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SUBMISSION

to the

JOINT STANDING COMMITTEE ON TREATIES

from the

GRAINS RESEARCH AND DEVELOPMENT CORPORATION

February 2003

Introduction

This submission is made at the invitation of the Joint Standing Committee on Treaties in its consideration of the International Treaty on Plant Genetic Resources for Food and Agriculture ("the Treaty").

In the period before and after the Treaty was finalised, the Grains Research and Development Corporation ("GRDC") has been represented at meetings convened by Agriculture, Fisheries and Forestry – Australia ("AFFA"). The Department's invitation to participate in discussions was welcomed because access to plant genetic resources from overseas is vital to research and development for the Australian grains industry and the Corporation was interested in any moves which might improve that access.

Consideration of issues

We have now read the *National Interest Analysis*, which we were not aware of until after it was lodged, and the transcript of the Committee's hearing on 9 December 2002. This submission seeks to weigh up the pros and cons of Australian ratification of the Treaty on the basis of the information currently known to us.

Claimed advantages

Reasons for Australia to take ratification action are set out formally in the *National Interest Analysis* (paragraphs 8-14) and in AFFA's opening statement to the Committee hearing.

The principal reason given is that ratification would enable Australia to participate in the international framework of access and benefit-sharing.

What is not made sufficiently clear in the formal statement is that Australia already participates, energetically, in the international exchange of plant genetic resources. Moreover, Australian participants have been generally satisfied with the practical operation of germplasm exchanges internationally, whether in agreement with CGIAR agricultural research centres or through other arrangements.

The *National Interest Analysis* goes on to state that the capacity of Australian plant breeders to access genetic resources from overseas is likely to become more difficult if Australia does not ratify.

No evidence is adduced to support the statement. To our knowledge, Australian participants in the exchange of germplasm have not formed the conclusion that a regime as proposed under the Treaty will improve access.

"Conservation" is put forward by proponents of the Treaty as a major feature. AFFA documents say that the Treaty will establish a binding framework through which to conserve plant genetic diversity and use the conserved species sustainably.

The requirement in Article 5 of the Treaty is to promote an integrated approach to conservation. The promotion activity, however, is under the caveats of "subject to

national legislation" and "as appropriate". Further, Article 18 provides for a Contracting Party to undertake and finance national conservation and sustainable use activities "in accordance with its national capabilities and financial resources".

It is not clear that those provisions are strong enough to promise a level of achievement superior to current conservation activities internationally, or to activities which could equally be pursued **outside** a treaty in the future.

Matters of concern

In the interests of a balanced picture, certain points which give some concern from the industry perspective are itemised below.

Payments required from users of the system

Mentioned first here, since it does not seem to be mentioned at all in the *National Interest Analysis*, is the binding requirement for recipients commercialising a product which incorporates material accessed from the multilateral system to make payments to a fund to be administered by the Governing Body. Even in exempt cases where the product is available without restriction to others for further research and breeding, the recipient is still to be encouraged to make such a payment.

Paragraph 28 of the *National Interest Analysis* recognises that additional costs would arise for Australia to support international secretariat activities, but goes on: "Ratification would not involve additional compulsory payments to other Contracting Parties, such as developing countries or countries with economies in transition".

However, Article 13 of the Treaty makes it appear that additional payments would be involved if use of plant genetic resources was judged – by the Governing Body, FAO, an IARC, or whoever has the authority to judge – as meeting the Treaty's requirements for benefit-sharing.

Uncertainty surrounds the impact of "benefit-sharing" on users not only in the process of decision-making about which transactions trigger payments. The likely **levels** of individual payments are also unknown. The only guidance is in the phrase "in line with commercial practice", which remains undefined in the Treaty.

The private and public sectors

Under the heading *Sharing of monetary and other benefits of commercialisation*, Article 13 of the Treaty states: "The Contracting Parties agree, under the Multilateral System, to take measures in order to achieve commercial benefit-sharing, through the involvement of the private and public sectors in activities identified under this Article...".

Recent developments in Australian wheat breeding may be relevant here. The new GRDC-sponsored consortia join together public and private organisarions and will conduct their business on a more commercial basis. Uncertain aspects of the Treaty, such as the payments question, become more pointed in these circumstances.

At the start, the Treaty is to cover all Annex 1 plant genetic resources under the management and control of Contracting Parties and in the public domain, with other (private) holders of genetic resources free to include them voluntarily in the Multilateral System. The provision for a review two years after the Treaty starts, however, contains an implicit threat to withhold access or take other measures against private holders who do not join the system (Article 11.4).

Material transfer agreements

The key document in future access to plant genetic resources will be the proposed new standard material transfer agreement (MTA), which will include a requirement for "benefit-sharing" through payment of monies into a Trust Fund, in given circumstances.

Texts relating to the MTA in the Treaty are cast in general terms and do not give clear guidance on how day-to-day activity will be conducted. In particular, the operation of benefit-sharing and the bases for payment into the proposed Trust Fund are vague. If this part of the Treaty is to have any practical effect, its proponents will have to put forward a workable formula for what is meant by conditions such as "in line with commercial practice".

In the formal Australian Statement to FAO (November 2001) on the possible future implementation of the Treaty, probably the most important of the issues "considered necessary for the purposes of implementation" is in point (iii) of the Statement: *It will be essential that the material transfer agreements which will underpin the Treaty are commercially realistic.*

The extent to which that essential requirement is met will be known only when the Expert Group and the Interim Committee for the Treaty have developed advanced versions of texts for MTAs. It is understood that Australia has full scope to participate in the work of those groups without first ratifying.

Intellectual property

The Australian Statement to FAO pointed to ambiguous provisions on the scope and application of intellectual property (IP) rights, saying that this was a highly regrettable situation which could undermine the Treaty. Inter alia, the Statement emphasised that Australia would insist on mutual respect for the national IP rights laws of member countries, and would ensure that recipients continue to be able to seek IP rights for innovations developed from the use of material accessed under the multilateral system, provided they meet national laws.

The statement also said that the list of crops should be extended, as some exclusions would probably distort the system.

Despite those reservations made in the Australian Statement, however, Article 30 of the Treaty bluntly declares that no reservations to the Treaty are permitted.. This is confirmed in the *National Interest Analysis* (paragraph 34).

Scope of the Treaty – List of crops

In consultations with AFFA, grains industry and other representatives have pointed out that Annex 1, the list of crops covered by the Treaty, excludes crops which the Australian industry would expect to see included as part of a comprehensive, effective multilateral system. Examples of these in the grains sector are soybeans, peanuts, linseed, safflower, some millets/panicum, buckwheat and sesame. The horticulture industry agreed that there were important omissions for it, too, tomatoes being the most obvious one.

This appears to be a case where deficiencies in the Treaty result from unresolved bilateral disputes (e.g. among Latin American, Asian and African states), with Australian interests unable to be satisfied in the wider area of the multilateral negotiations.

Implementation in the Federal system

Questions on how the Treaty will be implemented in Australia's Federal system of government have been asked by industry and researcher representatives. While aware that discussions have taken place, we do not know how the matter will be **formally** settled.

In its analysis of Treaty articles, the Attorney-General's Department Office of International Law wrote on 28 February 2002:

"...Annex 1 PGRFA [Plant Genetic Resources for Food and Agriculture] that is under the management and control of the Federal Government in Australia and its agents and instrumentalities would be covered by the MLS [Multilateral System]. PGRFA that is under the management and control of a State and Territory Government or its instrumentalities would not be covered, even if that management or control was funded by the Federal government. [page 5 of A-G's paper]. Whether, and if so how, the States and Territories might be required to modify existing practices and policies is a question of domestic implementation..." [pp. 5-6].

When the issue was raised by a Committee member at the Joint Standing Committee's hearing on 9.12.02, an AFFA representative responded that the States had indicated that "they are interested in administratively applying the treaty to their own stocks and resources as well". [p. TR 21]

The status of material in Australian genetic resource centres and the centres' modus operandi are of immediate interest to researchers, the R&D Corporations and the industries which use the product of R&D based on that material. As well as the States, organisations such as the GRDC have a substantial investment in those centres, with negotiations in train on their continued support.

We think it would be useful if a clear statement was available on the formal settlement of domestic implementation of Treaty provisions affecting Australian-held genetic resources.

It is not only the application of Treaty provisions to *ex situ* material in Australian genetic resource centres which has raised doubts. During negotiation of the Treaty, a domestic debate continued, unresolved, on access to *in situ* biological resources in States and Territories.

Under Article 12.3(h) of the Treaty, Contracting Parties agree that access to PGRFA found in *in situ* conditions will be provided according to national legislation or, in the absence of such legislation, in accordance with such standards as may be set by the Governing Body. If, as appears to be the case from discussion among the States, there is no national legislation meeting the purpose, access standards would seem to be in the hands of the Treaty's Governing Body.

Attitudes and future actions of other countries

Observing the widely divergent positions taken by other participants in the Treaty negotiations, the industry is concerned to know the current situation of countries important to Australia for their status as customers, competitors or cooperators in research. In this regard, Senator O'Brien referred in the Parliament on 29.8.02 to "major seed technology innovators" such as the US and Japan which were reported to have refused to become parties to the Treaty.

According to FAO information, a relatively small number of countries have ratified. Those who, on that advice, had **not** ratified included Japan, China, Korea, Malaysia, Singapore, South Africa, Brazil, Mexico, Russia, Ukraine, Poland and all other former Soviet states. Of all those countries, none except Brazil had even signed. The US signed just before the deadline, but had not ratified.

Conclusions

Discussion at the Committee's first hearing gave useful background about the likely outcome on benefit-sharing from the Treaty. AFFA confirmed a Committee member's assumption that, even in the case where Australian-sourced material was used by another country and subject to payment, the money "need not necessarily – and probably would not – come to Australia but rather would go to the Governing Body for determining where it was most needed in terms of promoting the ideals of this treaty".

While the Department speaks of the Treaty building on the existing International Undertaking, from an Australian industry viewpoint the Treaty actually appears more limiting than the Undertaking and, therefore, will be seen as partly dismantling rather than building on the Undertaking. To put the industry perspective in another way: the exchanges in the Committee hearing make it evident that this is not an agreement for protecting and promoting returns for Australian farmers, but a binding treaty to advance ideals aimed principally at assistance to developing countries.

In that light, it would be reasonable to question why such assistance could not be rendered in a more direct, focussed and controllable way by using a vehicle such as ACIAR or AusAid. It would make more predictable the tasks of those Departments responsible for budgeting. In addition to any "benefit-sharing" payments to be made by a Contracting Party in a given year, countries which ratify will also have to

contribute to the costs of a new international bureaucracy to administer the Treaty, and the domestic costs of servicing it.

As to the next step in the Treaty's process, the Expert Group will have the task of preparing the draft text of a new MTA, for consideration by the Interim Committee and, eventually, submission to the Governing Body.

A judgement on the practicability and value of the new MTA will have to await examination of advanced drafts. Any modelling which could be undertaken to throw light on the effects of Treaty membership would also help in the judgement. It should be a condition of Australian ratification of the Treaty that the conditions contained in the MTA and any associated benefit-sharing protocols or agreements are satisfactory to Australia.

Given the understanding that countries like Australia are entitled to participate in the work of the Expert Group and the Interim Committee without first ratifying, we believe that Australian representatives should take part in that activity and be able to report back on progress.

On balance, there appears to be insufficient reason to hurry in as an early ratifier, but adequate justification for a more circumspect approach, while cooperating in the work to draft the documents which will be the most important from Australia's standpoint.

The point at which serious consideration needs to be given to ratification is when the Governing Body is being formed, if –as is stated – membership will confer the advantage of being part of decision-making by consensus in that body.

Even the currently projected timetable does not foreshadow that the Governing Body will meet before 2004. There should be time enough for Australia to obtain a better idea of what its commitments will be before taking a final decision on the value of ratification.