sharing Clearing-House.[15] This Clearing-House serves as a mechanism for sharing of information related to access to genetic resources within the scope of the CBD, i.e. "*genetic material of actual or potential value*" provided by CBD Contracting Parties that are countries of origin of such resources or that have acquired the genetic resources in accordance with the CBD.[16] Contracting Parties to the Nagoya Protocol are required to make available to the Clearing-House information regarding access and utilization of such genetic resources, as well as traditional knowledge associated with them and benefits arising from their utilization.[17]

16. Regarding the relationship between the Nagoya Protocol and other international instruments, in accordance with Article 4.1 of the Nagoya Protocol, "*the provisions of [the] Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity*".[18] It is further stated that "[the] *Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol*" and that "*where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, [the] Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument*" (Nagoya Protocol, Article 4, paragraphs 2 and 3).[19]

17. Article 4 of the Nagoya Protocol has particular relevance for the Treaty. It covers PGRFA shared under the Treaty and excludes them from the scope of the Nagoya Protocol. Given the complementary nature of the International Treaty and the Nagoya Protocol, the latter therefore, only applies to genetic resources that are shared outside the scope of the Treaty.

18. Aligning the scope of the Multilateral System with the scope of the Treaty would further increase clarity on the roles and areas of application of the Treaty and the Nagoya Protocol

[15] Article 14.1 of the Nagoya Protocol.

[16] Articles 1 and 15 of the CBD.

[17] Articles 3 and 14.2 of the Nagoya Protocol.

[18] A similar provision is contained in Article 22.1 of the CBD.

[19] It is worth recalling that the Parties to the Nagoya Protocol emphasize the fundamental role of the International Treaty in achieving food security worldwide and sustainable development of agriculture in the context of poverty eradication and climate change, and reaffirmed that "international instruments related to access and benefit-sharing should be mutually supportive" (Nagoya Protocol, preambular paragraphs 16 and 20).

respectively, and therefore constitute a solid basis for a harmonious and mutually supportive implementation of the two international agreements at national level.

19. From the perspective of users of PGRFA, a fully harmonized international legal framework for access and benefit-sharing relating to PGRFA would significantly enhance legal certainty, avoiding unclear legal situations or possible areas of overlap. At the same time, the International Regime would contain a consistent legal framework for PGRFA, whose special nature, distinctive features and need for distinctive solutions, are explicitly recognized in the Nagoya Protocol.[20]

IV. PROCEDURES FOR IMPLEMENTING THE MEASURES UNDER CONSIDERATION BY THE WORKING GROUP

20. The proposed measures could be introduced in the Treaty's legal framework, by amending the Treaty or by adopting a supplementary protocol. For the sake of clarity, the scope and procedure of each option, including their respective advantages and disadvantages, are addressed below in sub-sections A and B respectively.

A. Amendment of the Treaty in accordance with its Article 23

21. The Governing Body may consider amending Article 11, paragraph 2, of the Treaty with a view to expanding the scope of the Multilateral System to all PGRFA, and removing Annex I. Alternatively, the Contracting Parties may consider maintaining Article 11, paragraph 2, of the Treaty as it is at present and upgrading the list of genetic resources contained in Annex I. This latter option would nevertheless limit the scope of the Multilateral System to the genetic resources listed in Annex I only and the future application of the Multilateral System to other PGRFA may require a subsequent amendment of the Annex, thus the Treaty, as it is an integral part of it.

Procedure of adoption of amendments to the Treaty (Article 23)

22. In accordance with Article 23 of the Treaty, the Treaty may be amended upon proposal of one of its Contracting Parties and with the approval of the Governing Body. In particular, the text of any proposed amendment shall be communicated to Contracting Parties by the Secretary at least six months before the Governing Body's session convened for adoption. Provided there is a quorum at the Governing Body's session, amendments shall be approved by consensus of the Contracting Parties present at the session of the Governing Body.

23. It is worth mentioning that, according to paragraph 8(a) of the *Principles and Procedures which should Govern Conventions and Agreements Concluded under Articles XIV and XV of the Constitution, and Commissions and Committees Established under Article VI of the Constitution* (the Principles and Procedures), "*amendments to all conventions and agreements concluded under Article XIV of the Constitution shall be reported to the Council which shall have the power to disallow them if it finds that such amendments are inconsistent with the objectives and purposes of the Organization or the provisions of the Constitution. If the Council of the Organization considers it desirable, it may refer these amendments to the Conference which shall have the same power*". Accordingly, amendments to the Treaty are operative until disallowed by the Council or the Conference.

Entry into force (Article 23)

24. The consent of a Contracting Party to be bound by an amendment to the Treaty may be expressed by: ratification, acceptance and approval. A minimum number of instruments expressing the consent should be deposited for the entry in force of an amendment. In particular, in accordance with Article 23.4 of the Treaty, "[a]*ny amendment adopted by the Governing Body shall come into*

[20] Preamble and Article 8(c) of the Nagoya Protocol.

force among Contracting Parties having ratified, accepted or approved it on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by two-thirds of the Contracting Parties. Thereafter the amendment shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendment".

B. Introducing the proposed measures through a protocol to the Treaty

25. The proposed measures could also be reflected in a protocol to the Treaty, *i.e.* an international agreement supplementary to the provisions of the Treaty. Such a protocol would be adopted on the basis of, and in accordance with, Article XIV, paragraph 2(b), of FAO Constitution.[21] In international law, two types of protocol are identified.

- Amending protocols are aimed at amending, i.e. altering the wording, of an earlier treaty.
- Supplementary protocols, instead, are primarily intended for complementing an earlier treaty with additional provisions and obligations. This instrument could be used where the proposed measures would complement the Multilateral System with new payment schemes and obligations, with a view to attaining the objectives of the Treaty.

26. The possibility to adopt an amending or a supplementary protocol would therefore depend on the content and scope of the protocol. If the scope of a protocol to the Treaty is limited to amending some of the provisions of the Treaty – e.g. Articles 11.2 and 13.2(d)(ii) – an amending protocol would be the suitable instrument in the circumstances.

27. Should the protocol constitute a means to implement some objectives or specific provisions of the Treaty or aim at further developing the current Multilateral System, complementing it with additional areas of application, payment schemes, reporting mechanisms, new obligations for the Contracting Parties, a supplementary protocol would be suitable.

28. This device could also contain provisions that would clarify its relationship with the Nagoya Protocol, including recognition of the SMTA as equivalent to *internationally recognized certificates of compliance* (Article 17.2 of the Nagoya Protocol).

29. It could therefore contribute to achieving a fully harmonized international legal framework of access and benefit-sharing relating to plant genetic resources for food and agriculture. Moreover, it could significantly enhance legal certainty for users, avoiding unclear legal situations or possible areas of overlap.

30. Another relevant difference between amending and supplementary protocols regards the eligibility for membership to the protocol.

31. Consistent with international law practice, amending protocols to an agreement are open only to the parties to that agreement, "*since they are purely subsidiary, dependent agreements, having no other object than to amend the treaties, and hence it would be meaningless for any State not already bound by the treaties to become party to such protocols*".[22]

32. Conversely, if a supplementary protocol to an agreement constitutes an independent and complete international instrument, such a protocol might be open to States other than those being parties to the agreement.[23] Should this be the case, a supplementary protocol to the Treaty should

[21] In accordance with Article XIV, paragraph 2(b), of FAO Constitution, "The Council, under rules to be adopted by the Conference, may, by a vote concurred in by at least two thirds of the membership of the Council, approve and submit to Member Nations: (…)supplementary conventions or agreements designed to implement any convention or agreement which has come into force under paragraphs 1 or 2(a)".

[22] Summary of the practice of the Secretary General as Depositary of Multilateral Treaties (1999), ST/LEG/7/Rev.1, paragraphs 254-255.

[23] Summary of the practice of the Secretary General as Depositary of Multilateral Treaties (1999), ST/LEG/7/Rev.1, paragraphs 254-255. Under Article XIV of the Constitution, a supplementary protocol to the agreement might be open to accession by Nations other than those parties to the agreement, if the supplementary protocol provides for such a possibiliy.

contain all provisions necessary to make it a complete international instrument, such as the provisions on settlement of disputes, signature, ratification, entry into force, *etc.* Furthermore, the relationship between the Treaty and the protocol, as well as any provisions on the interpretation of the two instruments in case of conflict between the two, should be included in the protocol.

33. However, the supplementary protocol may also stipulate that only Contracting Parties of the Treaty may accede or ratify it.

34. It is worth noting that nothing prevents States from including in a supplementary protocol some provisions amending the Treaty, provided that such provisions produce their effects *vis à vis* States being members of both the protocol and the Treaty.

Procedure for proposing and approving a protocol to the Treaty

35. The procedure for the proposal and adoption of a protocol to an agreement concluded under Article XIV is set out in Article XIV, paragraph 2(b), of FAO Constitution[24]. A supplementary convention may be proposed by *a technical meeting or conference comprising Member Nations, which has assisted in drafting the convention or agreement and has suggested that it be submitted to Member Nations concerned for acceptance* (Article XIV, paragraph 3(a)).

36. The Governing Body could therefore encourage and provide guidance on the development of a Protocol. The drafting of a Protocol could be entrusted to a technical meeting or a conference comprising Member Nations. Specifically, the negotiation of an amending protocol would be limited to the Treaty's Contracting Parties. Interested Member Nations that are not Contracting Parties to the Treaty could, instead, take part to the negotiation of a supplementary protocol. In general, the drafting phase often involves protracted negotiations to achieve the desired concurrence of views among the participating Member Nations.

37. Once final agreement is reached on the text of the protocol, the proposed text shall be submitted to the Council, through the Director-General, on behalf of the relevant technical meeting or conference.[25] The Council may, by at least two thirds of the membership of the Council, approve and submit it to Member Nations.[26]

Instruments for expressing consent to the protocol and entry in force

38. Regarding the instruments for expressing consent to be bound by the protocol, *both the traditional system, i.e., that of signature [27], signature subject to ratification, and accession, as well as the more recent and simplified system of acceptance by the deposit of an instrument of acceptance have in the past been applied by the Organization and shall be retained*.[28]

39. As regards entry into force, [the] *supplementary convention or agreement approved by the Conference* or *Council for submission to Member Nations shall come into force for each contracting party as the convention, agreement, supplementary convention or agreement may prescribe* (Article

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However, States eligible to accede to the Protocol must be either Members Nations of FAO or any State that is not Member of FAO but as a member of the United Nations, or any of its Specialized Agencies or of the International Atomic Energy Agency (paragraph 12 of the *Principles and Procedures*, BT, Section O, Appendix).

[24] Article XIV, paragraph 2(b), of FAO Constitution sets out the procedure for adopting *supplementary conventions or agreements designed to implement any convention or agreement which has come into force under paragraphs 1 or 2(a)*, i.e. those *conventions and agreements concerning questions related to food and agriculture* and *agreements concerning questions relating to food and agriculture which are of particular interest to Member Nations of geographical areas specified in such agreements and are designed to apply only to such areas* respectively.

[25] Article XIV, paragraph 3(a), of the FAO Constitution.

[26] Article XIV, paragraph 2(b) of the FAO Constituion.

[27] The only Article XIV body allowing definitive signature as instrument for expressing the consent to be bound by the convention is the Plant Protection Agreement for Asia and Pacific Region (APPPC). *See* Article X.1 of APPPC Agreement A and Article XII.1 of APPPC Agreement B. The same provision is set out in Article XVIII.1 of APPPC as amended in 1999 (but such version has not entered in force to date).

[28] BT, Section O, Appendix, paragraph 4.

XIV, paragraph 4). In this regard, it is noted that multilateral conventions and protocols typically provide that entry into force shall take place when a specified number of States have deposited their instruments expressing consent to be bound.

Provisional entry into force

40. With respect to supplementary protocols, States may agree on the provisional entry into force of the protocol or a part of it, upon certain conditions being met (*e.g.* the notification of a certain number of instruments of acceptance, the notification of acceptance of provisional application, or a minimum number of signatures).[29] The protocol could include a provision to this effect.

41. Should this be the case, once the protocol has entered into force provisionally, it creates obligations for the parties that agreed to bring it into force in that manner.[30] This device enables States that are ready to implement the obligations under the protocol to do so before its definitive entry in force.

V. CONCLUSION

42. This document has laid out a variety of options for implementing the measures, which the Governing Body requested the Working Group to develop for its consideration. The options range from minimal changes to the SMTA to the development of a possible protocol, supplementing and/or improving the existing legal framework of the Treaty, in order to achieve the goals set by the Governing Body to increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner; and enhance the functioning of the Multilateral System by additional measures.

43. When discussing the implementation of the measures it proposes to the Governing Body, the Working Group may wish to consider the possibility of amending the Treaty in accordance with its Article 23, for example with a view to expanding the scope of the Multilateral System or changing the list of Annex I.

44. It may also wish to give attention to the possibility of implementing and complementing the Treaty's objectives and provisions through a protocol to the Treaty. As has been shown, the Governing Body enjoys a considerable degree of flexibility in further enhancing the functioning of the Multilateral Systems, when implementing and further developing the proposed measures by adoption of a protocol.

45. Finally, the Working Group may wish to take into account the potential benefits of a fully harmonized and consistent international legal framework for access and benefit-sharing relating to PGRFA and consider the possible advantages provided by the different legal options presented in this document.

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[29] In accordance with Article 25, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, "[a] treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed". In FAO, the only convention concluded under Article XIV of the FAO Constitution and providing for its provisional application is the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. In accordance with Article 32 of the latter, "[the] Agreement shall be applied provisionally by States or regional economic integration organizations which consent to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification".

[30] *See* the United Nations Treaty Handbook, Sections 3.4 and 4.2.3 on *Provisional application* and on *Provisional entry into force* respectively. It is worth noting that, in accordance with Article 25, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, "[u]nless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".