National Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture

(Presentation 3)

This paper reviews the steps that may need to be taken to implement the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter ‘the Treaty’) at the national level.

General

In general, the Treaty is more of a framework agreement than one that sets strong and detailed obligations on Contracting Parties. There are many things that a Contracting Party can do to implement the Treaty at the national level, such as improving the national systems for the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA) in line with the general direction set out in Articles 5 and 6 of the Treaty, and providing for the realization of farmers’ rights. But there are few things that a Contracting Party is required to do right from the outset, except for ensuring that the multilateral system can and does operate in the country.

Review of national legislation

One of the first things that will need to be done is to review national legislation and administrative procedures to ensure that the Treaty can be implemented. Usually this will have been done before the country ratifies or accedes to the Treaty. If it was not done then, such a review will need to be carried out as a matter of urgency once the country has become a Contracting Party. Indeed, Article 4 of the Treaty is very clear in describing the general obligation of each Contracting Party to ‘ensure the conformity of its laws, regulations and procedures with its obligations under the Treaty’.

Much of the review is likely to be concerned with longer term issues, such as improvements in the systems of conservation and sustainable use of PGRFA and the promotion of an integrated approach to the exploration, conservation and sustainable use of those resources in accordance with Article 5. They are also likely to involve consideration of the approach to be taken towards the realization of farmers’ rights (see below).

One immediate issue, however, is likely to be to ensure that there are no laws, regulations or administrative approaches in force that would prevent the country from implementing the multilateral system. One likely source of incompatible legislation could be laws and regulations adopted for the implementation of the Convention on Biological Diversity (CBD). While the Treaty itself is in harmony with the CBD, national implementation of the CBD has tended to concentrate on the bilateral negotiation of mutually agreed terms with entities seeking access to genetic resources, and the establishment of procedures for the granting of prior informed consent, including, for example, public hearings and publication of applications in newspapers. Both of these could conflict with implementation of the expedited processes for access to PGRFA of Annex 1 crops and forages under the multilateral system.
There would thus be a need for new legislation creating legal space for the implementation of the Treaty, unless, under national law, the Treaty is automatically implemented in national law and overrides previous national legislation.

There are normally two possible approaches that could be followed in adopting national legislation:

- The first would be to create the necessary legal space, without necessarily setting out detailed substantive steps to be followed in implementing the Treaty. At its first meeting in January 2010, the Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System of the International Treaty (hereinafter ‘the Committee’), has suggested the following wording as appropriate for this type of legislative provision:

  *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 Party IV of the said Treaty.*

- The second approach would be to deal in more detail with the procedures to be followed in granting access to material under the multilateral system or, more generally, with aspects of the management and conservation of plant genetic resources.

The new legislation in Ethiopia is an example of the first approach, where the legislation provides that access to genetic resources under a multilateral system is to be made in accordance with the procedure specified in the multilateral system under the Treaty and in accordance with future regulations to be issued on the subject.  

The new law developed by Syria on plant genetic resources is an example of the second approach. It deals in general terms with conservation and sustainable use, the protection of local communities and farmers’ rights, and sets out general terms and processes for dealing with requests for access, both under the multilateral system and more generally. It also deals with the procedures and terms of collecting PGRFA from *in situ* conditions.

### What is included in the multilateral system?

**Collections automatically included in the multilateral system**

The Treaty provides that ‘all PGRFA listed in Annex 1 that are “under the management and control of the Contracting Parties and in the public domain”’ are included automatically in the multilateral system.

The meaning of these terms has been considered by the Committee, which made the following analysis and recommendations:

*The Committee … noted that the legal situation as to what should be regarded as “material under the management and control of the Contracting Party and in the public domain” may well vary from country to country. It recognized the desirability of a coherent approach in the application of these concepts, which are at the heart of the multilateral system.*

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1. Ethiopia, Proclamation No. 482/2006 on Access to Genetic Resources and Community Knowledge, and Community Rights, 2006, Article 15. The Proclamation provides for a special access permit.
In considering the meaning of these concepts, the Committee agreed that the Vienna Convention on the Law of Treaties, which requires a literal interpretation of treaty provisions, should be followed.

The Committee was of the opinion that the expression ‘under the management’ means that a Contracting Party has the power to undertake acts of conservation and utilization in relation to the material: it refers to the capacity to determine how the material is handled and not to the legal rights to dispose of the PGRFA. The ordinary meaning of ‘control’ in this context would focus on the legal power to dispose of the material. In other words, it is not sufficient that the PGRFA be ‘managed’ by a Contracting Party (e.g., through conservation in a genebank); it must also have the power to decide on the treatment to be given to such resources.

The Committee considered that the expression ‘of the Contracting Parties’ obviously includes material held by structures of the central national administration, such as government departments and national genebanks. It may or may not cover material held by autonomous or quasi-autonomous entities normally considered to be part of the national plant genetic resources system. Likewise, special issues may arise in the case of Federal States. There is an expectation on the part of Contracting Parties that all such material that is not automatically included should be brought within the multilateral system through positive action.

The Committee noted that the expression ‘PGRFA under the management and control of the Contracting Parties’ encompasses both PGRFA held ‘in situ’ and that held ‘ex situ’.

On the term ‘in the public domain’, the Committee noted that there were two possible meanings. One meaning is the concept of public property under administrative law. The other meaning refers to material or information that is not subject to intellectual property rights. The Committee considered that the concept of ‘public domain’, as used in Article 11.2 of the Treaty, should be understood in the context of intellectual property law.

PGRFA under the management and control of the Contracting Parties, and in the public domain, are part of the [multilateral system] without any declaration or notification. However, actual use of such material depends on information being made public about what materials are available and where they may be accessed, along with related non-confidential information.

**Measures that the government could take to encourage the holder of other collections to bring their collection into the multilateral system**

As noted above by the Committee, there is a general expectation that all collections normally considered to be part of a national plant genetic resources system, whatever their precise legal status, should be in the multilateral system, whether this inclusion is automatic or comes about through active measures taken by the government. Active measures could include withholding public funding from collections that are kept out of the multilateral system, or making holders aware of the advantages of bringing their collections within the multilateral system. The Treaty itself provides that the governing body should eventually assess progress in including the plant genetic resources held by natural and legal persons and should decide whether access shall continue to be facilitated for those persons that have not included their collections in the multilateral system.
Notification of the material that is included in the multilateral system

The Treaty does not place any legal obligation on Contracting Parties to report on the material included in the multilateral system, whether it is included automatically (under Article 11.2) or voluntarily (under Article 11.3). However, it is obvious that the practical availability of the material included in the multilateral system will depend on the availability of information on what is actually in the system and where it is held.

Accordingly, at its third session in June 2009, the governing body requested all Contracting Parties to report on the PGRFA that are automatically in the multilateral system in accordance with Article 11.2 and to make information on these resources available to potential users of the multilateral system, in accordance with national capabilities. At the same session, the governing body also expressed its concern at the lack of information on the inclusion of PGRFA by natural and legal persons within the jurisdiction of Contracting Parties and reiterated the urgency of obtaining the appropriate information. Such information should include the holders of the collections, the crops included and the total number of accessions.

The Treaty’s secretariat has included the following sample letter of notification on its website:

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**Sample Letter of Notification of Inclusion of Material in the Multilateral System**

| To the Secretary of the International Treaty on Plant Genetic Resources for Food and Agriculture |
| Mr. Shakeel Bhatti |
| Food and Agriculture Organization of the United Nations |
| Viale delle Terme di Caracalla 1 |
| 00153 Rome, Italy |

**Subject:** Notification regarding the contribution of the [name of the CP/natural or legal entity] to the Multilateral System

The International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty) has established a Multilateral System of Access and Benefit-sharing. Regarding the coverage of the Multilateral System, Article 11 specifies that the Multilateral System shall include 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, and that Contracting Parties invite other holders of the plant genetic resources for food and agriculture listed in Annex I to include these in the Multilateral System.

Herewith, the [name of the CP/natural or legal person] wishes to notify to you that the following plant genetic resources for food and agriculture listed in Annex I and maintained in [name of the CP] have been included in the Multilateral System.

1. The collections held by [name of the collection centre], [name of the country], located in XX. Through the website [url address] detailed data on the composition of the collection and user procedures to order samples are readily available.

2. The [name of species] collection held by the [name of the collection centre] located in XX [and consisting of...]. The website [url address] provides access to the collection’s database.

Germplasm held in the collections listed above will be made available to users under the conditions of the Standard Material Transfer Agreement of the International Treaty on Plant Genetic Resources for Food and Agriculture.

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Implementing the multilateral system

Administrative measures
While some countries may find it necessary to adopt or amend national legislation to allow for implementation of the multilateral system, other countries have found that implementation can be undertaken through administrative measures.

The following account of the experience of Germany is one example of such an approach. In the case of Germany, the responsibility for PGRFA is shared between the federal and state authorities, and PGRFA is also held in private institutions. The focal point for the Treaty is the Federal Ministry of Agriculture. The framework for the implementation of the multilateral system, including activities of both government and private institutions, is provided by a National Programme on Plant Genetic Resources, by an Advisory and Co-ordinating Committee, and by a National Inventory for Plant Genetic Resources.

As a first step in implementation of the multilateral system, information on the system was provided to all relevant stakeholders, in both the public and private sectors. This included the preparation of explanatory notes on the standard material transfer agreement (SMTA) and a list of frequently asked questions (FAQs). Public and private institutions were informed of the SMTA and the rights and obligations arising from its use. The private sector was also encouraged to make voluntary payments when a product that incorporates material accessed from the multilateral system is commercialized without restrictions.

As a second step, existing collections of Annex 1 PGRFA were examined against the criteria of governmental ‘management and control’. As a result of this examination,

- collections under the direct control of the Federal Ministry were instructed to introduce the SMTA;
- collections under the control of the states and/or local authorities were requested to introduce the SMTA;
- all other collections (mixed, private) were invited to introduce the SMTA.

The third step was the identification of Annex I material in the genebanks that are in the public domain, excluding both material held under black-box arrangements, for example, and protected varieties, which are available for further research and breeding from individual breeders.

The final step was to include the identified material formally in the multilateral system and to flag such material in the databanks.

This case draws the following lessons:

- Early and comprehensive information to the relevant stakeholders on the national implementation of the multilateral system and the SMTA by the respective authorities is important.
- Existing ‘infrastructures’ for cooperation, such as a national programme for PGRFA with a national coordination committee and a national inventory (documentation system) should be used as much as possible.

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4 Taken from the FAO Second Report on the State of the World’s Plant Genetic Resources.
• The text of the SMTA is not self-explanatory, especially for users not speaking UN languages. There is a need for assistance through experts giving guidance and/or a courtesy translation in the national language. Explanatory notes, FAQs, etc., are useful in order to facilitate the implementation of the multilateral system and the SMTA at national levels.

• General guidelines on how to include material in the multilateral system at the collection level (e.g., identification of public-domain accessions) could be helpful.

**Designation of the competent authority or authorities to sign SMTAs**
Whatever approach is taken towards the implementation of the multilateral system, one important element will always be to ensure that there is clarity as to the authority or authorities empowered to sign SMTAs. This may be a single authority in the country, where most PGRFA are held in a central national genebank. Where the material is distributed over several genebanks (including genebanks at different levels of government, such as federal and state genebanks, or where collections are voluntarily included in the multilateral system by natural and legal persons), authority may lie or be delegated to the genebanks concerned.

**Measures to promote farmers’ rights**
The Treaty includes one Article (Article 9) devoted to farmers’ rights. Responsibility for the realization of those rights is left squarely with national governments. As iterated in Article 9, measures to protect and promote farmers’ rights should include the following:

• the protection of traditional knowledge relevant to PGRFA;

• the right to equitably participate in sharing benefits from their utilization;

• the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA.

The right to save, use, exchange and sell farm-saved seed or other propagating material is also recognized as fundamental to the realization of farmers’ rights in the Preamble to the Treaty, but it is treated in a neutral fashion in the main body of the Treaty. Article 9.3 merely indicates that nothing in Article 9 should be interpreted as limiting any rights that farmers already have in this regard. In other words, if farmers already have this right, or any part of it, under national legislation, then the Treaty does not purport to take that right away.

One example of legislation that takes a comprehensive approach to the subject is the Protection of Plant Varieties and Farmers’ Rights Act of 2001 in India. The Act protects the rights of farmers to save, use, sow, re-sow, exchange, share and sell their farm produce, including seed of a variety protected by breeders’ rights, provided that they do not sell branded seed packaged and labelled as a seed variety protected under the Act. In this sense, while the rights extend far beyond those that would be allowed under the 1991 UPOV Act, they correspond to the rights ‘left unlimited’ by Article 9 of the Treaty.

The Act of 2001 also provides for the registration of farmers’ varieties on a par with breeders’ varieties. Farmers’ varieties are required to meet the same criteria of distinctiveness, uniformity and stability but are not required to meet the criterion of novelty. The Act also

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5 N.B. We fully appreciate that adequate treatment of the issue of farmers’ rights requires a full learning module in itself. We have opted to include this very brief coverage of the subject so that participants can see linkages between farmers’ rights and other components of the Treaty.
protects the rights of farmers by requiring breeders and other persons applying for the registration of varieties under the Act to declare that the genetic material acquired for developing the new variety has been lawfully acquired and to disclose the use of genetic material conserved by tribal or rural families in the development of the registered variety. Claims for compensation may be made where it is found that the tribal or rural communities have contributed in the evolution of the variety. The Act provides for claims for benefit sharing to be made after the publication of certificates of registration of new varieties: where benefit sharing is ordered by the Authority, the money is to be paid into the National Gene Fund. Farmers who are engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation have the right to recognition and reward from the Gene Fund.

While the new Indian legislation is a comprehensive attempt to implement farmers’ rights at the national level, a number of other countries have taken action on individual components of the rights enumerated in Article 9 of the Treaty. Some of these initiatives are documented in a recent study by the Fridtjof Nansen Institute in Norway. Examples are a successful movement, supported by both the academic world and farmers’ organizations in Norway, to resist increasing the scope of breeders’ rights in that country in line with the 1991 UPOV Act, and an initiative in the Philippines to create a registry of rice varieties maintained in the community as a way of protecting traditional knowledge and farmers’ varieties against misappropriation. Documenting and publicizing farmers’ varieties can prevent claims that those varieties are new and distinct (which are criteria for registration under plant protection legislation).

Other examples of new initiatives include the Malaysian Protection of New Plant Varieties Act of 2004, which seeks to introduce more flexibility into the requirements for the registration of farmers’ varieties. While reiterating the normal criteria of new, distinct, uniform and stable for breeders’ varieties, the Act exempts new varieties bred—or discovered and developed—by a farmer, local community or indigenous people from the requirements of stability and uniformity: farmers’ varieties must be distinct and identifiable. The intention of the legislators is to facilitate claims by farmers for new, distinct and identifiable varieties that are vegetatively/clonally propagated. The Act also restricts the scope of breeders’ rights to exclude acts done privately on a non-commercial basis, thus allowing small farmers to continue their normal practices of using and exchanging farm-saved seed.

Recent debates on the future implementation of farmers’ rights have focused on the distinction between the ‘ownership’ approach and the ‘stewardship’ approach. The former places emphasis on the right of farmers to be rewarded for genetic material obtained from their fields and used in commercial varieties; the latter places emphasis on the rights that farmers need to have in order to allow them to continue as stewards and innovators of agrobiodiversity. Both such approaches are clearly reflected in the present state of national implementation of farmers’ rights. Of the two approaches, the first more closely reflects a rights-based approach; the latter more closely reflects the original conception of farmers’ rights as launched in the agreed interpretations to the International Undertaking.

The measures that countries have taken to promote farmers’ rights include the registration and protection of farmers’ varieties, measures to protect traditional knowledge from misappropriation, measures to ensure prior informed consent and measures to promote farmers’ associations.

**Provisions for conservation and sustainable use**

Article 5 and 6 of the Treaty provide a modern framework for action on the conservation and sustainable use of PGRFA. Most of the actions listed in these articles will not necessarily require new legislation, although they will certainly require concerted action by national governments at the administrative level. One exception may well be the review and adjusting, where appropriate, of breeding regulations concerning the distribution of varieties and seed.