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ACCESS TO PLANT GENETIC RESOURCES – LEGAL QUESTIONS
FOR MATERIAL ON ITS WAY INTO THE MULTILATERAL
SYSTEM OF THE PLANT TREATY

Morten Walløe Tvedt

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1

SETTING THE SCENE AND QUESTIONS EXPLORED

The topic explored in this article is the ‘mutually supportiveness’ between the two ABS systems in international law concerning access to plant genetic resources. Access and Benefit Sharing (ABS) is finally getting into an implementation modus and the discussions on the coverage of and grey areas between the different systems is on the agenda. Many activities are taking place under the Convention on Biological Diversity (CBD) and its Nagoya Protocol (NP). For some years now the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or the Treaty) is in implementation modus.¹ The ITPGRFA, adopted in 2001 and in force since 2004, is generally aimed at promoting the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA)² and the fair and equitable sharing of the benefits arising from the utilization of these resources.

The preamble to the ITPGRFA uses the term ‘mutually supportive’ in ‘[r]ecognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security’. This language has been used several times during the negotiations. Representatives from the ITPGRFA and some states state that the Multilateral System is ‘mutually supportive’ of the CBD, but seldom say what it is that makes them mutually supportive. In establishing its relationship to other international agreements, NP Art. 4 uses the term ‘supportive’. The task undertaken here is to revisit and explore the mutual supportiveness of the ITPGRFA for ABS in general.

The Oxford English Dictionary explains ‘supportive’ as ‘providing encouragement or emotional help’³ and the verb ‘to support’ as to ‘give assistance to’.⁴ The term ‘mutually’ can be explained as ‘with mutual action’.⁵ Combining the two could perhaps result in: actions providing encouragement and giving assistance to the respective objectives of the two said legal instruments. For them to provide encouragement and assistance, three criteria in particular have to be satisfied: they must help make genetic resources accessible and useable; countries must be able to enforce their sovereign right to them effectively; and thirdly, benefits shall be shared from their utilisation back to conservation and sustainable uses through the respective mechanisms they establish.

The academic literature is scarce in identifying the elements that make the ITPGRFA mutually supportive of general ABS and analysing the manner in which they are mutually supportive. In the process of writing this analysis, one academic paper using the term ‘mutually supporting’ in its title was published.⁶ It identifies elements enabling the implementation of the ITPGRFA in a mutually supportive manner. The idea here is to explore interfaces between the two ABS systems to assess their mutual supportiveness, and also to take a closer look at a selection of the proposals made in the paper just cited dealing with the mutual supportiveness of the two instruments to better understand the mutual support they will give to CBD implementation.

1 *International Treaty on Plant Genetic Resources for Food and Agriculture* [ITPGRFA], Food and Agriculture Organization, 3 November 2001, 2400 UNTS 303, entered into force 29 June 2004.

2 PGRFA are defined as ‘any genetic material of plant origin of actual or potential value for food and agriculture (ITPGRFA art. 2).

3 ‘supportive’ (Oxford Dictionaries, OUP February 2014) < www.oxforddictionaries.com/definition/english/supportive?q=supportive+of > accessed at 24. February 2014.

4 ‘to support’ (Oxford Dictionaries, OUP February 2014) < <http://www.oxforddictionaries.com/definition/english/support?q=support> > accessed at 24. February 2014.

5 ‘mutually’ (Oxford Dictionaries, OUP March 2014) < www.oxforddictionaries.com/definition/english/mutually?q=mutually > accessed at 2. March 2014.

6 Michael Halewood and others, ‘Implementing “Mutually Supportive” Access and Benefit Sharing Mechanisms Under the Plant Treaty, Convention on Biological Diversity, and Nagoya Protocol’, (2013)9/1 *Law, Environment and Development Journal (LEAD)* 68 < <http://www.lead-journal.org/content/13068.pdf> > accessed 06 February 2015.

The methodology adopted for the analysis is that of public international law. This involves a text-based reading of treaties, interpreting them in conjunction with and in light of less binding sources of law such as minutes of meetings, other documents and legal theory. It presents no opinion on policy or related political questions. It performs a technical legal analysis and seeks to contribute to a better understanding of the interaction and mutual support they hold potential to provide.

2 THE HISTORIC CONTEXT FOR ABS IN THE ITPGRFA

The Multilateral System of Access and Benefit Sharing (MLS) under the Treaty was set up to address certain needs regarding the international gene bank collections of plant accessions for breeding, taking into account the ‘special features of plant genetic resources’.⁷ When the CBD was finalized, negotiating parties recognized that some important issues were left without satisfactory solutions in international law. In section 4 of Resolution 3 from the Nairobi conference, where the text of the CBD was agreed, reads:

4. Further recognizes the need to seek solutions to outstanding matters concerning plant genetic resources within the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture, in particular: (a) Access to ex-situ collections not acquired in accordance with this Convention; and (b) The question of farmers’ rights.⁸

⁷ For more information of the negotiations that led to the ITPGRFA and the difficult political challenges encountered along the way, see Regine Andersen, *Governing Agrobiodiversity: Plan Genetics and Developing Countries* (Ashgate, 2008) 87-115.

⁸ *Resolution 3, The Interrelationship between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture* [Nairobi Resolution 3], entered into force 22 May 1992, the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity.

The quoted section 4 is the only place in Resolution 3 where the term ‘access’ is used; ‘benefit sharing’ does not appear in the resolution. The wording indicates that the particular access issue in need of resolution was access to ex-situ collections not acquired according to the rules of the CBD. This sets the background for the interpretation of the rules in the ITPGRFA concerning the MLS, as the scope of the Treaty is much broader than what were originally identified as remaining questions.

The ‘international collections’ (i.e. the Consultative Group on International Agricultural Research and other relevant organizations) were recognized as having a particular role in strengthening conservation and sustainable use of PGRFA. Indeed, the status of the international plant collections, Visser tells us, ‘formed a major element of the discussions.’⁹ At this point of time the collections were recognized as a complex issue given the difficulty of impossibility of identifying the country of origin (as used in the CBD) for the accessions in collections.¹⁰

There is no language in the Resolution to indicate that PGRFA were as such excluded from the scope of Article 15 of the CBD, only that accessions in ‘ex-situ collections’ needed a special solution compared to a strict application of the sovereign rights recognized in the CBD. As the preamble to the Standard Material Transfer Agreement (SMTA) confirms, the MLS provides a way in which countries

⁹ Bert Visser. “The Moving Scope of Annex I: The List of Crops Covered under the Multilateral System” in *Crop Genetic Resources as a Global Commons - Challenges in International Law and Governance*. Edited by Halewood, et al. New York, Routledge, 2013 in Michael Halewood, Isabel López Noriega, Selim Louafi (eds), *Crop Genetic Resources as a Global Commons - Challenges in International Law and Governance* (Routledge, 2013) 274-276.

¹⁰ Andersen. *Conceptualising the Convention on Biological Diversity: Why is it Difficult to Determine the ‘Country of Origin’ of Agricultural Plant Varieties?* Lysaker, Fridtjof Nansen Institute, 2001 no. 7/2001) and Andersen, et al. *International Agreements and Processes Affecting an International Regime on Access and Benefit Sharing under the Convention on Biological Diversity - Implications for its Scope and Possibilities of a Sectoral Approach*. Lysaker, Fridtjof Nansens Institutt, 2010. (FNI Report, no. 3/2010).

can 'exercise their sovereign rights over their Plant Genetic Resources for Food and Agriculture'.

3

PGR MANDATORY INCLUDED IN THE MLS

The MLS for ABS under the Treaty applies only to PGRFA under specific circumstances, i.e. when certain accessions of PGRFA are in the 'public domain', are accessed for specific uses, and under the condition that no intellectual property rights (IPRs) hinder the further exchange and access of the material received from the MLS. These limitations in the scope of the MLS need to be better understood if we are to clarify the legal relationship between the two instruments. The MLS establishes rules that are *lex specialis* the general rules in the CBD and NP.

There is an increasing focus on the so-called 'moving'¹¹ or 'dynamic'¹² scope of ITPGRFA. If the scope of the MLS widens, the number of accessions under the general CBD regulation will decrease in like measure. This underscores the importance of a clear picture of the scope of the special ABS system under the MLS to better understand issues arising from the implementation of the CBD and NP. Since the PGRs included in the MLS are delimited by criteria in the treaty text, we need to interpret these criteria to understand their respective scope.

The Treaty has been characterized as a 'dynamic ... global and innovative framework' by the Secretary of the ITPGRFA.¹³ This might lead one to expect

dynamic arguments in the interpretation of relevant provisions in the Treaty, which can be expected to impact the relationship with the CBD and the NP. Broadening the scope of the MLS beyond the wording in the interpretations of the ITPGRFA will narrow the area covered by the sovereign rights pertaining to the different countries. The principle of sovereignty in international law thus provides an argument against broad and dynamic interpretations.

3.1 Certain Species and Genera

The MLS as it is set out in Articles 10 to 13 is a core component of the ITPGRFA.¹⁴ Whereas the ITPGRFA as such covers non-ABS issues concerning all PGRFA, its ABS system in the MLS covers only certain crops. ITPGRFA Article 11.1 defines the scope of the MLS as 'the plant genetic resources for food and agriculture listed in Annex I', i.e. thirty five food crops and twenty nine forage plants. Annex I crops include major staples crops, as well as a range of other plants widely used for food and agriculture. Annex I is a negotiated list of species that are pooled for particular purposes. At the level of politics, opinion is sharply divided on whether to expand this list or not.¹⁵ The political differences as to coverage are annotated by Visser who notes that African countries at one point suggested nine food crops for inclusion, whereas European countries at the same time proposed as many as two hundreds and eighty seven.¹⁶ Disagreements over the list 'revealed deep political divides', writes Visser.¹⁷ These are rather

11 Visser (n 9).

12 Selim Louafi and Bhatti. "Efforts to Get the Multilateral System Up and Running" in *Crop Genetic Resources as a Global Commons - Challenges in International Law and Governance*. Edited by Halewood, et al. New York, Routledge, 2013 187.

13 Bhatti, et al. *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts*. Gland, IUCN, 2009. (IUCN Environmental Policy and Law Paper, no. 67/4) 187.

14 Louafi and Bhatti (n 12) 194.

15 Brad Fraleigh and Harvey. "The North American Group: Globalization That Works" in *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture*. Edited by Frison, et al. London, Earthscan, 2011) 116, refers to the opinion of the US: the list is 'far too short and should be expanded'. It is an interesting position for a country, which is not even party the Treaty. Europe has expressed a similar view, according to Visser and Borring. "The European Regional Group: Europe's Role and Positions during the Negotiations and Early Implementation of the International Treaty" in *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture*. Edited by Frison, et al. London, Earthscan, 2011) 72-73. See also Visser (n 8) 265-266.

16 Visser (n 9) 266.

17 *ibid* 272.

empirical observations, but they become relevant as an auxiliary argument in legal argumentation by indicating that countries are bound only by the Annex and the treaty wording to which they have formally agreed. Clearly, crops which are not on the Annex list fall under the general scope of the CBD and NP when it comes to ABS.¹⁸ Issues other than ABS, such as regulating farmers' rights and conservation of diversity, apply to all PGRFA, whereas the CBD and NP regulate ABS outside the MLS.

From a legal perspective, Article 11.1, in combination with the Annex, defines the plant material to be mandatory included under the MLS. This does not prevent collections applying the SMTA and the same terms and conditions to a wider number of species and subspecies to the extent that there is no ABS legislation impeding this action.¹⁹ Countries and collections are free (have jurisdiction) to include more species under the same regulatory regime as those PGRs that are mandatory under the MLS.

Again Visser observes the absence of provisions or system to review and amend the Annex in the ITPGRFA.²⁰ This, combined with the political differences, such as those between Africa and Europe, indicate that the scope of Annex I is not easily moved and would require consensus among contracting parties.²¹ Legally speaking, one can ask whether amendments to the Annex require a separate ratification process by the contracting parties to the ITPGRFA. The sharp political divisions among countries, combined with the principle of countries having sovereign rights over PGRFA not included in the Annex, are strong arguments suggesting that a separate ratification process would be required if the Annex were to be amplified and the scope of the MLS widened in consequence.

The list in the Annex refers to different taxonomic levels and as biology is not a static science, this creates some uncertainty in determining the exact scope of coverage of the Annex. The list in the

Annex gives some legal certainty about which crops are actually covered. Regarding wild relatives of cultivated crops, the way the Annex is formulated includes some, and leaves others outside the scope. In the case of cassava the genus is *Manihot*, but accompanied by a comment narrowing the genus to *Manihot esculenta* (the cultivated species). Thus, if this specification had not been added, all species of that genus would have been included. Under Brassica a large number of associated wild species are expressly added. There are several examples showing that the list is meant to include wild relatives in some cases, in other cases not. Annex 1 itself clearly shows that wild relatives are included by intent, not merely by implication.²²

3.2 Three Cumulative Criteria for Mandatory Inclusion

The next specification of the scope of the coverage of the MLS is that it covers '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.'²³ A purely literal interpretation of the wording, with its double use of the conjunction 'and', suggests all these three criteria must be present for PGR to be mandatorily included in the MLS. Thus, linguistically, the paragraph imposes three cumulative criteria: PGR being under the 'control' of the state; 'managed' by the state; and recognized as being in the 'public domain'. In this reading, only accessions which fall under all three criteria are mandatorily included in the MLS by the Contracting Parties.

For Annex I crops accessions that do not meet these criteria, countries retain their sovereign rights and discretion to decide whether a certain PGR shall be included in the MLS. Thus, PGRFA not qualifying accordingly are not mandatorily governed by the MLS. Stated in terms of sovereignty: contracting parties to the ITPGRFA have used their sovereign rights only for PGRs that meet these three criteria.

18 *ibid* 268-269.

19 Such wider application has been a topic for e.g. the Nordic Gene Bank.

20 Visser (n 9) 279.

21 This view is shared by Visser, *ibid* 279.

22 This section is based on comments by Trygve Berg, professor at the Norwegian University of Life Sciences, June 2014.

23 ITPGRFA, art. 11.2.

3.3 Management and Control of the Contracting Parties

The first two criteria that have to be met before plant genetic resources are mandatory included in the MLS is that they are under the ‘management and control of the Contracting Parties.’ As mentioned above, the use of the conjunction ‘and’ indicates these two criteria are cumulative (as is the case of ‘public domain’), have independent meanings, and call for two separate assessments of the factual situation.

‘Contracting Parties’ refers to countries that are members of the ITPGRFA. In other words, no other entities than countries are obliged to make PGR available under the MLS because of the ITPGRFA. Private collections are therefore not mandatorily included in the MLS, and very few such non-governmental collections are.²⁴

The next criterion is that the PGR must be under the *control* of the contracting party. Thus, PGR controlled by the government are mandatorily included in the MLS (provided the two other criteria are met). The interpretative question is what is meant by ‘control.’ Practical control by the contracting parties could be understood as the possession or holding of the accessions in which the plant genetic resources are found. ‘Under the control’ of the state party to the ITPGRFA infers that the governmental institution(s) is (are) in control of the material. Control implies a legal element and a factual side. The legal element is that the state institution must have a legal title to the PGRFA in question. The factual side of control implies that the accessions must be physically available in collections over which the government exercises control.

This opinion is reflected in the Norwegian Nature Diversity Act. Even though the public has the common right to use Norway’s genetic material, the competence of the government to grant access ‘does not limit the right of any owner or other entitled person to deny access on other grounds a) to the biological material, or b) to the land from which

the genetic material is obtained.’²⁵ Either the landowner or the holder of a certain stock of genetic material now enjoys a right to *control* physical access to the accession. Similarly, the contracting state must have legal access to and be able to exercise physical control of the material for the PGRFA to be mandatory under the terms of the MLS.

‘Control’, Correa suggests, ‘call[s] for the capacity to exercise physical acts over the resources.’²⁶ This would lead us to interpret the ‘control’ criterion as meaning that the holding of the accession by a government is sufficient and all that is required to meet this criterion. Indeed, in Correa’s opinion, ‘holding the resources is sufficient.’²⁷ If, however, the holding of the physical material accrues to a government by means of an illegitimate act of collection, whereby the rights of the farmers have been violated or other holders have not consented to having their physical samples or accessions ‘controlled’ by a government, one could therefore perhaps argue that the term ‘control’ has both a factual and legal side: the material must be factually held and such holding may not be the result of an illegitimate or illegal act.

The term ‘control’ is also subject to technical limitations. Seeds in a gene bank are divided between a base collection for long-term storage and an active collection for distribution. If the active collection is depleted or the viability of the remaining seeds is precarious, exchange is not possible until seeds from the base collections have been grown out and multiplied and the active collection replenished with fresh seeds. This is a practical situation characterised by lack of control in as much as many gene banks are far behind schedule in the rejuvenation of their accessions and therefore practically unable to dispatch seeds according to formal obligations.²⁸

25 *Naturmangfoldloven / Nature Diversity Act*, Norway, LOV-2009-06-19-100 (Norway), Section 58, para 2.

26 Correa. “Plant Genetic Resources under the Management and Control of the Contracting Parties and in the Public Domain: How Rich Is the ITPGRFA’s Multilateral System?” in *Crop Genetic Resources as a Global Commons - Challenges in International Law and Governance*. Edited by Halewood, et al. New York, Routledge, 2013)182.

27 *ibid* 182.

28 This section is based on comments by Trygve Berg, professor at the Norwegian University of Life Sciences June 2014.

24 Collections in the Multilateral System, <www.planttreaty.org/inclusions?field_mls_noti_inclu_type_owner_value_many_to_one=Natural+or+legal+person> accessed 18th January 2013.

This is linked to the interpretation of ‘control of the Contracting Party’ insofar as this criterion implies that only such accessions as are actually *and* legally controlled by a government are mandatorily included in the MLS.

This leads us to the next (linguistically first) criterion according to which the PGR must be ‘under the management’ of the contracting party to be mandatorily included in the MLS. A purely linguistic understanding of ‘management’ of a genetic resource indicates a degree of physical handling, taking care of, conserving, or storing the resources. If this wording is interpreted in light of the outstanding matters referred to in Nairobi Resolution no. 3, ‘management’ could be understood as being an accession in an ex-situ collection.²⁹ ‘Those resources,’ Correa suggests, ‘that the contracting parties do not handle physically (or “manage”), directly or by a third party under their instruction, do not form part of the multilateral system.’³⁰ This is important as Correa also seems to believe that states are not obliged to include in the MLS varieties held by farmers.

One difficult question is whether ‘control and management’ refers to collections of ex situ collections only or whether also in situ conditions controlled and management of the government are also mandatory covered by the MLS? There are strong initiatives among core actors in the implementation of the ITPGRFA to include also in situ plant material, which is on governmental or public land. Such a broadening of the interpretation could make farmers’ varieties mandatorily included in the MLS if these farmers are using publicly owned land. If this interpretation is chosen, it in consequence diminishes the rights of farmers that are using governmentally owned land. Farmers owning their own land would be outside this inclusion, whereas the one using public land would also have share their PGR. This author is of the

opinion that in situ are not mandatorily included in the MLS. The objective and background for the ITPGRFA strongly suggests that in situ PGRs were not meant to be mandatorily included in the MLS.

These two criteria are not too difficult to interpret and apply. It is challenging to understand all aspect of the law that applies to genetic resources because one party may have a right to the organism, and another the title to the genetic material in the accessions. It easy to agree with Correa when he writes that a ‘distinction must be established between rights over a physical entity as such (physical property) and over the genetic information contained in these resources (intangible property).’³¹ This distinction between the plant and its genetic material must also be remembered when interpreting the two first criteria for accessions being mandatorily included in the MLS, that the genetic material must be under the management and control by the member states.

3.4 The Criterion ‘in the Public Domain’

The third criterion is that plant genetic resources ‘in the public domain’ must be included in the MLS of the contracting parties to the ITPGRFA. To clarify this interpretation is important to understand the practical implementation and clarify any grey zones between the CBD/NP and the ITPGRFA. As the term ‘public domain’ has not been defined by the ITPGRFA, it is up to an interpretation of the wording to determine whether a certain resource must be included in the MLS or not.³²

The Oxford English Dictionary defines ‘public domain’ as ‘the state of belonging or being available to the public as a whole, especially through not being subject to copyright or other legal restrictions.’³³ The first part of this definition is broad, and infers an interpretation of the concept in terms of what the authorities have decided to make available to the

²⁹ Nairobi Resolution 3 (n 8) and further *Vienna Convention on the Law of Treaties* [VCLT], United Nations, 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980 which refers to the interpretation to happen ‘in the light of its object and purpose’ of the treaty.

³⁰ Correa (n 26) 181.

³¹ *ibid.*

³² VCLT, art. 31.

³³ ‘supportive’ (Oxford Dictionaries, OUP February 2013). < www.oxforddictionaries.com/definition/english/public%2Bdomain?q=public+domain > accessed 18 February 2013.

public. Clearly the wording indicates that public domain is not necessarily and only linked to IPRs. This is confirmed by the reference to especially, which indicates the concept broader than IPR is required to understand substance of 'public domain'. Secondary sources of international law are relevant in this context to its interpretation.³⁴

Correa is one of the very few commentators to have explored what is meant by 'public domain'. 'There are two possible meanings of the concept of "public domain"', he suggests, narrowing the interpretative scope.³⁵ The two interpretations he suggests derive first from the sense of 'public property' as used in 'administrative law', and second from what is *not covered by any Intellectual Property Rights*.³⁶ For Correa, seemingly, these are the only possible interpretative alternatives of 'public domain'. The main differences between the two is the level of discretion they give national governments to decide what should and what should not be included in the MLS.

I will argue that the wording allows of a more interpretations than these two. In being very specific, Correa's argument limits governments' leeway to determine the legal status for PGRFA. I begin by exploring the options set out by Correa, before examining other interpretative options.

The first of Correa's interpretative options is that 'public domain' means a concept of administrative law.³⁷ Correa explains the administrative law alternative as 'being equivalent to that of "public property"[in describing] a set of goods that belong to the general public and are dedicated to the public's use (for example, a navigable river bed in its entirety)'.³⁸ This administrative law alternative is a very specific property regime. The corresponding legal concept in Argentinean administrative law is '*Dominio Público*'. Marienhoff, who is professor in Argentinean public law explains that the legal concept '*Dominio Público*' in Argentinean law as a legal regime according to which certain goods are

'*inalienable e imprescriptible*'.³⁹ It includes a concept of public property right implying an inalienable right of the public to access and use these goods which cannot be delimited by or expropriated into a private exclusive right. *Dominio Público*, as a concept of administrative law, leaves it to national legislators to determine which resources to have this status. State practice, in giving clear meaning to the concept, could be taken as an argument substantiating this alternative interpretation.

The idea of *dominio público* whereby the resources should not fall under a private right finds its parallel in the ITPGRFA: the recipient of material may not take out IPRs on it 'in the form received'. This resembles an idea of the MLS as a common pool to be preserved and protected from depletion by the appropriation of certain parties. Therefore, one could argue, interpreting the Treaty as a whole and consistently would be an argument in favour of this interpretative option.

The second way of understanding 'public domain', according to Correa, 'emerges from intellectual property rights'.⁴⁰ He spells out the interpretative option as pertaining to all resources not subject to intellectual property right protection, either because the right has expired, because the knowledge has been known and IPR protection cannot be obtained, or, in the case of non-IPR material, because they are not eligible for protection.⁴¹ The consequence of this reading is that the common pool becomes defined as those resources that are not amenable to privatization under any other legal system of law (IPRs). Its scope depends, moreover, on another legal system than that set out in the MLS. Understanding 'public domain' as being on the outside of the IPR systems does not harmonize very well with the

34 Statute of the International Court of Justice (adopted 26 June 1945) 33 UNTS 933 (ICJ Statute) art 38.

35 Correa (n 26) 182.

36 *ibid* 182-183. (emphasis added)

37 *ibid* 182.

38 *ibid*.

39 Marienhoff. *Tratado de Derecho Administrativo: Dominio Público*. Vol. 5. Buenos Aires, Abeledo-Perrot, 1998, p. 24.

40 Kaul, et al. (eds.). *Providing Global Public Goods: Managing Globalization*. New York, Oxford University Press, 2003, cited in Correa, "Plant Genetic Resources under the Management and Control of the Contracting Parties and in the Public Domain: How Rich Is the ITPGRFA's Multilateral System?", 2013, p. 182.

41 Correa, "Plant Genetic Resources under the Management and Control of the Contracting Parties and in the Public Domain: How Rich Is the ITPGRFA's Multilateral System?", 2013 p. 182-183.

prohibition in the MLS against applying for IPRs for material in the form received. If 'public domain' was understood in this manner, the MLS would appear as a negatively defined common good whose borders were set by another property rights system.

One could also ask the critical question why plant varieties that are protected under plant breeders' rights system should not have to be included in the MLS and freely exchanged for the purpose of breeding and research. The logic in the benefit sharing mechanism in the ITPGRFA is that if a protected plant variety is available for research and breeding, then no monetary benefits are mandatory. Following on this logic, there should be an obligation to make available also protected plant varieties that are not subject to such an exclusiveness clause that they do not trigger benefit sharing on the same terms and conditions in the MLS as all the other accessions. This consequence argument is a strong one against interpreting 'public domain' strictly as outside IPR protection.

Correa refers to Kaul and others who maintain that 'public domain', can be understood as 'a collection of things available for all people to access and consume freely.'⁴² If 'public domain' is interpreted as whatever is not subject to IPR, Kaul and others must be wrong insofar as a patent would reduce availability to all. In many countries the situation is such that genetic resources cannot be accessed and consumed free of charge, even if they fall outside IPR protection. So a reading of 'public domain' in this light would fail to recognize other private rights to genetic resources (apart from IPRs) and common rights to genetic resources, such as, for example, Indigenous and Local Communities' (ILC) rights based on statutory or customary legal grounds, according to the country. The argument derived from Kaul and others is therefore, in my view, rather an argument in support of the first public law alternative rather than the latter IPR alternative discussed by Correa.

Correa also points to the ambiguity in the concept 'public domain' as an argument in favour of the 'outside-IPR' option.⁴³ But that negotiating parties

could have chosen a clearer term is not a decisive legal argument in any one particular direction. It could as well be said that if the negotiating parties understood 'public domain' as meaning 'outside IPRs', they could easily have expressed this understanding with greater clarity in the wording. In general moreover, unclear wording seldom indicates a wish on the part of states to diminish their discretion or sovereignty for the future. Ambiguity is therefore rather an argument for the administrative law approach than the IPR reading of the term. Thus, in my opinion, this argument cannot 'tip the balance' as Correa suggests.⁴⁴

Unlike Correa, who seems to operate with two not fully satisfying alternative interpretations, there are, I would argue, at least two more alternatives.

'In the public domain' could be understood in a practical and a concrete manner. It could be interpreted in the light of the 'outstanding matters' the negotiations at the Food and Agricultural Organization of the United Nations (FAO) were going to resolve, as stated in Nairobi Resolution no. 3, paragraph 4, 'Access to *ex-situ* collections not acquired in accordance with this Convention.'⁴⁵ One could understand public domain as pertaining to material already available to the public. *Ex-situ* collections are mostly publicly available. The reference to public domain could therefore have been meant in a more practical legal manner. From this we derive a third way of understanding 'public domain', as simply 'made available through the system of *ex-situ* collections.' This third possibility finds support in the motivations driving the negotiations for an MLS system to address the needs of the existing *ex-situ* collections. Since ITPGRFA refers to the national PGRFA, the term 'public domain' could mean what is publicly available in the gene banks.

A fourth interpretation of 'public domain' could be whatever is not designated by the state as under any property, be it IPRs, a *Dominio Público* pool of resources, or any other manner in which sovereign rights have been used to set up a property rights

42 *ibid* 182.

43 *ibid* 184.

44 *ibid* 184.

45 Nairobi Resolution 3 (n 8).

system. The general sovereign rights of countries can be used to establish other kinds of property-rights statutes to genetic resources than *Dominio Público*. Governments have the jurisdiction to regulate property in a number of ways. Also Correa's point of departure was that the sovereign rights of countries under the CBD include the competence to regulate public or private property rights to genetic resources.⁴⁶ This is a well-established principle, and applies equally to plant genetic resources inasmuch as the ITPGRFA does not regulate ownership to PGR. Governments can thereby assign a variety of public, semi-public, private, or semi-private rights. For example, a government may grant a common property right to genetic resources to indigenous or local peoples. It could also assign private property rights as a successive right to the sole holder of biological material. Another option is to assign the right to PGRFA to the farmers to protect their traditional methods of preserving and refining the genetic diversity. In all these situations, interpreting 'public domain' as referring to anything not covered by any property rights would establish a distinction and leave PGR under other kinds of government-adopted property schemes outside the scope of the MLS. Interpreting 'public domain' in light of a general sovereign right to genetic resources provides a persuasive argument for linking 'public domain' to the resources a government allows to be owned or held by the public and expressly made available to all. I will therefore argue that the term 'public domain', as used in the ITPGRFA, does not reduce governments' sovereign right to set up any property right regime over their PGRFA. The system becomes most consistent if the interpretation of public domain also recognises other property rights to PGRFA than only IPRs.

In responding to this view, Correa says 'it is unlikely that the negotiating parties would have left the determination of which material are, or are not, in the multilateral system basket to the total discretion of the parties.'⁴⁷ There are legal sources that can challenge the view expressed by Correa. Take for example the legal background to the pre-CBD

negotiations of the ITPGRFA to resolve the outstanding issue of international collections. The factual situation indicates that countries originally intended to maintain their regulatory freedom to include more or less PGRs in the MLS. This contention is further supported by the principle of sovereign rights in international law; due to the politically tense negotiations leading to the Treaty, it seems unlikely that governments would have linked the scope of the MLS to the patent system and other IPR systems. It is not likely that state delegates would have accepted 'not subject to patents' as a linguistic substitution for 'public domain'. This is further attested by the Treaty's recognition of the MLS as a means of exercising the sovereign rights of a country over PGR. Indeed, I would say, the state parties that negotiated the ITPGRFA would be unlikely to refrain from allocating rights internally to PGRFA to indigenous and local peoples and as part of the farmers' rights. At the deepest level, governments have only used their sovereign rights over PGRFA to bind themselves to including the resources they declare to be open for all into the MLS.

The concept of 'public domain', Correa argues in his conclusion, 'that is used in the ITPGRFA, *should* be understood in the context of intellectual property rights'.⁴⁸ Here, Correa takes a surprisingly strong normative position on the interpretation of a defining term for the MLS. When Correa and, in another chapter in the same book, Manzella,⁴⁹ state that 'public domain' 'should' be understood in terms of what is not covered by IPRs at a specific point of time, it is more of a policy recommendation than a legally binding conclusion drawn from normative sources. In fact, the use of the argumentative term 'should' indicate significant political freedom in how the term is applied in practice. As seen in this section, the normative sources give stronger support to the 'administrative law' approach, than to the 'outside IPR' approach, if one had to choose between these

46 *ibid* 182.

47 *ibid* 184.

48 *ibid* 184 (emphasis added).

49 Daniele Manzella. "The Design and Mechanisms of the Multilateral System of Access and Benefit Sharing" in *Crop Genetic Resources as a Global Commons - Challenges in International Law and Governance*. Edited by Halewood, et al. New York, Routledge, 2013 (emphasis added).

two options. There is also strong legal support for seeing ‘public domain’ as recognising other property rights, including farmers’ rights. In section 3.5 below we are going to test these two interpretative options on a selection of difficult practical cases or situations.

According to Halewood and others in their latest publication, ‘the TAC [Ad Hoc Technical Advisory Committee of the Standard Material Transfer Agreement] and commentators consider that “public domain” should be interpreted as referring to the state of not being subject to intellectual property rights.’⁵⁰ Here Halewood and others give the impression that the IPR alternative is the only one that commentators have discussed. This is strange given that Medaglia and others in 2013 published a report in which they clearly stated that this is not the only interpretation, not even the one with the strongest legal support.⁵¹ This report was presented at a conference hosted by Bioversity International in January 2013 with Michael Halewood as a host.⁵² It is therefore very strange that Halewood ignores the contrary views of a major critic. This is a controversial legal issue and the opposite view must obviously be given space in an academic paper. It is worthy of criticism that one of the main bodies (core representatives from Bioversity International) engaged in advising states parties to the Treaty leaves out the full picture on perhaps the most controversial question of obliging countries to include material in the MLS.

I shall now look at some difficult cases and discuss them in light of these criteria with a view to gaining a clearer idea of where the implementation challenges lie.

50 Halewood (n 6) 79.

51 Medaglia, et al. *The Interface between the Nagoya Protocol on ABS and the ITPGRFA at the International Level - Potential Issues for Consideration in Supporting Mutually Supportive Implementation at the National Level*. Lysaker, Fridtjof Nansens Institutt, 2013. (FNI Report, no. 1/2013).

52 The ABS Capacity Building Initiative, in collaboration with the CBD and the Treaty Secretariats, conceptualized and organized an expert workshop in Rome in January 2013, hosted by Bioversity International, <http://www.abs-initiative.info/countries-and-regions/global/italy/experts-workshop-the-international-treaty-and-the-nagoya-protocol-mutually-supportive-implementation/>.

3.5 Four Typical Situations

It is important, Louafi and Bhatti suggest, that ‘countries – particularly developing countries – take the legal and administrative steps to identify the materials in their countries that are part of the multilateral system.’⁵³ This indicates the importance attached to testing and clarifying these general legal considerations and to clarifying any grey zones by the Secretary of the ITPGRFA. From the perspective of implementing the CBD/NP and the ITPGRFA, clarifying these limitations is of crucial interest because PGR outside the MLS are covered in principle by sovereign rights (if there are no other reasons to explain why the resource is outside the scope of the CBD). The interpretations discussed above are really understood first when discussed in the light of concrete examples.

Interestingly enough, clarifying the grey zones is important to specify the legal situation related to farmers’ rights to their own germ plasm. One practical example is PGR held by farmers. Accessions of plant genetic material held by farmers would mandatorily be in the public domain, if the ‘outside IPR’ interpretation were applied. If that interpretation becomes the standard one, farmers’ PGR will meet *this* criterion of mandatory inclusion in the MLS. If the ‘administrative law’ approach is chosen, it would depend on the legal regime of the particular country whether they were in the public domain or not. If they are kept on the farm, neither the ‘managed’ criterion nor the ‘under control’ criterion would be met, meaning that farmers’ accessions would fall outside the scope of the MLS. One could argue, depending on the legal situation of the country in question, that crops and seeds on the farm would mostly be the private property of the farmer.

One example which deserves attention is when these farmers’ unique PGR are held in their country’s collection of Annex I crops. Accessions in a governmental ex-situ collection will easily meet the management and control criteria. If ‘public domain’ is understood as ‘outside IPR’, that criterion will be met (as this unique PGR is not under any IPR) and

53 Louafi and Bhatti (n 12) 188.

the material will be *mandatorily* included in the MLS. A core question is whether an understanding between the farmer and the collection in which the PGR is held on behalf of the farmer or 'in trust' is sufficient ground to consider the material to be outside the farmer's 'management and control'. How 'public domain' is understood becomes crucial in this connection. Let us say the material has been bred for decades by certain identifiable groups of ILCs or a farmer community. If the 'public domain' definition is legally linked to the IPR systems, these resources will not be protected by any IPR, and thus mandatorily included in the MLS system, regardless of the distinctiveness of the accessions. Seed collectors depend on farmers' willingness to give the seeds, which they usually do according to customary standards of exchange within the community. Normally, farmers are willing to collaborate with a national gene bank, and, based on agreements, we could think of situations where farmers allow their seeds to be maintained as part of a national in-situ programme, making them thus available for collection and exchange at any time, but this collaboration does not necessarily mean the farmer resigns some or all rights to the material. If 'public domain', on the other hand, is understood as recognising all types of (property) right to PGR, the material is not mandatorily included in the MLS, in breach of other such rights. Ironically, the non-IPR alternative could create a disincentive for the country to preserve these resources in a national collection. If left on the farm without any governmental management or control, these resources will be outside the scope of the contracting parties. By being brought into the collection, Correa's suggestion could undermine the incentive to conserve the material in a collection.

If we change the example, so the collector is not a governmental representative, but a representative of a global ex-situ collection. Let us say the crops are in Annex I, or are related to Annex I species, and they are collected and put into one or more of the collections already defined as covered by the MLS. The collector can target resources in the wild, on farmers' land or, for example, in different types of community-based collections among farmers. In all these three examples, the material is not *managed* by the state, nor *controlled* by the state, and it is not necessarily declared by the country as being in the

'public domain'. Thus, the material will be outside the mandatory MLS in the country and covered by general ABS rules. If such material is collected, in legal terms the act of collecting will technically fall outside the MLS, as the criteria for mandatory inclusion in the MLS will not be met. In all likelihood, then, access to these PGR will be governed by the CBD, national ABS laws, and any customary or other legal norms inside a country. If the country where collecting happens does not regulate access, it is an open question whether the act of collecting can be defined as illegal; one could, however, argue that such activity before regulation is in place is not supportive of the objectives of the CBD.⁵⁴ In such a case, the lack of regulatory frameworks could be used as an argument to undermine the long-term exercise of sovereign rights. Providing countries, where the activities take place, need therefore to consider whether they should exercise their sovereign rights or power of direction and put PGRs into the global common pool of the MLS. Here, the common interest in documenting and conserving the PGRs can stand against the interest of exercising the sovereign rights of the country where the seeds are collected.

A fourth example could be plant varieties that are protected by a plant breeders' right based on the The International Union for the Protection of New Varieties of Plants Conventions (UPOV).⁵⁵ These plant varieties are not subject to mandatory benefit sharing since they are 'available without restriction to others for further research and breeding'.⁵⁶ The whole reason why they are not subject to benefit sharing is that they are available for research and

⁵⁴ *En passant*, it is interesting to draw a connection to the scope of the draft EU proposal for the NP implementing act as proposed by the Commission. Here, the temporal scope leaves collections of any genetic resource before NP enters into force outside the scope of ABS. Thus, material collected in the past, present and future – until the NP comes into force – in the EU and the providing country would fall outside the scope of the due diligence requirement for collections.

⁵⁵ *International Convention for the Protection of New Varieties of Plants 1991* [UPOV-1991], UPOV, 2 December 1961, UPOV/INF/6/1, as amended on 10 November 1972, 23 October 1978 and 19 March 1991.

⁵⁶ *Standard Material Transfer Agreement* [SMTA], ITPGRFA Governing Body, 16 June 2006, Resolution 1/2006 art 6.7 and 6.8.

breeding. If the alternative ‘outside IPR’ is chosen, then UPOV-based protected varieties will not be part of the MLS, as they would not be part of ‘public domain’ in Correa’s understanding. This leads to the somewhat ironical result that these protected plant varieties do not trigger benefit-sharing obligations, but are not fed back into the MLS which was used to develop them. Including these protected plant varieties in the MLS would bring them one step closer to meeting the rationale for not activating the sharing of benefits.

3.6 Concluding on the Criteria for Inclusion in the MLS

Legally speaking, a large number of other examples in the grey area between mandatory inclusion in the MLS and where ABS is being governed by CBD/NP, could be constructed. These technically more complex cases require further thought when countries are to implement the ITPGRFA and CBD/NP.

To sum up, the interpretation of ‘public domain’ as argued by Correa, Manzella and Halewood would make it clear that UPOV-protected plant varieties should not be included in the MLS even though they are developed without shared monetary benefits. The consequence of this interpretation is a serious constriction of the sovereign rights of countries relative to the resources included in the MLS. It is not easy to see how this interpretation can be supportive of the CBD objectives. The interpretation with the strongest legal grounding maintains that the scope of the ‘public domain’ is still to be decided by each country as part of its sovereign right to all genetic resources. Bioversity International is urging for an interpretative expansion of the scope of the MLS. By mentioning *en passant* that ‘Commentators and the TAC also largely agree that *in-situ* materials may also be “under the management and control” of the national government and ‘in the public domain’ and as a result be included in the multilateral system’,⁵⁷ without referring to other views indicates that legal argumentation is used to expand the scope of the MLS.

⁵⁷ Halewood and others (n 6) 79.

Whether these two systems are mutually supportive probably depends on how the question of which system is supporting which is resolved. In choosing the ‘outside IPR’ interpretation, the emphasis is on the breeders’ access to new material, whereas the right of ILCs and farmers is not prioritised. In the on-going discussion concerning the future functionality of the MLS, two topics, the benefit sharing mechanism and the coverage of the system, are on the agenda.

4

ON GOING DEVELOPMENTS AND LINES OF ARGUMENTATION

There is an on going political push to expand the scope of the MLS. This is evident in the mandate giving by the Governing Body of the ITPGRFA in 2013 mandate to the working group meetings.⁵⁸ One argument raised in the discussions of the usefulness of the MLS is that most of the material in the MLS is duplicated elsewhere. Some are therefore urging the inclusion of more unique samples in the MLS. Unique samples are, however, often held by others than the government collections and are thus outside the mandatory scope of the MLS. This can easily be turned into an argument for expanding the material in the MLS (while possibly undermining the benefit-sharing potential from the use of the MLS).

One way to expand the MLS is by official amendment either of the Annex 1 to the ITPGRFA or the ITPGRFA itself. This would require consensus and probably also a new round for ratification by members. Such an amendment would score high on legitimacy, as governments would have a clear say in the matter. It would be a cumbersome process, however. Sceptical governments could use their acceptance as a bargaining chip in efforts to have the benefit-sharing mechanism improved.

⁵⁸ Terms of reference for the ad hoc open-ended working group to enhance the functioning of the multilateral system of access and benefit-sharing, <http://www.planttreaty.org/node/5851/>.

Another means of expanding the scope of the MLS is by national governments deciding to include more material into the MLS. This option would be mutually supportive with the CBD/NP in requiring countries to decide to use their sovereign rights to these resources to expand the scope of the MLS.

As I have demonstrated in the previous sections, Bioversity and theorists are pushing to expand the scope of the MLS informally by a reinterpretation of core concepts. There are attempts undertaken to redefine the concept of 'public domain' so as to widen the scope of the mandatory inclusion in the MLS. This attempt scores low on mutual supportiveness as it lacks the participation of the countries. It will move resources into the MLS that countries had reason to believe were outside its scope when they ratified the ITPGRFA.

The MLS is expanding as we speak. Collection missions are bringing material to collections designated as part of the MLS, i.e. Consultative Group on International Agricultural Research Centres receiving material or even collecting material and placing it under the governance of the SMTA. This is low on support of sovereign rights though it depends on whether the government of the providing country has taken a legitimate decision and the farmers with rights to that material. Another thing, if these collecting activities happen in countries without a proper ABS system, it will not be in breach of its laws, but will still be low on supportiveness.

5

DISCUSSION AND CONCLUSIONS – MUTUALLY SUPPORTIVE?

5.1 Potential Grey Zones of Free Riding

One important task is the inclusion of unique PGR in the MLS. There is, however, a large geographical area where countries with users of PGRs are not members of the ITPGRFA. Many important

countries like the US, China, Russia, Argentina, Chile, South Africa, Mexico, Bolivia, and New Zealand are not full members of the Treaty. This raises the question of whether 'free riders' should have the same access to the MLS as entities from countries having contributed to the establishment of the common pool by becoming members of the Treaty. There are no regulations in the MLS that treat users from non-member states differently from those from member countries.

A private user of PGRFA is bound by the terms in the SMTA. But there are considerable difficulties to be resolved before an effective benefit-sharing mechanism can work as predicted. Granting companies from non-member states access on the same terms could be held as creating a misbalance in the system as these countries do not share their PGR with the global community. The enforcement mechanisms under the MLS versus a private company based in a member country are stronger than the enforcement on a company where its government is not a member to the MLS.

Actually, this loophole could in fact have an adverse effect on competition, as it could be cheaper and easier for a breeding or biotech company in one of the non-treaty countries than a breeder in a Treaty member country. This could be of great concern to European countries and European breeders by increasing the competitive pressure on their breeding companies. Politically, it could be used as reason to revise the regulations on access to the common pool in the MLS, by requiring membership-based benefit sharing, obliging a company which wants access to the pool to pay a flat royalty into the MLS from the total revenue achieved from the sale of its seeds.

5.2 Mutually Supportive on the Side of Access?

We have looked at the grey zones between the scope of the MLS and the general regulation of ABS. There we identified a number of ways in which the scope of the MLS affects the scope of the general regulation of ABS. On one hand, it can be seen as securing a legal space for the MLS to operate in.⁵⁹ On the other,

⁵⁹ *ibid* 76-78.

it can be interpreted as a need for governments to shape national policy and law with a view to developing clear systems for the two ABS regimes to communicate, prevent overlap and ensure that where one ends the other takes over. This is particular the case for access to material in the MLS for non-food and non-agriculture purposes, where the MLS has no mandate to grant access or enter into agreements on behalf on the source country.

As we saw, there are different ways to expand the scope of the MLS, including the attempt to extend Annex I to the ITPGRFA; changing the legal interpretation of core terms; and by bringing accessions of unique material into the collections covered by the MLS. All these acts of expansion touch on the relationship between ABS generally and the MLS. Before the two systems can be pronounced mutually supportive, decisions will have to be taken respecting the sovereign rights of countries to these resources.

Finally, a difficult issue discussed by Halewood et al. is whether in situ PGRFA is mandatory under the MLS.⁶⁰ It is difficult to see how the three criteria regulating the mandatory accession of material in the MLS can apply to PGR in situ. How the domestic mechanisms determining whether in situ should be included in the MLS is one topic to be decided by authorities in charge of national implementation arrangements, since there is no legally binding obligation in the ITPGRFA to include them.

5.3 The MLS and Farmers Varieties

The topic of the inclusion of farmers' varieties in the MLS is closely connected to the previous question of in situ material. In section 3.5, we looked at the relationship between the farmers and their rights to farmers' varieties, on the one hand, and the open access system in the MLS, on the other. One could argue that it is crucial for conservation and the future sustainable use of the genetic pool of PGR to collect farmers' varieties. It is clear that PGRs in the farmers' fields are not covered by the MLS.⁶¹ Unique traits will likely be found in

accessions from farmers, gardeners, or local and indigenous peoples. How the inclusion of these unique accessions is done is a sensitive issue in which the interest of the MLS in the Treaty to provide the most interesting and updated material might be pitted against the rights of the farmers to their local material, often with unique traits. How the collecting activity adheres to their (tangible) property rights to the seeds is a question of the mutual supportiveness of the MLS to the concept of farmers' rights under the Treaty, as expressed in Article 9.

If the farmer gives consent to the collection of material to the MLS, one could argue using the rhetoric of the Treaty that access to this material is a benefit: but a benefit to whom? To the breeders and companies to who access is forthcoming? It is harder to see the advantage or benefits to the local farmer in a developing country. Ironically, if a farmer's accession leads to the discovery of a new and valuable trait, which is bred into a new protected plant variety, that same farmer will have to buy the improved variety just like anyone else. If, however, the company itself had got in touch with the farmer and taken the material and done the same without the agreement of the farmer, this would be a clear case of misappropriation. This line of argument is not to be understood as an argument against the MLS, but it intends to show how delicate the questions of rights of farmers can become from the perspective of the global system.

⁶⁰ *ibid* 86-87.

⁶¹ *ibid* 83.

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