December 2009

The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Item 5.2 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

IDENTIFICATION OF PGRFA UNDER CONTROL AND MANAGEMENT OF CONTRACTING PARTIES, AND IN THE PUBLIC DOMAIN

I. CONTEXT

1. 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). By Article 11.2, this Multilateral System includes all PGRFA listed under Annex I of the Treaty "which are under the management and control of Contracting Parties and in the public domain".[1]

2. At its Second Session, the Governing Body "requested the Secretary to continue gathering information on the assessment of progress in the inclusion of plant genetic resources in the Multilateral System",[2] and at the Third Session, stressed "the importance of documenting the plant genetic resources for food and agriculture within the Multilateral System, so that they may be accessed for the purpose of utilization and conservation for research, breeding and training for food and agriculture".[3]

3. The Governing Body further requested Contracting Parties "to report on their plant genetic resources for food and agriculture that are in the Multilateral System, in accordance with Article 11.2 of the International Treaty, and, according to national capacities, to take measures to make information on these resources available to potential users of the Multilateral System"

II. QUESTIONS OR ISSUES

[1] Article 11.1 and 11.2.

[2] IT/GB-2/07/Report, paragraph 65.

[3] Resolution 4/2009, paragraph 1.

4. However, only a limited number of Contracting Parties have as yet formally notified the Secretary of what and where these resources are. Several have, therefore, brought to the notice of the Secretariat the difficulties they are facing in interpreting the relevant provisions of the Treaty, and in harmonizing these with other elements of their legal systems, and a number have asked for advice and assistance.

5. In this context, and based on initial the inquiries by several Contracting Parties and other stakeholders, the Secretary had forwarded this issue to the first meeting of experts.

6. The meeting, in considering the various issues arising in the context of legal, policy and other measures for national and regional implementation of the Treaty analyzed, *inter alia*, which effective measures interested Contracting Parties, other governments and entities could take to identify or include material in the Multilateral System. The meeting 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 Convention on Biological Diversity.

7. 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. The paper is attached as an *Annex* to this document.

III. ADVICE SOUGHT

8. The Committee's advice is sought on:

(a) the above issue, including possible measures, to assist Contracting Parties to identify plant genetic resources for food and agriculture that are under the management and control of Contracting Parties, and in the public domain;

(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.

ANNEX

PGRFA UNDER CONTROL AND MANAGEMENT OF CONTRACTING PARTIES AND IN THE PUBLIC DOMAIN

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Definition of the problem

The Multilateral System (MLS) of the International Treaty on Plant Genetic Resources for Food and Agriculture ('the Treaty') comprises the plant resources of crop species listed in Annex I which are "under the management and control of Contracting Parties, and in the public domain" (article 11.2 of the Treaty).

The determination of which resources are part of the Multilateral System in accordance with article 11.2 is crucial for the implementation of the Treaty. Possible divergences in the interpretation given to this provision in different Contracting Parties might result in inconsistencies in the application of the Treaty. This paper focuses on that interpretation and elaborates different aspects that need to be clarified for this purpose. The suggested interpretation is made in accordance with the method indicated by the Vienna Convention on the Law of the Treaties, which requires a literal reading of treaty provisions[4].

Analysis

Although the Treaty is concerned with the access to, and conservation and use (for plant breeding, research and training) of *all* plant genetic resources for food and agriculture, it has established a special regime of "facilitated access" for a group of crops important for food security, which are enumerated in Annex I of the Treaty.

In accordance with Article 11 of the Treaty, the MLS comprises resources from five sources:

a) 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'.

b) Contributions from all others holding plant genetic resources for food and agriculture listed in Annex I, upon invitation from the Contracting Parties.

[4] In accordance with article 31.1 of the Vienna Convention on the Law of the Treaties, '[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

c) Resources included voluntarily in the MLS by natural or legal persons within the jurisdiction of the Contracting Parties, "who hold plant genetic resources for food and agriculture listed in Annex I".

d) Plant genetic resources for food and agriculture listed in Annex I and held in the *ex situ* collections of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR), as provided for in Article 15.1(a).

e) The resources held by other international institutions, in accordance with Article 15.5.

PGRFA mentioned in paragraph a) are the only subset that is included in the MLS without further authorization or agreement. The various concepts included in article 11.2 (first sentence) are examined below:

'All plant genetic resources for food and agriculture listed in Annex I…'

Article 11.2 makes it clear that it covers *all* PGRFA in Annex I. Article 30 of the Treaty also categorically states that: 'No reservations may be made to this Treaty'. It does not allow, hence, for any exception, based on agronomic, economic or other criteria. Consequently, a Contracting Party could not declare, for example, that it unilaterally excludes materials from certain crops listed in Annex I of the Treaty from the system.

In addition, Article 11. 2 applies to materials maintained in *"ex situ"* as well as *"in situ"* conditions, as no distinction between these two categories is made. This is without prejudice to the particular conditions that might be implemented to provide access to PGRFA held *"in situ"*, in accordance with article 12.3(h) of the Treaty[5].

The only exception limiting the obligation imposed by Article 11.2 is provided for by the Treaty in relation to resources "under development, including material being developed by farmers", access to which "shall be at the discretion of its developer, during the period of its development" (Article 12.3 (e)).

'…under the management and control of…'

"Management" means "administration of business concerns or public undertakings; persons engaged in this"[6]. In the context of article 11.2, "management" is specifically

[5] Article 12.3(h): 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.

[6] *The Concise Oxford Dictionary*, p. 614.

referred to activities by the 'Contracting Parties' and may be understood as the way in which the State and other governmental entities organize and coordinate their own conduct .

The expression "under the management" would appear to mean that a Contracting Party has the capacity to exercise, directly or through a third party under its control or supervision, acts of conservation and utilization. It seems to refer to the actual handling of the material and not to the legal *status* of the PGRFA. As a result, "under the management" might include any PGRFA –whatever its legal status- that are administered by a Contracting Party and that, therefore, the Contracting Party can make available, upon request, under the facilitated access conditions provided for in the MLS.

Article 11.2, however, not only alludes to "management", but to 'management and control' of the Contracting Party. The ordinary meaning of "control' in this context could be understood as "power of directing, command" [7].

It may be possible to interpret that "control" just reinforces the concept of "management". However, the use of two different terms suggests that different concepts were deliberately introduced. It is not sufficient that the PGRFA be 'managed' by a Contracting Party (e.g. through conservation in a genebank); a Contracting Party should also have the power to decide on the treatment to be given to such resources[8]. Hence, there may be materials that are 'managed' by a Contracting Party but which may not be under its 'control (e.g. when they are conserved by the Contracting party in providing a service to a third party). Conversely, there may be materials under the 'control' of a Contracting Party, but which are not subject to its 'management' (e.g. materials deposited by a Contracting Party in a foreign genebank).

'….and in the public domain.'

The Treaty was negotiated and adopted "in harmony" with the Convention on Biological Diversity (Article 1.1), and specifically recognizes (Article 10.1) the sovereign rights of States regarding "their own" PGRFA. The recognition of sovereign rights over their PGRFA does not imply, however, the recognition of property rights over these resources. It simply expresses deference in favour of the decisions that the Party may adopt with regard to the determination of the legal status of the PGRFA in their jurisdiction.

There are two possible meanings of the concept of "public domain":

a) Under *administrative law* 'public domain (or "public property") applies to things that are dedicated to the public's use (for example, a navigable river bed). Public property can

[7] *The Concise Oxford Dictionary*, p. 206.

[8] It should be noted that Article 11 does not refer to the "property", 'ownership' or 'possession' of the PGRFA. Paragraphs 2 and 3 in Article 11 refer to "holders" and those "who hold", respectively. In relation to the resources possessed by the CGIAR Centres, the term "held" is also used (article 15.1).

be declared and exercised over quantifiable and individualized goods, or over an indeterminate quantity of resources (e.g. the water in rivers or hydrocarbons in the subsoil).

Under some national regulations on access to genetic resources adopted to implement the Convention on Biological Diversity, specific reference is made to States' rights over genetic resources. The Andean Community's Decision 391, for example, states that 'genetic resources' are assets belonging to the nation or state. However, the Decision provides for different property regimes for the 'biological resources' that incorporate such resources (articles 5 and 6).

b) "Public domain" can also be understood as information that is *not* subject to intellectual property rights which can therefore be freely used without payment to or authorization from third parties[9]. This concept is comparable to that of "*res communes"*, something that is available for common use. 'Public domain' may be deemed to include information:

(i) whose protection by intellectual property rights has expired;
(ii) eligible for protection but not protected because of failure to comply with certain requirements for the acquisition of the applicable rights (e.g. filing of a patent application before the disclosure of the invention);
(iii) not eligible for protection[10].

There are some important differences between the meanings of 'public domain' under administrative and intellectual property law: while under administrative law, the concept suggests some form of property or control by the State, in the framework of intellectual property rights the State has no rights over the information, which is publicly available.

As a result, under administrative law the State may limit the use of the public domain (for instance, through an authorization to privately use assets under governmental control as part of the concession of public services), while under intellectual property law, it is absolute and, in principle, mandatory[11].

Options

A key interpretative issue is which of the two meanings indicated above is intended by the expression "public domain" in article 11.2.

[9] 'Public domain' has been defined as "a collection of things available for all people to access and consume freely" (Kaul I; Conceicao P; Le Goulven K; Mendoza R. (2003) 'Why do public goods matter today', in Kaul I; Conceicao P; Le Goulven K; Mendoza R. (Editors), Providing global public goods. Managing globalization, Oxford University Press, New York, p. 8.)

[10] Some legal experts, particularly in the area of copyright, consider that "public domain", *stricto sensu*, does not include information that was never eligible for protection (e.g., purely factual information). There is no room in the Treaty, however, to make this distinction.

[11] See Choisy S. (2002), *Le domain public en droit d'auteur*, Litec, París, p. 53.

Several reasons suggest that article 11.2 refers to the concept found under intellectual property law[12]. If the negotiating parties intended to allude to public property, the concepts of 'management and control' would be superfluous, because the latter encompass the right to the former[13]. In the negotiating history of the Treaty, there is no precedent suggesting that the parties opted to limit one of the basic sources of materials for the MLS to PGRFA in the public property of the Contracting Parties. Moreover, if this were the case, each Contracting Party might determine what is deemed public property or not, thereby leaving them great discretion to include or not materials in the MLS.

'…of the Contracting Parties…'

Another important issue is the meaning of 'Contracting Parties' in terms of organizations and entities that exercise management and control on PGRFA listed in Annex I.

This concept obviously encompasses PGRFA held 'in-situ' or 'ex-situ' subject to the 'management and control' by the State itself, including its ministries or departments. It also covers other entities under State control[14], such as public research institutions, independently of whether their direction or management is decentralized, operate under a separate budget, or some of their transactions are subject to private contractual law and not to public administrative law. The concept would not include, on the contrary, entities not subject to the State control, for instance, private foundations that held genebanks. Likewise, in the case of federal States, materials held by sub-federal entities would be outside the MLS, unless voluntarily included in the MLS in accordance with article 11.3 of the Treaty.

In some cases, however, the extent to which a particular entity may be deemed under the control of a Contracting Party may be uncertain[15]. This determination should be made, in accordance with the relevant domestic legislation, by the State in whose jurisdiction the entity operates, but other Contracting Parties may resort to the arbitration and conciliation mechanism of the Treaty in case of divergences about the legal status of particular entities holding materials of the crops listed in Annex I of the Treaty[16].

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[12] See also IUCN (2005) *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*, Gland and Cambridge, p. 84.

[13] In accordance with the principle of "*effet utile*" applied under customary international law, an interpretation that gives full meaning to all the terms in the Treaty should be sought.

[14] 'Control' may be deemed to exist when the actions of an entity are governed or directed by the State. Differences may exist, however, under national laws on this concept.

[15] The Governing Body of the Treaty, at its Third Session, encouraged **'**Contracting Parties, as appropriate, in reporting on their plant genetic resources for food and agriculture in the Multilateral System, to provide information on the collections of legal persons not part of the government, whom they regard as forming part of their national plant genetic resources systems and who are willing to make such information available', Resolution 4/2009, available at ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf..

[16] See Annex II of the Treaty.

Conclusions

All materials that are administered by the Contracting Parties and on which they can take decisions regarding their conservation and use, are covered by the MLS.

The concept of "public domain", as used in article 11.2 of the Treaty, should be understood in the context of intellectual property law. It includes (1) materials whose protection has ended (whatever the reason may be), and (2) materials that never were protected or that will ever be protected, whether it be for not satisfying the respective formalities or for not fulfilling the substantive requirements to obtain protection.

PGRFA under the management and control of the Contracting Parties, and in the public domain, as interpreted above, belong to the MLS without any declaration or notification. To the extent that the required conditions are met, they should be deemed as automatically belonging to the MLS. However, it might be difficult for other Contracting Parties to exactly know which are the PGRFA under the MLS, among other reasons, because of uncertainty about the institutions that are under the 'control' of a Contracting Party[17].

The Governing Body of the Treaty, at its Third Session, requested 'all Contracting Parties to report on their plant genetic resources for food and agriculture that are in the Multilateral System, in accordance with Article 11.2 of the International Treaty, and, according to national capacities, to take measures to make information on these resources available to potential users of the Multilateral System'. These reports may contribute to clarify which are the institutions subject to Contracting Parties' control that held PGRFA in the MLS.

[17] Resolution 4/2009, available at ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf.