

**Draft study on relationship between an international regime on ABS and other international instruments and fora which govern the use of genetic resources**

**International Treaty on Plant Genetic Resources for Food and Agriculture and the Food and Agriculture Organisation's Commission on Genetic Resources for Food and Agriculture**

**1. Introduction**

1.1. Further to the request to the Executive Secretary in paragraph 13(c) of CBD COP 9 Decision IX/12, this study has been commissioned to examine how the international regime under the CBD could be mutually supportive of the activities of, and co-exist with, the International Treaty on Plant Genetic Resources for Food and Agriculture ('ITPGR') and the Food Agriculture Organisation's Commission on Genetic Resources for Food and Agriculture ('FAO Commission'). It will examine the relationship between these bodies and the developing international regime on access and benefit sharing ('ABS international regime') and identify possible options for their future co-existence and co-operation.

**2. Overview of the ABS international regime and the ITPGR and FAO Commission**

2.1. The document, 'Overview of Recent Developments at the International Level Relating to Access and Benefit Sharing'<sup>1</sup> ('the Overview'), prepared for the 5<sup>th</sup> Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit Sharing in October 2007, presents an overview of the ITPGR and the FAO Commission. This paper should be read in conjunction with that document.

**2.2. Overview of International Treaty on Plant Genetic Resources for Food and Agriculture**

2.2.1. Following the submission of the Overview, there have been further developments under the ITPGR. In particular, the second session of the Governing Body ('GB') met between 29 October and 2 November 2007 and adopted a number of decisions on the operation of the Multilateral System ('MLS').

2.2.2. At this session, the GB agreed to include an interpretative footnote in the standard Material Transfer Agreement ('sMTA') to the effect that references to Annex I should not preclude the International Agricultural Research Centres ('IARCs') from using the sMTA for both Annex I and non-Annex I material<sup>2</sup>. This would permit IARCs to use the sMTA for all transactions under Article 15.1(a) and (b) of the ITPGR.

2.2.3. In addition, other organisations, such as the International Coconut Gene Bank for Africa, the International Coconut Gene Bank for the South Pacific, the Mutant Germplasm Repository of the Joint Division of the FAO and the International Atomic Energy Agency have put their collections (both Annex I and non-Annex I species) in the MLS. This has significantly expanded the scope of the MLS and thus is an

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<sup>1</sup> UNEP/CBD/WG-ABS/5/4/Add.1

<sup>2</sup> Report of the 2<sup>nd</sup> Session of the GB of the ITPGR, paragraph 68

important consideration in examining the relationship between the ITPGR and the international regime.

2.2.4. The MLS is now a day-to-day operational system with hundreds of transfers of genetic resources made on a daily basis using the sMTA. In response to this large volume of transfers and related activities the Secretariat of the Treaty is establishing, in collaboration with key stakeholders, information technology systems to support the implementation of the MLS.

2.2.5. Furthermore, the number of Contracting Parties to the ITPGR has increased to 120, as of 31 October 2008.

### **2.3. Overview of FAO Commission**

2.3.1. The Overview referred to the adoption of the Multi-Year Programme of Work ('MYPOW') by the FAO Commission at its Eleventh Regular Session in 2007. The FAO Commission's MYPOW covers all components of biological diversity of interest to food and agriculture and recommends that the '*FAO continue to focus on access and benefit sharing for genetic resources for food and agriculture in an integrated and interdisciplinary manner...It decided that work in this field should be an early task within its Multi Year Programme of Work.*' In light of this, the FAO Commission will consider policies and arrangements for ABS for genetic resources at its 12<sup>th</sup> session, planned for the 3<sup>rd</sup> quarter of 2009. The detailed agenda and future work on ABS for the 12<sup>th</sup> session is still under consideration.

## **3. Analysis of the relationship between ABS international regime and the identified regimes**

3.1. The CBD has long recognised the special nature of agricultural biodiversity and the need for close co-operation between the FAO and the CBD. In Resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, States were urged to find way to develop complementarity and co-operation between the CBD and the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture.

3.2. Moreover, CBD Decisions II/15 and V/5 recognised the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions. In particular, the Appendix to Decision VI/5 set out some of the distinctive features of agricultural biodiversity, the following of which are relevant in the context of ABS:

*(a) Agricultural biodiversity is essential to satisfy basic human needs for food and livelihood security,*

*(b) Agricultural biodiversity is managed by farmers; many components of agricultural biodiversity depend on human influence; indigenous knowledge and culture are integral parts of the management of agricultural biodiversity,*

*(c) There is a great interdependence between countries for the genetic resources for food and agriculture<sup>3</sup>*

The importance of agricultural biodiversity to food security and livelihood improvement is particularly relevant in today's world as we face increasing global challenges and threats, such as climate change.

### **3.3. The ITPGR and the ABS international regime**

#### **Relationship between the ITPGR and the CBD**

3.3.1. The ITPGR was concluded under Article XIV of the FAO Constitution. International agreements adopted under this provision are international agreements in their own right but have constitutionally prescribed links to the FAO<sup>4</sup>.

3.3.2. The ITPGR is the outcome of the process to revise the International Undertaking on Plant Genetic Resources for Food and Agriculture to bring it into harmony with the CBD. Consequently, Article 1 of the ITPGR recognises that its objectives<sup>5</sup> will be attained by closely linking the ITPGR to the FAO and the Convention on Biological Diversity ('CBD').

3.3.3. The preamble to the ITPGR, recognises the mutually supportive nature of the ITPGR's relationship with other international agreements<sup>6</sup>. Moreover, the close links between the CBD and the ITPGR are enshrined in Article 19 of the ITPGR, which provides for close co-operation. In this regard, the functions of the Governing Body of the ITPGR shall be to<sup>7</sup>:

- establish and maintain cooperation with other relevant international organizations and treaty bodies, including in particular the Conference of the Parties to the Convention on Biological Diversity, on matters covered by this Treaty,
- take note of relevant decisions of the Conference of the Parties to the Convention on Biological Diversity and other relevant international organizations and treaty bodies;
- inform, as appropriate, the Conference of the Parties to the Convention on Biological Diversity and other relevant international organizations and treaty bodies of matters regarding the implementation of this Treaty;

In relation to the CBD, Article 22 provides that the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any *existing* agreement, except where the exercise of those rights and obligations would cause serious damage or threat to

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<sup>3</sup> CBD Decision V/5, appendix , paragraph 2(a) to (c)

<sup>4</sup> See Moore and Tymowski: 'Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture', IUCN Environmental Policy and Law Paper No. 57, 2005.

<sup>5</sup> See Article 1.1 The objectives of this Treaty are the conservation and the sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security

<sup>6</sup> *Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security; Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements; Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements*

<sup>7</sup> See Article 19(g), (l) and (m) of the ITPGR

biological diversity. Furthermore, the COP has recognised the important role that the ITPGRFA will have, in harmony with the CBD<sup>8</sup>, as has the FAO Conference in its call for co-operation between the two instruments and secretariat<sup>9</sup>. Thus there are clear institutional requirements and political calls for close co-operation and working arrangements between the two instruments, which would need to be respected in addressing the ITPGR's relationship with the international regime.

3.3.4. While the ABS international regime is still under development, it is difficult to identify any overlaps or gaps with precision. However, the following analysis is based on the CBD and the current state of play set out in Annex I of CBD Decision IX/12.

### **Scope of the CBD and ITPGR**

3.3.5. The CBD and the ITPGR are the only existing global international agreements that provide for ABS arrangements for genetic resources. As such, their relationship is of central importance in devising an effective ABS international regime. All Parties to the ITPGR are currently Parties to the CBD, while not all Parties to the CBD are Parties to the ITPGR. However, it should be recognised that the situation is dynamic and could change. For example, the USA may become a Party to the ITPGR but remain a non-Party to the CBD. In addition, if the international regime were to become legally binding instrument, then a new, more complex, situation would arise with the possibility of a countries being Parties to some but not all of the 3 instruments. This patchwork of legal obligation between States could create particular challenges in the operation of any future ABS regime.

3.3.6. The scope of Article 15 of the CBD covers 'genetic resources'. This Article recognises the sovereign right of States over their natural resources and the authority to determine access to genetic resources. As an exercise of that sovereign right, Parties to the CBD agreed on the provisions in Article 15 that regulate access to and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.

3.3.7. Article 2 of the CBD defines 'genetic resources' as genetic material of actual or potential value. When read in conjunction with the definition of 'genetic material' Article 15.1 has a, prima facie, wide scope that covers all genetic resources.

3.3.8. There are still diverging opinions on the exact scope of the ABS international regime<sup>10</sup> and this provision will be further discussed at the 7<sup>th</sup> meeting of the ABS Working Group.

3.3.9. The scope of the ITPGR covers all plant genetic resources for food and agriculture<sup>11</sup>. However, within the ITPGR, a Multilateral System for access and benefit sharing ('MLS') was established to deal with a subset of those resources, which are listed in Annex I to the ITPGR. Thirty-five food crops and 29 genera forages are listed in Annex I. In

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<sup>8</sup> See CBD Decision VI/6

<sup>9</sup> FAO Conference Resolution 3/2001

<sup>10</sup> See section II on scope of Annex I to CBD Decision IX/12

<sup>11</sup> Article 3 of the ITPGR

addition, there are special provisions in the ITPGR for the genetic resources held by IARCs, including Annex I and non-Annex I resources<sup>12</sup>. All the IARCs of the Consultative Group on International Agricultural Research (CGIAR) have signed agreements with the Governing Body of the ITPGR, bringing these resources under the purview of the ITPGR, such that they are made available under the same conditions as genetic resources included in Annex I.

3.3.10. To understand the potential relationship of the ITPGR with the ABS international regime, the different elements of the ITPGR need to be considered separately as different legal and political considerations apply, in particular,

- a) Contracting Parties obligations vis-à-vis Annex I and non-Annex I crops
- b) Special situation of the IARCS
- c) Potential for the development of Annex I

**a) Contracting Parties to the ITPGR**

3.3.11. The MLS covers all plant genetic resources for food and agriculture that are listed in Annex I and that are under the management and control of the Contracting Parties and in the public domain<sup>13</sup>.

3.3.12. For these resources, Contracting Parties agreed to facilitate access under the MLS for the purpose of utilisation and conservation for research, breeding and training for food and agriculture<sup>14</sup>. This facilitated access shall be pursuant to the sMTA<sup>15</sup>, which contains the specific conditions set out in Article 12.4. Any benefits that arise from the use of these resources under the MLS shall be shared fairly and equitably through a range of mechanisms detailed in Article 13.2. Thus facilitated access is required for a closely defined set of circumstances. The ITPGR is silent as to how access should be granted outside of those defined circumstances. In such cases, it would appear that Parties retain their rights to provide access to genetic resources as they determine (subject of course to Article 15 of the CBD if they are Parties to it). Parties may wish to provide such resources under the terms of facilitated access in Articles 12(3) and (4) or under another MTA.

3.3.13. Thus for this detailed subset of genetic resources, and for certain specified purposes, Contracting Parties to the ITPGR, in exercise of their sovereignty, have agreed on a legally binding mechanism to facilitate access and share benefits arising from utilisation<sup>16</sup>. Thus this is, in effect, a special application of Article 15 of the CBD.

3.3.14. For genetic resources that are not listed in Annex I nor granted facilitated access under Article 12, the general provisions of the ITPGR apply to them. These provisions are of a more general nature, primarily aimed at conservation and sustainable use. However, some Contracting Parties, providers of genetic resources, may also choose

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<sup>12</sup> Article 15(1) of the ITPGR

<sup>13</sup> Article 11.2 of the ITPGR

<sup>14</sup> Article 12 of the ITPGR

<sup>15</sup> Which was adopted at the 1<sup>st</sup> GB of the ITPGR, see Resolution 2/2006

<sup>16</sup> See Article 10(1) of the ITPGR

to use the sMTA for non-Annex I resources, if they so wish. In this regard, some organisations have encouraged members to use the sMTA for non-Annex I crops<sup>17</sup>. In addition, in accordance with Article 24, Annex I may be expanded to include additional genetic resources (see paragraph 3.3.18 below).

3.3.15. Contracting Parties to the ITPGR are required to take appropriate measures to encourage natural and legal persons within a Contracting Party's jurisdiction to include Annex I resources within the MLS<sup>18</sup>. But there is presently, no legal obligation of such natural and legal persons to place their genetic resources within the MLS. However, the Governing Body will assess the progress of including resources from such persons within the MLS and decide whether to continue provide facilitated access to such persons that have not included their genetic resources within the MLS<sup>19</sup>.

#### **b) Special provisions on the IARCS**

3.3.16. Plant genetic resources listed in Annex I and held by the IARCs are subject to the provisions on the MLS<sup>20</sup>. However, plant genetic resources other than those listed in Annex I and collected before it's entry into force, shall be made available under an amended version of the MTA's used prior to the entry into force of the ITPGR<sup>21</sup>. As mentioned in Section 2.1, a significant development at the 2<sup>nd</sup> session of the GB was that the Contracting Parties agreed to include an interpretative footnote in the sMTA, which in effect would allow IARCs to use the sMTA for both Annex I and non-Annex I crops. This was a unanimous preference of IARCs to use only one instrument, in order to simplify procedures for the distribution of germplasm and hence reduce costs<sup>22</sup>. The GB may also seek to establish agreements with other international institutions to include them with the MLS<sup>23</sup>. A list of agreements signed under Article 15 can be found on the ITPGR's website<sup>24</sup>.

3.3.17. While there is a legal obligation for IARCs to use the sMTA for Annex I resources<sup>25</sup>, there has been agreement that they could also use it for non-Annex I resources. In practice, the IARCs are using the sMTA for all genetic resources held by them, which has led to thousands of transactions taking place. This has significantly increased the use of sMTAs.

#### **c) Potential for the development of the scope of the MLS and of Annex I**

3.3.18. A final consideration is that the ITPGR foresees the potential to amend Annex I<sup>26</sup>. Such an amendment would require consensus of the Contracting Parties<sup>27</sup>. This could result in additional crops and/or forages being added to Annex I and so included within the MLS. To

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<sup>17</sup> For example the EC PGR Steering Committee

<sup>18</sup> See Article 11(3) of the ITPGR

<sup>19</sup> See Article 11(4) of the ITPGR

<sup>20</sup> Article 11.5 and 15.1 (a) of the ITPGR

<sup>21</sup> Article 15.1 (b) of the ITPGR

<sup>22</sup> Report of the 2<sup>nd</sup> Session of the GB of the ITPGR, paragraph 67

<sup>23</sup> Article 15.5 and 11.5 of the ITPGR

<sup>24</sup> [http://www.planttreaty.org/art15\\_en.htm](http://www.planttreaty.org/art15_en.htm)

<sup>25</sup> Article 15.1 of the ITPGR

<sup>26</sup> Article 19.3(i) and Article 24 of the ITPGR

<sup>27</sup> See Articles 23 and 24 of the ITPGR

date there has been no substantive discussion on the amendment of Annex I.

### **Legal and policy analysis and challenges**

- 3.3.19. The ITPGR is a subsequent agreement to the CBD and arguably a form of *lex specialis*. It is recognised that the ITPGR should be implemented in harmony, and in mutual supportiveness, with the CBD and that its objectives can only be achieved if they work closely with each other.
- 3.3.20. As an independent agreement, the CBD could not amend the ITPGR nor could it take non-legally binding decisions which would alter the legal obligations under the ITPGR. And vice versa. The GB is the supreme decision making body for the ITPGR, as is the COP for the CBD.
- 3.3.21. In the current situation, where Parties to the CBD are Contracting Parties to the ITPGR, in accordance with Article 30 of the Vienna Convention on the application of successive treaties relating to the same matter, then the legal relationship of the ITPGR would prevail among them to the extent of the scope of the ITPGR. In practice, Contracting Parties to the ITPGR need legal space to implement the specific provisions of the ITPGR, especially in relation to the operation of the MLS. This would also be the case if the ABS international regime were to be a non-legally binding instrument.
- 3.3.22. However, should the ABS international regime be legally binding, it would be necessary to consider how the legal regime of the ITPGR could be dealt with to ensure mutually supportiveness. The absence of any provision on the relationship between the ITPGR and the ABS international regime could lead to legal uncertainty. That said, it would be possible to craft an international regime, which recognises the specific circumstances of the ITPGR as a specialist instrument. This possible option, along with others, is explored further below.
- 3.3.23. There is also a political and practical perspective to be considered. Contracting Parties are in the process of implementing the ITPGR, especially the MLS, within their national legislative and/or administrative frameworks. This is a complex process, which is both time and resource intensive.
- 3.3.24. One final point about the relationship between the ITPGR and the international regime is the potential interface between Article 9 of the ITPGR dealing with farmers rights and Article 8(j) of the CBD. Article 9 recognize *'the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world'*. While Contracting Parties recognise that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments, each Contracting Party should take measures to protect and promote farmers' rights. Such measures include:

- the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and
- the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

There is clearly a read across to Article 8(j) of the CBD, as well as issues identified in the Annex to Decision IX/12, in particular in Section D on Traditional Knowledge associated with genetic resources, which will require further consideration during the negotiations of the international regime.

### **3.4. The FAO Commission and the ABS international regime**

#### **Relationship between the FAO Commission and the CBD**

3.4.1. The FAO Commission has been established under Article VI.1 of the FAO constitution and, according to its Statutes, reports to the Director-General who shall bring to the attention of the FAO Conference through the Council any recommendations adopted by the Commission, which have policy implications or which affect the programme of finances of FAO. The Commission negotiated the International Treaty on Plant Genetic Resources for Food and Agriculture and has developed codes of conduct, in particular the Code of Conduct for Germplasm Collecting and Transfer, and other non-legally binding policy instruments in the field of genetic resources for food and agriculture.

3.4.2. In 1983, the FAO Conference established the Commission on Plant Genetic Resources as an institutional response to the adoption of the International Undertaking on Plant Genetic Resources. While the Commission has developed many non-legally binding instruments, negotiated the International Treaty on Plant Genetic Resources for Food and Agriculture and served as the Interim Committee for the ITPGR, it is currently not involved in negotiating any legally binding instruments that concern ABS and genetic resources of relevance to food and agriculture. However, part of the Commission's terms of reference is "to keep under continuous review all matters relating to the policy, programmes and activities of FAO in the area of genetic resources of relevance to food and agriculture, including their conservation and sustainable use and the fair and equitable sharing of benefits derived from their utilization, and to advise the Director-General and the Council and, as appropriate, its technical committees, including in particular the Committees on Agriculture, Forestry and Fisheries on such matters." Moreover, the Commission provides, according to its Statutes an intergovernmental forum for negotiations and to oversee the development, upon the request of the FAO Governing Bodies, of international agreements, including legally binding agreements

#### **Scope of the CBD and FAO Commission**

3.4.3. The FAO Commission's 1983 mandate<sup>28</sup> was significantly broadened in 1995<sup>29</sup> to cover 'all components of biodiversity of relevance to food and agriculture'. The broadening of this scope was to be by a step-by-step- approach, beginning with animal genetic resources. As mentioned in section 3.3.6 above, the scope of Article 15 is significantly wider.

#### **Legal and policy analysis and challenges**

3.4.4. The FAO Commission's work spans all components of genetic resources for food and agriculture, including: plants, animals, forests, aquatic, micro-organism and invertebrate genetic resources. It's potential contribution to the ABS regime was recognised at the 10<sup>th</sup> Session of the Commission, where it was recommended that, in response to requests from the CBD, the FAO and the Commission contribute further to the work on ABS, in order that it moves in the direction supportive of the special needs of the agricultural sector, in regard to all components of biological diversity of interest to food and agriculture<sup>30</sup>.

3.4.5. At the 11<sup>th</sup> Session, the FAO Commission considered the cross sectorial international policy issues and genetic resources and agreed on the importance of considering access and benefit sharing, in relation to all components of biodiversity for food and agriculture<sup>31</sup>. The Commission decided to include work on ABS as an early task within its Multi-Year Programme of Work and so it will be considered as a cross-sectorial matter at its 12<sup>th</sup> session, due to take place in the 3<sup>rd</sup> quarter of 2009.

3.4.6. In addition, the issue of ABS was taken up at the Interlaken Conference on Animal Genetic Resources for Food and Agriculture. The Interlaken Declaration commits States to facilitating access to these resources and the fair and equitable sharing of the benefits arising from their use, consistent with international obligations and national laws. In addition, the Global Plan of Action for Animal Genetic Resources promotes, as one of its main objectives, a fair and equitable sharing of benefits arising from the use of animal genetic resources for food and agriculture<sup>32</sup>. ABS is also integrated throughout the Strategic Priorities for Action, in particular by developing national strategies that incorporate the contribution of animal genetic resources for sustainable use, including mechanisms to support wide access to and the fair and equitable sharing of benefits arising from the use of animal genetic resources and reviewing the implications and impacts of international agreements on ABS.

3.4.7. The FAO Commission has not yet developed any legally binding ABS instruments under its Multi-Year Programme of Work. As such, the impacts on the ABS International Regime are largely political and policy orientated. However, this shouldn't detract for the possibility that the FAO Commission may wish to develop a legally binding instrument

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<sup>28</sup> Resolution 9/83 at the 22<sup>nd</sup> session of the FAO Conference

<sup>29</sup> Resolution 3/95 at the 28<sup>th</sup> Session of the FAO Conference

<sup>30</sup> See paragraph 76 of the Report of the 10<sup>th</sup> Regular Session of the FAO Commission

<sup>31</sup> See report of the 11<sup>th</sup> session of the FAO Commission, CGRFA-11/07/Report, paragraph 71

<sup>32</sup> Report of the Interlaken Conference, Annex 2, paragraph 15.

for specific components of biodiversity for food and agriculture in the future.

- 3.4.8. One of the main policy considerations will be to ensure that the work under the FAO is mutually supportive of, and coherent with, the ABS international regime. In this regard, issues over duplication of work and potential inconsistencies arise. These will be considered further in the possible options.

#### **4. Options for addressing the relationship between the ABS IR and the identified regimes**

4.1. In light of the above analysis a number of options can be identified. Possible options are described below, with a brief summary of issues and challenges that arise in them

##### **4.2. Option 1: Exclude all genetic resources of relevance for food and agriculture from the ABS international regime**

4.2.1. This option would exclude all genetic resources of relevance for food and agriculture from the ABS international regime. As such, it would exclude both the work under the ITPGR and the FAO Commission.

4.2.2. This option would support the existing recognition by CBD Parties of the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions. It would provide legal space for the operation of the MLS under the ITPGR for both Contracting Parties and the IARCs and allow for future development of Annex I. As regards the FAO Commission, it would give political space for the Commission to consider ABS issues for all genetic resources of relevance to food and agriculture in an in-depth and sectoral manner and could allow for more tailored solutions best suited to the different components of biodiversity for food and agriculture. This could also allow for the development of regimes for all genetic resources, including those acquired before the entry into force of the CBD. In addition, such an option could avoid duplication and overlapping work

4.2.3. On the other hand, it may be difficult to clearly identify which species are relevant to food and agriculture, given that many crops may have multiple uses. As such, this option could create a loop hole within the ABS international regime. In addition, a broad interpretation of the term could result in the exclusion of most biodiversity, that could make the international regime almost meaningless. It would be important to have a clearer understanding of the scope of such exclusion, and in this regard, a focus on the specific use of the genetic resources may be useful.

4.2.4. Furthermore, such an approach (i.e. with genetic resources for food and agriculture being dealt with outside the international regime) could lead to inconsistent approaches. While there may be an argument that genetic resources for food and agriculture requires a distinct response, as recognised in CBD Decisions II/V and V/5<sup>33</sup>, excluding all such genetic resources from the international regime may so lead to an

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<sup>33</sup> See paragraphs 3.1 and 3.2

incoherent response and implementation. Such a blanket exclusion may not be justified by the distinctive nature of plant genetic resources for food and agriculture. This approach could lead to a fragmented ABS international regime and thereby affect its overall effectiveness, and fail to meet the CBD's objectives.

#### **4.3. Option 2: Exclude ITPGR Annex I genetic resources from the ABS international regime, plus allow room for expansion of Annex I**

4.3.1. This option is a more refined exclusion, which would exclude plant genetic resources covered by Annex I to the ITPGR from the ABS international regime. All other genetic resources of relevance to food and agriculture would be included in the international regime.

4.3.2. This option would provide legal space for the operation of the MLS in Contracting Parties to the ITPGR. In considering this option, it would be necessary to ensure that any future amendment of Annex I could be accommodated in the exclusion. It would be possible to draft the exclusion in a way that would allow for such a development. In addition, it may be necessary to more precisely delineate the use of Annex I genetic resources so that only those within the MLS are excluded<sup>34</sup>.

4.3.3. However, this option would not overcome the challenges presented by the IARCs use of the sMTA for non-Annex I genetic resources. Nor does it identify a space for the potential work under the FAO Commission. However, this latter issue could be dealt with elsewhere in the regime, for example if the ABS international regime were to take a sectoral approach to uses of genetic resources, and in provisions to ensure mutually supportiveness between on-going work in the FAO and the ABS international regime. In addition, from a taxonomic perspective, it may be difficult to clearly delineate the scope of Annex I. Thus a simple exclusion of Annex I genetic resources may give rise to practical challenges.

4.3.4. To overcome the challenges presented by the IARCs, a sub-option could be created which would build on option 2 but also exclude all genetic resources (both Annex I and non-Annex I) held by the IARCs and other specified organisations that have placed their collections under the framework of the ITPGR<sup>35</sup>. This would reflect the current practical situation under the ITPGR. The ABS international regime could carve out those genetic resources to ensure that the legal space required for the implementation of the ITPGR was respected, as well as continuing the on the ground operation and use of the sMTA.

#### **4.4. Option 3: The ITPGR and FAO Commission as legally autonomous entities within the ABS international regime**

4.4.1. A more nuanced approach would be to build on the basic concept explored in option 2 but more clearly respect the autonomous legal status of the ITPGR and the FAO Commission, while trying to ensure mutually supportiveness between the regimes. The CBD could invite both the FAO Commission and the ITPGR to be *elements* of the ABS international regime, while recognising their distinctive legal autonomy.

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<sup>34</sup> See paragraph 3.3.12 and 3.3.13

<sup>35</sup> See paragraph 2.2.3 above

The ITPGR and the FAO Commission could be provided with a complementary role that facilitates mutually supportiveness between the elements, while excluding them, or elements of them, from the detailed provisions that would operationalise ABS under the ABS international regime. The exclusion from the operation of any detailed ABS rules could be tailored to the specific features of the regimes, bearing in mind their legal autonomy. In this regard, this approach may be easier to achieve for the ITPGR, given that there is an existing instrument. However, provisions could be made by the governing body of the international regime to respect the differences between the ITPGR and FAO Commission and their state of development. For example, it is possible to foresee two variants. In the first, the governing body of the international regime could recognise the ITPGR and the special legal conditions created by it. For example, genetic resources included in Annex I and those held by the IARCs, which are part of the MLS, could be clearly carved out of any specific operational rules on ABS. In the second case, with respect to the FAO Commission, the governing body of the international regime could consider further specific exclusions in light of future developments under the FAO Commission, for example if a treaty on animal genetic resources were to be agreed...

4.4.2. However, and while respecting their legal autonomy, the FAO Commission and ITPGR could be invited to take concrete actions to provide mutual support, for example by providing expertise or assisting in the development of the regime, with respect to certain sectors or uses of genetic resources.

4.4.3. Such an approach would need to ensure that space was created within the ABS international regime that was tailored to the specifics of both regimes. This could be a complex task in order to respect all the nuances. But this option could respect the legal autonomy of both regimes and the existing legal rules of the ITPGR, while ensuring mutual supportiveness and allow the regimes to develop in a coherent and consistent manner.

#### **4.5. Option 4: Include all genetic resources of relevance for food and agriculture within the ABS international regime**

4.5.1. This option would be to include all plant genetic resources with the ABS international regime, including the operation of ABS arrangements.

4.5.2. This option would present both legal and political challenges, in particular with respect to the ITPGR. If the ABS international regime were to be non-legally binding, then it would not be able to alter the legal obligations of Parties to the ITPGR, even if it purported to do so. If such a non-legally binding regime included contradictory or inconsistent provisions to the ITPGR, this would have no legal effect as such but produce a conflicting political statement. Again, Contracting Parties to the ITPGR may be reluctant, or indeed refuse, to agree such a political commitment.

4.5.3. On the other hand, if the ABS international regime, were to be legally binding and called for ABS arrangements that were contradictory to or inconsistent with the ITPGR, there would be a legal

issue as to which regime applied to Parties to both regimes. In addition, given the number of ITPGR Parties and the current active process of implementation, such an approach could be a strong disincentive for ITPGR Parties to become Parties to a legally binding ABS international regime.

4.5.4. There would be no such difficulties with respect to the FAO Commission, as to date there is no additional legally binding obligations. However, it may take some of the political space from the Commission to develop tailored solutions to the issue of genetic resources for food and agriculture, which have been recognised as requiring distinctive solutions. That said, much would depend on how these resources were integrated into the regime, and there could be options for providing a distinctive solution for such resources within the ABS international regime. In this regard, inclusion within the ABS international regime, could allow for a more coherent and consistent approach and develop practical mechanisms for mutually supportiveness of the two regimes.

## **5. Summary**

- 5.1. In all of these options, it will also be critical to consider the implications for national implementation to ensure that any decisions on scope would allow for coherent and effective implementation in national legal systems. In this regard, it may be useful to consider existing State practice of how genetic resources within the MLS of the ITPGR interface with other national ABS regimes, as well as how Contracting Parties to the ITPGR have dealt with the interface of Annex I and non-Annex I genetic resources at the national level.
- 5.2. Given the legally binding nature of the MLS in the ITPGR and the overlap of Parties, there are legal problems if genetic resources in Annex I and part of the MLS were to be included in any legally binding ABS operational rules. Such problems do not arise in the same manner as the FAO Commission, given that their consideration of ABS for all components of genetic resources of relevance to food and agriculture is at an early stage and does not yet include any legally binding mechanisms. However, there is still a need to respect their autonomous legal standing of both regimes, while ensuring the development of an ABS international regime which is coherent with and mutually supportive of the existing and future regimes.