

International Treaty on Plant Genetic Resources for Food and Agriculture: Implementation Challenges for Nepal

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The first international treaty to specifically address access to genetic resources for food production entered into force in June 2004. However, due to its many ambiguities, poor countries will find it difficult to draw benefits from the Agreement or even to implement it.

The International Treaty on Plant Genetic Resources for Food and Agriculture was developed in response to alarm over the enormous difficulties associated with the access and benefit-sharing provisions espoused by the Convention on Biological Diversity (CBD). First, the CBD advocates bilateral benefit-sharing arrangements. Second, its provisions are weak on access to genetic resources for food and agriculture (PGRFA) held in *ex situ* collections such as genebanks. And third, it remains conspicuously silent on the modalities for sharing benefits arising from the commercialisation of products based those genetic resources.

The International Treaty is a first attempt to facilitate unrestricted access to PGRFA. Thirty-five food crops and twenty-nine forages are included in Annex I, which lists the genetic resources that countries agree to make available under an open-access multilateral system (MLS) established by the Treaty. The list seeks to capture those crops that are both crucial for food security and over which there is greatest interdependence amongst countries.¹

One of the Treaty's major concerns is protecting the rights of farmers and farming communities, whose contributions to maintaining global food security through the conservation, sustainable use and refinement of PGRFA are globally recognised. Further, its Article 13 provides a mechanism for sharing the benefit arising out of the use of the PGRFA through information exchange, access to and transfer of technology, and capacity-building taking into account the priority activity areas. In addition, an 'equitable' share of financial benefits arising from commercialisation must be paid to a trust fund.

On the face of it, this agreement should be a boon for a PGRFA-rich least-developed country (LDC) like Nepal. Unfortunately, the gains are likely to remain limited at best because of the flaws and difficulties contained in the Treaty itself, as well as the particular challenges faced by Nepal.

Challenges in the Treaty

For one, lack of clarity on intellectual property right (IPR) issues is a major challenge for the contracting parties to the Treaty. Its most controversial provision (Article 12.3.d) 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" (emphasis added). This provision is subject to varied and often conflicting interpretations.

The wording of the provision makes it clear that in the process of reconciling the parties' conflicting interests, the Treaty privileges the concerns of developed countries by allowing IPR protection for genetic resources accessed under the multilateral system but consequently modified. Despite the Treaty's general prohibition of rights that could limit access to PGRFA, the italicised qualification above opens the door wide to providing intellectual property protection for genetically modified genes or their sequences, even if they are obtained from the MLS. Some even argue that the Treaty has been made subordinate to the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).²

Second, despite representing 80 percent of world's calorie intake, the list of PGRFA included in the MLS is not exhaustive. It does not include some of the major food crops such as soya, sugar cane, palm oil, groundnuts, etc., thus preventing countries that are rich in such resources (particularly in South America and Southeast Asia) from taking advantage of the

system. Countries wishing to add PGRFA to the list must go through an amendment procedure, which is bound to be acrimonious given the consensus clauses contained in Article 23.3 and Article 24.2 of the Treaty. This also means that even a single country can block an amendment.³

Third, the absence of any prescribed mechanism for sharing benefits arising from commercial use of genetic materials in terms of amount, form and conditions means that there is limited leverage for PGRFA-rich developing countries to negotiate such an arrangement. Although the Treaty mentions that the benefits should primarily flow to farmers – particularly in developing countries – who 'conserve and sustainably use plant genetic resources for food and agriculture', countries are at a loss to figure out what sort of mechanism they should follow in order to realise this objective.

These difficulties emanate from flaws inherent to the Treaty itself, and will be faced by almost all developing countries. The specific challenges that a country like Nepal is likely encounter are discussed below.

Challenges in Nepal

First, Nepal has not yet acceded to the Treaty. While accession documentation requirements were reportedly completed in early 2003, the government has not made its position clear on whether or when it is going to accede. This apathy not only shows a lack of political commitment but also a dilemma arising from the conviction that due to its limited stake in the MLS, Nepal may not be able to benefit much from the Treaty.

Second, developing plant variety protection law – which seems to be one of the prerequisites for facilitating benefit-sharing under the Treaty – has become a controversial issue in many developing countries. This

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is because countries are required to strike a balance between breeders' rights and farmers' rights. Some of them inevitably fall prey to lobbying by biotechnology firms and seed giants to provide strong protection to breeders' rights. To make their case convincing, these key players threaten to withdraw their investment in agricultural research should such protection be denied.

Classic political economy theory suggests that through the consolidation of their global presence, driven by mergers and takeovers, biotechnology firms are becoming a stronger, more cohesive and organised force. Needless to say, they are in a position to exert much stronger pressure on governments (including legislators) for securing heightened protection to their 'inventions' compared to what poor, marginalised, vulnerable and unorganised farmers could do. Nepal is no exception.

Recognising the significance of the need to protect farmers' rights, the Nepalese government has opted for an effective *sui generis* system for the protection of plant varieties as mandated by the Article 27.3(b) of TRIPS Agreement. At the time of WTO accession, despite pressures from several members of the Working Party, Nepal refused to become a member of International Union for the Protection of New Varieties of Plants (UPOV). However, in the process preparing *sui generis* legislation, the government received a UPOV-style draft law prepared by a vested interest lobby. This shows that the government is often vulnerable to pressures from certain quarters. Since there is a lack of institutional memory in the government machinery, and policy-makers are in favour of non-UPOV *sui generis* legislation could be transferred elsewhere, there is a strong possibility of the government succumbing to such pressures in the future.

Third, Nepal does not have access and benefit-sharing legislation despite the fact that the country ratified the CBD in 1993 and prepared a Draft Access and Benefit-sharing Policy and Bill in 2002. While these documents leave a fair amount to be desired due to the loopholes they contain, delay in their implementation or enactment shows a lack of political will on the part of the government.

Fourth, concerned officials at the Ministry of Agriculture and Co-operatives feel that countries with limited technological capacity will not be able to utilise the resources, which are in the common pool (MLS) comprising crops or crop groups.

Despite these challenges, the Treaty can be considered a humble attempt to strike a balance between the donors and users of plant genetic resources for food and agriculture. It is more specific in some respects than the CBD, but its policies are still too broad and lack practicality. It does, however, provide a platform on which a detailed international policy framework regarding access and benefit-sharing related to PGRFA can be built. And, since the Treaty is still evolving, it offers developing countries, acting collectively, a chance to overcome some of its birth defects. At the same time, the domestic implementation challenges could be overcome by emphasising the needs for capacity-building for negotiators and government agencies, taking into account local community perspectives; data collection; accessibility and dissemination of information; and involvement of the private sector as well as civil society organisations.

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ENDNOTES

¹ Grain and Kalpavriksh (2002), *International Treaty on Plant Genetic Resources for Food and Agriculture: A Challenge for Asia*, Delhi: Kalpavriksh.

² See for example, Hasan, Rizwana (2004), *ITPGRFA and Protection of Farmers' Rights*, Policy Brief No. 9, Kathmandu: South Asia Watch on Trade, Economics & Environment (SAWTEE).

³ See Grain and Kalpavriksh (2003), *Supra* note 1.

Biodiversity Meet Squares off on Agricultural Subsidies

Meeting in Bangkok in February, scientific and technical advisors to the Convention on Biological Diversity (CBD) clashed on what constitutes a 'perverse incentive' that encourages biodiversity loss. At issue was a paper called *Proposals for the Application of Ways and Means to Remove or Mitigate Perverse Incentives*, based on a 2003 CBD Secretariat document originally intended to assist countries in removing perverse incentives on a voluntary basis, such as land-use policies that encourage the reclaiming of wetlands. The item has been taken over by a political agenda that equates the term 'perverse incentives' with 'agricultural subsidies'. Argentina and New Zealand, often supported by Australia, South Africa and/or Brazil, viewed this item as an opportunity to get other countries to change their agricultural subsidy programmes, to the dismay of the Europeans. A contact group was formed to discuss the definition of perverse incentives, but quickly got bogged down in differences over the meaning of the term 'practices which generate perverse incentives'. In the end, these terms remained undecided, and the heavily bracketed draft document was forwarded to the CBD's Conference of the Parties, which will decide on the next steps.

A heated discussion also took place between the proponents and opponents of repealing the CBD's 1998 moratorium on 'genetic use restriction technologies' (GURTS), more familiarly known as 'terminator technologies' because they render seeds sterile. Critics – including several African countries, Austria, Switzerland, Peru and the Philippines – warned that GURTS could compromise the ability of farmers and indigenous peoples to reuse their seeds, and raised concerns over impacts on agricultural biodiversity and the possibility of 'terminator genes' being transferred to wild plants. Advocates, led by Canada, argued that adverse environmental and social effects of the technology had not yet been confirmed and should be subject to strict risk assessments. They also pointed out that risks to non-modified crops and wild species were reduced given that the seed would not grow a second time. Unable to reach consensus, delegates retained the moratorium for the time being and sent the controversial report from the CBD's Ad-hoc Technical Expert Group on GURTS to the Conference of the Parties and to the Working Group on Article 8(j) (traditional knowledge).

A Strategy for 'Bridging' Three Continents

In an era of ever-increasing information flows, tools to help manage and synthesise knowledge have become of prime importance. Stemming from its mission to empower stakeholders in trade policy-making, ICTSD has continued to strengthen its alliances with regional institutions in Africa, Latin America and Asia to create and disseminate information and knowledge through a series of *Bridges*-like publications strategically targeted to the specific needs of the stakeholders in each of these regions.

Recognising the enormous challenges faced by francophone Africa and Latin America, ICTSD came together with Enda – Tiers Monde in Senegal, the Centro Internacional de Política Económica para el Desarrollo Sostenible (CINPE) in Costa Rica, and the Fundação Getulio Vargas and the Centro Brasileiro de Relações Internacionais (CEBRI) in Brazil, to provide a series of publications designed – in terms of language, focus and issue coverage – with specific constituencies in mind. In French, Spanish and Portuguese, *Passerelles*, *Puentes* and *Pontes* seek to highlight sustainable development concerns in trade policy formulation and negotiations, to generate innovative thinking, and to fill significant knowledge and information gaps for regional stakeholders. Although they share the principles and general objectives of *Bridges*, the contents and editorial focus are specifically directed at, and produced by, stakeholders in each region. As a complement to *Passerelles*, *Puentes* and *Pontes*, web portals on trade and sustainable development issues in the three the languages will be available in the near future.

Puentes

Produced with a Latin American audience in mind, *Puentes* focuses on the presentation of issues discussed at the multilateral and regional/bilateral trade arenas of special interest to the region, as well as providing a space for communication and the sharing of ideas among different stakeholders. Starting out as a quarterly, *Puentes* is moving toward publication of its analytical content every other month. Furthermore, a new electronic information service called *Puentes Quincenal* has been developed to provide news updates on a bi-weekly basis. Both *Puentes* publications are co-produced by ICTSD and CINPE.

Passerelles

Passerelles is specifically tailored to respond to the needs of French-speaking African stakeholders. It consists of three specific products: a bimonthly analytical publication, a bi-weekly electronic news and information service, and daily coverage of the WTO ministerial meetings. All of these products are co-published by ICTSD and Enda. In addition to analysis and information on developments relevant to Africa at the WTO, including those related to the Cotton Initiative and special and differential treatment, *Passerelles* provides regular coverage of regional developments related to trade and sustainable development including the AGOA and the ACP-EU EPA negotiations, among others. The publication series has become the first stop for trade and sustainable development news in French-speaking Africa.

Pontes

Recognising Brazil's growing importance as a driving force in regional and multilateral fora, and the responsibilities that come with this role, a similar series has been launched in Portuguese. The main objective of *Pontes* is to generate the necessary knowledge to constitute a firm basis for broad and informed stakeholder participation in Brazil. A pilot issue was published in August, and plans are afoot to develop a bi-weekly electronic information service shortly.

Bridges Asia

The latest addition to this series of information tools is the forthcoming pilot issue of *Bridges Asia*, published out of Bangkok in collaboration with Chulalongkorn University and the Stockholm Environment Institute-Asia. The plan is to move on to a monthly production schedule for a publication that looks at trade and sustainable development issues through an Asian prism, focusing on regional trade negotiations as well as those at the multilateral level. *Bridges Asia* will eventually be translated into Bahasa Indonesia, Chinese, Thai and Vietnamese, and will be distributed to key government officials and other actors in academia, the private sector and civil society. A bi-weekly electronic news service is also planned.

The International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit organisation that aims to contribute to a better understanding of development and environmental concerns in the context of international trade.

ICTSD upholds sustainable development as the goal of international trade and promotes participatory decision-making in the design of trade policy. ICTSD implements its information, dialogue and research programmes through partnerships with institutions around the globe.

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