Chapter 3. An Analysis of the Relationship between the Nagoya Protocol and Instruments related to Genetic Resources for Food and Agriculture and Farmers’ Rights

Claudio Chiarolla*, Sélim Louafi** and Marie Schloen***

The genetic diversity of crops, farm animals, forest trees, aquatic organisms, micro-organisms and invertebrates provides the biological foundation for the world’s food production. While these different genetic resources for food and agriculture (GRFA) have specific characteristics, they all play a major role for food security. Since the beginning of agriculture more than 10,000 years ago, the early use and exchange of GRFA has been more or less organised and aimed to increase food security by increasing and diversifying production. However, GRFA management became a global challenge requiring international coordination only quite recently, in the 1960s. These efforts deal with various objectives closely related to those of the Convention of Biological Diversity (CBD): the conservation of biodiversity, the sustainable use of its components, and the promotion of GRFA-based innovations and equity in the sharing of the benefits derived from their use.

This chapter considers the extent to which the Nagoya Protocol applies to GRFA and the legal implications of different regulatory options for the food and agriculture sectors. Attention is paid in particular to the interaction between the Protocol and one specific legally binding international access and benefit-sharing (ABS) instrument, namely the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty) of

* Research Fellow on International Governance of Biodiversity at Institut du développement durable et des relations internationales (Iddri) Paris.
** Senior Research Fellow at the Centre International de Recherche Agronomique pour le Développement (Cirad), UMR AGAP, Montpellier, France.
*** Research Fellow at the Centre International de Recherche Agronomique pour le Développement (Cirad), UMR AGAP, Montpellier, France and Research Centre for European Environmental Law, University of Bremen, Germany.
the Food and Agriculture Organisation of the United Nations (FAO). It also considers the relationship between farmers’ rights, which are recognised by the FAO Treaty, and the relevant provisions of the Nagoya Protocol; in particular, those concerning the protection of the rights of indigenous and local communities and their traditional knowledge.

The chapter is divided into two parts. Part one provides background information on the distinctive characteristics of GRFA that should be duly taken into account in the development and implementation of ABS legislation and/or regulatory requirements for GRFA (Part I, section 1), and on the international institutional framework on GRFA and ABS that predates the adoption of the Nagoya Protocol (Part I, section 2). Part two specifically analyses the legal interaction between the Nagoya Protocol and the above described regulatory framework, its related institutions and the on-going processes within those institutions. Particular attention is paid to the international ABS instrument already in force in the plant sector, namely the International Treaty (Part II, sections 2 to 4), and the on-going ABS-related international process concerning GRFA under the aegis of the FAO Commission on Genetic Resources for Food and Agriculture (Part II, section 5).

Finally, this chapter concludes that the ABS-implementing instruments for GRFA need to accommodate their distinctive characteristics and, therefore, their approach may differ from the mainstream bilateral ABS approach envisaged under the Nagoya Protocol. To date, the ABS regulatory framework in the food and agriculture sector appears to be in harmony with the objectives of the CBD and its Nagoya Protocol. Besides, the regulatory options that are available under these instruments hold the potential for it to continue being developed and implemented in harmony with such objectives, while increasing equity in the way resources are exchanged and used, and the ensuing benefits shared not only between users and providers, but also between the GRFA sectors and society at large.

I. Genetic Resources for Food and Agriculture and Access and Benefit-sharing

1. The Specificities of Genetic Resources for Food and Agriculture

Crop, animal and microbial genetic resources play an integral part in agricultural and food production systems. The diversity of these GRFA is to a

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