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PLANT GENETIC RESOURCES AS COMMONS: THE MODEL OF FAO'S INTERNATIONAL TREATY

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Introduction

After almost 7 years of negotiations, the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter ITPGRFA) was adopted in November 2001¹. The Treaty already recognises in its Preamble that plant genetic resources for food and agriculture are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere. Thus, the main objectives of the ITPGRFA are the conservation and sustainable use of plant genetic resources for food and agriculture (hereinafter PGRFAs) and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security². Although the Treaty covers all PGRs³, it establishes an international commons pool, the so called multilateral system, only for certain kinds of resources that will guarantee the access to these resources and the sharing of benefits

¹ The ITPGRFA entered in to force in June 2004. In December 2008, 119 states had ratified it.

² Art. 1. The ITPGRFA may be considered in fact as a special application of art. 15 (Access to Genetic Resources) of the Convention on Biological Diversity:

“1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.

4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”

As it will be pointed out below, the ITPGRFA goes beyond the bilateral approaches adopted under the CBD, clearly inappropriate for PGRFA, and states an access and benefit sharing (ABS) global system for some PGRs.

³ Art. 3 ITPGRFA.

generated from their use. The following paragraphs will focus on the definition and characteristics of this commons regime for PGRFAs.

The Multilateral System

In the exercise of their sovereign rights on their PGRFAs, the ITPGRFA contracting parties have agreed to establish a multilateral system of access and benefits sharing for a set of fitogenetic resources (and associated information) that have been considered the most important to food security and on which countries are most interdependent⁴. Therefore, the multilateral system includes all the genetic resources specified in Annex 1 of the ITPGRFA that are in the public domain and under the control of the contracting parties⁵. A set of about thirty crops and 29 forage genera are included in the Annex. Still, some important resources are excluded from the system: so, soya bean, groundnut, sugarcane, tomato and most tropical forages as well as certain species that are part of the genepool used by breeders of cassava, potato and common beans. A particular situation is that related to the materials under development during the period of development: art. 12.3 (e) states that access to plant genetic resources for food and agriculture under development may be at the discretion of its developer, during the period of its development. On the other hand, art. 15 contains special provisions for the *ex situ* collections of PGRFAs held by the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) and other international institutions. Accordingly, Annex 1 and, after the signature of the corresponding agreements, non Annex 1 materials contained in CGIAR collections are made available under the multilateral system. Other international collections (namely the Tropical Agricultural Research and Higher Education Center, the International Coconut Genebank for African and the Indian Ocean, International Coconut Genebank for the South Pacific, Mutant Germplasm Repository of the FAO/IAEA Joint Division) have also signed agreements with the ITPGRFA Governing Body and put their materials in the multilateral

⁴ The inclusion of many crops in the list of Annex 1 was subject to long negotiations. The final list was informed by scientific but also political and strategic reasons: M. Halewood and K. Nnadozie, "Giving Priority to the Commons: The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)", *The future control of food, A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*, eds. Geoff Tansey and Tasmin Rajotte, (2008), p. 135-136.

⁵ Art. 11.2 ITPGRFA. About these two conditions see C. Correa "Recursos fitogenéticos bajo la administración y control de las Partes Contratantes y en el dominio público ¿Cuán rica es la canasta del sistema multilateral del Tratado Internacional?", in *El sistema multilateral de acceso y distribución de beneficios del Tratado Internacional sobre los Recursos Fitogenéticos para la Alimentación y la Agricultura. Su importancia para Latinoamérica*; eds. Isabel López Noriega and Michael Halewood, Recursos Naturales y Ambiente, vol. 53. 2008.

system.⁶ Non Annex 1 PGRFAs or those that are not under the control of the contracting parties or in the public domain may be voluntarily included in the international commons pool. So, the Netherlands and Germany have already taken some steps to put non Annex 1 materials in the multilateral system⁷.

Access to PGRFAs by the contracting parties and by legal and physical persons under their jurisdiction will be permitted according to the obligations established in the Treaty and specified in the Standard Material Transfer Agreement (hereinafter SMTA)⁸. The SMTA is the legal tool, the standard contract, to be used by all the suppliers and recipients to transfer material placed under the multilateral system. It sets out their legal right and duties, including provisions concerning the sharing of benefits arisen from the commercial use of the material (vid. infra) and the procedure for dispute resolution. Access to PGRFAs under the multilateral system must be accorded expeditiously and free or at a minimum cost⁹. It must be done only as concerns access for purposes of utilisation and conservation for research, breeding and training to food and agriculture and not for chemical, pharmaceutical and/or other non-food/feed industrial uses¹⁰. According to the “copyleft” spirit, genetic resources accessed under the multilateral system must continue to be made available to the multilateral system under the terms of the Treaty¹¹.

Benefits arising from the use of plant genetic resources for food and agriculture under the multilateral system must be shared fairly and equitably through the mechanisms foreseen in art. 13.2: i.e. the exchange of information, access to and transfer of technology, capacity building, and the sharing of benefits arising from commercialisation. As the Treaty recognises, the facilitated access established for the multilateral system constitutes itself a major benefit¹². Moreover, the SMTA specifies the benefit sharing conditions for the commercial use of PGRs received under the multilateral system. They will be applied when

⁶ For a list of the agreements concluded under Article 15 see http://www.planttreaty.org/art15_en.htm.

⁷ UNEP/CBD/WG-ABS/7/INF/3/Part.1, Study on the relationship between an international regime on access and benefit-sharing and other international instruments and forums that govern the use of genetic resources: The International Treaty on Plant Genetic Resources for Food and Agriculture and the Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations, 3 March 2009, p. 4.

⁸ The Governing Body of the ITPGRFA adopted the Standard Material Transfer Agreement in its Resolution 1/2006 of 16 June 2006. The text may be accessed on http://www.planttreaty.org/smta_en.htm.

⁹ Art. 12.3(b) ITPGRFA.

¹⁰ Art. 12.3(a) ITPGRFA.

¹¹ Art. 12.3(g) ITPGRFA.

¹² Ar. 13.1 ITPGRFA.

the recipient of the material accessed from the commons pool commercializes a product that is a PGRFA and that incorporates material received under the multilateral system always if the product is not available without restriction to others for further research and breeding. In most of the cases, patents concerning PGRFAs will surely trigger the benefits sharing mechanism. On the contrary, breeder's rights will not do it since they do not restrict the use for research and breeding. If the PGRFA is available to others for further research and breeding, no payment is necessary although it is still encouraged. The SMTA establishes two options for the sharing of benefits generated by the commercial use of material accessed under the multilateral system. According to the first one, the recipient must pay a 1.1 percentage of the sales of the commercialised products in accordance with the other conditions required in Annex 2 of the SMTA. This option does not clearly specify the level of incorporation of the accessed material in the final product, nor the duration of benefit sharing. This may cause some reluctance for the participation of private companies into the system¹³. Alternatively, the recipient may choose to pay a minor royalty rate -0.5 per cent of sales- over a 10 year period on *all* PGRFA products she commercializes of the same crop, whether or not they incorporate material from the multilateral system and whether or not they are available for research and breeding.

Departing from the individualist and bilateral approach of the “access and benefit sharing” measures adopted at the national level for the implementation of the Convention on Biological Diversity —where benefits generally go directly to the country of origin/supplier of the genetic resources; in the multilateral system the monetary benefits will go to a common fund created under the Treaty. It should be noticed that suppliers have not an immediate incentive to pursue those who infringe the terms of the SMTA (i.e. who do not share commercial benefits or use the materials for forbidden purposes). To overcome this obstacle an innovative solution has been put in place: the so called third party beneficiary, an entity representing the governing body and the multilateral system, has been empowered with the right of initiating dispute settlement procedures regarding rights and obligations of the provider and the recipient under the agreement. Moreover, according to art. 8.3 SMTA, the third party beneficiary has the right to request that the appropriate information, including samples as necessary, be made available by the provider and the recipient, regarding their

¹³ M. Halewood and K. Nnadozie, op. cit. n. 4, p. 133.

obligations in the context of the SMTA. The FAO has accepted the invitation of the ITPGRFA Governing Body to represent the third party beneficiary.

The ITPGRFA and Intellectual Property Rights

The relationship between the multilateral system and intellectual property rights is far from being clear. It was indeed one of the more contentious issues during the negotiations of the Treaty, since the views of developed and developing nations differed a lot. The ITPGRFA imposes some conditions that may affect to the application of intellectual property rights in relation to the resources placed under the multilateral system. So, art. 12.3 (d) states that recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System. While some commentators consider that recipients cannot claim any kind of intellectual property rights over the material, others consider that no intellectual property rights can be taken out over the material, or subsequent products derived from that material, only if the effect would be to limit the facilitated access by others to the original material. Some doubts also exist in relation to the meaning of the expression “or their genetic parts or components, in the form received from the Multilateral System”. Does it allow to take out IPRs on products or materials if some improvement or modification has been made (as considered by most of developed countries), or on the contrary, does it forbid it -since the genetic multilateral system material is embedded in the product (as suggested by most developing countries)-?¹⁴ Finally, it is worth to say that the FAO Treaty has been the first international binding instrument to recognise farmer’s rights. This point is explained by S. K. Vema in her contribution to this report.

Conclusion

Different from the rationality behind IPR laws and ABS CBD-like measures that enhance the appropriation and concentration of common resources, the ITPGRFA represents an innovative attempt to favour the global access and benefit sharing of plant genetic resources for food and agriculture. Since the utility of genetic resources in agriculture depend

¹⁴ G. Moore and W. Tymowski, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*, (2005), p. 92; M. Halewood and K. Nnadozie, op. cit. n. 4, p. 122.

upon access to the greatest diversity of germplasm as possible¹⁵, and due to food security reasons and the global interdependence on these materials, it may be said that *a priori* and theoretically –it is very soon to come with empirical conclusions- the international crop commons created under the ITPGRFA seems to be much more appropriate to preserve sustainable access to food and biodiversity than other proprietary regimes.

¹⁵ M. Halewood and K. Nnadozie, op. cit. n. 4, p. 122.