

INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES: THE FINAL STRETCH

GRAIN
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The International Undertaking on Plant Genetic Resources for Food and Agriculture (IU) was first adopted by governments at the Food and Agriculture Organisation of the United Nations (FAO) in 1981. It was meant to be a legally-binding convention that would counteract the privatisation of genetic resources by establishing their status as the “common heritage of mankind”. At the time, the main impetus for privatisation was coming from the expansion of the plant breeders’ rights system (the Union for the Protection of Plant Varieties or UPOV). The IU was the first global treaty to spell out commitments to conserve genetic resources and ensure their long-term benefit to all.

The treaty soon ran into problems. Northern governments refused to make it binding, so it became a voluntary undertaking instead of a convention. The North was upset with the IU questioning the legitimacy of intellectual property rights (IPR). This concern was somewhat “resolved”, in their eyes, by a 1989 annex which doubly acknowledges that plant breeders have legitimate rights as do farmers. Farmers’ Rights, as framed in the IU, started out as a bold attempt to recognise and reward farmers’ innovation with respect to crop genetic resources. But eventually it has come to be an empty promise of compensation to communities for having contributed the genetic diversity so useful to industry. The South also had its own problems with the IU. In particular, it became severely disillusioned with the concept of common heritage because it turned out to be meaningless: the North continued patenting and profiting from the South’s germplasm, while the South got nothing in return.

By the late 1980s, the same governments that had dreamed up the IU started drafting the Convention on Biological Diversity (CBD). The CBD was originally meant to be an umbrella framework for *in situ* conservation of biological resources, particularly in national parks and protected areas. But it gradually took on *ex situ* conservation and all of FAO’s political issues as well. Finalised in 1992, the CBD reframed the status of genetic resources from a common heritage to “national sovereignty”, making them subject to wheeling and dealing on a bilateral basis. Genetic resources were thus reduced to a commodity to be bought and sold under the authority of individual governments.

As a consequence, the FAO member states decided to revise the old Undertaking to bring it into harmony with the CBD. The negotiations have dragged on for eight years now, almost collapsing several times. And in the meanwhile, the legal and political backdrop to the negotiations grew even more complicated with the establishment of the World Trade Organisation (WTO). The WTO administers an agreement on Trade-Related Aspect of Intellectual Property Rights or TRIPS. The TRIPS Agreement is now a central pillar of the global trade system. Despite CBD and the International Undertaking, it requires all WTO members to grant intellectual property rights on plant varieties (seeds). This makes private control over genetic resources

the rule, not the exception – and seriously threatens any exchange of germplasm as well as the inherent rights of local communities, particularly in developing countries.

A reconstructed draft of the International Undertaking, which tries to account for all this, was finally agreed to last June. But several issues remain unresolved and in brackets. The text is now on its way to the 31st Conference of the FAO (2-13 November 2001) for adoption. Two particularly crucial issues remain to be sorted out: to what extent the IU will allow for IPR on genetic resources accessed through the system and how many crops will form part of that system.

What is at stake under the “new” IU has risen considerably. It’s still about developing an international system – implying shared responsibilities – to conserve genetic diversity of food and fodder crops. But more critically, it’s about whether or not these resources will be rescued from the deepening spiral of corporate – and state – monopolisation. If governments do not reach an agreement on the IU in November, we will be left with only one global legal instrument setting the rules over farmers’ seeds and farmers’ rights: the WTO TRIPS Agreement.

1. WHAT’S IN IT FOR FARMERS?

The new Undertaking will have little direct and immediate impact on the rights of farmers over genetic resources. It contains a very weak article on Farmers’ Rights, and the only explicit reference to farmers as plant breeders says that they will have the same rights over their breeding materials, during the period of varietal development, as formal sector breeders have. This may prove useful as some protection against biopiracy, but the IU essentially sets rules for the formal research and breeding sector. For that reason, its direct effects will be felt almost exclusively there.

But indirectly, there will be real impacts on farmers. The multilateral system that the Undertaking aims to set up promises at least some shelter from purely bilateral and commercial approaches to managing the planet’s shrinking genetic diversity. The agreement is in no way revolutionary, but there is little doubt that a world with a properly crafted IU will be better for farmers than one without it.

The main potential positive effects of the Undertaking are listed below. How much of this will actually materialise depends on the final negotiations between now and the FAO Conference in November:

Nothing compensates for the loss of genetic diversity

The Green Revolution transformed Asia’s rice fields in the late 1960s with the deployment of one particular rice variety called IR8. By the early 1970s, grassy stunt virus (GSV, transmitted by the brown planthopper) was ravaging huge areas because the lone IR8 had been so widely planted and was susceptible.

The International Rice Research Institute (IRRI), which was developed IR8, scoured more than 5,000 accessions of rice from its genebank and finally found three samples (individual plants) of one accession which contained a gene for resistance to GSV. That gene was then bred into new rice varieties to provide needed resistance against GSV. And it worked.

This goes to show what is at stake with the IU. Either people are able to access and use these natural forms of resistance to pests and disease or we let them become private property. If genetic resources are monopolised, everyone will have to beg for them and we all risk further recourse to pesticides or genetic engineering to deal with the epidemics that monocultures and genetic erosion foster.

i) Facilitated access to agricultural biodiversity. The IU would to some extent re-establish, between its signatories and for the crops that are covered, the free

exchange of genetic materials that was the norm until the advent of IPR. In a world of increasing interdependence, and in the face of ongoing genetic erosion, this makes a very considerable difference to plant breeders. Importantly, the system will cover materials collected both before and after the coming into force of the CBD.

ii) Strengthened public sector breeding and conservation in the developing countries through more stable funding commitments from the industrialised countries. If directed well, this should also support and promote on-farm biodiversity management. While public research institutions are not always helpful or sensitive to farmers' needs, they are almost always a better alternative to the transnational companies which increasingly dominate international agricultural research to serve their own extremely narrow agenda.

iii) A strong global forum specifically for agricultural biodiversity will be preserved. The FAO Commission on Genetic Resources, created by the original Undertaking, has contributed a lot to advancing the political discussion about genetic resources between governments, and with other actors, including farmers' organisations and NGOs. There is a clear and continued need for such a high-level and public political forum. Should the Undertaking renegotiation fail, it is unclear where the natural home for the discussion on agricultural genetic resources would be.

An acceptable IU would:

- strictly prohibit IPR on the material that is accessed through the system, thereby cutting a big hole out of the WTO TRIPS regime;
- keep important agricultural genetic resources in free circulation (not privatised, no monopolies);
- cover a significant list of crops, the germplasm of which would be subject to these rules and not to the "free trade" scenario of the CBD.

This would make the IU an important instrument to counter the privatisation of crop genetic resources and contribute to the safeguarding of public agricultural research and farmers' control over these resources.

An unacceptable IU would:

- put no restrictions on IPR and therefore allow crop germplasm – whether it is held by companies, public genebanks or farmers – to be privatised and monopolised by a handful of biotech and seed corporations; and
- cover very few crops under its rules (countries are negotiating a list of crops to which the rules of the IU would apply).

Such an Undertaking would not contribute to further sustainable plant breeding. On the contrary, it would just be another instrument that puts the logic and interests of international trade over and above the interests of small-scale farmers and agriculture.

2. THE CRUCIAL POINTS STILL UNDER DISCUSSION

There are three critical issues left to resolve: IPR (which, alone, will make or break the whole IU in November); the IU's relationship with WTO; and the list of crops that will go into the multilateral system.

➤ **IPR**

Most of the South is generally willing to provide access to genetic resources as long as the North shares the benefits it derives from them. Most of the North generally accepts this, as long as benefit sharing is based on some level of acceptance of IPR.

There are really three components of the IPR picture in the IU negotiations. First, the definition of plant genetic resources. Second, whether the parties will allow IPR on them. Third, what kind of benefit sharing system will be involved.

The benefit sharing scheme has already been agreed to. It says that when one party accesses germplasm from the system and commercialises a product developed from that germplasm, there will be a mandatory payment back to the system "except whenever such a product is available *without restriction* to others for further research and breeding". (Within five years, the parties will decide whether the mandatory payment applies in all cases of commercial use.) This rule is ambiguous. It might mean that when intellectual property rights are granted over new products, a payment has to be made. In which case, the Undertaking would promote IPR as a political basis for benefit sharing. Yet the article in question does not mention IPR, so it is unclear. The interpretation of this provision is expected to be fought over later, after the IU is adopted.

The more crucial and still very controversial part is whether and to what extent the IU will directly ban IPR, such as patents and plant breeders' rights, on material accessed through the system. Article 13.3.d states that whoever receives genetic resources from the multilateral system shall not claim any IPR on them. But this principle is surrounded by a series of (still bracketed) qualifiers which could either make this rule full and strong or partial and meaningless. The struggle is over whether the ban will apply only to the seeds as such, or whether it will extend to all genetic materials contained in the seeds, even when used to breed new varieties. The Annex explains the complications involved in the wording of this Article in detail.

➤ **WTO**

There is an Article in brackets which talks about the IU's relationship with other international agreements. On the one hand, it says that the IU will not affect the rights and obligations that the parties have contracted under any existing agreement. On the other hand, it also asserts that the IU will not be subordinate to any other international agreement. This is an internal contradiction and is especially important in the context of TRIPS. While the primary battle is about how far the IU will go in banning IPR on seeds, this Article will need to be ironed out to clearly put the IU above WTO/TRIPS.

➤ **The list**

The access and benefit sharing rules of the IU will only apply to a specific list of crops. The agreed principle is that crops which are important for food security and for which there is international interdependence in terms of plant breeding should go on

the list. Once a crop is on the list, any material from that crop will be under the rules of the system. Presently, the list is very short with many relevant crops not included, mainly due to resistance from various developing countries.

This is in part a reflection of negotiation tactics. Countries rich in biodiversity do not want to put their crops on the list before agreements are reached on other fronts – most importantly IPR. But some countries, like Colombia and Brazil, expect to gain more from bilateral deals and are hesitant to commit them to a multilateral system. These commercial considerations are therefore mixed up with legitimate fear of biopiracy. Again, progress can be made on the crops discussion once the IPR picture is cleared up.

The bottom line is that a good solution is possible for the IU. The European Union can be brought to bend on the IPR issue and agree to clearer wording that bans IPR on the materials covered by the IU. In turn, the South could offer more of its crops for inclusion in the multilateral system. Countries like the USA and Australia – which have been notoriously obstructive through the whole process – would most likely not agree to any restrictions on IPR. But they are increasingly isolated, even from their usual supporters, and should be asked to get flexible or get out.

3. TIME TO ACT

A total ban on IPR can and should be fought for. Sensitivities on the IPR issue are very high right now, be it in the immediate IU negotiating circle, the media or public opinion. Important moves are now under way at WTO to allow for greater access to patented medicines. The IU represents an important means to rebuff TRIPS in the name of food security, ultimately curtailing the reach of WTO into the farmers' fields. But the time left to achieve this is extremely short.

Several lines can be taken to help governments finalise an IU that protects and promotes food sovereignty:

- Campaign for “No IPR on Seeds”. If the Undertaking allows for IPR on genetic resources – farmers' seeds, after all – accessed through the multilateral system, there will be a serious backlash from civil society.
- Defend the text of article 13.3.d based on keeping "parts and components" in and deleting "in the form received" (see Annex). The EU might accept this if developing countries agree to put more crops on the list as a result.
- Challenge governments that do not want the IU to *leave* the negotiations.
- Point out that governments that allow or want patents on seeds are undermining food sovereignty and food security.
- Argue that a multilateral system with no IPR is a system worth having and a system worth putting crops into.
- Campaign for the supremacy of an IPR-free seed system over WTO and over any other international agreement.

The free circulation of seeds is what is at stake. If the IU fully bans IPR, the force of WTO in obliging everyone to privatise biodiversity will be neutralised. If the IU allows for IPR – or even encourages it as a benefit sharing tool – we will have a system that promotes biopiracy and privatisation. Of course, in the final negotiations there will be a lot of shades of grey between the black and the white. But those of us concerned about the future of biodiversity-rich farming must fight for free access to seed.

ANNEX

ARTICLE 13.3.D: THE “MAKE OR BREAK” ARTICLE OF THE IU

It currently reads:

[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];

Meaning:

shall not claim intellectual property or other rights: The “other rights” portion is very important. Contracts (e.g. Material Transfer Agreements) can establish monopolies over breeding materials without actually involving formally registered IPR. This is how Golden Rice was sent to IRRI for further development.

that limit facilitated access: In principle, all IPR limit access, because they are rights to prevent others from using whatever it is that is protected under the IPR.

plant genetic resources for food and agriculture: This depends on how “plant genetic resources for food and agriculture” will be defined in the Undertaking. The definition should include “parts and components”.

parts or components: If recipients cannot claim IPR on “parts or components”, that means they cannot extract a gene from a farmer’s variety and patent it. If these words are deleted, then Monsanto will be able to patent anything it accesses under the multilateral system – and we will have legalised biopiracy.

in the form received: The North wants any prohibition of IPR to be limited to materials “in the form received”. This may sound superfluous, because nothing can be protected by IPR in the form it is received from the multilateral system in so far as it would not be considered new. However, if this Article ends up saying there will be “no IPR on genetic resources, including parts and components, in the form received” that will be a contradictory compromise likely to play in favour of the North. Because it means that IPR on *modified parts and components* would be permitted. And what constitutes sufficient modification is not stated. Many industrialised countries presently grant patents on genes for simply having been isolated from a plant!

The proper solution would be to (1) keep “parts or components” in and (2) delete “in the form received”. This would effectively ban IPR on any material covered by the IU, and any derivative of such material, shared through the system. As a result, TRIPS would not apply and the WTO would lose jurisdiction over an important portion of the world’s biodiversity.