Moving forward with the International Undertaking: legal mechanisms to alleviate mistrust

Susan H. Bragdon

Abstract

The International Undertaking (IU) – a non-binding intergovernmental agreement to promote the conservation, exchange and utilization of plant genetic resources – was conceived in controversy during meetings held by the Food and Agriculture Organization (FAO) between 1981 and 1983. The acrimony and distrust that characterized those discussions, and indeed much of the history of germplasm development and exchange, continues to influence the negotiations to revise the IU to bring it in harmony with the Convention on Biological Diversity (CBD). The issues of scope, access and benefit-sharing have been particularly divisive. The critical issues are so inter-related that it is difficult for parties to make progress on one when uncertainty exists on the resolution of the others.

Mistrust can be a serious stumbling block to reaching agreement. With time running short before the self-imposed deadline of completing the negotiating process in 2000, it is important for the parties to explore ways to signal their willingness and ability to foster trust. This paper explores legal mechanisms that may help parties overcome the barriers that cause them to act with suspicion. Specifically the paper explores resolutions, memoranda of understanding, letters of intent, and traditional and emerging diplomatic mechanisms. An evaluation of these tools and experience shows that there can be value in: (1) disaggregating specific elements of negotiation, (2) identifying common interests and principles that will govern and/or have to be incorporated into the final agreement, and (3) establishing a process whereby it is politically difficult to ignore the outcome and recommendations. The paper concludes by suggesting the negotiators may wish to consider various alternatives for moving forward including: (1) separating the benefit-sharing issue and addressing it during the negotiating process through a unilateral letter of intent, (2) signing a mutual letter of intent or memorandum of understanding outlining the intentions of the parties or relevant groupings of parties on controversial issues, or (3) signing a letter of intent or memorandum of understanding that separates controversial issues and establishes a process by which they will be resolved.

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Comments and queries on the contents of this paper are welcome and should be addressed to:
Volume Editor: Jan Engels <J.Engels@cgiar.org>
Genetic Resources Science and Technology (GRST)
IPGRI, Via delle Sette Chiese 142, 00145 Rome, Italy
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IPGRI
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I. Background

A. Historical relevance: underlying issues in the revision of the International Undertaking

The International Undertaking (IU) – a non-binding intergovernmental agreement to promote the conservation, exchange and utilization of plant genetic resources – was conceived in controversy during meetings held by the Food and Agriculture Organization (FAO) between 1981 and 1983. During these meetings, developed and developing country governments debated the ownership and control of plant germplasm in a highly politicized environment concerned with Plant Breeders’ Rights, genebank safety, the management of genetic resources flows by the International Board for Plant Genetic Resources (IBPGR, the forerunner to International Plant Genetic Resources Institute, IPGRI), and national germplasm embargoes. The acrimony and distrust that characterized those discussions, and indeed much of the history of germplasm development and exchange, continues to influence the negotiations to revise the IU to bring it in harmony with the Convention on Biological Diversity (CBD).

The issues of scope, access and benefit-sharing have been particularly divisive. Benefit-sharing issues currently dominate the negotiations. Discussions regarding mechanisms, formulas, including efforts to proportion the contribution and benefits from germplasm exchange and plant breeding, have left all sides uncertain and frustrated. The critical issues are so inter-related that it is difficult for parties to make progress on one when uncertainty exists on the resolution of the others. This is exacerbated by the inequities that characterize the relations between the negotiating parties and the lack of a firm foundation for cooperation.

B. A legal perspective

In many ways negotiation is a laboratory for building relationships among parties. An important part of these relationships is a party’s understanding of the degree of trust it can have in other parties or in blocs of parties sharing similar interests. Mistrust can be a serious stumbling block to reaching agreement. The history of inequity in the sharing of benefits derived from the exchange, use and development of plant genetic resources of relevance for food and agriculture (PGRFA) has slowed progress in reaching agreement on a revised IU. The development of personal relationships amongst the parties through an informal contact group is an important step in building trust. With time running short before the self-imposed deadline of completing the negotiating process in 2000, it is important for the parties to explore ways to signal their willingness and ability to foster trust. This paper explores legal mechanisms that may help parties overcome the barriers that cause them to act with suspicion. These are mechanisms that may be used prior to reaching formal agreement precisely to enable parties to proceed to concluding an agreement. By dispelling mistrust, the goal of these mechanisms is to enable parties to choose the more optimal solution of an agreement negotiated on the basis of mutual understanding and cooperation. Ultimately, these qualities must underpin a successfully functioning revised IU.

This paper first explores resolutions, a traditional international legal mechanism by which parties can express their intention short of a legally binding agreement. Next, the paper examines potentially analogous mechanisms from the commercial law context. One of these, the memorandum of understanding, has already
been adapted by the Secretariat for the CBD. Another, the letter of intent, will be analyzed for potential relevance to promoting trust in the international multilateral context. The paper will then look at traditional and emerging diplomatic mechanisms to resolve disputes characterized by suspicion and mistrust for their possible relevance to the negotiations to revise the IU. These mechanisms tend to be process-oriented. The paper concludes with a section outlining the possible relevance of the mechanisms discussed to helping to build trust amongst the negotiators revising the IU.

II. International legal mechanisms: Resolutions

Resolutions are statements made by parties to a negotiation or agreement. While technically not legally binding, resolutions can carry considerable weight and in some cases are treated in a very legalistic way. Examples from the CBD and the Convention on International Trade in Endangered Species (CITES) provide good illustrations of how resolutions can be used, interpreted and relied upon.

When the parties negotiating the CBD concluded the agreement they wanted to ensure that momentum was not lost in the period after its conclusion but prior to its entry into force. Consequently, they passed several resolutions setting out action that was to take place in the interim period, including a request that issues of relevance to PGRFA be addressed under the auspices of the FAO Commission. The Commission referred to this language in its decisions to move forward on the revision of the IU. The Conference of the Parties to the CBD (COP) also has relied on this language and Commission decisions quoting it to support the division of responsibilities as set out by the original negotiators to the CBD.

The passage and use of resolutions by the CITES COP has evolved into a quasi-legal process. Species listings are authorized in the treaty itself and are a legal requirement albeit one in which a party can take a reservation. The listing criteria, however, were passed by resolution and are revised from time to time by the COP. The COP, however, refer to these criteria, citing and quoting them frequently in their decisions and actions. The whole culture surrounding the discussion and use of the criteria is very legalistic. In fact, the COP cites, interprets and applies the criteria in the resolution no differently than one would expect of a resolution with the force of law.
III. Commercial law: Memoranda of Understanding and Letters of Intent

Memoranda of Understanding are non-legally binding statements reflecting the parties’ mutual understanding of their relationship to one another with regard to the subject matter of the memorandum. The Secretariat for the CBD has signed Memoranda of Understanding with nine international organizations including the Secretariats for CITES, the Convention on Wetlands of International Importance (the Ramsar Convention) and the Convention on Migratory Species (CMS) outlining how they will work together on issues of mutual interest.¹

A letter of intent can be a general agreement to negotiate in good faith but still contain certain legally binding provisions (e.g., “Notwithstanding the foregoing sections, section X, Y and Z shall constitute a legally binding agreement.”). These may be, for example, exclusivity provisions (e.g., a provision preventing a seller from talking about a potential deal for a period of time), confidentiality provisions, providing for a break-up fee if a party does not proceed with the deal, or a sunset clause. Letters of intent are most commonly used in business transactions such as venture capital investments in start-up companies, proposed mergers and construction deals.

The lack of enforcement mechanisms can limit the usefulness of commercial law analogies to the IU context. Nevertheless, as has been seen with the use of resolutions in the CITES context, non-legally binding mechanisms can create a process whereby it is difficult to opt out. Likewise, the use of a letter of intent in the IU context would have to rely on non-legal deterrents (such as damage to reputation and political costs in this and other arenas) for its effectiveness.

¹ Communication from Dan Ogolla, Legal Advisor, Secretariat for the CBD, 8 March 2000.
IV. Diplomatic mechanisms for dispute resolution

Diplomatic means of resolving disputes characterized by a history of mistrust present useful lessons into how mistrust can be overcome to get parties to move (perhaps slowly) toward agreement. The peace process in Northern Ireland and the handling of environmental degradation and potential dispute over the resources of the Aral Sea after the break-up of the Soviet Union provide useful insight into means by which parties can be brought to and kept at the negotiating table.²

A. Northern Ireland

The situation in Northern Ireland represents a protracted and often violent political dispute requiring resolution. Nevertheless, the EU and Northern Ireland share certain key attributes including: (1) the need to bring parties with high levels of mistrust together to reach agreement, (2) a growing understanding of the need for and value of cooperation, (3) issues involving domestic sovereignty, and (4) the need to ensure that responsibility and power are shared in new institutions or mechanisms.

Over a period of 15 years, British and Irish officials worked together to create a series of joint agreements, declarations and initiatives that set up the structure of the negotiations and identified the fundamental principles upon which the conflict could be resolved. Building on these efforts, it was ultimately the intervention of an international body led by former US Senator George Mitchell that succeeded in reaching agreement in April 1998. Throughout this process, progress was often followed by serious setbacks just as is currently being seen with implementation of the agreement itself. Nevertheless, certain key features reveal themselves as having been important mechanisms in reaching agreement. These include the willingness to include all relevant parties, the ability to disaggregate controversial issues, the creation of new institutions with credibility, and the ability to identify and agree on the fundamental principles upon which the ultimate agreement would be based.

In February 1995, the British and Irish governments agreed upon A New Framework for Agreement, more commonly referred to as the Joint Framework Document. The Joint Framework Document set out a shared understanding of the parameters of the possible outcome, impetus and direction of the process. It also identified the fundamental principles that had to be incorporated into the ultimate resolution including self-determination, democracy and non-violence. The Joint Framework Document, however, did not establish a solid foundation on which all-inclusive political talks could be based. The political parties of Northern Ireland had never experienced face-to-face negotiations. Furthermore, obstacles to negotiations needed to be addressed before the parties would even consider negotiating. The most pressing of these was the decommissioning of the stockpiles of weapons held by Northern Ireland’s paramilitaries.

Moving forward required severing the decommissioning issue from the pre-negotiating discussions on the basis, participation, structure and agenda of the negotiating process. The decommissioning of weapons was separated from other matters.

ters by establishing an International Body on Decommissioning to provide an independent assessment of the issue. The International Body, headed by George Mitchell, was structured as a traditional consultative body without authority to impose its views on the parties. The International Body had the authority to create its own procedures but it was to meet with relevant parties to elicit their views on decommissioning. The International Body also recognized the need to insulate the negotiations from violence. It therefore recommended that all parties affirm their commitment to six principles of democracy and non-violence (subsequently known as “The Mitchell Principles”).

While the creation of the International Body was followed by some of the most serious set-backs in the 15-year period, it was ultimately on its report that the new Labour Government of Tony Blair and the Irish Government based their joint paper expressing their position on decommissioning. It was this paper that led to substantive progress on the issue.

The Agreement ultimately reached in April 1998 (often referred to as “The Good Friday Agreement”) certainly does not mark the end of the peace process. Ultimately, if implementation of the Agreement and the peace process are to be successful the parties to the conflict will need to develop working relationships based on trust and mutual respect.

B. The Aral Sea Basin
Under the Soviet Union the fate of the Aral Sea Basin and its water was a matter of domestic concern. With the collapse of the Soviet Union, the Aral Sea Basin was suddenly controlled by five newly independent states with varying claims on the water. The experience of these five states yields valuable information for the parties to the IU on mechanisms to build new regimes for resources allocation.

Shortly after the collapse of the Soviet Union, the five ministers of water management signed an agreement of “Cooperation in the Management, Utilization and Protection of Interstate Sources.” The Agreement commits the five states “to refrain from any activities within their respective territories which, entailing a deviation from the agreed water shares or bringing about water pollution, are likely to affect the interests of, and cause damage to the co-basin states” (Article 3). The uncertainty of the transition period and in particular the fear of what would happen without a central authority in the Soviet Union provided the impetus for agreement. But cooperation lasted beyond this initial period. The states involved did not have the legal or institutional basis for international cooperation and it was the intervention of the World Bank and other intergovernmental organizations, including UNEP, that provided this foundation.

Because of the sweeping nature of the changes taking place throughout the former Soviet Union, the World Bank and other international actors were able to take on a large role and to ensure that the management of the Aral Sea Basin did not become a conflict over resource allocation. The need for substantial financial assistance enhanced the role of the World Bank in continuing to encourage cooperation among the five states. The help of non-governmental organizations, the World Bank, UNEP and other international actors has kept the five states of the Aral Sea Basin at the negotiating table regarding the issue of resource allocation.
V. Possible ways forward

The negotiators revising the IU are finding agreement on access, on benefit-sharing and on the connection between the two, difficult to reach. The goal is to find an acceptable way out of the impasse by creating a situation that promotes cooperation and alleviates mistrust. Parties may wish to consider:

1. **Disaggregating and addressing benefit-sharing through a unilateral letter of intent:** Severing the most contentious issue – in this case benefit-sharing – and addressing it through a unilateral letter of intent on behalf of developed countries may alleviate mistrust by making clarifying intentions in a legal format. The letter could outline as specifically as possible developed countries’ intentions with regard to benefit-sharing and the principles that will guide their actions in this regard. In all other respects, the negotiating process could continue as planned.

2. **Signing a mutual letter of intent or memorandum of understanding outlining intentions of various parties or blocs of parties on controversial issues:** The parties could enter into a mutual letter of intent or memorandum of understanding outlining mutual interests, principles that will guide the process and then specifically address the general intentions of developed and developing countries with regard to those issues presenting the most difficulty. These may be scope, access and benefit-sharing.

3. **Signing a letter of intent or memorandum of understanding that disaggregates controversial issues and establishes a process by which they will be resolved:** The parties may wish to separate benefit-sharing from the overall negotiations and establish a process by which its resolution is facilitated. The letter or memorandum could spell out the general principles and process by which options for resolution could be developed and establish a small group to carry out the process. The cases of Northern Ireland and the Aral Sea Basin illustrate that while concepts of international law such as sovereignty can be obstacles to resolving controversy, emerging principles of international law such as transparency and democratic process can be helpful. The group created would not have any authority to impose its views but parties will need to buy into the process. The credibility of the group and the process by which it developed its proposals would need to make it difficult to ignore its recommendations. It also needs to be a process that is oriented toward agreement and not the ventilation of extreme positions. Incentive to halt that kind of behaviour would need to be built into the process. Finally, it will be important that the group not draft a precise but politically irrelevant package of options. The range of issues from both sides would need to be represented and, as was the case with International Body on Decommissioning, it would need to meet with relevant parties to elicit their views. To have the necessary expertise one would expect the group to have the disciplines of economics, law, genetics and agriculture represented.
VI. General conclusions

The negotiation to revise the IU is a complicated interaction among parties with disparate interests and a history characterized by mistrust. Like the situations in Northern Ireland and the Aral Sea Basin, the negotiation also involves multiple inter-related issues which can make agreement that much more difficult to reach. Regardless of the means parties choose to move forward in the negotiations, valuable lessons can be learned from the commercial law, international law and diplomatic contexts that may lend insight into possible legal mechanisms available to promote compromise among the parties. There may be value in:

- disaggregating specific elements of negotiation
- identifying common interests and principles that will govern and/or have to be incorporated into the final agreement
- establishing a process whereby it is politically difficult to ignore the outcome and recommendations
- the participation of international actors, including intergovernmental organizations, particularly when they are able to exercise financial or other leverage.

In addition, it may be concluded that there is a need to:

- rely on non-legal deterrents as “enforcement” mechanisms for the pre-agreement agreement or process
- be wary of an agreement to agree that requires so much additional bargaining and controversial drafting so as to defeat its purpose.

Annex. Draft letter of intent

Recognizing global interdependence on the exchange, use and development of plant genetic resources for food security;

Stressing the shared interest in establishing a multilateral system for this exchange;

Noting the equitable sharing of benefits is integral to the successful functioning of a multilateral system of exchange;

The Parties to this letter do hereby impose the following conditions and obligations upon themselves:

Options for provisions

- requirement to negotiate in good faith
- principles that will guide and/or be incorporated into the ultimate agreement (e.g. democratic processes, transparency)
- obligations specific to benefit-sharing
- framework or process by which proposals for addressing benefit-sharing (and possibly other contentious issues) can be prepared.