



# Plant genetic resources for food and agriculture

By Claudio Chiarolla

ICTSD - Natural Resources, International Trade and Sustainable Development

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The status of genetic resources for food and agriculture (GRFA) is a category for which matters in the ABS Working Group are complicated by existing rules, procedures and practices. The UN Food and Agriculture Organization (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) provides an internationally agreed framework for the conservation and sustainable use of crop diversity and the fair and equitable sharing of benefits, in accordance with the CBD. Should the ABS Protocol thus explicitly exclude PGRFA under the ITPGRFA's Multilateral System or is there a need for a more flexible regulation of GRFA?

The ITPGRFA facilitates access to PGRFA through its Multilateral System (MLS) and sets out specific ABS rules in the Standard Material Transfer Agreement (SMTA).<sup>1</sup> While the International Treaty itself applies to all PGRFA, the Multilateral System only facilitates access to 64 crops and forages. The species of included crops are listed in Annex I of the ITPGRFA. However, these pooled resources are available under the facilitated access mechanism of the MLS only if access is requested for the purpose of utilization and conservation for research, breeding and training for food and agriculture. This means that national ABS legislation, the CBD and the ensuing ABS Protocol may apply if recipients intend to use Annex I PGRFA for other purposes, "such as chemical, pharmaceutical and/or other non-food/feed uses."<sup>2</sup>

The current draft ABS Protocol provides for different options regulating its relationship with the FAO International Treaty and the Protocol's scope regarding PGRFA. These can be found

<sup>1</sup> Chiarolla (2008), 'Plant Patenting, Benefit Sharing and the Law Applicable to the FAO Standard Material Transfer Agreement', *The Journal of World Intellectual Property*, 11 (1), 1-28.

<sup>2</sup> Article 12.3(a).

in Article 3 and Article 3 bis of the draft ABS Protocol.

Whether the emerging ABS Protocol will provide enough flexibility to accommodate the needs of agricultural research and plant breeding, and how it will manage to do so are open questions. An obvious solution would be to allow the future expansion of the FAO Multilateral System. However, such expansion is unlikely to occur in the short-term, because most countries of origin of excluded crops are unlikely to make any concessions given their high expectations from, and emphasis on, the draft ABS Protocol to be adopted in Nagoya.

Currently, there are two alternative PGRFA-related exclusions in Article 3 of the draft ABS Protocol, namely: I) genetic resource contained in Annex I of the ITPGRFA provided they are used for the purposes of the ITPGRFA; or II) genetic resources under the Multilateral System of the ITPGRFA, both current and as may be amended by its Governing Body. The scope of the first option is narrower than the second one, since the latter makes no reference to purpose-of-use-related requirements for the actual inclusion of PGRFA into the Multilateral System. On the other hand, the second option also envisages the potential expansion of the Multilateral System's coverage to other crops and forages not currently listed in Annex I. Because of this, the second option may be preferred to allow for the future expansion of the MLS.

As regards the materials collected before the entry into force of the CBD and held in the ex situ collections of the Consultative Group on International Agricultural Research (CGIAR), the solution envisaged by the Governing Body of the ITPGRFA was to replace the use of interim Material Transfer Agreements with a new Agreement along the lines of the Standard Material Transfer

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Agreement of the ITPGRFA which includes benefit sharing provisions.<sup>3</sup> The issue of whether the SMTA needs to be modified for its use with non-Annex I crops has been discussed by the Governing Body of the ITPGRFA at its third meeting in Tunis, Tunisia in June 2009. No substantial changes have been made to the SMTA and such Agreement is currently used for the transfer of non-Annex I crops.<sup>4</sup>

During recent ABS negotiations, a common understanding emerged that the finalization of the Protocol may entail the deletion of both alternative options under letter (c) of Article 3, while the provision on the Protocol's relationship with other instruments contained in paragraph 4 of Article 3 bis would be retained. Although the ITPGRFA and its MLS are not directly referred to in its wording, there is no doubt that they are in fact the only existing "specialized ABS instrument" consistent with the CBD. Therefore, it is important to examine the legal implications of paragraph 4 of Article 3 bis. The latter provision is drafted in broad terms that allow for the voluntary use of the Standard Material Transfer Agreement including for the transfer of non-Annex I PGRFA between providers and recipients. In particular, it provides scope for using the SMTA for the transfer of materials held in the ex situ collections of CGIAR, including non-Annex I PGRFA, in accordance with the ITPGRFA Governing Body's decision.<sup>5</sup> It also allows for the transfer of PGRFA from providers under the jurisdiction of an ITPGRFA Party to recipients under the jurisdiction of non-parties.<sup>6</sup>

3 FAO (2007), 'Consideration of the Material Transfer Agreement to be Used by the International Agricultural Research Centers of the CGIAR and other relevant International Institutions, for PGRFA not Included in Annex I of the Treaty', IT/GB-2/07/13 Rev 1, FAO, Rome, Italy, (29 October - 2 November 2007).

4 FAO (2009), 'Report of the Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture', GB-3/09/Report, Tunis, Tunisia (1-5 June 2009), at paragraphs 38 and 39.

5 See: IT/GB-2/07/Report, paragraph 68.

6 This interpretation is supported by the utilization of the expression "[...] this Protocol does not apply for the Contracting Party or Parties

Thus, the choice to delete the explicit exclusion contained in Article 3 (paragraph 2, letter c) of the draft ABS Protocol, while retaining paragraph 4 of Article 3 bis, appears neither to affect the rights and obligations of any Contracting Party deriving from any existing international agreement nor to prevent the Parties from developing new specialised ABS agreements. On the other hand, the Protocol's potential application to benefits arising from "continuing" and "new uses" of genetic resources "acquired before the entry into force of the Convention,"<sup>7</sup> which is strongly supported by the African Group, would require reconsidering the current practice, which the ITPGRFA's Governing Body has collectively endorsed, to make available all PGRFA held in the ex situ Consultative Group on International Agricultural Research collections through the Standard Material Transfer Agreement.<sup>8</sup>

Beyond the realm of plant genetic resources, life patenting and associated equity and benefit sharing issues have emerged in all agricultural genetic resource sectors including, inter alia, Microbial Genetic Resources and Animal Genetic Resources for Food and Agriculture. In particular, the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA) has discussed the desirability of sectoral approaches, which could be envisaged in accordance with paragraph 2 of Article 3 bis of the draft Protocol. The further elaboration of cross-sectoral ABS issues relevant to food and agriculture as well as the relationship between the work of the CGRFA and that of the forthcoming ABS Protocol's governing body are critically important for genetic resources for food and agriculture covered by the Protocol and for food security.

to the specialised instrument [...]", where specific reference is made to either "Contracting Party or Parties" vis-à-vis a single reference to Contracting Parties.

7 Article 3, not numbered paragraph 3, letters a) and b).

8 See: IT/GB-3/09/Report at Paragraphs 38-39 and IT/GB-3/09/Inf. 15.