



The renegotiation of the International Undertaking on PGRFA

Some observations on the interface between the Multilateral System and IPRs

(by Genetic Resources Action International, January 2001)

Introduction

Together with an increasing number of other NGOs, GRAIN has monitored, participated in, and contributed to. the renegotiation of the International Undertaking. In June 2000, we published an article in which the negotiations towards a new Undertaking were analysed and in which several proposals were made to achieve a strong international instrument that truly benefits the sustainable and equitable conservation and management of PGRFA¹.

GRAIN remains committed to the successful conclusion of these negotiations. As the process of the renegotiation is now reaching a critical phase, we take the liberty to offer a few observations to delegations meeting at the 5th session of the IU Contact Group from 5 to 9 February.

Towards facilitated access by all

In our judgment, agreement on the design of the Multilateral System for access and benefit sharing is the key to the overall success of the renegotiation. The key to success with the Multilateral System, in turn, is agreement on the interface between IPR protection and the facilitated access mechanism envisaged.

It must be recognised that while most prospective Parties are now bound by the TRIPS agreement, national legislations have very different approaches to IPR protection of plant material. A solid majority of developing countries are striving to limit proprietary control over PGRFA as much as possible. Typically, they exclude plant varieties for patent coverage, offering instead some kind of sui generis protection for plant varieties. In some cases, Farmers Rights or broader Community Rights are being incorporated in legislation in order to balance the different rights

¹ GRAIN, 'Last chance for an open access regime?', in: 'Seedling', June 2000, Barcelona. Available at: <http://www.grain.org/publications/jun00/jun001.htm>

systems and provide for more appropriate management and use of PGRFA at the national and local levels.

Most developed countries have opted, in contrast, to maximise proprietary control over PGRFA. Most of them exercise today a combination of plant variety protection under UPOV and industrial patents on PGRFA parts and components, on breeding tools, techniques and processes, and on plants and varieties as such.

Consequently, the real challenge for the Undertaking negotiation is that it needs to design the Multilateral System to be compatible with *all* these very different national situations. Saying that facilitated access needs to take place "in accordance with applicable property regimes" (Montreux Chairman's Elements) or "be consistent with national law" (present draft) implies compatibility both with those national regimes which permit a high level of exclusive IPRs on plants, and with those which do not.

To succeed in this, we feel that the Contact Group needs to consider more in depth the following 4 points.

1. No limitations of coverage

The basis of the Multilateral System must be a mutual commitment to provide facilitated access to all material of the covered crops in a coherent fashion, regardless of whether a Party has opted for a high level of proprietary control or not. There is a need to clarify that the commitment will indeed apply to all material in the jurisdiction of each Party, whether held by public or private entities, and whether covered by IPRs or not.

Our impression is that delegations still have highly diverging understandings of how the System would operate in this respect. Some for example appear to envisage a general exemption for patented materials, so that whenever a plant breeding product would incorporate components under patent protection, facilitated access rules would cease to apply. Others seem to presuppose a mechanism of 'designation', similar to that used to identify what parts of CGIAR collections fall under the trusteeship agreement with FAO, which would allow Parties to unilaterally decide to exempt any amount of material from coverage.

Obviously, in both cases, the mutual character of the Multilateral System would be lost and there would effectively be no reliable commitments made by Parties.

Excluding patented materials from the System, while at the same time requiring biodiversity-rich countries to make their non-patented diversity condition to the 'facilitated access' rules, would be totally unfair and inequitable.

Regarding 'designation', our impression is that a false analogy is drawn between the CGIAR/FAO agreement and the Undertaking. What seems to be overlooked is that the former is a voluntary agreement by a group of private institutes to put a specific number of *ex-situ* collections under oversight of the FAO. The Undertaking will be of a entirely different character and magnitude. We are speaking about a legally binding treaty whereby governments will agree to mutually reduce barriers to PGRFA exchange on all the major food crops in their entirety. A 'designation' procedure is reasonable in the first case, but entirely unacceptable in the second, simply because it would remove the very basis of agreement, the mutual commitment.

2. No IPRs on materials received

It must be made clear that IPRs can under no circumstances be claimed by a Party or an other recipient on the materials received from the Multilateral System, including any genetic parts and components isolated from such material. It must be emphasized that if the restriction is not extended to genetic parts and components, it will be entirely ineffectual and allow unlimited privatisation of material that is being shared through the System.

Because existing intellectual property treaties, including the TRIPS agreement, do not establish any minimum standards either for novelty or inventive step in patent applications, it is important that the Undertaking clearly spell out what should apply in the Multilateral System. Present jurisprudence in some industrialised countries is extremely liberal and allows, for example, patents on genetic material without any requirement for technical intervention except the isolation of a gene with standard industry methods. This is in fact the legal background to a very large part of biopiracy cases involving PGRFA. If no safeguards are included in the Undertaking, it will in fact condone such practices and give them status of international law.

The Undertaking at the very least needs to make a unequivocal distinction between the materials received from the System, and new materials developed on the basis of those received. To the extent that a recipient adds new work to a material received, it is up to the legislation of the individual Party to decide whether IPR protection covering that new addition may be warranted. This falls outside the scope of the Undertaking. What must be regulated by the Undertaking, however, is that such protection must never extend to the material originally received, no matter whether it is left in its natural state or broken down into its genetic components. For example, if a seed sample is received, and a gene isolated, which is then incorporated into a new variety, it would be up to the individual Party whether this new variety could be the subject of an IPR, and possibly also the use of the gene in that particular context. But under no circumstances should the gene as such be covered by IPR, as it was already present in the material received.

3. Availability of IPR-protected materials

When IPRs are granted on any material of the covered crops there will be a need for special mechanisms to ensure its availability in the Multilateral System.

With UPOV-type PBR protection, availability for the purposes of the System may not be an insurmountable problem, as the protection does not extend to the genetic makeup of the varieties and there is a general, although restricted, research exemption. There may however be cases, for example in farm-based breeding, where restrictions on replanting will indirectly block research.

Patent protection, however, will in most national legislations block all research and development use without the consent of the patent holder. This is in direct contradiction with the basic access requirements of the Multilateral System. Thus there is a need for an mechanism to ensure compliance in those cases. In effect, the Undertaking must demand that Parties in some way provide a research exemption whenever patents are obtained on PGRFA covered by the System.

It can be noted that the EU, in its Directive on protection of biotechnological inventions, has provided possible models for this by introducing two types of ad hoc measures for very similar purposes. One is a general limitation in the coverage of plant and animal patents to allow on-farm reproduction of the patented organisms. The other is a provision for compulsory cross-licensing between PBR and patent holders in cases where one cannot exercise his rights without infringing those of the other.

It should perhaps also be emphasized that this in no way implies that other rights of the IPR-holder would be restricted. The right to economic compensation if and when new research results in a new commercial product would remain. But not the right to block that research, nor to block the commercialisation of its results.

4. Relation to commercial benefit sharing

The question has legitimately been raised what is the rationale for the royalty payments foreseen in 14.2.d(iv), and what is the relation between those provisions and those limiting IPRs in Article 13. Some have argued that there would be a contradiction between the two Articles.

In our view, the royalty payments should be seen as a compensation to the Multilateral System for private gains realised from commercial products developed on the basis of materials received from the System. The facilitated access offered by all Parties will be an important contribution to those commercial benefits, and some proportion should flow back to the collective providing that access.

As drafted, the royalty system is roughly proportionate to the level of IPR protection granted. It is mandatory where license payments are required on the genetic material as such (patents). It is recommended where license payments are only required on propagation material (PBR). It is zero if the product is put in the public domain or license payments waived.

The relation between this royalty system and the limits to IPRs in Article 13 is as far as we can see non-existent. What is excluded in Article 13 are IPRs on the material received from the System. What forms the basis for royalty payments in Article 14 are the IPRs granted on new materials developed on the basis of material received. As long as this distinction is upheld, we can see no interference or contradiction.

Conclusion

GRAIN remains committed to contributing to the success of the Undertaking renegotiation. We feel that the negotiation, although difficult, holds the promise of creating the first large-scale implementation of the access and benefit-sharing principles set down in the CBD. Success with the Undertaking would provide an important example for upcoming discussions of benefit-sharing in several other fields of biodiversity.

Yet, unless the fundamental concerns outlined above are fully addressed, we could not recommend any developing country to sign a revised Undertaking. Indeed, it is

doubtful whether an Undertaking failing on these points would even be in the best interest of most developed countries.

If clear lines cannot be drawn limiting the extent to which IPRs can be used in conjunction with facilitated access under the Multilateral System, the Undertaking will in fact constitute a blank check, a license for private interests to gradually appropriate public domain PGRFA, until nothing of value remains. This scenario should be equally worrisome for public research institutions and gene banks in the North as for the governments of the South.

This Paper was drawn up by Genetic Resources Action International (GRAIN) as a contribution to the negotiations on the revision of the International Undertaking on PGRFA.

GRAIN is an international NGO that promotes the sustainable management and use of agricultural biodiversity based on people's control over genetic resources and local diversity.

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