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**TO:**

Ms Gillian Gould  
Committee Secretary  
Joint Standing Committee on Treaties  
Parliament of Australia  
PARLIAMENT HOUSE ACT 2600

**Fax No:** 6277 2219.....**Date:** 12 February 2003

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**Subject:** Response to Supplementary Questions regarding the International Treaty on Plant Genetic Resources for Food and Agriculture.

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*Kristiane G. Herrmann*



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Ms Gillian Gould  
Committee Secretary  
Joint Standing Committee on Treaties  
Parliament of Australia  
PARLIAMENT HOUSE ACT 2600

Dear Ms Gould

I refer to your letter of 30 January 2003 which sought further information on aspects of the International Treaty on Plant Genetic Resources under consideration by the Joint Standing Committee on Treaties (JSCOT). We have prepared responses to the supplementary questions raised in the paper attached to your letter, in conjunction with the other Departments represented at the 9 December JSCOT hearing on possible ratification of this Treaty. These responses are enclosed.

Should you require further information, please feel free to contact me on 6272 4670 or email [kristiane.herrmann@affa.gov.au](mailto:kristiane.herrmann@affa.gov.au).

Yours sincerely

Kristiane Herrmann  
Manager  
FAO Plant Genetic Resources

12 February 2003

Sub 4.1

**International Treaty on Plant Genetic Resources for Food and Agriculture  
Responses to JSCOT supplementary questions**

**Implementation**

1. If the Commonwealth cannot compel any of the agencies holding the largest proportion of PGRFA to participate in the multilateral system of exchange, what is the purpose of the Commonwealth ratifying the Treaty?

The international competitiveness of the Australian food and agriculture sector depends heavily on a steady flow of plant breeding improvements. Australian plant breeders must have access to plant genetic material which, for virtually all our commercial agricultural crops, needs to be sourced from overseas. The Treaty covers plant genetic material on which Australian plant breeders depend and is therefore important to Australian interests.

Commonwealth ratification of the Treaty will enable any legal or natural person in Australia to access material covered by the multilateral system of facilitated access and benefit sharing established by the Treaty. If the Commonwealth did not ratify the Treaty, Australians would have no rights in relation to the multilateral system.

In consultations with the Commonwealth, the States and Territories have confirmed their interest in participating in arrangements involving the multilateral system.

2. If the international exchange of PGRFA is so obviously to the mutual advantage of all participating agencies, what is the necessity of giving the multilateral system treaty status?

The framework established by the Treaty provides Contracting Parties with minimum reciprocal rights of access and benefits as between the Contracting Parties for plant genetic resources for food and agriculture under the Treaty's multilateral system. Treaty status provides a legal guarantee of these rights.

When adopting the Treaty text in November 2001, the FAO Conference agreed the Treaty would be legally binding (Resolution 3/2001). A copy of this resolution is attached.

3. Could State agencies holding collections of PGRFA and the CSIRO participate in the multilateral system of exchange without Australia's ratification of the Treaty?

No. The multilateral system of exchange is established for facilitated access and benefit sharing between the Contracting Parties to the Treaty. As indicated in the response to Q1, if Australia did not ratify the Treaty, it would have no rights or obligations under the Treaty, including in respect of the multilateral system.

4. On which agency's advice did you state in the NIA (para. 17 (para 27?)) that implementation of the provisions of the Treaty would not require legislation?

In accordance with normal procedures, the Office of International Law, Attorney-General's Department, provided legal advice on the Treaty's obligations at international law. This advice formed the basis of further analysis and consultations on the nature of arrangements required for the Treaty's implementation in Australia. Commonwealth agencies and the States and Territories were involved in this analysis and these consultations. The Attorney-General's Department was involved in these discussions and advised Australia is able to meet its obligations under the Treaty at international law without the need for legislative change.

5. Is Australia a party to any other treaties that require voluntary co-operation of domestic agencies for their implementation?

This question seems to infer voluntary cooperation of domestic agencies is required to enable Australia to meet its obligations under the Treaty. This is not the case. The Commonwealth would be committing to implementation of obligations under the Treaty. As summarised in paragraphs 15 - 26 of the National Interest Analysis these obligations cover a range of matters.

Specifically in relation to the multilateral system, the Commonwealth would be committing to make available material under its management and control and in the public domain for inclusion in the multilateral system (Article 11.2) and to provide facilitated access in accordance with Article 12.4.

The Treaty establishes a framework for the operation of the multilateral system and for minimum participation consistent with the protection of property rights over resources to be included in the multilateral system. It applies the same terms of access to all potential users of the multilateral system (Article 12.4). Article 12.2 states that legal and natural persons of a Contracting Party may access the multilateral system.

A Contracting Party can only commit those resources over which it has direct control. Other holders of material in a country which is a Contracting Party are not compelled to use the multilateral system, but are encouraged to contribute material to the multilateral system and retain discretion on the decision to access material covered by the Treaty's multilateral system.

Many treaties are implemented through executive and administrative action by government agencies and do not require additional legislative action.

6. Can you provide information on the detail of the domestic situations of any other parties that have ratified the Treaty, for instance, will the Canadian Government be relying on the voluntary co-operation of legal and natural persons within its jurisdiction to implement the terms of the Treaty?

Canada has a webpage dealing with its ratification of the Treaty. The reference for the webpage is: [http://pgrc3.agr.gc.ca/itpgrfa\\_menu.html#](http://pgrc3.agr.gc.ca/itpgrfa_menu.html#)

A copy of the Canadian media release on its signature and ratification of the Treaty is enclosed. This can be found at: <http://agr.gc.ca/cb/news/2002/n20610ae.html>

#### **Relation of the Treaty to the International Undertaking**

1. What is the rationale for giving the non-binding provisions of the International Undertaking treaty status?

As indicated in the reply to Question 2 above on Implementation, the Treaty provides for a binding multilateral system of facilitated access and benefit sharing which guarantees reciprocal rights between the Contracting Parties. Facilitated access and benefit sharing for mutual benefit is not guaranteed under the non-binding International Undertaking.

2. On its entry into force will the Treaty void the International Undertaking?

A binding agreement takes precedence over non-binding arrangements. There is nothing in the Treaty to specifically terminate the Undertaking. The FAO Conference resolution adopting the text of the treaty (FAO Conference Resolution 3/2001) recognises the revision of the Undertaking to harmonise it with the Convention on Biological Diversity would take the form of a legally binding instrument.

3. Have there been previous attempts to give the International Undertaking treaty status?

We are not aware of any previous attempts to give the International Undertaking treaty status. The revision of the Undertaking arose from the negotiations on the Convention on Biological Diversity (CBD), which covered all biological resources and resulted in a legally binding treaty. At the conclusion of the CBD negotiations it was agreed that matters concerning plant genetic resources for food and agriculture would be addressed through a revision of the International Undertaking on Plant Genetic Resources. This revision process commenced in 1993 with the adoption of FAO Conference Resolution 7/93 (a copy is attached). The revised text was adopted by consensus by the 2001 FAO Conference.

4. Could you outline any obstacles to these attempts?

Please refer to question 3 directly above.

5. Has the United States expressed any reservations in regard to ratification of the Treaty?

The United States signed the Treaty on 1 November 2002. The text of the United States press release on signature is enclosed, and includes a comment on proceeding to ratification. The press release can be found at:

<http://www.usembassy.it/usunrome/files/Statements/A2111209.htm>

#### **Remuneration**

1. Could you detail the arrangements under the International Undertaking for payment for the exchange and use of PGRFA?

The International Undertaking has no mandatory arrangements for payment for the exchange and use of PGRFA. It provides in general that 'samples will be made available free of charge, on the basis of mutual exchange or on mutually agreed terms'.

2. Could you provide the Committee with the per annum level of payment received by Australia for the provision of plant genetic resources under the International Undertaking?

As there is no national tracking system for exchanges and the terms on which they are made we are unable to provide this information.

3. Under the provisions of the Treaty, does Australia stand to lose payments for the exchange of information to the Governing Body?

We consider this unlikely.

Confidential information or information covered by laws which limit access are excluded from obligations and so it is unlikely that there are disadvantages.

For example 12.3 (c) and 13.2 (a) cover elements of information exchange and are consistent with current arrangements involving exchange of plant breeding material. In both instances the requirements to provide information are limited.

4. Is there a possibility that under the free exchange of plant genetic material provisions of the Treaty that countries with strong track records in investment in research and development of PGRFA will lose the advantage of their investment?

The Treaty's multilateral system of facilitated access and benefit sharing contains provisions which ensure that access to material protected by intellectual property or other rights has to respect and be consistent with applicable national laws and international agreements. Those countries with a strong track record in investment, research and development and intellectual property protection would therefore be able to protect their interests.

**Question**

Article 13(d)(ii) of the Treaty provides for consideration by the Governing Body within a five year period 'whether the mandatory payment requirement in the Mutual Transfer Agreement (to be concluded by the Governing Body) shall apply also to cases where such commercialised products are available without restriction to others for further research and breeding

1. What would be the effect on the exchange of PGRFA if the Governing Body were to extend mandatory payments in this way?

Any comment on how the Treaty's Governing Body might in the future deal with the matter raised in this question is speculative.

However, to the extent that implementation of the multilateral system of exchange deals with access, benefit sharing and intellectual property considerations, which also arise under members' obligations under other international agreements, such matters will need to be implemented in a mutually supportive manner. As stated in the preamble to the Treaty, 'nothing in the Treaty shall be interpreted as implying' in any way a change in the rights and obligations of the Contracting Parties under other international agreements'.

To the extent that the Governing Body comprises members signatory to other agreements involving related considerations, decisions need to be implemented in a manner consistent with those Parties' interests under other relevant international agreements.

This matter would be addressed by the Governing Body when it has had an opportunity to examine issues in the light of circumstances at the time, including experience with the operation of the Treaty since its entry into force. Any decision would be by consensus of the Governing Body and therefore any member interests under other international agreements dealing with related issues would be protected.

2. Would you agree that in effect this clause has the potential to set in place conditions in which the Governing Body would possess a monopoly over a commercialised exchange system for PGRFA?

We do not agree that the Governing Body would possess a monopoly over a commercialised exchange system for PGRFA.

The Governing Body is comprised of countries which have ratified the Treaty and those countries decide issues by consensus (Article 19.2). The functions of the Governing Body are described in Article 19.3. While the Governing Body has an exclusive right to determine issues falling within the mandate of the Treaty, this role is limited by the Treaty's provisions and the position of its members on the issues arising.

Even when the Treaty enters into force, it will not prevent Contracting Parties from exchanging PGRFA with other Parties or Non-Parties, on mutually-agreed terms, outside the ambit of the Treaty.

**The Governing Body**

The Chair sought clarification as to the composition of the Governing Body (*Transcript of Evidence*, p. 29). The question received no response.

Article 19.1 provides for the establishment of a Governing Body consisting of all contracting parties to the Treaty.

1. Does this include non-state contracting parties such as legal and natural persons within the jurisdiction of contracting parties and IARCs?

No. Only Contracting Parties will be members of the Governing Body (Article 19.1) and each Contracting Party will have one vote (Article 19.4). Article 27 makes clear that only sovereign states may accede to the Treaty.

2. Will non-state contracting parties on the Governing Body have voting rights?

Not applicable. Please refer to the answer to Q1 directly above.

**Attachments**

1. FAO Conference Resolution 3/2001 (Adoption of the Text of the International Treaty on Plant Genetic Resources for Food and Agriculture)
2. Canadian press release on signature and ratification
3. FAO Conference Resolution 7/93 (Revision of the International Undertaking on Plant Genetic Resources)
4. Text of press release on United States signature of the Treaty