Cross-Cutting Issues*

(summary of presentation)

I. Interrelationships

In addition to needing familiarity with the provisions of the international obligations and any corresponding national implementing legislation, GR professionals also need to be familiar with how they link across instruments and institutions. The complex interrelationship among issues such as Farmers' Rights, the rights of indigenous and local communities, intellectual property rights, conservation of genetic resources, access to genetic resources and benefit sharing presents a challenge to decision-makers. For example, while the access provisions of the CBD do not mention intellectual property rights, in practice there is a clear and very strong link. In fact, as the session on the history and origins of law in this area discussed, one catalyst for the development of mechanisms to regulate access was the perceived imbalance between those who benefited from intellectual property rights and those who did not, as suppliers of 'law materials' that could not be protected.

II. National policy and law

National systems are growing more formal and complex with respect to the ownership of and access to genetic resources. In both developing and developed countries, the scope of what can be protected is expanding, as is the strength of the protection. In developing countries, laws governing ownership, access, benefit sharing, IPRs, community rights, and so on, are all interrelated, whether or not those policies are explicitly linked in national law. GR professionals must therefore be sensitive to the relationship between, *inter alia*:

- intellectual property rights and ABS mechanisms
- intellectual property rights and the rights of indigenous and local communities
- ABS mechanisms and indigenous and local communities
- the multilateral system (MLS) and farmers' rights
- patents and plant variety protection (both in terms of national laws implementing the TRIPS Agreement and in terms of managing intellectual property rights in their work) and other forms of *sui generis* protections for farmers' varieties

III. International policy and law

GR professionals must be aware of the evolution of the different international regimes and their relationship to one another. Treaties can have different but related subject matter. The CBD, for example, covers all biological diversity while the IT is only concerned with PGRFA. Treaties can also belong to different areas of international law, such as environmental law and trade law. While there is no legal hierarchy between fields of

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international law, in practice the WTO trade-related instruments are stronger because they contain the threat of sanctions. This threat does not exist in the CBD or the IT.

Generally, access to biological material is addressed by instruments such as the CBD and the IT and access to breeding results and genetic innovations are usually regulated by IP instruments such as the national regimes established pursuant to the TRIPS Agreement and/or UPOV. When dealing with access, GR professionals need to know which instrument governs. The IT governs all PGRFA[1], the MLS only a subset established by Annex 1. At the same time, the Annex can be amended by the Parties (though because the treaty provides for its amendment by consensus only, change to Treaty provisions is likely to be a difficult process). For PGRFA not subject to the MLS and accessed after the entry into force of the CBD, the CBD provisions apply. Another issue that may arise is the relationship of the IT to any networks to which country or institution may belong and whether these agreements are consistent with the IT.

When dealing with intellectual property rights and the minimum standards set by international law, the relationship between instruments has been a matter of debate. Debate has gone on for years about the relationship between the CBD and the TRIPS Agreement with the Doha Ministerial Declaration asking for further examination of the relationship between the CBD, TRIPS and traditional knowledge. The CBD is ambiguous on its relationship to IPRs except that it is clear that they should be supportive of and not run counter to the Convention's objectives. GR professionals should therefore aim to manage intellectual property in a manner that is in line with national objectives and supportive of the CBD while observing the minimum standards set by TRIPS. Another area where property rights arise is with participatory plant breeding. When formal, institutional, breeders collaborate with farmer-breeders a whole host of ownership issues arise to which a GR professional must be sensitive (*see* Session 8).

IV. Benefit sharing

A. CBD

Issues of equity and benefit sharing are the common threads underlying most of the cross-cutting issues. Benefit sharing is one of the CBD's three objectives and is explicitly and implicitly reinforced throughout the treaty's provisions. Nevertheless, the term is never defined or given concrete operational content. In the context of access, intellectual property rights, traditional knowledge, the issue of how benefits will be generated, to whom the benefits will flow and what constitutes benefits continue to be subject to considerable debate. These issues are also at the heart of the debate on the relationship between the CBD and TRIPS.

B. IT: The Multilateral System

Benefit sharing was also a major topic of debate in the context of the IT. The MLS established by the rules for access and benefit sharing for genetic resources of a list of crops contained in an Annex to the treaty and associated information. Intellectual property rights are respected. IPRs may not be claimed, however, on material 'in the form received' from the system. The precise meaning of this phrase may need to be clarified by the Interim Committee and ultimately the Governing Body to the IT. The treaty's article on benefit sharing recognizes

[1] The IT does not, however, cover access for purposes that are not related to food and agriculture.

that access itself is a major benefit of the Multilateral System, and states that benefits arising from the use of PGRFA under the Multilateral System should be shared fairly and equitably through a number of mechanisms, both voluntary and mandatory in nature. Contracting Parties agree, for example, to 'provide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources…' This particular paragraph [13.2.(b)(i)] encourages the transfer of technologies including those that are essentially 'embedded' in genetic materials. But, the transfer is not mandatory, and respect for property rights is specifically accommodated. Benefit sharing in the form of a payment into an international fund at FAO is mandatory when genetic material from the system is used to produce a 'product that is a PGRFA' (e.g. a line or cultivar) that is commercialised, unless this product is made available without restriction for further research and development. In effect, patenting will trigger the benefit sharing mechanism; plant breeders' rights will not. A genebank manager accessing or receiving non-MLS material may wish to consider the value of encouraging the receipt of the material on the condition that it be treated in the same way as MLS material. In addition to simplifying and reducing administrative costs, it would assure that access and benefit sharing arrangements were consistent with the norms established by the IT.

C. IT: Farmers' Rights

Issues of equity and benefit sharing were also a catalyst to the evolution of Farmers' Rights under the IT. In the original IU debates, there were those who used the term 'Farmers' Rights' as a general political concept and those who interpreted it as a legal concept. Those viewing it as a legal term make proposals such as defining the rights as an alternative form of IPR covering, for example, the products of farmer selection and breeding. Those viewing it as a political concept make proposals to establish a fund to finance PGRFA conservation and development work. The IT clarifies the international implications of the term. In Article 9, Contracting Parties recognize the contribution of farmers, but state that the responsibility for the realization of Farmers' Rights rests with national governments. Each Contracting Party 'in accordance with their needs and priorities…as appropriate, and subject to national legislation' agrees to take measure to protect and promote Farmers' Rights, including the protection of traditional knowledge, the right to participate in benefit sharing, and the right to participate in making decisions at the national level regarding PGRFA.

The obligations are vague and, as with the CBD, conditioned by phrases such as 'as appropriate'; hence there is no commitment to do anything specific. Article 9.3 notes that 'Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.' If the farmers have these particular rights in a national jurisdiction, then there is nothing in the treaty that takes these away. On the other hand, there is nothing in the treaty that establishes these rights either. The GR professional must therefore be aware of how the issue is handled nationally.