THE MOVING SCOPE OF ANNEX 1

The list of crops covered under the multilateral system

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Introduction

The multilateral system of access and benefit sharing (multilateral system) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) is currently limited in scope to the list of 64 food and forage crops included in Annex 1 of the Treaty. On the one hand, the existence of a finite list of crops logically follows from the agreement to establish a multilateral system and was reached rather early in the negotiations on the Treaty. This multilateral system needed to be defined and limited, and the list helped provide a solution to this problem. On the other hand, the negotiations of the contents of the list itself reflect how perspectives on access and benefit sharing differed between regions and how these different perspectives resulted in divergent views on the composition of the list. In this sense, the negotiations of the content of the list represented a microcosm of the larger political and legal debates that were so central to the negotiations of the ITPGRFA.

Whereas many developing countries were inclined to regard the multilateral system as an experiment that had to show its effectiveness and its value in terms of monetary benefit sharing, developed countries in general pointed to the access to genetic resources as a major benefit in itself. The former view resulted in cautious positions regarding the length of the list, whereas the latter position favoured the inclusion of all plant genetic resources for food and agriculture (PGRFA) by default. The fact that the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) already hosted international, publicly available collections that contained a major share of the genetic resources of staple crops of essential importance to all countries – in particular, developing countries – also influenced the debate and the final decisions on the composition of the list. The 35 food crops and 29 forage crops in Annex 1 of the
ITPGRFA represent a compromise, which was arrived at over the course of several negotiating meetings. This compromise blended a proposal made by the African region for only nine food crops with a proposal made by the European region to include 287 crops.

This chapter analyses the negotiating process that led to the current composition of the Annex 1 list, highlighting how differing perspectives on more fundamental issues – with the largest differences lying between developed and developing countries – influenced the final outcome of the list. The chapter also considers how the perspectives on the importance of biodiversity for global survival have changed in the nine years since the Treaty was adopted, and whether or not expansion of the Annex 1 list might be possible in light of those changes.

**A chronology of the negotiations on the list**

Resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity (CBD), which was agreed in 1992, identified the Food and Agriculture Organization’s (FAO) Global System on Plant Genetic Resources as the context within which issues left outstanding by the CBD (access to existing *ex situ* collections and farmers’ rights) should be addressed. The FAO and its Commission on Genetic Resources for Food and Agriculture (CGRFA) took up this challenge.

Between November 1994 and November 2001, the CGRFA, which was the FAO body in which the ITPGRFA was negotiated, convened nine times to develop the Treaty, in three regular and six extraordinary sessions. To support its work, the working group of the CGRFA convened a number of times early in the negotiating process, while a specially established contact group also convened six times between September 1999 and June 2001. An expert meeting in Montreux in 1999 played a pivotal role in establishing the principles for this internationally binding agreement. Whereas all of the countries that were members of the CGRFA (more than 150) took part in the negotiations of the commission, the informal consultations in the contact group were only attended by delegations from 40 countries and the European Union, and the Montreux meeting was only attended by 24 participants.

Over time, the negotiations resulted in four consecutive negotiating drafts, a consolidated negotiating text, the chairman’s elements derived from the Montreux meeting, and a composite draft text incorporating the chairman’s elements. However, the composition of a list of crops was not discussed until late in the negotiations. In fact, in the regular sixth session of the CGRFA in June 1995, a ‘list by way of example’ was presented for the first time, containing a large number of genera and crops – a total of 231! Consecutively, in May 1997, a vast majority of participants in the seventh regular session of the CGRFA agreed in principle to establish a multilateral system to facilitate access in an efficient, effective and transparent way. However, only in the fourth extraordinary session of the CGRFA, which took place in December 1997, did the notion take shape that the multilateral system would have to facilitate access to PGRFA through a list of major crops, which was yet to be
determined. After the initial submission of a list ‘by way of example’, it took until the third meeting of the contact group in August 2000 before formal discussions on the list really began to come together. Less than one year later, the final composition of the list was reached in June 2001, although negotiations on the list carried on until the meeting of the FAO Council in November 2001.

The list of crops took shape in several phases, and, over this period of time, it was variously referred to as an ‘example proposed during the sixth session of the CGRFA of a list of genera important for food and agriculture’, a ‘Tentative List of Crops (Article 11.3.3)’, and a ‘List of crops covered by/under the Multilateral System’. During a late phase of the negotiations, additional lists circulated under the heading ‘Lists of crops discussed and pending acceptance by some regions/countries, during the meetings of the Working Group for the list of crops at the sixth extraordinary session’, namely ‘Crops under discussion (Spoleto – Table II)’ and ‘Additional crops under discussion’ (CGRFA, 2001). Country and region contributions also referred to ‘listed crops essential to food security’ (United States), ‘crops/genera of basic importance for human world food consumption’ (Brazil), and ‘proposed list of crops of the Latin American and Caribbean Region’.

Whereas the early negotiations on the list are characterized by individual country contributions, later negotiations show mainly regional positions and contributions. Such regional positions could sometimes only be reached after lengthy and complex consultations at the regional level. In the case of the meetings of the G-77 and China, reaching effective conclusions necessitated even more complex and time-consuming consultations.

The negotiations on the composition of the list formed a late phase in the development of the multilateral system, and Annex 1 proved to be one of the major missing pieces in the final agreement of the ITPGRFA. Finalizing the list of crops in Annex 1, using regional approaches that ranged from nine to 287 crops, remained the largest obstacle in the final negotiation process, and there were good reasons for this part of the negotiations to be late and complex.

**Annex 1 and the CBD**

To suggest a direct linkage between the various perspectives on the list of crops contained in Annex 1 under the multilateral system, on the one hand, and the CBD, on the other hand, may seem a little far-fetched to some, but this was certainly not the case. The adoption of the CBD in 1992 caused a definitive paradigm shift, away from the concept of biodiversity (including genetic resources) as the heritage of humankind and towards the concept of national sovereignty over genetic resources. According to the CBD, states can decide the conditions for access to their genetic resources, and, as a result, the introduction of the term ‘country of origin’ is very significant. It was the mandate of the CGRFA to revise the International Undertaking on Plant Genetic Resources for Food and Agriculture (International Undertaking) to bring it into harmony with the CBD. The FAO and its commission were requested to do so in order to resolve issues regarding the status of existing ex situ collections – in particular, the collections held by the IARCs.
Many delegates participating in the negotiations of the ITPGRFA operated from the perspective of national sovereignty, taking the principles on which the CBD was based as the default for access and benefit-sharing arrangements and being prepared to consider the need and justification for exceptions to the rule for PGRFA. In this same perspective, the Brazilian delegation, during the second meeting of the Contact Group in April 2000, stated that the negotiations on the multilateral system and its Annex 1 should be considered a ‘window’ to be opened on the bilateral benefit-sharing arrangements of the CBD, but that such action was only justifiable if the ‘window’ was small, had clearly defined limits, and would be an important contribution for food security, represented by the basic staple food crops, to the benefit of all countries (CGRFA, 2000a).

In the final days of the negotiations on the Treaty in the FAO Council in November 2001, a number of developing countries also presented their view that, in effect, ‘crops on the list represent gifts by countries to the rest of the world’ (IISI, 2001a). Such wording was clearly motivated by the principle of national sovereignty enshrined in the CBD. However, other perspectives prevailed among the participants from developed countries, where any limitation to access to PGRFA was seen as a threat to the interests of plant breeders and, thus, to major breeding advances and world food security. Naturally, the interests of plant breeders also included the need to limit additional costs stemming from new policy instruments as much as possible. Hence, throughout the negotiations, the notions of ‘window’ and ‘gift’ often came up against the notion of the need to promote plant breeding. Both perspectives recognized the importance of global food security. However, other elements also played a role in the discussions and negotiations, as will be discussed in the following section.

The linkage between Annex 1 and other major components of the ITPGRFA

The negotiations on Annex 1 – that is, the list of crops covered by the multilateral system – cannot be properly understood without reference to the negotiations on other major elements of the Treaty, in particular:

- the scope of the multilateral system (what is included and what is not);
- the agreed types of use for which access is provided;
- the provisions on benefit sharing, including the notion that access to plant genetic resources for food and agriculture represents a benefit in itself;
- (other) financial arrangements to facilitate the implementation of the ITPGRFA; and
- the options to obtain intellectual property rights on products derived from materials included in the multilateral system (see, for example, the statements of five regions contained in CGRFA, 2000b; IISI, 2001a).

In discussing the scope of the multilateral system, discussions arose whether or not it would only include material from the public domain, whether the multilateral system would only cover material acquired before the coming into force of the CBD (prior to December 1993), and whether the multilateral system would cover ex situ as
well as in situ materials (CGRFA, 1997a). Developing countries feared that if only material in the public domain would be incorporated in the multilateral system, they would still lack access to the more advanced, and therefore more valuable, breeding materials developed in the private sector. Developed countries felt that it was important to incorporate materials found in situ in the multilateral system, since this category encompassed wild crop relatives from which so many useful resistance and tolerance traits could be derived. In addition, most countries were prepared to agree that, in practice, it would be inefficient to try to distinguish materials acquired by a country or collection holder before the coming into force of the CBD from materials obtained thereafter. As long as agreements on all these issues were pending, it was felt to be premature to negotiate the contents of the list of crops covered in Annex 1 under the multilateral system.

Type of use formed a major concern for a number of developing countries that wished to limit the use of material obtained from the multilateral system for purposes of research, breeding and training for food and agriculture and not for other uses, as was ultimately reflected in the final text of the ITPGRFA (Article 12.3(a)). In fact, only during implementation of the Treaty was direct use by small-scale farmers dealt with in particular as a separate issue.

**Box 14.1 Text of Article 12.3(a)**

12.3 Such access shall be provided in accordance with the conditions below:

(a) Access shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses. In the case of multiple-use crops (food and non-food), their importance for food security should be the determinant for their inclusion in the Multilateral System and availability for facilitated access.

While the provisions on non-monetary benefit sharing could be derived from the concepts elaborated in the CBD (Articles 16–18), the negotiations on an agreement on monetary benefit sharing heavily impacted on the preparedness of developing countries to include crops in the list. This was also the case for the discussions on financial arrangements. Although framework decisions on mandatory monetary benefit sharing were reached at a rather late stage in the negotiations, there was no time to work out the details for such mandatory benefit sharing, such as the triggers for payment and the level of monetary benefit sharing. Such details had to be worked out in the subsequent negotiations of the Standard Material Transfer Agreement (SMTA), which were finalized in 2006.8 In addition, the elaboration of the funding strategy that was discussed in the first three sessions of the Governing Body of the
ITPGRFA between 2006 and 2009 provided more clarity on the objectives, targets and expectations of the access and benefit-sharing arrangements. Lack of clarity about the nature and level of benefit sharing made many developing countries hesitant in accepting an expanded list of crops covered under the multilateral system.

**Box 14.2 Framework agreements on mandatory benefit sharing: Articles 13.2(d) and 18 of the ITPGRFA**

13.2 The Contracting Parties agree that benefits arising from the use, including commercial, of plant genetic resources for food and agriculture under the Multilateral System shall be shared fairly and equitably through the following mechanisms: the exchange of information, access to and transfer of technology, capacity-building, and the sharing of the benefits arising from commercialization, taking into account the priority activity areas in the rolling Global Plan of Action, under the guidance of the Governing Body:

...  
(d) Sharing of monetary and other benefits of commercialization  
(i) The Contracting Parties agree, under the Multilateral System, to take measures in order to achieve commercial benefit-sharing, through the involvement of the private and public sectors in activities identified under this Article, through partnerships and collaboration, including with the private sector in developing countries and countries with economies in transition, in research and technology development;  
(ii) The Contracting Parties agree that the standard Material Transfer Agreement referred to in Article 12.4 shall include a requirement that a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism referred to in Article 19.3f, an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.

The Governing Body shall, at its first meeting, determine the level, form and manner of the payment, in line with commercial practice. The Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products; it may also decide on the need to exempt from such payments small farmers in developing countries and in countries with economies in transition. The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may
also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding.

Article 18 – Financial Resources

18.1 The Contracting Parties undertake to implement a funding strategy for the implementation of this Treaty in accordance with the provisions of this Article.

18.2 The objectives of the funding strategy shall be to enhance the availability, transparency, efficiency and effectiveness of the provision of financial resources to implement activities under this Treaty.

18.3 In order to mobilize funding for priority activities, plans and programmes, in particular in developing countries and countries with economies in transition, and taking the Global Plan of Action into account, the Governing Body shall periodically establish a target for such funding.

18.4 Pursuant to this funding strategy:

(a) The Contracting Parties shall take the necessary and appropriate measures within the Governing Bodies of relevant international mechanisms, funds and bodies to ensure due priority and attention to the effective allocation of predictable and agreed resources for the implementation of plans and programmes under this Treaty.

(b) The extent to which Contracting Parties that are developing countries and Contracting Parties with economies in transition will effectively implement their commitments under this Treaty will depend on the effective allocation, particularly by the developed country Parties, of the resources referred to in this Article. Contracting Parties that are developing countries and Contracting Parties with economies in transition will accord due priority in their own plans and programmes to building capacity in plant genetic resources for food and agriculture.

(c) The Contracting Parties that are developed countries also provide, and Contracting Parties that are developing countries and Contracting Parties with economies in transition avail themselves of, financial resources for the implementation of this Treaty through bilateral and regional and multilateral channels. Such channels shall include the mechanism referred to in Article 19.3f.

(d) Each Contracting Party agrees to undertake, and provide financial resources for national activities for the conservation and sustainable use of plant genetic resources for food and agriculture in accordance with its national capabilities and financial resources. The financial resources provided shall not be used to ends inconsistent with this Treaty, in particular in areas related to international trade in commodities.
(e) The Contracting Parties agree that the financial benefits arising from Article 13.2d are part of the funding strategy.

(f) Voluntary contributions may also be provided by Contracting Parties, the private sector, taking into account the provisions of Article 13, non-governmental organisations and other sources. The Contracting Parties agree that the Governing Body shall consider modalities of a strategy to promote such contributions.

18.5 The Contracting Parties agree that priority will be given to the implementation of agreed plans and programmes for farmers in developing countries, especially in least developed countries, and in countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture.

Developed countries argued that facilitated access to PGRFA that are included in the multilateral system constitutes in itself a major benefit – a notion that has been incorporated in the text of the ITPGRFA (Article 13.1). However, since most plant breeding is concentrated in developed countries and most benefits are felt to accrue to developed countries, this facilitated access was less convincing for many developing countries, particularly because they expected that most varieties developed from genetic materials obtained from the multilateral system for agriculture in developed countries would not be suitable for use in an unmodified way in their own agricultural systems.

Disagreement over the list of crops revealed deep political divides on the issue of trading agricultural resources. Some participants in the negotiations indicated that without a clear consensus on whether PGRFA would include a plant’s genetic parts and components (which was eventually agreed upon in Article 12.3(d) of the Treaty), it would be very difficult for a country to know what it was agreeing to in this virtual market exchange of agricultural genetic materials (IISI, 2001c). In fact, lack of clarity in the agreed text resulted in the additional inclusion of the provision ‘in the form received’, which was essential for developed countries. While it can be assumed that any new product derived from the original plant genetic resources obtained from the multilateral system may be protected by intellectual property rights, it remains to be seen how much the original genetic resource needs to be changed for intellectual property protection to be widely acceptable, and how limitations on the use of PGRFA obtained from the multilateral system by very wide patent applications may be avoided.

Many developing countries feared that various forms of intellectual property rights would limit, in practice, access to, and use of, products derived from genetic materials obtained from the multilateral system. In this context, negotiations on the modalities of access also stimulated a discourse on the list of plant genetic resources to be included in the multilateral system early on in the work of the contact group. Some delegates were of the opinion that the list should be narrowed if obtaining intellectual property rights on the products of materials obtained from the multilateral system would be allowed.
In fact, the African region proposed a long list of crops early during the negotiations under the condition that use of the materials under the multilateral system would not be amenable to intellectual property protection. Only when developed countries maintained their condition that obtaining intellectual property right protection would have to be possible, and would indeed form a basis for benefit sharing, did the African region shift to a position that defended a very short list of crops (CGRFA, 2000b).

In conclusion, the negotiating process on each of these elements directly influenced countries’ and regions’ perspectives on the composition of the list. Thus, postponing negotiations on the composition of the list made sense since its fate was to be determined by the outcome of the negotiations on these other major elements of the Treaty.

**Fundamental perspectives on the functionality of the list**

From a more fundamental perspective, the list is an inseparable part of the multilateral system, and this system incorporates two components that, in turn, are also inseparable: (1) benefit sharing necessitates access and (2) without benefit sharing no preparedness to facilitate access can be expected. Many developed countries tended to focus heavily on the access component and regarded benefit sharing other than by making the products of breeding with materials from the multilateral system freely available as a politically unavoidable consequence. However, many developing countries took the opposite stance. For them, benefit sharing represented a final recognition of the use that developed countries had made of the genetic resources maintained and developed in their countries for centuries. When mentioning the term access and benefit sharing, developing country representatives tended to hear only benefit sharing, while developed country representatives heard only access. For example, it was very important for the African region that benefit sharing would contribute to their own capacity building in the area of plant breeding. In general, many developing countries felt that if developed countries thought the conservation of plant genetic resources was essential for plant breeding, it would only be logical that they would have to pay for this conservation. Again, these divergent views complicated discussions and decision making on the list of crops.

In one of its interventions during the final FAO Council meeting in November 2001, Norway protested against this particular sentiment, stating that all countries were both providers and recipients of PGRFA. In a similar stance, the European region had long since argued that a short list of crops would, in particular, damage the position of developing countries since so many flows of plant genetic resources were largely in the direction of developing countries, particularly plant genetic resources originating from the collections of the IARCs. Developing countries were looking for a balance between providing access under the multilateral system and obtaining benefits from the use of their own resources.

**Criteria for the establishment of the list**

In the report produced by the chairman of the eleventh session of the Working Group of the CGRFA, which was held in December 1996, explicit reference is made
to food security. It states that the ITPGRFA (which is then still referred to as the International Undertaking)9 should apply to PGRFA, with specific reference to food security (CGRFA, 1996a). The same report also makes note of ‘the scope of any agreement on access and benefit-sharing’, mentioning food security as well as countries’ interdependence as two issues to be resolved. Interdependence between countries was addressed in the FAO’s report on the State of the World’s Plant Genetic Resources for Food and Agriculture, which was released in 1996, showing that for their major food crops all regions depended heavily on plant genetic resources originating from other regions. Finally, the report concluded that

one option would provide for access in accordance with national legislation, and sharing out the benefits derived, on a multilateral basis … This [option] would apply to a list of genera, covering both in situ and ex situ material, as well as material collected before and after the entry into force of the CBD. The list could be based on importance for world food security and great worldwide interdependence. There was wide agreement that this proposal might provide a useful starting point, although the disadvantages of limited inclusive lists were also stressed. 

(FAO, 1997)

Subsequently, the report of the fourth extraordinary session of the CGRFA in December 1997 refers to conclusions of the Contact Group: ‘In this context, it was noted that the criteria that had been used to establish the Tentative List of Crops annexed to Article 11 were (i) their importance for food security at local or global levels, and (ii) countries’ interdependence with respect to plant genetic resources’ (CGRFA, 1997b). Hence, while other criteria for the scope for the multilateral system had been suggested in the course of the negotiations, including the degree to which the material is endangered by genetic erosion, the role of the material in sustainable agricultural production, the social and/or economic importance of the material, and the strategic economic importance of the material to the source country, these two criteria remained the only acceptable criteria for the establishment of the list (ibid.). It is fair to say that these two criteria would never be able to be applied in an absolute manner, and so it left substantial room for disagreement and negotiation, as is apparent from the negotiating process.

In the end, the two criteria of food security and mutual interdependence also ruled out the incorporation of forestry crops and medicinal crops in the list of crops covered by the multilateral system. Incorporation of these crops had been considered in the early stages of the negotiations (CGRFA, 1994a, 1995).

The collections held by the IARCs

During the entire negotiating process, the status of the IARC collections formed a major element of the discussions. In a report to the sixth session of the CGRFA in June 1995, the signing of the agreement by the FAO and 12 of the IARCs was mentioned, placing their ‘designated germplasm’ under the auspices of the FAO and recognizing ‘the
intergovernmental authority of FAO and its commission in setting policies for the International Network’ (CGRFA, 1995). This agreement formed a clear early signal that the IARC collections had to be covered by the Treaty and that the conditions regarding access to these collections and the sharing of benefits derived from their use should be addressed. Moreover, since the body that gave the centres policy advice concerning their international collections was the same body hosting negotiations of the Treaty, it only made sense that the collections of the CGIAR centres would be included within the scope of the ITPGRFA.

In fact, the first negotiating draft of November 1994 refers extensively to the work done, and the collections held, by the IARCs, long before the concept of the multilateral system became established and recognized in the course of 1997 (CGRFA, 1994b). Providing access to the material held in the ‘base collections’ to parties to the ITPGRFA for purposes of scientific research, plant breeding or genetic resources conservation was already foreseen. In the Montreux expert meeting, which took place in January 1999, participants reconfirmed that the multilateral system would initially cover a limited selection of crops determined on the basis of criteria of food security and interdependence. The collections of the IARCs would also form part of the multilateral system on terms previously agreed with these centres. The composite draft text of the International Undertaking, which was released in April 1999, provided text on the multilateral system and explicitly incorporated ‘all material held in ex situ collections by such of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research’ (CGRFA, 1999). The final text of the Treaty refers to the IARC collections in Articles 11.5 and 15, clearly placing the ex situ collections listed in Annex I and held by the IARCs in the multilateral system.

There are two primary reasons why the incorporation of the IARC collections in the multilateral system is significant for the composition of the list of crops under Annex 1 in the multilateral system. First and foremost, the composition of the IARC collections and, in particular, the crops represented in those collections directly influenced the discussions on the composition of the list. The status of the IARC collections had been questioned for a number of years – in particular, by countries from which genetic resources in those collections had been obtained as well as by some countries hosting the IARCs – and the revision of the International Undertaking and the negotiations on the ITPGRFA offered the opportunity to come to a definite agreement on the status of these international collections. In practice, it was only logical to place these collections in the multilateral system that was under discussion. To a large extent, the crops held by the IARCs had represented global staple crops as well as forages, and there was a strong tendency from many countries to adjust the final list of crops in such a way that the list would encompass all, or nearly all, of the crops held in the IARC collections. In fact, this is what happened, although, in dealing with the IARC collections in Article 15, the final text of the Treaty still distinguishes between PGRFA listed in Annex 1 and PGRFA other than those listed in Annex 1.

Second, experts of the IARCs were often consulted by the members of the CGRFA who were negotiating the Treaty, and these experts made regular pleas to solve the status of the IARC collections, in the interest of their own centres, by
including their collections in the multilateral system to the fullest extent possible. In effect, all major crop holdings represented in the IARC collections, with the exception of some millets, soybeans, forages and tree species, have eventually become incorporated into Annex 1.

**On the composition of the list of crops**

The same report by the chairman of the eleventh session of the Working Group of the CGRFA, which called for the development of a list of crops, also mentioned that ‘various ways of developing lists were considered: (i) starting from a comprehensive list (such as that in Annex 1 of the Third Negotiating Draft), and excluding those taxa on which agreement could not be reached, or (ii) beginning from a short agreed list [such as those given in the attachments to this Appendix D] and agreeing on further genera to be included’ (CGRFA, 1996a). In fact, the second approach appeared to form the only viable option.

Before an agreement on the composition of the list of crops could be reached, it was necessary to agree on the identification of the crops concerned. The technical advice that was offered resulted in the adoption of the genus as a biological identifier of the crop, since in almost all cases the gene pool—which is, all of the species with which the crop can be hybridized with more or less difficulty—is fully included in the crop genus (CGRFA, 1998a).10

The first list that can be found in the documents on the negotiations of the ITPGRFA is the one that was appended to the report of the sixth session of the CGRFA in June 1995 (CGRFA, 1995, Annex 1 to Appendix 1). This list of 231 crops is presented as an ‘example proposed during the sixth session of the Commission of a list of genera important for food and agriculture’ and is subdivided in 21 crop categories, including major grain crops, minor grain crops, major grain legumes, minor grain legumes, cereals from other families, major starch crops, minor starch crops, oil crops, fruits, shrub fruits, tree fruits, vegetable crops, nuts, spices, herbs, beverages, fibres, sugar crops, industrial crops, forage grasses and forage legumes. This list, however, seems to have only functioned as a reference. It was never seriously discussed. In 1996, during the third extraordinary session of the CGRFA, various submissions were made regarding the composition of the list (CGRFA, 1996b). The submission of the United States proposed inclusion of those plant genetic resources for which there was a global interest in maintaining unrestricted access, and it listed 25 crops plus an unspecified number of forage crops. Brazil submitted a proposal based on the relevance of crops for world food security, human world food consumption and greater interdependence worldwide. This proposal included 25 crops, of which 20 were shared with the list proposed by the United States.11 A submission made by France made no reference to a list, since France and the European region in general had major objections to a list since they were fearful of limitations to diversification, human dietary needs and global food security. The fourth negotiating draft still contained the original list of 231 species/crops, which was tabled in 1995 by way of example.
In 1998, a new draft text for the Treaty appeared as a consolidated negotiating text. To this text, a new Annex 1 was attached (CGRFA, 1998b). This list contained 37 crops, including all crops earlier proposed by North America and the Latin American group as well as some additional crops. In addition, the list of grass and legume forages had been revised and now reflected 28 grass forages and 33 legume forages. In response to this list, five regions proposed varying draft lists of crops during the third inter-sessional meeting of the Contact Group, which took place in August 2000. The chair of this meeting opened the floor for statements from the regional groups addressing the list of crops covered by the multilateral system (CGRFA, 2000c). The Latin American group stated that consensus on a combined list of crops relevant for food security had been reached at a recent regional meeting. The region noted that their submission of 29 crops to the Contact Group was subject to conditions, including the adoption of a mechanism for benefit sharing, the consensual adoption of the ITPGRFA text, the use of genetic material covered under the multilateral system only for food purposes and acquired access to genetic material relevant to the private sector. The African region announced submission of a limited list of nine crops. To the African region, this smaller list was to be seen as a ‘trial sample’ that would allow countries to build trust and gauge the levels of success and failure before the list was expanded. In the view of some of the other delegations, this African proposal not only severely restricted the level of access but, at the same time, also limited the potential for benefit sharing. The European regional group recalled its position that the multilateral system should apply to all plant genetic resources for food and agriculture, noting that world food security reached beyond the small number of large crops grown across the world. The Europeans underscored the need for inclusion of a wide list of plant genera, which would encompass 287 crops compiled through consultations with stakeholders at all levels. Among the other delegations, the European proposal raised concerns since this proposal was seen to be an attempt to open access to an expanded range of genetic resources, which were not all directly related to food security. However, according to the European group, an expanded list might in fact be more beneficial to developing countries since they had been the major net recipients of PGRFA over the past decades. Asia submitted a list of 22 crops based on the criteria of global food security and interdependence, noting that their list reflected consensus in the region, although some countries in the region (notably Japan and South Korea) had preferred expanded lists. This region also stated that future additions to their list would depend upon progress in implementing the ITPGRFA – in particular, the components addressing the multilateral system and access and benefit sharing in general. The North American regional group supported the list of 37 crops appearing in Annex 1 of the composite draft text.

The sixth meeting of the Contact Group, which took place in April 2001, took up the issue of the list of crops, and a technical group on the list of crops was established that reported on its work at the end of the session (IISI, 2001b). This technical group made substantial progress. It worked on the premise that all regions could propose the inclusion of crops. Those crops to which no other region objected would stay, otherwise they were removed. This approach, which was probably the only realistic
one, caused crops to be removed rather easily. The reservation of only a single region or country was sufficient for the removal of a crop from the consensus list. The working group reported consensus on a list of 30 crops and considerable support for a further 17 crops (crops for which only one country or region had placed reservations). It also reported that much more discussion was needed on the list of forage crops, and it asked for technical advice regarding the genera by which the agreed crops could be properly identified. The list of 30 crops lacked a number of important crops that were featured in the earlier version attached to the composite draft text in August 2000 – namely soybeans, peanuts, sugar cane, tomatoes, onions, melons, pumpkins, flax and cotton and oil palm – while a few new crops had been added, including apples and triticale (a hybrid between wheat and rye). This list of 30 crops was quite similar to the final list, which was established in the sixth extraordinary session of the CGRFA, wherein the majority of the text of the ITPGRFA was agreed upon. Late in the proceedings of this meeting, breadfruit, asparagus, strawberries, grass peas and eggplant were added, and so the final list comprised 35 crops in total.

The final discussions on the expansion of the list of crops took place within the G-77 and China between developing countries (Latin America, Africa and Asia). Although several attempts to make changes were made in the final hours of the session of the FAO Council in October and November 2001, no further changes were agreed upon. The final list contained 35 food crops. Much less discussion was spent on the list of forage crops, although a large number of the originally proposed forage crops were also objected to and removed from the list. Of the 28 proposed forage grasses and the 33 originally proposed forage legumes, 12 forage grasses and 15 forage legumes, as well as two other forage crops, remain.

In the last stages of the negotiations on the list of crops, many delegations changed gears. Negotiations did not so much centre on which crops countries and regions had to offer to the multilateral system but, rather, which crops countries and regions wanted to obtain from the multilateral system for their own agricultural development. This outcome led to the removal of a number of crops in the last stage of the negotiations. Attempts by the European region to agree on a regular and scheduled revision of the list of crops also were not successful. In line with the draft version of the ITPGRFA’s article on the coverage of the multilateral system negotiated during the eighth regular session of the CGRFA in 1999, which made reference to a periodic review of Annex 1 as well as of the provisions on access, benefit sharing and financial arrangements, the region proposed adding an article stating that the multilateral system would be including the crops listed in an additional annex of crops (Annex E) after five years following the treaty’s entry into force, provided that the funding strategy and the SMTA had been adopted by then. A number of developing countries stated that the successful review of the treaty’s financial mechanism, benefit-sharing provisions and SMTA would be necessary before the list could be expanded. Another proposal by the European region for a biannual review of the list was not accepted either (IISI, 2001a).

When the European region asked for consideration to be given to expanding the list, developing countries responded by calling into question the need to review the mechanisms such as the funding strategy and commercial benefit sharing, in order to
ensure an appropriate balance in securing their perceived gains under the Treaty. The rather limited composition of the list served to anger several developed countries, which felt that the developing countries were not really dedicated to the cause of the Treaty and the issue of global food security. Many developing countries responded by saying that trust was needed before the list could be revisited and possibly expanded. This response was a reference to the outcome of the negotiations on other components of the ITPGRFA – in particular, the provisions on benefit sharing and financial arrangements and the interpretations of the text associated with intellectual property rights.

Some reflections on the future

The contents of the list were one of the last things negotiators struggled over. In the lead up to the adoption of the Treaty’s text, countries made last-minute deals about the inclusion of some species and unilaterally withdrew their consent to the inclusion of others. Over the course of the negotiations and across regions, the potential scope of the list expanded and contracted dramatically, shifting from possibly including all agricultural plants to only comprising a narrow list of just nine species or genera.

The negotiations on the list of crops were characterized by two extreme positions taken by Africa, which favoured a very short list on the one hand, and Europe, which favoured a very comprehensive list on the other hand. Other regions kept to the middle ground or remained sitting on the fence for a long time. Regions objected to the inclusion of certain crops not because these crops were considered to be unimportant for food security but, rather, because the genetic resources of these crops were considered to be, first and foremost, economic assets for those particular regions. This is how soybean and groundnut, sugar cane and oil palm disappeared from the list, even though they had been featured for a considerable period. It also explains why some crops that no country would seriously consider to be of utmost importance to food security are included on the list, such as asparagus and strawberries. Ultimately, no region objected to a proposal to include these crops, and so they stayed on the list.

This chapter has examined the relationship between the evolution of the negotiators’ thinking about the scope of materials covered in the multilateral system and the way that other, more fundamental issues were resolved over the course of the negotiations. Looking back at the negotiations of Annex 1, one can attempt to consider the possibility of adding crops to the Annex 1 list. However, no specific provisions to regulate such a revision of the list have been incorporated in the text of the ITPGRFA, although text to that effect was proposed in the final stages of the negotiations. While changes in the composition of the list of crops are possible, such changes will require the consensus of the parties to the Treaty. Given the sharp divides between regions based on fundamentally different perspectives and expectations, such revisions are not likely in the short term. Only if the implementation of the ITPGRFA in general, and the benefit-sharing arrangements and the funding strategy in particular, appear to be successful and no negative effects result from the execution of the intellectual property rights, might the occasion arise for an expansion of the list of crops. Growing food insecurity might add to the willingness of countries to re-examine the composition of the list.
One could argue that the adoption of the draft Strategic Plan for the Implementation of the Benefit-Sharing Fund of the Funding Strategy has built the basis for improved benefit sharing between regions, which will benefit developing countries, but the five-year target of US $116 remains to be reached in the next few years. Only when this target is realized might there be sufficient trust between regions and confidence in the acquisition of future benefits to move towards an extension of the list.

While the need to adapt to climate change is likely to dramatically increase interdependence between countries and regions for their plant genetic resources for food and agriculture, it is likely that policy makers will need several years at least to analyse the full effects of climate change on agricultural production in their countries and to realize that it will further increase their interdependence on plant genetic resources from other countries and regions in an unprecedented way. Although these two developments might foster a re-evaluation of the list of crops, another development of importance will have a less predictable outcome – namely, the volume and scope of intellectual property rights in general and patents in particular as well as the degree by which these issues will influence the access of developing countries to modern breeding materials. Ultimately, these factors will have an enormous influence on the willingness of the parties to re-examine Annex 1. As a result, no early and easy re-examination of the list of crops in Annex 1 is to be expected on the basis of changed circumstances. In short, expansion can and will come hand in hand only with increased trust in the implementation of the ITPGRFA and with a realization of all of the benefits of facilitated access.

Notes

2 Convention on Biological Diversity, 31 ILM 818 (1992) [CBD].
3 The Commission on Genetic Resources for Food and Agriculture was known as the Commission on Plant Genetic Resources until 1996.
4 CBD, supra note 2, Article 15 and Article 2 respectively.
6 Also known as Centres of the Consultative Group on International Agricultural Research or CGIAR centres.
9 This document was the non-legally binding precursor of the ITPGRFA.
10 In the case of Annex 1, notable exceptions are formed by the *Bassica* complex and wheat, where other genera than the crop genus also provide for hybridization, and *Citrus* where related genera provide the root stocks.
11 Differences between the lists proposed by the United States and Brazil regarded tanier, taro, chickpeas, pigeon peas, oranges, sugar beets, sugar cane, pumpkins and tomatoes.
References


