

The International Treaty on Plant Genetic Resources for Food and Agriculture – sometimes called the ‘seed treaty’ – was adopted by UN Food and Agriculture (FAO) member states in 2001 and came into force in 2004. Governments that signed on are now working out implementation details. Far from its roots in the struggle to assert farmers’ rights as a counterforce to breeders’ rights, the Treaty has ended up being mainly about granting new privileges to industry. It will give seed companies free access to most of the world’s public genebanks without any obligation to share their own materials in return.

The FAO seed treaty

From farmers’ rights to breeders’ privileges

GRAIN

How farmers stand to be affected by the new FAO ‘seed treaty’ is a question on the minds of numerous groups around the world today. When governments started talking about “farmers’ rights” in relation to seeds at the FAO some 25 years ago, the key issues driving the debate were the rapid extinction of farmers’ seeds, often called genetic erosion, and the increasing privatisation of the planting material for the world’s food supply through patents and plant breeders’ rights. Over the stormy debates, governments came to a consensus that farmers should be recognised for their historic and ongoing role as developers of the incredible diversity of potatoes, tomatoes, barley, maize and bananas that plant breeders rely on today. In practical terms, this meant safeguarding the rights of farmers to work with, and live from, farming systems based on diversity, in the face of expanding monocultures and uniform seeds. It also meant trying to channel some of the profits of the seed industry into conservation of the resource base that it exploits.

During the eight-year negotiation of the Treaty, both of these issues remained on the table. But in the final text, only some poetic language about farmers’ rights remains, without any real obligations. The drafting went from a strong commitment to farmers’ rights as “the right to use, exchange, and in the case of landraces and varieties that are no longer registered, market farm-saved seed” to merely saying that the Treaty will not take away those rights in countries where farmers still have them. The idea of getting industry to share benefits with farming communities fared only slightly better. The final language is a weak phrase that says benefits should flow “primarily, directly and indirectly” to farmers. To dispel any remaining doubts, a provision was added to state that the responsibility for realising farmers’ rights rests with national governments. In other words, if governments feel like it and if their patent or plant variety rights laws don’t already preclude it. In many countries, seeds marketing regulations and implementation of the World Trade Organisation rules on intellectual property make it illegal, if not



highly difficult, for farmers to use, exchange and market farm-saved seed.

This does not mean that all discussion on farmers' rights is dead and buried at the FAO. The Treaty's Governing Body, which meets for the first time in 2006, could decide to look into how national governments are dealing with it. But to be realistic, things will not go further. The Treaty in its final form is not intended to further farmers' rights.

The biased rules of the game

As governments now start wrestling with how to implement the Treaty, in preparation for the first meeting of the Governing Body in June 2006,

just how little this system will support farmers – especially farmer breeders – is becoming increasingly evident.

The main issues being looked into are the nitty-gritty of how to facilitate access to the genetic materials in the system and the drafting of a standard material transfer agreement (MTA) that has to faithfully respect all the rights and obligations outlined in the Treaty. The implications for farmers stem from key principles of the Treaty itself (see box). It is obvious that this system is turning into a dream come true for the corporate seed industry, led by such giants as Monsanto, Syngenta, Dupont and Bayer. These companies get guaranteed access to all the material in the system, most of which came from farmers. They are free to use any material from the system to develop commercial products and make as much profit as they can on them without any obligation to pay back, on the only condition that others can use their final, commercialised products for further breeding. At the same time, they never have to share any of their own materials, except the finished varieties they put on the market. They keep exclusive control over “material under development”, their private collections (regardless of origin), discarded rejects from the breeding process and everything else. Compare this with the detailed requirements imposed on the CGIAR centres which join the system. They are explicitly required to make their own materials available in order to join, and they must even allow the secretary of the Treaty to inspect their facilities at any time.

The treatment of the seed industry makes a complete mockery of the notion of benefit sharing. The main benefits to be shared in the Treaty are access to genetic resources for food and agriculture and a portion of the monetary gains. Yet the industry has no obligation to provide either, so benefits will only flow in one direction. Farming communities all over the world will continue to carry the responsibility of sustaining the genetic diversity of crop plants, without sufficient rights or recognition. And governments will continue to bear the cost of genebanks. Seed companies, according to the Treaty, will be able to order what it needs at “minimal cost” and demand it delivered “expeditiously”.

And as materials from their working collections and breeding processes become obsolete, they can donate them to government genebanks for safekeeping and save themselves that cost (common practice already) while tactically hanging on to anything that could potentially be of future interest

The main thrust of the Treaty

The FAO Treaty is basically an agreement on how to implement the access and benefit-sharing rules of the Convention on Biological Diversity (CBD) in the field of food and agriculture. Under the CBD, nation states have the sovereign right to control all access to biodiversity within their jurisdiction, and to get a share of the benefits generated from the biodiversity they have granted access to. This means that governments have to negotiate individual bilateral contracts for each and every transaction, including the exact rate and form of benefit-sharing. This model is a catastrophe not only because it promotes the wholesale commodification of resources previously shared within and among communities or in the public domain, but also because it does not work. Privatisation through intellectual property rights is the only result. Benefit-sharing is not happening.¹

The FAO Treaty takes a different approach. The idea is that parties to the agreement can use their national sovereignty not to individually regulate every transfer of genetic material, but jointly create a multilateral system that gives everyone access on equal terms to the whole set of resources covered. This has two advantages. First, it recognises that access itself is the main benefit to be shared, and aims to facilitate it rather than limit it by exclusive contracts and patents. Second, any monetary benefits generated through the system are to be pooled and used to support conservation and sustainable use efforts, rather than enrich any single provider.

But by the time governments finished negotiating the Treaty, the original plan had been severely crippled by the same forces that made the CBD a vehicle for commodification instead of conservation. On the one side, developed country governments fiercely resisted anything that would limit the right of corporations to continue privatising genetic resources, in particular their right to patent them. On the other side, a number of developing countries were equally eager to limit the scope and coverage of the Treaty in order to preserve their perceived business opportunities as providers of individual genes on the global market.

What remains is very far from a generalised system of mutual access to all plant genetic resources for food and agriculture, contrary to the rhetoric flowing from FAO and many governments. But it does provide an alternative route to CBD implementation that doesn't lock all international seed exchanges into a tangle of bilateral contracts.

¹For a detailed account of why, see the recent GRAIN analysis in *Seedling*, April 2005, “Re-situating the benefits from biodiversity”. Available online at www.grain.org/seedling/?id=327



to themselves or useful for their competitors. Altogether, this constitutes not benefit sharing but a massive subsidy to the global seed industry both from farmers and from taxpayers.

The implementation discussions

The implementation discussions now underway will not change any of this. There is a provision in the Treaty which says that any changes to the Treaty text must be decided by consensus, which means that for all practical purposes, the text is written in stone and will not change.

Nonetheless, some of the implementation issues are important. Most attention has been focused on the drafting of the standard MTA. This is the contract between the provider and the recipient of a seed sample, in which the recipient promises to respect the conditions of use laid down in the Treaty. A first draft of this MTA was discussed between member governments in a small closed “contact group” in Tunisia in July 2005. No observers were allowed, although the seed industry sent several representatives as participants in European government delegations. The group is scheduled to meet again in April 2006 in order for the final draft MTA text to be adopted by the first meeting of the Governing Body in June.

The hottest issue in the MTA discussion concerns the exact level and calculation of the mandatory payment to be applied on patented products. The Treaty only says that the level should be “in line with commercial practice”. This is not very helpful, since commercial practice is to always charge whatever you can get away with and this varies widely from country to country. The FAO has commissioned a background study which establishes that much. Industrialised countries predictably want to calculate a low percentage on the basis of net sales, while developing countries want it to be a high percentage on the basis of gross sales. The result will probably end up somewhere in the middle.

Another issue is what to do in the case of disputes. Formally, the MTA is a business contract between two legal persons. What happens if there is disagreement between them? Say Syngenta takes out a patent on some Laotian rice germplasm it got from the International Rice Research Institute despite the interdiction in the MTA. The default option is that the parties go to court to resolve it. An alternative is to offer a dispute resolution mechanism inside the Treaty itself. This was discussed in depth at the July meeting.

Nuts and bolts of the Treaty

The Treaty only covers a limited list of crops. It does include most of the major food crops, but it excludes many minor food crops and forages important to tropical regions.

- Access will only be facilitated for conservation, research and breeding. And access only applies to food and feed uses of a crop, not to industrial or other uses, probably not even fibre use.
- Access will only be provided to materials held by government institutions or in the public domain, plus most of the materials held by the research centers of the Consultative Groups on International Agricultural Research if they decide to join (most of them likely will). No private holders, be they corporations like Monsanto or individual farmers, are obliged to provide access to their seed collections.
- Materials held under *in situ* conditions, such as crops in the field or wild materials in the forests, are excluded from the scope of the Treaty. This means that governments remain free to regulate access under their own national legislation.
- Also excluded from the Treaty are materials considered “under development”.

In terms of rights and obligations, the biases toward the seed industry become quite pronounced:

- Even though they have no obligation to *provide* access, private companies (as well as individuals) have unlimited rights to *get* access to the materials in the system.
- While recipients of plant samples are *not* allowed to patent any part of the material they receive from the system “in the form received”, they *are* allowed to do so when it is no longer in that same form. Some governments have already made clear that a very minimal technical intervention, such as isolating a gene from a seed sample, is all that is needed for the material to be perfectly patentable under the terms of the Treaty, even though the gene was there from the beginning.
- Monetary benefit-sharing must occur when a product incorporating material from the system – a new plant variety, for example – is commercialised. But it is only mandatory for products that are not considered “available without restriction to others for further research and breeding”. This means there is no mandatory benefit-sharing from the marketing of varieties held under plant breeders’ rights schemes, like that of the Union for the Protection of New Plant Varieties. Only patented materials, and possibly hybrids or similar seeds for which the breeding lines are kept proprietary, will be considered triggers of benefit sharing. Some European governments even claim that *European* patents should not trigger benefit-sharing because the European Union’s life patenting directive opens the door to compulsory licensing. In other words, since compulsory licenses on patented seeds are now a possibility, this would theoretically make all seeds patented in Europe “available without restriction” and therefore excluded from the benefit sharing scheme.



What about farmers?

While the implementation discussions have gone into great detail in matters like this, mesmerised by the legal and economic consequences for governments and private companies, there is virtually no discussion of the effects on farmers. What will the Treaty mean in practice if a farmer breeder, a seed saver group or a community seed security initiative want to access genebank materials? What does it hold in store for their own collections? Is there a risk that zero action on farmers' rights, which the Treaty leaves to the whim of governments, will also translate into further restricted access for farmers?

Judging from experience, the importance of the Treaty should probably not be overestimated in these respects. The history of FAO's seeds work shows that national governments rarely have allowed themselves to be much influenced by international instruments. Practical experience also indicates that the relations between the formal genebank system and the informal breeding and seed-saving sector vary enormously both between countries and over time. There are examples of very friendly cooperation as well as of direct conflict. Sometimes these experiences stem from political issues or a lack of any legal recognition of farmers' rights, but simple things like personal relations have also been known to come into play. So it is very difficult to say anything general either about the present situation or how it might change due to the Treaty.

But taking the text as it stands, the following observations can be made:

- Communities, associations and individual farmers, have the right to request seed samples from the system, just like corporations, as long as they are in the jurisdiction of a government that is a party to the Treaty.
- There is no obligation for the seed collections held by seed savers networks, community-based initiatives or individual farmer-breeders to provide materials to this new system. Again, these people have the same status as the seed companies.
- Individuals or private organisations involved in selection and breeding work are not obligated

to put material "under development" into the system. This is one of the few places in the Treaty where farmers are explicitly mentioned. However, the provision regarding *in situ* material partly contradicts this, as it recognises a right of governments to regulate access to *in situ* materials under national legislation. Farmer breeding usually take place in the field, so the materials are both *in situ* and under development. This is a possible point of conflict where national governments could try to use the Treaty to restrict farmers' rights.

- Because there is no right of access for direct use – only for conservation, research and breeding – both farmers and scientists have questioned whether this will become a new restriction on access. A reasonable interpretation is that this should not be a problem. When someone accesses material from a collection, it is almost never for direct use without passing through some form of conservation, research or breeding. Access always means getting a small sample of seeds. These seeds have to be multiplied and the plants are almost invariably evaluated and/or selected in the process. This could be considered research or breeding already. But if a genebank is looking for a reason to restrict access, this clause could provide it.

Overall, the conclusion is that implementation of the Treaty will probably change very little at all for farm-based breeding. It will more significantly give guaranteed access to corporations, who will probably not share much in return but get private property rights over the results. 2

Going further

- All official documents regarding the Treaty are on the FAO website at www.fao.org/ag/cgrfa, including the report from the latest meeting in Tunisia in July 2005.
- For a good introduction to the Treaty, including negotiation history, see David Cooper (2002), "The International Treaty of Plant Genetic Resources for Food and Agriculture", *RECIEL* 11 (1).
- GRAIN's baseline analysis of the Treaty remains unchanged from the day it was adopted. See our *Seedling* editorial of December 2001, "A Disappointing Compromise", available at www.grain.org/seedling/?id=174.

