

Protecting Farmers' Rights in the Global IPR Regime

CHALLENGES AND OPTIONS FOR DEVELOPING COUNTRIES

Genetic diversity of agricultural plants is the very basis of farming. Plant genetic diversity is probably more important for farming than any other environmental factor; it is *the factor* that enables adaptation to changing environmental conditions. Thus, it is crucial to global food security and poverty reduction in the South.

The world's agro-biodiversity is disappearing at an alarming rate. For several major crops, up to 80–90 percent losses in variety over the past century have been reported.¹ In addition, legal restrictions on access to available genetic resources are emerging as an obstacle to traditional farming.² Since the dawn of agriculture, farmers have been the custodians of agro-biodiversity. In developing countries, the vast majority of farmers still act as stewards and innovators of genetic diversity, but the enormous transformations of agricultural systems worldwide are increasingly curbing their possibilities.

Farmers' rights are about enabling farmers to continue as stewards and innovators of agro-biodiversity, and about rewarding them for their contribution to the global genetic pool. As such, farmers' rights are a vital means in the fight against poverty. This Policy Brief³ outlines central challenges and options for the realization of farmers' rights, taking as the point of departure the historical evolution of the concept.

HISTORICAL BACKGROUND

The idea of farmers' rights emerged from the debate on intellectual property rights (IPRs) on plant genetic resources (PGRs) in the early 1980s, as voiced in international negotiations.⁴ At that time, the signatories to the International Undertaking on Plant Genetic Resources of the United Nations Food and Agriculture Organization (FAO) discussed how they could attract the signatures of more countries, as this was pivotal to realizing the objectives of conserving these resources and making them available. Many Northern countries set the recognition of plant breeders' rights (PBRs) as a precondition for joining the International Undertaking. However, many developing countries were opposed to it, seeing such rights as against the objectives of the Undertaking and, in addition, unfair, since plant breeders add only the final few links to the hard work and innovations that farmers, particularly in developing countries, have carried out for hundreds and thousands of years. The solution to this conflict was that PBRs were recognised along with farmers' rights by the FAO



Conference in 1989, in the form of an agreed interpretation of the International Undertaking.⁵ Farmers' rights mean rights arising from the past, present and future contributions of farmers' in conserving, improving, and making available plant genetic resources (...). These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions (...).

This recognition of farmers' rights was achieved in exchange for something that already existed, i.e., PBRs. As such, this can be seen as a breakthrough for the advocates of farmers' rights. However, the concept was not defined, and there was great uncertainty about what it should cover.

When the Convention on Biological Diversity (CBD) was adopted in 1992, the negotiators urged FAO to commence negotiations on a legally binding regime on PGR for food and agriculture, including the question of farmers' rights.⁶

This marked the start of lengthy negotiations that finally led to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in 2001. According to Article 9 of ITPGRFA, governments are to protect and promote farmers' rights but can choose the measures to do so according to their needs and priorities. Certain measures are suggested, covering the protection of traditional knowledge (TK), benefit sharing and participation in decision making. The rights of farmers to save, use, exchange and sell farm-saved seeds and propagating materials are also addressed, but without giving any particular direction for implementation. Two other provisions (paras 13.3 and 18.5) state that funding priority will be given to farmers contributing to maintaining agro-biodiversity. The ITPGRFA preamble highlights the necessity of promoting farmers' rights at the national as well as international levels. There is, however, as yet no common understanding of how this can be achieved. The Governing Body of ITPGRFA will discuss this at its second session in October/November 2007.

The idea of farmers' rights has been intimately linked with the discussion of IPRs ever since the concept was first mooted internationally. Nevertheless, it still remains unclear as to exactly how the links to IPRs can be understood, and what the concept of farmers' rights actually means. This has hampered efforts to raise awareness about the necessity of realizing farmers' rights, which is crucial to ensure progress in this area. Thus, arriving at a clear and fruitful understanding of the concept is the first challenge, and fundamental to identifying further challenges and options.

UNDERSTANDING THE CONCEPT OF FARMERS' RIGHTS

Whereas there are many perceptions regarding farmers' rights, they generally fall within one of two different main approaches:⁷

Ownership approach

This approach refers to the right of farmers to be rewarded for genetic materials obtained from their fields and used in commercial varieties and/or protected with IPRs. The idea is that such a reward system is necessary to ensure equitable sharing of benefits arising from the use of agro-biodiversity and to establish an incentive structure for continued maintenance of this diversity. Access and benefit sharing (ABS) legislation and farmers' IPRs are suggested as central instruments.

Stewardship approach⁸

This approach refers to the rights that farmers must be granted in order to enable them to continue as stewards and innovators of agro-biodiversity. The idea is that the legal space required for farmers to continue with this role must be upheld and that farmers involved in the maintenance of agro-biodiversity—on behalf of our generation, for the benefit of all humankind—should be rewarded and supported for their contributions.

If we take the measures suggested under ITPGRFA for the realization of farmers' rights as the point of departure, the goals to pursue would be quite different for the two approaches (See the box on the next page).⁹

Proponents of the stewardship approach note that agricultural plant varieties are normally shared among farming communities: ownership of varieties is traditionally an alien idea among farmers, and represents a profound break with traditional perceptions. Furthermore, it would be difficult to identify exactly who should be rewarded. In addition, the demand for farmers' varieties among commercial breeders is limited, so relatively few farmers would benefit, whereby most of the contributors to the global pool of genetic resources would remain unrewarded. Also, the ownership approach could lead to disincentives to share seeds and propagating materials among farmers because of benefit expectations and/or exclusive IPRs for farmers' varieties. Thus, if countries choose to follow the ownership approach, it is vital that it does not conflict with the overall objective of stewardship, which has been the prevailing principle in FAO ever since the discussion came up.

Based on the many perceptions on the concept, the following working definition may be seen as a lowest common denominator:¹⁰

Farmers' rights consist of the customary rights that farmers have had as stewards and innovators of agro-biodiversity since the dawn of agriculture to save, grow, share, develop, and maintain plant varieties; and of their legitimate rights to be rewarded and supported for their contribution to the global pool of genetic resources as well as to the development of commercial varieties of plants, and to participate in decision making on issues that may affect these rights.

Such a 'minimum definition' does not directly address the latent conflict between farmers' rights and IPRs. Rather, it seeks to establish a common ground for addressing the crucial issue of farmers' rights, which is necessary to develop a fruitful dialogue among stakeholders on the measures that need to be taken—and also with regard to IPRs. Based on this definition, we can derive three core challenges:

- upholding and developing *legal space*¹¹ for farmers' customary practices related to agro-biodiversity;
- creating *support mechanisms* for farmers' contributions to the global pool of genetic resources; and
- enabling farmers' *participation* in relevant decision-making processes.

We will focus on the first two in this Policy Brief.

UPHOLDING LEGAL SPACE

Farmers' practice of saving, using, exchanging and selling seeds and propagating materials from their own harvest is increasingly affected by three forms of legislation: IPRs, particularly PBRs; seed laws; and ABS laws.¹²

PBRs restrict the use of farm-saved seeds and the exchange of seeds and propagating materials from plants protected with such rights. The extent to which they restrict such practices depends on the coverage of the rights and possible exemptions for small-scale farmers. The past 40 years have seen a steady increase in restricting these rights through the International Union for the Protection of New Varieties of Plants (UPOV), the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organization (WIPO). Also, regional and bilateral trade agreements between the countries of the North and the South often set the introduction of PBRs as a condition. Such regimes are evolving extremely fast in many developing countries, and increasingly restricting farmers' legal space. The problem is that the seed sector in these countries never had the chance to adapt to a slowly developing IPR regime, as in the North. This makes it extremely difficult to establish 'prior art'—formal knowledge of already existing plant varieties—which is necessary to establish whether a new variety for which PBRs are sought is really new. Normally the burden of proof lies with the farmers, who mostly have only marginal institutional and financial capacity to challenge rights conferred on breeders.

Seed laws cover the exchange and sale of seeds and propagating materials—regardless of whether they are protected with IPRs—for plant-health reasons. Their certification rules are normally based on criteria relevant to genetically homogeneous plant varieties developed by professional plant breeders, but not farmers' varieties. The result is that farmers' varieties are excluded from the formal market in many countries. In Europe, it is even prohibited to exchange seeds among farmers or to give them away.

ABS laws, often adopted with reference to CBD, tend to restrict access to genetic resources for companies and entities other than farmers and indigenous peoples. However, in some cases the laws also cover gene bank conservation activities, vital for farmers' continued access to agro-

biodiversity. In Peru, for example, access-related legislation on the protection of TK has proven a barrier to conservation, and has discouraged the sharing of potato seeds among farmers.

From a farmers' rights perspective, the main goal must be to uphold the legal space for farmers within these emerging legislative frameworks. At the minimum, farmers must be allowed to save, develop, exchange and sell seeds and propagating materials from their varieties¹³ with other farmers. Plant-health concerns must be addressed in other ways. Furthermore, IPR legislation must be designed so as to enable small-scale farmers to continue their customary practices related to seeds and propagating materials. Finally, ABS legislation must not impose barriers to conservation activities, or serve to discourage seed exchange among farmers.

CREATING SUPPORT MECHANISMS

Creating effective support mechanisms is not only about the equitable sharing of benefits from the use of genetic resources; it is also vital to ensuring the maintenance of agrobiodiversity *in situ*. We can distinguish between direct and indirect as well as monetary and non-monetary benefit sharing. Direct benefit sharing takes place between purported 'owners' and 'buyers', whereas indirect benefit sharing is between the stewards of agro-biodiversity and society at large, often channelled through development cooperation. Although several countries in the South have enacted legislation on direct benefit sharing, no instances of such benefit sharing have been reported so far with regard to agrobiodiversity.¹⁴ By contrast, there are many examples of indirect benefit sharing, normally non-monetary. The most frequent benefits are:

- access to seeds and propagating materials, and related information;
- participation in the definition of breeding goals;
- participatory plant breeding through collaboration between farmers and scientists;

TWO APPROACHES FOR THE REALIZATION OF FARMERS' RIGHTS

ITPGRFA measures	Protection of farmers' TK	Equitable sharing of benefits arising from the use of PGRs	Participation in relevant decisions at the national level	Farmers' customary use of propagation materials (saving, sharing, selling)
Stewardship approach	The goals are to protect such TK against extinction and thus to encourage its further use.	Benefits are to be shared between stewards of PGRs and society at large—partly through the Multilateral System.	Participation is important to ensure legal space and rewards for farmers' contributions to the genetic pool.	The goal is to uphold the legal space to ensure farmers' continued maintenance of PGRs.
Ownership approach	The goals are to protect TK against misappropriation and to enable its holders to decide over its use.	Benefits are to be shared between purported 'owners' and 'buyers' of PGRs upon prior informed consent on mutually agreed terms.	Participation is important to ensure adequate legislation on ABS and IPRs.	The goal is to introduce farmers' IPRs along with PBRs – in balance.

- strengthening farmers' seed systems;
- conservation activities, including local gene banks; and
- enhanced utilization of farmers' varieties, including market access.

Today, these benefits are achieved mostly through initiatives taken by civil society organizations and some extension services, and reach only a limited number of farmers. Options to scale up such activities include the establishment of funds or facilitating mechanisms at the national and international levels to channel the necessary resources to activities supporting farmers in their maintenance of agrobiodiversity. This would also require scaling up institutional structures and competence for these purposes—in close collaboration with farmers.



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CONCLUSION

Raising awareness on the importance of farmers' rights for food security and poverty reduction is the most pressing challenge today. A minimum definition, as proposed in this Policy Brief, may be instrumental in furthering dialogue among stakeholders on the measures to be taken. The core challenges are the increasing legal restrictions on farmers' customary practices related to agro-biodiversity, and the lack of support structures and farmers' participation in relevant decision-making processes. Central options pertain to creating a legal space within legislative frameworks for farmers' stewardship and innovations in agriculture, and establishing funding mechanisms at the national and international levels in order to scale up activities supporting them in their vital contribution to the global genetic pool. ■

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South Asia Watch on Trade, Economics & Environment (SAWTEE) is a regional network that operates through its secretariat in Kathmandu and 11 member institutions from five South Asian countries, namely Bangladesh, India, Nepal, Pakistan and Sri Lanka. The overall objective of SAWTEE is to build the capacity of concerned stakeholders in South Asia in the context of liberalization and globalization.



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NOTES

¹ FAO, *State of the World's Plant Genetic Resources for Food and Agriculture* (Rome: Food and Agriculture Organization, 1998).

² Regine Andersen, *Governing Agrobiodiversity: Plant Genetics and Developing Countries* (Aldershot, UK: Ashgate, forthcoming, 2007).

³ The article is based on the findings of an international research project on farmers' rights led by the author. Publications from the project can be downloaded free of charge from www.fni.no/farmers/main.html.

⁴ This section is based on Regine Andersen, *The History of Farmers' Rights – A Guide to Central Documents and Literature*, FNI Report 8/2005 (Lysaker, Norway: The Fridtjof Nansen Institute, 2005a).

⁵ FAO Conference Resolution 5/89.

⁶ UNEP: Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, May 22, 1992.

⁷ This is based on Regine Andersen, *Results from International Stakeholder Survey on Farmers' Rights*, FNI Report 9/2005 (Lysaker, Norway: The Fridtjof Nansen Institute, 2005b).

⁸ In this context, the term 'stewardship' is used in recognition of farmers' role in maintenance and innovative development of PGRs.

⁹ From Regine Andersen, *Realising Farmers' Rights under the International Treaty on Plant Genetic Resources for Food and Agriculture*, Summary of Findings from the Farmers' Rights Project (Phase 1), FNI Report 11/2006 (Lysaker, Norway: The Fridtjof Nansen Institute, 2006).

¹⁰ *ibid.*

¹¹ This concept was first used in this context in Andersen 2006.

¹² This development can be seen as the result of the interaction between the international regimes presented here and their driving forces, as analysed in Andersen 2007, forthcoming.

¹³ This concept broadly covers traditional varieties and farmers' plant variety innovations.

¹⁴ Andersen 2005b.