

December 2009



# The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



## Item 5.1 of the Draft Provisional Agenda

### INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

#### FIRST MEETING OF THE *AD HOC* ADVISORY TECHNICAL COMMITTEE ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY

Rome, Italy, 18-19 January 2010

### CREATING LEGAL SPACE FOR THE IMPLEMENTATION OF THE TREATY IN THE CONTEXT OF ACCESS AND BENEFIT- SHARING

#### I. CONTEXT

1. Article 4 of the Treaty provides that “[e]ach Contracting Party shall ensure the conformity of its laws, regulations and procedures with its obligations as provided in this Treaty.”<sup>1</sup>
2. By Article 10 of the Treaty, Contracting Parties, in the exercise of their sovereign rights, have agreed to establish a Multilateral System of Access and Benefit-sharing covering the plant genetic resources for food and agriculture (PGRFA) listed under Annex I of the Treaty “which are under the management and control of Contracting Parties and in the public domain”.<sup>2</sup>
3. Pursuant to these provisions, Contracting Parties are in the process of enacting legal, policy and other measures to implement both the access and the benefit-sharing provisions of the Multilateral System at national and regional levels.
4. Under Article 12.2, Contracting Parties agree to take the necessary legal or other appropriate measures to provide facilitated access to other Contracting Parties through the Multilateral System.
5. Under Article 13.2, Contracting Parties agree to take measures under the Multilateral System in order to achieve benefit-sharing, through the involvement of the private and public sectors in activities identified under Article 13, through partnerships and collaboration, including with the private sector in developing countries and countries with economies in transition, in research and technology development.

<sup>1</sup> Article 4.

<sup>2</sup> Article 11.1 and 11.2.

## II. QUESTIONS OR ISSUES

6. In this context, following questions brought to the attention of the Secretariat by several Contracting Parties and other stakeholders, the first meeting of experts considered what legal, policy and other measures are needed for national and regional implementation of the Multilateral System.

7. The first meeting of experts considered the need for the provision of legal space for the Treaty within general national legislation regarding access to genetic resources. This could be affected by allowing for special treatment of Plant Genetic Resource for Food and Agriculture within such general legislation. The Expert Group requested for an input paper with possible model provisions creating such legal space. It recommended that the Governing Body stress the need for coherence and mutual supportiveness between the Treaty and relevant international instruments, particularly the CBD

8. Pursuant to this request, the Secretariat commissioned an input paper on the above issue in order to facilitate discussions, and the provision of advice and opinion, as contained in the *Annex* to this document.

## III. ADVICE SOUGHT

9. The Expert Meeting's advice is sought on:

- (a) the above questions, including possible elements of such measures;
- (b) what needs to be done and which information gathered in preparation for the second meeting of the *Ad Hoc* Advisory Technical Committee, if there is no immediate solution; and
- (c) Which aspects of these questions need to be sent to the Governing Body and what options should be presented for its consideration.

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*ANNEX*

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**POSSIBLE MODEL PROVISIONS CREATING LEGAL SPACE FOR TREATY IMPLEMENTATION**

By Carlos M. Correa

December 2009

***Definition of the problem***

Access and benefit sharing (ABS) measures adopted in line with the Convention on Biological Diversity (CBD) generally apply to all sectors of biodiversity, including Plant Genetic Resources for Food and Agriculture (PGRFA). ABS measures typically subordinate access to genetic resources to prior informed consent (PIC), mutually agreed terms and the sharing of benefits to be established through agreements entered into with the States and other stakeholders (e.g. land owners, indigenous communities). In some situations, these measures may impede the operation of facilitated access to PGRFA as provided for in the Multilateral System (MLS) of the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter 'the Treaty').

This paper discusses how to provide legal space for the operation of the MLS within national ABS legislation with regard to PGRFA, in cases where a potential normative conflict exists.

***Analysis***

The 'ABS Measures Search Page' of the CBD Secretariat lists 41 countries that would have adopted ABS measures based on or inspired by the CBD.<sup>3</sup> There are, however, different types of regulations.<sup>4</sup>

A first category includes general environmental laws which are only 'enabling' in nature, in the sense that they empower a competent national authority to examine the issue and provide specific guidelines or regulations.<sup>5</sup> A second category includes laws on

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<sup>3</sup> See <http://www.cbd.int/abs/measures.shtml>.

<sup>4</sup> The following categorization is partially based on Lyle Glowka (1999), "Access legislation and plant genetic resources for food and agriculture: implications for the revised International Undertaking", FAO, Bonn.

<sup>5</sup> For instance, the National Environment Management Act, 1994 (Law No. 13/94) of Gambia, empowers the competent national authority to prohibit or restrict any trade or traffic in any component of biological diversity (article 32(g)) and stipulates that "the genetic resources of the

sustainable development, conservation, national parks, or biodiversity, which generally contain access provisions more detailed than the measures in the first category.<sup>6</sup> Finally, a third category comprises “dedicated” regulations specifically aimed at regulating access to genetic resources and benefit-sharing.<sup>7</sup>

In addition, the legal *status* of ABS measures greatly varies, as they include regional regimes (e.g. Decision 391 of the Andean Community), national laws, decrees, resolutions, and guidelines or strategic documents relating to biodiversity.<sup>8</sup>

As a result of this diversity in the nature of ABS measures, a potential conflict with the system of facilitated access of the MLS is not likely to arise in all situations where such measures have been adopted, but only where:

- a) there is binding legislation in force that provides for PIC and the bilateral negotiation of benefit-sharing, or otherwise subjects access to PGRFA to conditions or formalities not required under the MLS;
- b) the scope of the relevant legislation includes PGRFA; and
- c) the applicable legislation prevails over the Treaty provisions.

The situation described in a) and b) may be found in a number of countries that have enacted ABS measures of the second and third categories mentioned above. This is, so far, a relatively small number of countries,<sup>9</sup> despite the fact that the CBD has been in force for more than a decade.

The existence of binding ABS legislation of broad scope does not automatically mean that it would prevail over the Treaty obligations regarding the implementation of the MLS. Legal systems vary significantly with regard to the hierarchy of national laws and international treaties, as well as with regard to the conditions under which treaty provisions become binding in a particular jurisdiction. Thus, in some countries constitutional rules determine that international treaties prevail over national laws, while in others they are at the same hierarchical level. In the latter case, an international treaty may derogate provisions of an earlier national law, and vice versa. Moreover, in some countries, treaties' provisions (subject to some conditions) may be deemed self-executing, that is, there is no need to formally incorporate them through national legislation, while in others, national legislation must be enacted to make treaty provisions enforceable or operational.

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Gambia shall constitute an essential part of the natural wealth of resources of the people of the Gambia” (article 35).

<sup>6</sup> Most of these laws establish the principles of mutually agreed terms and prior informed consent for access, in some cases in great detail such as the Biodiversity Law of Costa Rica (Law No. 7788 of 1998).

<sup>7</sup> Such as the Philippines Executive Order 247 (1995), Decision 391 of the Andean Group, and the regulations issued to implement said Decision in some of the Andean countries.

<sup>8</sup> See <http://www.cbd.int/abs/measures.shtml>.

<sup>9</sup> See <http://www.cbd.int/abs/measures.shtml>.

In sum, the special treatment for the access to PGRFA provided for under the MLS might be implemented in a Contracting Party despite the existence of a national ABS measure that broadly covers all sectors of biodiversity, in situations where, for instance, the ABS measure is not of binding nature, or where it is overridden by a treaty provision because the latter is deemed of a higher normative level than the national measure, or it is deemed to supersede any prior national legislation. There are other situations, however, where the implementation of the MLS may require amending or partially derogating an ABS measure.

### ***Options***

In fulfilling their international obligations under the Treaty, Contracting Parties need to review national ABS measures to determine whether they encumber or prevent the operation of the facilitated access provided for under the MLS.

Should a possible conflict between a national ABS measure and the Treaty arises, Contracting Parties may need to carve out an exception in the relevant ABS measure in order to exempt transfers of PGRFA covered by the MLS from PIC and other conditions applicable in accordance with such a measure. Such an exception may be drafted as follows:

*Pursuant to the obligations established by the International Treaty on Plant Genetic Resources for Food and Agriculture, access to and the transfer of plant genetic resources for food and agriculture of the crops covered by the Multilateral System of the Treaty shall only be subject to the conditions set out in Part IV of the said Treaty.*

In order to clarify that the proposed exception would only be applicable for the uses of PGRFA specifically allowed under the MLS, 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.*