

Input paper for the Second Meeting Ad Hoc Technical Committee on Sustainable Use of Plant Genetic Resources for Food and Agriculture

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SOME CONSIDERATIONS ON THE RELATION BETWEEN FARMERS' RIGHTS, PLANT BREEDERS RIGHTS AND LEGISLATION ON VARIETY RELEASE AND SEED DISTRIBUTION

Based on informal international consultations and research carried out within the framework of the Farmers' Rights Project of the Fridtjof Nansen Institute, Norway.

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This paper presents some of the results from the Farmers' Rights Project of relevance to the ACSU meeting. The Farmers' Rights project was established in 2005 to provide research based guidance to decision makers and practitioners on the realization of Farmers' Rights (see www.farmersrights.org). Within the framework of the Farmers' Rights Project, several informal international multi-stakeholder consultations have been carried out over the years, which together with research from the Farmers' Rights Project provide the basis this brief input paper.

The ITPGRFA provisions on Farmers' Rights related to seed (Article 9.3)

Farmers' Rights is a cornerstone in the ITPGRFA, as the conservation and sustainable use of crop genetic resources for a substantial part I carried out by farmers. Farmers are maintaining crop genetic diversity by saving, selecting, using, developing, exchanging and selling farm saved seed. The ITPGRFA terms farmers' practices of saving, using, exchanging and selling farm-saved seed as rights. However, it is vague on the contents of these rights. Section 9.3 of the Treaty states that nothing in the relevant article (Article 9 on Farmers' Rights) 'shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed, subject to national law and as appropriate'.

The preamble notes that 'the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material (...) are fundamental to the realization of Farmers' Rights'. This indicates the importance of these rights, but does not give much guidance, as the rights referred to are only vaguely addressed. Despite the lack of precision, the general line of thought is clear. It is important that farmers be granted rights in this direction, although the individual countries are free to define the legal space they deem sufficient for farmers regarding their rights to save, use, exchange and sell farm-saved seed.

Global consultations on Farmers' Rights: Recommendations on Article 9.3

Global Consultations on Farmers' Rights were conducted in 2010.² Consisting of both an e-mail based survey and an international consultation conference with regional components

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² See the full report from the consultations here: <http://www.farmersrights.org/pdf/FNI%20Report%201-2011%20Farmers%20Rights.pdf>

held in Addis Ababa, Ethiopia, the consultations were organized as a response to Resolution 6/2009 of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, which called for regional workshops on Farmers' Rights. In the two phases of the consultations, a total of 171 experts and stakeholders from 46 countries in Africa, Asia, the Near East, Latin America and the Caribbean, North America and Europe, and from farmer organizations, government institutions, the seed industry, NGOs, IGOs, research institutions and other relevant groups participated. The participants shared their views and experiences and discussed obstacles and options to the realization of Farmers' Rights. The consultation conference resulted in recommendations from the regional groups as well as joint recommendations from the conference. The prime concern among most participants is the need for guidance, support and capacity building to develop or adjust national legislation, policies, strategies and programs for the realization of Farmers' Rights.

The European and North America group noted among other things that:

- The broad range of biodiverse farming practices using diverse seed systems across all regions (including Europe and North America) respond to diverse human needs and balance different requirements;
- The diversity of plant genetic resources for food and agriculture developed by farmers/breeders and exchanged within and among communities, countries, and continents require diverse seed systems within different legal situations;
- The conservation and sustainable use of plant genetic resources for food and agriculture are inseparable from farmers' knowledge and practice about seed and farming systems;
- Farmers as well as specialized plant breeders have important knowledge and skills that can complement one another.

The joint recommendations from the Addis Ababa consultations emphasised that:

- National governments should consider Article 9.3 broadly, with particular regard to the fact that the factors involved in determining how to recognize these rights are not purely scientific and that these rights have implications for farmers' livelihoods and other social, economic and environmental issues.
- Formal and local seed systems should not be seen as in opposition but should be recognized as complementary and, as such, there is a need to ensure legal space for each to make its contribution to the conservation and sustainable use of PGRFA at the national level.

Farmers' Rights in relation to the WTO/TRIPS

The freedom to define legal space for farmers is delimited by other international regimes. Most countries in the world are members of the World Trade Organization (WTO), and are thus obliged to implement the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). According to the TRIPS Agreement, all WTO member countries must protect plant varieties either by patents, or by an effective sui generis system (a system of its own kind), or a combination (Art. 27.3.b). The limits to a sui generis system and the meaning of an 'effective' sui generis system are not explicitly defined in the text. In other words, countries have to introduce some sort of plant breeders' rights.

Relation to UPOV

The Union for the Protection of New Varieties of Plants (UPOV) has held that the most effective way to comply with the provision concerning an effective sui generis system is to follow the model of the UPOV Convention. There are several versions of the UPOV model. The most recent one (the 1991 Act of the UPOV Convention) provides that plant breeders are to be granted comprehensive rights – to the detriment of farmers' customary rights to save, re-use, exchange and sell seeds. It is still possible to make exceptions for small-scale farmers to enable them to save and re-use seeds, but only within strict limits. Exchange and sale of seeds among farmers are prohibited. All this applies to seeds protected with plant breeders' rights, and not to traditional varieties.

The UPOV model has met with resistance from some countries and many organizations that fear that joining UPOV would be detrimental to the rights of farmers to save and share propagating. As an example, Norway in 2005 decided to remain member of UPOV'78, after a thorough discussion of whether the country should join UPOV'91. The reason why the government of Norway decided reject UPOV'91 was the need to uphold a proper balance between farmers' and breeders' rights.

A core question is how to create necessary legal space

The TRIPS Agreement provides only minimum standards, leaving enough scope for the development of other solutions more compatible with the demand for Farmers' Rights. The challenge in the context of the Plant Treaty is thus for WTO member countries to meet their TRIPS obligations regarding plant breeders' rights, while at the same time creating the necessary legal space for the realization of Farmers' Rights to propagating material. The question becomes what room to manoeuvre is left to countries within the framework of their international obligations, to grant farmers the right to save, use, exchange and sell seeds.

Relation to variety release and seed distribution legislation

An additional constraint to Farmers' Rights in many countries is the introduction of seed laws requiring that varieties are officially approved for release and that seed and propagating material are certified, as conditions for bringing them out on the market, and in some cases (particularly in the North) even as a condition for exchange among farmers. The reason was originally to ensure plant health and seed quality. However, in many countries regulations have gone so far that they hinder the maintenance of crop genetic resources in the fields, in two ways:

- As traditional varieties are normally not genetically homogeneous enough to meet the requirements for approval and certification, these varieties are excluded from the market and may sooner or later disappear from active use.
- The seed laws may also stipulate that only authorized seed shops are allowed to sell seeds, whereas all other exchange is prohibited (sometimes with exceptions for horticultural plants or certain other species).

This more or less ends the 10,000-year-old tradition of seed exchange that made possible the development of our diversity today.

How the combination of seed legislation and plant breeders' rights affect sustainable use of PGRFA and Farmers' Rights

Combined, the two measures, as described above, constitute serious obstacles to the implementation of the Plant Treaty in terms of *in situ* on-farm conservation and sustainable use, as well as to Farmers' Rights. It is a paradox that rules originally intended to protect plant health in fact contribute to removing the basis for ensuring plant health in future, namely the diversity of genetic resources.

As we have seen above, seed laws together with strict plant breeders' rights represent a serious obstacle to Farmers' Rights to save, use, exchange and sell seeds. What possibilities are there to make such laws more compatible with these customary rights of farmers – which are so crucial to the maintenance of agro-biodiversity for food security, today and in the future?

The European Union has tried to solve the problem with a specific directive on conservation varieties. However, the EU directive on conservation varieties is not adequate to solve these hurdles, as its evaluation has shown. One reason is that seed exchange and sale is still prohibited among farmers under the directive. Another reason is that only varieties deemed interesting for conservation and sustainable use by certain authorities can be covered by the system, which is limiting diversity. Furthermore, the variety release and certification criteria are still too strict. Also, the marketing and use of the varieties are limited to the regions of origin, which is not in line with the customary uses of exchange that has been so important to the development of crop genetic diversity. On top of this, only limited quanta of seeds can be used. Last but not least the conservation varieties cannot be further developed by farmers, which makes them less attractive to farmers altogether. Thus, the directive does not encourage the conservation and sustainable use of crop genetic diversity, and pose serious barriers to the implementation of Articles 5, 6 and 9 of the Plant Treaty. Efforts to change the legislation are underway, but have so far not succeeded.

SOME GAPS AND NEEDS

Variety release and seed certification legislation poses serious hurdles to Farmers' Rights to exchange and sell farm-saved seed, and to the marketing of land races as well as many farmers' varieties. This constitutes a serious hurdle to on-farm conservation and sustainable use of crop genetic diversity. To overcome this hurdle, shared norms should be developed on how seed laws can be designed so as to ensure adequate legal space for farmers in this regard.

Intellectual property rights constitute hurdles to the realization of Farmers' Rights to various degrees. In some countries, the balance between farmers' and breeders' rights is seen as acceptable, as in India and Norway. In other countries, plant breeders' rights and patents constitute greater hurdles, as they prohibit customary uses of seed. It is necessary to discuss what kind of legal space farmers should be ensured with regard to plant breeders' rights and patents, with a view to developing shared norms.

Fear of misappropriation of farmers' varieties and associated traditional knowledge has led to protectionism with regard to seeds and knowledge among farmers in several countries. This development is detrimental to the sharing of seed and knowledge among farmers, as well as to ex situ conservation measures, but at the same time an understandable reaction to the evolvement of intellectual property regimes. It is necessary to find ways and means to ensure that farmers do not need to fear misappropriation. One

challenge is to identify efficient measures to establish prior art for land races and farmers' varieties, in order to ensure that these cannot be made subject to intellectual property rights. Another challenge is to include provisions in laws on intellectual property rights to ensure that no misappropriation takes place. Norms and rules in this regard need consideration.

Further Reading - Contributions from the Farmers' Rights Project:

Regine Andersen and Tone Winge (ed.) (2013): Realising Farmers' Rights to Crop Genetic Resources: Success Stories and Best Practices (Abingdon, UK: Routledge)
<http://www.routledge.com/books/details/9780415643849/>

Regine Andersen (2012): Plant genetic diversity in agriculture and Farmers' Rights in Norway. FNI Report 17/2012 (Lysaker, Norway: The Fridtjof Nansen Institute)
<http://www.farmersrights.org/pdf/FNI-17%20RA.pdf>

Regine Andersen and Tone Winge (2011): The 2010 Global Consultations on Farmers' Rights: Results from an e-mail based survey. FNI Report 2/2011 (Lysaker, Norway: The Fridtjof Nansen Institute)
<http://www.fni.no/doc&pdf/FNI-R0211.pdf>

Regine Andersen and Tone Winge, with contributions from Bell Batta Torheim (2011): Global Consultations on Farmers' Rights in 2010. FNI Report 1/2011 (Lysaker, Norway: The Fridtjof Nansen Institute)
<http://www.farmersrights.org/pdf/FNI%20Report%201-2011%20Farmers%20Rights.pdf>

Regine Andersen (2009): Information paper on Farmers' Rights submitted by the Fridtjof Nansen Institute, Norway, based on the Farmers' Rights Project. Input paper submitted the the Secretariat of the Plant Treaty 19 May 2009 (IT/GB-3/09/Inf. 6 Add.3)
<http://www.farmersrights.org/pdf/GB3Inf6a3.pdf>

Regine Andersen (2013): Progress for Farmers' Rights at GB5 in Oman. Note published at the website of the Farmers' Rights Project:
http://www.farmersrights.org/pdf/FR_afterGB5_RA.pdf

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