

Convention on Plant Genetic Resources Adopted

On 3 November, the FAO Conference finally adopted the revised International Undertaking – now International Convention – on Plant Genetic Resources for Food and Agriculture after seven years of difficult negotiations. The new Convention is the first binding international instrument to deal specifically with the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA); for background, see *The International Undertaking on Plant Genetic Resources in the Context of TRIPs and the CBD* by Robert Lettington in Bridges Year 5 No.6, page 11).

The purpose of the revision of the International Undertaking was to harmonise it with the UN Convention on Biodiversity (CBD). In its original form as a non-binding agreement, dating from 1983, the IU was based on the principle that PGRFA should be ‘preserved [...] and freely available for use, for the benefit of present and future generations’ as part of the common ‘heritage of mankind’. The CBD requires that commercial benefits arising from the use of genetic resources be shared with those who have conserved them.

Agreement on IPRs Despite US and Japan Opposition

One of the most contentious final points of the revision related to Provision 13.3(b) of the agreement, i.e. whether ‘genetic parts and components’ received from the Multilateral System (MS) should be patentable (the MS refers to a system for established under the Convention to facilitate access and benefit-sharing). The adopted text provides that ‘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 and components, in the form received from the Multilateral System’. Japan and the US opposed this formulation and consequently abstained from the final vote. The US noted in a statement during the final plenary that it would be unable to ratify the Convention due to the restrictions it places on innovations. Some observers have questioned the treaty’s usefulness if the US – as one of the key countries involved in plant breeding and genetic engineering – is not bound by its provisions.

Canada and Japan also expressed concerns regarding the consistency between the IC and the WTO’s TRIPs Agreement and in particular its Article 27.3(b), which requires Members to grant patents on micro-organisms and non-biological and micro-biological processes, and to establish some kind of intellectual property protection for plant varieties. Some observers noted that the IC might provide an important precedent for the unresolved discussions on the review of Article 27.3(b) at the WTO.

Another overlapping area concerns the IC provisions on benefit-sharing, which provide for monetary contributions derived from the commercialisation of products developed from PGRFA accessed under the MS. The payment is mandatory when the commercialisation of the product restricts the product’s availability for use in further research and breeding, and voluntary when the product is freely available for such purposes. While the IC does not explicitly discriminate between IPR holders – who are by definition conferred exclusive rights under TRIPs – and others, some observers speculate that it does so in practice due to the different rules for products available for further research and breeding and those that are not. Depending on how governments incorporate the IC’s provisions into their IPR regulations, they might be challenged in the WTO on the basis that they violate TRIPs obligations under Articles 27.1 and 29 by imposing additional conditions for IPR protection.

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Schemes where governments guarantee to buy credits irrespective of outcomes might be considered a form of subsidy, or risk underwriting, since the associated costs are not borne by the entities that undertake the projects. The question arises as to whether such purchases are bound by the WTO Agreement on Government Procurement. Further, the purchase by a government of credits from its national entities at a price higher than the prevailing market price could be viewed as a form of subsidy.

The European Commission’s revised guidelines on state aid for environmental protection spell out in detail the criteria for determining whether aid is compatible with the Common Market. The guidelines cover measures such as energy tax reductions to certain sectors, transitional investment aid for SMEs to adapt to new standards, investment in renewable energy, energy efficiency and combined heat and power, waste management, etc. The EC Treaty also identifies criteria for determining when state aid is not compatible. These regulations have been extended to cover all EFTA states. The EU enlargement policy also requires candidate countries to adopt state aid and competition legislation similar to that in place in the EU.

Within the EU, where state aid scrutiny applies also to JI and CDM projects receiving government assistance, a controversial case has already arisen: a Dutch bus manufacturer embarked on an AIJ pilot project with Peru, under which financial assistance from the Dutch government was accorded to replace 15 local buses with higher efficiency Dutch ones. Concerned that the environmental benefits of the AIJ project are not sufficient to justify the advantages gained in terms the Dutch company’s penetration of the Peruvian market as compared to European competitors, the European Commission has opened a procedure on the matter.

In general, the credits earned by private sector entities that engage in CDM projects could be expected to lead to an heightened WTO scrutiny of tariff, non-tariff and investment barriers to trade between developed and developing (host) countries in the relevant environmental services and goods.

A Co-ordinated Approach?

In general, the flexibility mechanisms will mitigate competitiveness effects since they lower the cost of compliance with targets. However, specific design issues are key to ensuring that the system generates these benefits. In developing the architecture of an EU-wide scheme, efforts have been made to implement climate change policies while maintaining fair competition among EU members.

It remains to be seen whether this approach will be mirrored in international negotiations on climate change, as governments further elaborate the functioning of the flexibility mechanisms. If a coordinated approach is not followed, instead countries will seek to achieve their targets without a ‘competitiveness rulebook’ in ways that are least costly to their export industries. Such a scenario would be more likely to lead to action under the WTO on the grounds of unfair support. However, countries must first ratify the Protocol, with or without the United States. But will they do so without guarantees that the playing field will remain level?

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¹ See papers at <http://europa.eu.int/comm/environment/climat/eccp.htm>