The International Treaty on Plant Genetic Resources for Food and Agriculture: Open Issues and Concerns

(Presentation 2)

Overview
As with most international agreements, the International Treaty on Plant Genetic Resources for Food and Agriculture contains ambiguities and instances where important text is open to conflicting interpretations. A number of important issues have been bequeathed to the Treaty’s governing body, which will attempt to resolve them by consensus. Until this happens, ambiguities will remain, and Contracting Parties will implement the Treaty in light of their understanding of it. Lack of clarity poses difficulties for Contracting Parties and centres in the Consultative Group on International Agricultural Research (CGIAR), equally.

Open issues relating to the Treaty

International agreements are developed largely through political, rather than scientific, processes. This would seem so obvious as not to warrant comment; nevertheless, with agreements addressing largely scientific topics, questions are inevitably raised about the quality of ‘science’ found in the document: Don’t they understand that…? Why didn’t they…? Didn’t our representatives explain that…? Look, these two paragraphs are contradictory! Why are the definitions of scientific terms so ‘political’?

The International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter ‘the Treaty’) is the result of a long—and most would say gruelling—series of political negotiations between countries. The first proposals for a legally binding Treaty on the subject were made in 1981. The subject of the Treaty was, and remains, controversial, and the Treaty itself is the result of countless compromises. From anyone’s vantage point, it is less than perfect. ‘Perfection’, however, was never one of the options on the table. From any perspective, the Treaty contains ambiguities and unresolved issues, some of which were known and visible to negotiators; some of which were probably not. Certain problems exist simply because negotiators could not agree on a solution and decided instead to move forward, accepting the fact that ambiguities exist and will need to be resolved at a later stage.

What follows is an exploration of some of these ambiguities and unresolved issues.

Definitional issues
There is a lack of clarity about the precise meaning of certain terms used in the Treaty—even in Article 2, where terms are defined. Uncertainties over the meaning of terms in the text will, of course, affect both countries and CGIAR centres.

The most troubling ambiguities are those pertaining to what—precisely—is being accessed under the multilateral system, how it can be used/protected, and under what conditions access might be denied or conditioned. Article 12.3(d), for instance, states: ‘Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic
resources for food and agriculture, or their genetic parts or components, in the form received from the multilateral system.’ The term ‘genetic parts and components’ is not defined and would be subject to different interpretations.

The phrase ‘intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture’ can be interpreted in two ways:

- that intellectual property rights (IPRs) limit facilitated access and, thus, no intellectual property of any type can be claimed, or
- that intellectual property can be taken out, provided it does not limit facilitated access— for example, plant breeders’ rights compatible with the International Union for the Protection of New Varieties of Plants (UPOV) could be claimed.

Similarly, does the phrase ‘in the form received’ refer to the prohibition against taking out IPRs (i.e., no IPRs should be taken out over the material in the form received), or does it rather refer to the restrictions on facilitated access (i.e., no IPRs should be taken out that would restrict facilitated access to the material in the form received)? The grammatical structure of the sentence would favour the second interpretation.

If the phrase means that no IPRs can be taken out ‘in the form received’, then does this allow IPRs to be taken out, for example, on genes isolated from the material received, because they were not received in the form of isolated genes? Or is this forbidden because the gene itself (provided no changes are made to it) was received from the multilateral system, albeit embedded within the genetic makeup of the material? Some countries were of the opinion that this paragraph would preclude the kind of patenting of genes that is allowed in the United States, namely the patenting of an isolated, purified DNA molecule for which a function (utility) is identified. These countries claim that the patented gene is the same as that received. Others counter with the argument that the isolated and purified form is different from the ‘form received’ from the multilateral system.

Furthermore, the issue is left open as to what is the minimum that a recipient has to do for the material to no longer be classified as being ‘in the form received’. Is the addition of a single ‘cosmetic’ gene (e.g., through transformation or conventional back-crossing) sufficient? Is inclusion of an essentially unaltered gene within a new construct sufficient? Such issues will presumably be addressed by the governing body in due course.

These are all matters that may need to be clarified by the governing body.

A further ambiguity that has been resolved by the governing body, at least for the present, is related to the method of calculating the level of mandatory benefit sharing. Once it is determined that materials from the multilateral system have been used in such a way as to trigger the mandatory benefit-sharing mechanism of the Treaty, Article 13.2(d)(ii) says that the level, form and manner of the payment will be ‘in line with commercial practice’. Exactly what ‘commercial practice’ is, was not defined in the Treaty. That remained to be defined in the negotiation of the standard material transfer agreement (SMTA). How that came out will be examined in more detail in Handout 24, on the SMTA.

Again related to mandatory benefit sharing, what exactly is the meaning of the expression ‘available without restriction’? The expression is not defined in the Treaty, although it is defined in the SMTA in the following way:
a Product is considered to be available without restriction to others for further research and breeding when it is available for research and breeding without any legal or contractual obligations, or technological restrictions, that would preclude using it in the manner specified in the Treaty.

But would this allow a patent holder to renounce certain rights afforded by a patent and thus escape the mandatory benefit-sharing provision? For example, could one patent a variety or line and then grant any and everyone a licence to use the material freely for research and breeding? So-called ‘protective patenting’ would, in our view, not necessarily trigger the monetary benefit-sharing requirement of Article 13, but this might need clarification by the governing body.

It is also still not clear whether a breeder from a company or institution would or would not be obtaining materials from the multilateral system were he or she to get materials from his or her own national genebank. One could argue that the Treaty regulates transfers between (not within) Parties. However, such an interpretation of the Treaty might well have the effect of introducing a major loophole into the system, by allowing multinational companies to acquire materials from the multilateral system free of any conditions under the multilateral system and then transferring them, for example, to other parts of the same company outside the country.

While transfers within the same company within a single country would not normally be required to be under the SMTA, it should be noted that the CGIAR centres have adopted the practice of requiring all acquisitions of material by Centre breeders from the in-trust collections\(^1\) to be subject to the terms and conditions of the SMTA, even if a signed SMTA itself is not required. The acquisition of Annex 1 materials by a CGIAR centre from its host country would, of course, also be subject to the terms and conditions of the multilateral system, assuming that that country is a Contracting Party. All distributions by CGIAR centres of Annex 1 material in the multilateral system are, of course, subject to the SMTA as of 1 January 2007. As of 1 February 2008, this also applies to non-Annex 1 material collected before the entry into force of the Treaty.

Finally, in terms of definitional issues, we note Article 12.3(e) on access, which states: ‘Access to plant genetic resources for food and agriculture under development, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development.’ What does ‘during the period of its development’ mean? When does this period begin and end? What actions constitute ‘development’? Presumably, certain normal practices would be allowed, for example, the development and retention (without mandatory access being made available) of multiple lines for use in producing a variety or the development of materials that would be made available under contract or sold to another entity, etc. Plant genetic resources for food and agriculture (PGRFA) under development formed an important issue in the negotiation of the SMTA. How that came out will be examined in more detail in Handout 24, on the SMTA.

**The list of crops for the multilateral system**

Annex I was the subject of passionate debate and substantial scientific input from experts, including experts present at the negotiating sessions, as well as the results of technical workshops, the reports of groups of experts, etc. Nevertheless, the text is not all that clear in certain regards. ‘Wheat’ is included in Annex I, but defined as ‘*Triticum* et al.’ Et al.? In addition, the Treaty does not acknowledge the fact that taxonomists and breeders will disagree about what is included within a particular genus or even species. Moreover, such groupings change over time. Will the materials under the multilateral system expand and contract as

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\(^1\) The ‘in-trust collections’ of the CGIAR centres are those that have been designated under the 1994 agreements with the Food and Agriculture Organization of the United Nations (FAO) as being held in trust for the benefit of the international community and as being freely available.
taxonomic understandings of what constitutes a particular genus evolve? Assuming that the
governing body will not want to undertake the cumbersome and costly task of constituting its
own taxonomic authority, on what basis will Contracting Parties and CGIAR centres decide
whether questionable categories or materials are included or excluded? Practically speaking,
how would the Treaty handle cases if materials considered today to be part of Annex I were to
fall off the list by virtue of changes in taxonomic practices?

Non-Parties

The Treaty regulates relations between Contracting Parties, and between CGIAR centres and
other international institutions that sign agreements with the governing body and Contracting
Parties. Like most international agreements, the Treaty does not deal specifically with relations
with non-Parties. The Treaty’s article on non-Parties (Article 31), as noted above, simply states
that non-Parties are encouraged to accept the Treaty.

The FAO Commission on Genetic Resources for Food and Agriculture, through its agreement
with CGIAR centres in 1994, already confirmed the history of CGIAR-held accessions, i.e., that
they were ‘donated or collected on the understanding that these accessions will remain freely
available and that they will be conserved and used in research on behalf of the international
community, in particular, the developing countries’. In the statement issued at the time of
signing their agreement with the governing body in October 2006, the CGIAR centres reaffirmed this understanding and made clear that the Treaty would not prevent the CGIAR
centres from continuing to make both Annex 1 and non-Annex 1 material available to non-
Contracting Parties in the same way as for Contracting Parties. Countries of course have the
right to decide whether to provide access to non-Contracting Parties and, if so, on what terms.
The Treaty does not mandate a particular course of action in this regard.

Some basic legal concepts and the rules of Treaty interpretation

Interpreting and understanding the Treaty requires some familiarity with basic legal concepts
and tools. The last section of this handout seeks to explain, first, the concepts of sovereignty
and property rights; second, the relationship of international law to national law; and third, the
basic rules of Treaty interpretation, including resolving conflicts between treaties.

National sovereignty and property rights

Article 10 of the Treaty recognizes the sovereign rights of States over PGRFA situated within
their territorial boundaries. In dealing with the conditions for facilitated access to PGRFA,
Article 12.3(f) makes reference to property rights, including intellectual property rights.
Sovereign rights are not synonymous with property rights. What then is the nature of each
type of right, and how are they different?

Sovereign rights

Sovereign rights are the rights (which appertain to independent sovereign states) to legislate,
manage, exploit and control access to their own natural resources. They include the right to
determine property regimes applicable to those resources, who owns them, what rights of
ownership can be entertained and how ownership can be established. Sovereignty and sovereign
rights imply independence and exclusivity: the rights appertain only to the sovereign power
concerned and not to any outside power. This is not to say that sovereignty and sovereign rights
cannot be subject to limitations or restrictions. In particular, sovereign states, in the exercise of
their sovereignty, can agree to exercise their sovereign rights in a particular way and subject to
agreed rules, which then become binding on them. This is in essence the principle of pacta sunt
servanda (‘agreements are to be kept’), which is the principle on which all international law is
based. In international treaties on the environment and development, statements recognizing the
sovereign rights of states over their natural resources are normally coupled with affirmations of their responsibilities to manage those resources in such a way as to avoid causing harm to other states, or to avoid harming interests that are of common concern to all countries or to humanity as a whole. Thus, the Preamble to the Treaty recognizes PGRFA to be a common concern of all countries in that all countries depend very largely on PGRFA. Article 10 of the Treaty is careful to state that it is in the exercise of their sovereign rights that the Contracting Parties have agreed to establish a multilateral system for access and benefit sharing for some PGRFA (which are important for reasons of food security and interdependence), which is then binding on them. Sovereign rights are not property rights, although a State may very well determine, in the exercise of its sovereign rights, that certain natural resources are the property of the State. The State may also own property, like other natural or legal entities, under the property regime that it has established in the exercise of its sovereign rights.

**Property rights**

Property rights, on the other hand, are rights to own, control and alienate property, within the system of property law established by the State. Property rights may be rights over material or tangible property, such as the crops growing on a farmer’s land. They may also be rights over intangible property, including information or innovations, such as patent rights or plant breeder’s rights. Intellectual property rights are also intangible property rights. They differ from rights over material or tangible property in that they are limited in time (up to 20 years in general for patents and 20 to 25 years under the UPOV 1991 Act for Plant Breeders’ Rights). They are exercisable only in the territory in which protection rights have been granted (the so-called ‘principle of territoriality’) and relate only to the intangible content of goods or processes. In the case of living organisms, for example, such rights may relate to the information contained in genes or other sub-cellular components, or in cells, propagating material or plants. Intellectual property rights confer a right to exclude others from producing, replicating, using or selling this information or innovation, or individual specimens or products produced using this information or by way of these innovations.

**The relationship between international law and national law**

In broad terms, national law is based on what the national parliament and courts decree to be the law. International law, on the other hand, is based on the fundamental concept of *pacta sunt servanda*, i.e., agreements are to be respected. In the hierarchy of law, international law is usually considered to be higher than national law. In other words, if a State enters into a binding international treaty, then it cannot argue that it cannot fulfil its obligations under the treaty because the treaty conflicts with national law. This rule is clearly and explicitly stated in Article 27 of the Vienna Convention on the Law of Treaties.² It is up to the State to ensure that its national laws are in line with its international obligations; otherwise, it is in breach of international law. Generally speaking, there are two types of national systems governing the relationship between national and international law. In one type of system, international laws are automatically considered to be binding national law; in the other system, international law has to be given the force of national law through an act of the legislature.

**Rules of international treaty interpretation**

The most authoritative statement of the rules of interpretation of international treaties is to be found in the Vienna Convention on the Law of Treaties of 1978.

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² Article 27 provides that ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . .’
The general rule of interpretation is set out in Article 31 of the Vienna Convention, providing that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

This general statement is full of meaning; however, four general observations can be made:

- As a general rule, one must interpret a treaty in accordance with its literal meaning. This is, in fact, known as the ‘golden rule’. There may have been a lot of discussions and arguments in the negotiation of a particular text, but once the text has been adopted as part of a treaty, then one has to look at the words that were actually used and try to interpret them in their normal everyday sense. Normally, one is not allowed to look at the preparatory work of the treaty, including the records of negotiations, to deduce another meaning from the text, unless the meaning is ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. If all the languages of the treaty are equally authentic, then all of the language versions have to be taken into account in establishing the meaning. If there is a difference of meaning, then ultimately the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, has to be adopted. In determining the meaning of a provision, any subsequent agreement or practice between the parties regarding the interpretation of the provision should be taken into account, together with its context.

- Second, a treaty must be interpreted in good faith. In other words, one should try to make sense of the literal text, in good faith, and not force the words into a sense that cannot be borne by the words. Under Article 26 of the Vienna Convention, all parties are required to implement the treaties they enter into in good faith.

- Third, the words must be interpreted in their context. In other words, one cannot isolate a word and give it a meaning that is not sustained by the context.

- Finally, and very importantly, one has to interpret a treaty in the light of its object and purpose. In other words, one has to try to find an interpretation of the literal words that is in line with the object and purpose of the treaty, and which does not run counter to them. The object and purpose of a treaty is usually set out in one of the early articles of a treaty. In the International Treaty on Plant Genetic Resources for Food and Agriculture, the objectives of the Treaty are set out in Article 1.

**Conflicts between treaties**
The Vienna Convention on the Law of Treaties also deals with conflicts between treaties. Under Article 30, later treaties entered into by the same parties relating to the same subject matter are normally treated as prevailing over earlier treaties, and the earlier treaties apply only to the extent that their provisions are compatible with those of the later treaties. This presumption does not operate where there is wording in the treaty to the contrary, e.g., where the treaty provides that a later treaty is not to be considered as being incompatible with an earlier one. In that case, the earlier treaty prevails.

**Effect of signature of treaties where the treaty has not yet been ratified**
One provision of particular interest in the Vienna Convention is Article 18, which provides that a State that has signed a treaty but not yet ratified it or has declared its intention not to proceed with ratification, shall, in the meantime, refrain from acts that would defeat the object and purpose of the treaty.