



FARMERS' RIGHTS OR CORPORATE CONTROL OVER SEEDS?

BACKGROUND PAPER TO THE NINTH SESSION OF THE
ITPGRFA GOVERNING BODY



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1. INTRODUCTION

From 19 to 24 September 2022, State Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or Treaty) will meet in India for the ninth session of the Treaty's Governing Body (GB9). At that meeting, governments will take important decisions that will have a direct bearing on peasants' and Indigenous Peoples' right to seeds. This briefing paper seeks to explain the most important issues and puts forward recommendations to ensure that the decisions taken at GB9 support peasants' and Indigenous Peoples' rights.

Adopted in 2001, the ITPGRFA stands out as a binding international instrument recognizing farmers' rights, i.e. the rights that peasants and Indigenous Peoples have over seeds, based on their "past, present and future contributions" to the conservation and development of agricultural biodiversity.¹ These rights, which are enshrined in Article 9 of the Treaty, are complemented by provisions on *in situ* conservation² of plant genetic resources (Art. 5) as well as their sustainable use (Art. 6). They have been reaffirmed and further developed in Article 19 of the UN Declaration on the Rights of Peasants and Other Persons Working in Rural Areas (UNDROP).

However, the Treaty has also been used by the seed industry as a tool to access the vast amount of seeds and plant genetic material that is stored in public seed and gene banks around the world. The ITPGRFA has put in place a so-called Multilateral System (MLS), which allows the facilitated access to this material for breeders and researchers. Although such access is, in principle, conditioned to the equitable sharing of the benefits that arise from the use of that genetic material, this has not worked in practice and seed corporations have paid next to nothing into the Treaty's Benefit Sharing Fund.³ This is despite the fact that most seeds and genetic material in the MLS stem from the seed selection and conservation work of peasants and Indigenous Peoples over centuries.

The upcoming Governing Body meeting will be decisive to determine whether the ITPGRFA achieves its objectives of ensuring the conservation and sustainable use of plant genetic material through the realization of farmers' rights; or if it will continue to serve mainly as a tool for the seed industry to exploit the seeds and plant genetic material contained in seed and gene banks around the world. The meeting comes at a time of multiple, interconnected crises regarding food, climate change, the economy and war, among others. The question of seeds and plant genetic material is critical in this context, given the centrality of peasants' and Indigenous Peoples' seeds management systems to guaranteeing the right to food and food sovereignty.

¹ ITPGRFA, Preamble and Art. 9.1.

² In the context of agriculture, *in situ* conservation refers essentially to the conservation of biodiversity in peasants' and Indigenous Peoples' fields.

³ African Centre for Biodiversity/Third World Network. 2019. Crunch Time for the Seed Treaty. A review of some of the outstanding issues in the negotiation. Will the effort to fix ITPGRFA's broken benefit sharing system measure up to expectations? Available at: www.acbio.org.za/sites/default/files/documents/Crunch_Time_for_the_Seed_Treaty_A_review_of_some_outstanding_issues_in_the_negotiation_Will_the_effort_to_fix_ITPGRFAs_broken_benefit_sharing_system_measure_up_to_expectations.pdf.



II. KEY ISSUES TO BE DISCUSSED AT THE TREATY'S GOVERNING BODY MEETING

1) Farmers' Rights

As a result of several years of advocacy by peasant and Indigenous Peoples' organizations as well as support by some governments, the ITPGRFA initiated a formal process on farmers' rights. At its seventh meeting in 2017, the Treaty's Governing Body established an Ad-hoc technical expert group (AHTEG) with the task of a) producing an inventory of existing measures to implement farmers' rights; and b) developing "options for encouraging, guiding and promoting the realization of Farmers' Rights". In 2019, this AHTEG's mandate was extended and the number of members from farmers' organizations was increased.⁴

The deliberations during the four AHTEG meetings allowed having in-depth - and often controversial - discussions about the implementation of farmers' rights. Although the process has been far from equitable (of the AHTEG's 45 members, for instance, only five have been representatives of peasants and Indigenous Peoples' organizations), peasants and Indigenous Peoples have been able to put forward their vision and proposals. Central to these is the understanding that farmers' rights are tied to peasants' and Indigenous Peoples' distinct seed systems, which are fundamentally different from commercial systems.

Several contentious issues have remained unresolved and the AHTEG was not able to finalize the so-called "Options paper" with guidance to the implementation of farmers' rights.⁵ One critical issue, which has been particularly contentious in the AHTEG's deliberations, is the relationship between farmers' rights and intellectual property rights (IPR) over seed and plant genetic material. Peasants and Indigenous Peoples'

⁴ ITPGRFA Governing Body Resolution 7/2017 and Resolution 6/2019.

⁵ www.fao.org/3/ni836en/ni836en.pdf.

representatives in the AHTEG have emphasized that their rights over seeds are human rights, as opposed to the commercial rights claimed by the industry. Consequently, they have opposed any language in the outcome document, which may be interpreted in such a way as to allow the limitation of farmers' rights by IPR. They have further pointed out that several examples in the farmers' rights inventory⁶ pertain to measures, which restrict, rather than promote, farmers' rights.

Another unresolved issue emerging from the discussions is the legal status of farmers' rights. In response to repeated statements made by AHTEG members from the seed industry, the International Convention for the Protection of New Varieties of Plants (UPOV) and some Northern countries challenging the binding character of the provisions contained in Article 9 of the Treaty⁷, peasants and Indigenous Peoples have asked the AHTEG to request the FAO's Legal Office to provide a legal opinion on the matter. However, no agreement was reached on this issue.

At the September meeting, the Treaty's Governing Body has to decide how to deal with the open issues - further deliberations during the meeting are likely in order to finalize the so-called "Options document"⁸ - as well as if and how to pursue the process on farmers' rights.

Recommendations to the ITPGRFA Governing Body:

- Ensure that the resolution on farmers' rights recognizes that peasants and Indigenous Peoples realize their rights over seeds (farmers' rights) primarily through their own, distinct seed systems and that these need to be protected through specific national legal frameworks.
- Clarify that peasants' and Indigenous Peoples' rights over seeds are human rights, and reject any decision or wording implying (explicitly or implicitly) that farmers' rights may be subjected to intellectual property rights, including the UPOV Acts.
- Request the FAO's Legal Office to issue a legal opinion on the nature of Art. 9 of the ITPGRFA.⁹

⁶ The inventory is available at: www.fao.org/plant-treaty/areas-of-work/farmers-rights/inventory-on-frs/en.

⁷ On several occasions during the AHTEG meetings, some members questioned the legally binding nature of the provisions contained in Art. 9 of the ITPGRFA. In particular, their statements suggested that Arts. 9.1 and 9.3 do not establish legally binding obligations to State Parties, and that the phrase "subject to national law and as appropriate" mentioned in Art. 9.2 should be interpreted in such a way that State Parties may choose to decide to apply the rights contained in Art. 9 - or not. AHTEG members representing peasants and Indigenous Peoples, as well as some of the experts nominated by Contracting Parties firmly opposed such an interpretation, among others referring to the principle of law *Pacta sunt servanda* contained in the Vienna Convention on the Law of Treaties. According to this principle, every treaty in force is binding to the parties to it and must be performed by them in good faith.

⁸ Available at: www.fao.org/3/ni836en/ni836en.pdf.

⁹ A proposal for the wording of such a request can be found in the Annex of this background paper.

2) 'Digital Sequence Information' (DSI)

Technological advances over recent years have significantly reduced the cost and time of sequencing genetic information from plants, cultivars and wild species, and the storing of this information in digital data bases. According to the industry and some researchers, new genetic engineering techniques allow for the introduction of genetic sequences of specific traits into plants, thus creating 'new' varieties that express those traits through processes that do not respect the natural physiological barriers of reproduction or recombination of living organisms.

The use of so-called 'digital sequence information' (DSI) carries serious risks of illegitimate appropriation and exploitation of peasants' and Indigenous Peoples' seeds and knowledge. Existing obligations regarding the free, prior and informed consent, benefit sharing and protection of traditional knowledge, among others, are being circumvented through the open access to millions of DSI from genetic material that are now available on the internet. The seed industry and some governments claim that DSI are not to be considered as plant genetic resources, but as mere information. If such an interpretation prevails, agreements such as the ITPGRFA would become obsolete, including their provisions on free, prior and informed consent and farmers' rights.

Over the past ten years, intense discussions have been taking place in the ITPGRFA and other international fora about how to deal with the challenges arising from the use of DSI. So far, no agreement has been reached. Whereas many debates have focused on applying existing obligations regarding the equitable sharing of benefits arising from the use of DSI, one of the most important and far-reaching issues has received less attention, namely the patenting of genetic sequences. The scope of such patents extends to all biological material that contains the respective sequence and expresses its function, including "native" biological material. This may include peasants' and Indigenous Peoples' seeds, resulting in them being required to pay royalties to patent holders. The combination of DSI, biotechnologies and IPR in the form of patents over genetic sequences therefore constitutes a major threat for the realization of farmers' rights.

At the last Governing Body meeting, governments did not reach an agreement on the issue of DSI and reverted to ongoing discussions in the Convention on Biological Diversity (CBD) and the FAO's Commission on Genetic Resources for Food and Agriculture (CGRFA). Given that no decision has been made in those fora,



State Parties to the ITPGRFA will have to look into the issue again at GB9.

Despite the lack of a decision by the Treaty on the issue of DSI, the ITPGRFA Secretariat has announced, on June 6, 2022, that it has signed a Memorandum of Understanding with DivSeek International, an organization that promotes the sequencing of plant genetic material and the use of DSI.¹⁰ The partnership risks allowing the seed and biotech industry to access all DSI of genetic material contained in the MLS, without having to sign agreements concerning the transfer of this material and opening up the possibility of patenting those plant genetic resources and/or their genetic components. Despite the absence of a formal position adopted by the Treaty's GB, the partnership with DivSeek thus creates facts - to the detriment of peasants' and Indigenous Peoples' rights. Without strong decisions at the India meeting, the Treaty risks functioning as an instrument for the appropriation of seeds and genetic material by corporations.

Recommendations to the ITPGRFA Governing Body:

- Clarify that DSI is not separate from the material genetic material/seeds from which it stems and therefore needs to be treated like genetic resources. Consequently, the industry and researchers are required to comply with the rules regarding access to seeds and genetic material under the Treaty's MLS, including the respect of farmers' rights.
- Modify the standard material transfer agreement (SMTA)¹¹ to access seeds under the Treaty's MLS so that the seed industry cannot patent genetic sequences that it has accessed through that system, and that the rights of peasants and Indigenous Peoples to seeds are guaranteed.¹²
- Revoke the ITPGRFA's partnership with DivSeek.
- Recommend the prohibition of patents on genetic sequences/DSI to be enacted by governments through national laws.

¹⁰ www.fao.org/plant-treaty/news/news-detail/en/c/1538433.

¹¹ The SMTA is a private contract with standard terms and conditions whose purpose is to ensure the respect of the ITPGRFA's provisions in the context of transfer of plant genetic material contained in the Treaty's Multilateral System.

¹² A proposal for the wording of such a modification can be found in the Annex of this background paper.

ANNEX

1) Proposal for a Request to the FAO's Legal Office for a legal opinion on the nature of Art. 9 of the ITPGRFA

At the fourth AHTEG meeting on farmers' rights, members representing peasants proposed to request the FAO's Legal Office to answer to the following questions. The proposal was supported by several other AHTEG members, but no consensus was achieved.

1. According to Article 9.2, "in accordance with their needs and priorities, each Contracting Party should, as appropriate and subject to national law, take measures to protect and promote Farmers' Rights." Does this mean that parties can choose to apply some rights listed in Articles 9.2 and 9.3, which they wish to implement, and not apply the others? Or does this mean that they are required, in order to respect the obligation they have made by ratifying the Treaty, to apply all the rights listed in Article 9, ensuring their coherence with other aspects of their national legislation, through enforceable national laws?
2. According to article 9.3 and the Preamble of the Treaty, which states: "Affirming that the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels", and taking into account that according to article 31 of the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Does Article 9.3 establish legally binding obligations on the Contracting Parties? Or is its application optional if national laws prohibit farmers' rights to save, use, exchange and sell farm-saved seed or propagating material?

2) Proposal for modification of the ITPGRFA's SMTA

At the Eighth Session of the ITPGRFA Governing Body, the International Planning Committee for Food Sovereignty (IPC) proposed to complement Article 6.2 of the SMTA in such a way to commit the beneficiary of facilitated access through the MLS not to claim "any intellectual property rights or other rights that limit the facilitated access to the material provided under this Agreement or to genetic parts or components, in the form received from the Multilateral System, or that limit the use for agricultural and food production, reproduction, exchange or sale of reproductive material of such material, in the form received from the Multilateral System".



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