ITPGR: farmers' rights or a fool's bargain?

The Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) held its third session on 1–5 June 2009 in Tunis. Many fine words and declarations of intent were addressed to farmers, while the seed companies consolidated both their unfettered access to all the farmers' seeds on the planet and their monopoly over seed markets. Notwithstanding the sometimes lively clashes between countries of the South and those of the North, does this "seed treaty" offer any new opportunities to farmers?

1 WHAT IS THE ITPGR?

1 a) Farmers' seeds, industry's raw material

The seeds bred and conserved by the world's farmers since the emergence of agriculture to the present day are the seed industry's only raw material; it calls them "plant genetic resources". The industry depends on access to these seeds, but farmers are also the industry's main competitor: as long as farmers save and breed their own seeds, it is difficult for seed companies to sell the seeds they produce. The seed industry used modern plant breeding techniques to make farmers' seeds stable and uniform and to adapt them to the heavy use of chemical fertilisers and pesticides for high yields, and then sold the seeds back to farmers in the form of commercial varieties.

1 b) The monopoly of non-freely reproducible industrial seeds

In order to ensure its commercial monopoly, the industry has, in most countries, succeeded in outlawing the sale or exchange of seeds that are not certified and/or registered on a national variety list. Farmers' seeds, which are open-pollinated and saved from season to season, are constantly adapting and diversifying in response to variations in the land and climate. They are never uniform or stable, and, for this, they are deprived access to the market and condemned to disappear. But, while farmers are prohibited from sharing or selling seeds to each other, they are not prevented from using the seeds from their harvests on their own farms. To remove this final freedom, industry invented F1 hybrids, which make seed saving non-productive. Hybrids are not available for all species, however, and so, to completely lock up its seeds, the industry introduced two types of intellectual property rights (IPRs) over plant varieties: patents, which prohibit the use of farm seeds; and plant breeders' rights (PBRs), which make seed saving a form of counterfeit that states can ban or permit only if royalties are paid.

1 c) From the common heritage of humanity to national sovereignty

The seed industry's monopoly has caused the rapid disappearance of farmers' varieties in those rich countries where industrial agriculture dominates. To safeguard these resources, industry convinced governments to collect the farmer seeds before they disappeared and conserve them in off-farm (*ex situ)* gene banks. Farmers practising subsistence agriculture or so-called "non-commercial" agriculture and having no money to buy commercial seeds or the fertilisers required to cultivate them, were allowed to conserve and exchange their traditional seeds: this on-farm (*in situ*) conservation allows renewal of seed diversity, which is no longer assured in the gene banks.

Plant genetic resources were initially considered to be "the common heritage of humanity", freely accessible to researchers and public- and private-sector plant breeders. In 1992, however, the protests of countries of the South, rich in biodiversity, were at last heard in the arena of international negotiations with the Convention on Biological Diversity (CBD). These countries denounced the agro-industrial practices of the North, which appropriated their genetic resources at no cost, and made them into products protected by IPRs, which could not then be used without payment. The seed companies and the rich countries that defend them then made the following proposal to the countries of the South: we will recognise your national sovereignty over your genetic resources and will negotiate your consent for the removal of any genetic resources from your countries and we will share the benefits gained through their commercial exploitation. In return, you must recognise the IPRs that allow us to produce these benefits and share them with you. In 1995, the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) required all members of the World Trade Organisation (WTO), to accept patents and/or PBRs on plants or to come up with a similar *sui generis* system of intellectual protection for plant varieties.

1 d) Access under the multilateral system and farmers' rights

The seed industry was careful to ensure that the genetic resources collected before the signature of the CBD and stored in its own collections or the collections of the countries of the North where it has free access were not subject to benefit sharing. It thus had time for further negotiations. Its first demand is for free access to all the planet's genetic resources, and to achieve this, it proposes a multilateral access system, which is, in essence, the ITPGR. Under the ITPGR system, all signatories to the treaty and parties, whether states or private individuals, who place their own genetic resources at the disposal of the multilateral system gain access to all the genetic resources made available by the other parties. Such free access extends to conservation, research or educational purposes; farmers' access depends on the good will of states. In exchange, signatory states promise to respect "the rights of farmers" who have maintained and continue to maintain these genetic resources. The treaty, while it has yet to ensure the implementation of these rights, defines them in the following way:

- protection of traditional knowledge;
- the right to share the benefits arising from the commercial use of their plant genetic resources;
- participation in national decisions about these plant genetic resources resources.

The treaty also provides for the rights of farmers to save, use, exchange and sell their seeds, but subjects these rights to national law. The implementation of farmers' rights, therefore, is in the hands of states, not the Treaty. Most governments completely ignore farmers' rights, some tolerate a degree of informal exchange of seeds between farmers outside the legal framework, and a very small number of countries have partially translated these rights into their national legislation (Brazil, India, Peru, Ecuador, Switzerland).

1 e) Benefit sharing and Material Transfer Agreements

Benefit-sharing is negotiated outside national borders and cannot be blocked by national legislation alone. So the seed industry's strategy has been to make it unworkable. In order for a private person or community to seek benefit-sharing from a company through a bilateral framework, their country has to act in their name. They cannot proceed unless their country has a law against biopiracy, and such laws are very rare. Moreover, the person or community

providing the resource has to be aware of its commercial use by third parties, and farmers and most governments of the South do not have the means to monitor all patents registered in every country. Meanwhile, companies can register PBRs without identifying the origin of the parental lines. This explains why an increasing number of plant breeders use PBRs to legalise their biopiracy: their varieties, produced from plant genetic resources, are protected by PBRs that allows them to avoid benefit sharing. Moreover, the company can patent particular genes present in a variety or the technical process for breeding it, without having to share the benefits resulting from these patents, on the pretext that they are the product of biotechnological research and not of traditional knowledge associated with the plant genetic resources used. Since the signature of the Rio Convention in 1991 and the ITPGR 14 years later, we can count on the fingers of one hand the number of bilateral financial payments made by seed companies to the communities whose plant genetic resources they used.

The Treaty has tried to address the glaring absence in the sharing of benefits by creating a multilateral benefit-sharing system based on the exchange of genetic resources between parties: any party that uses a resource coming from the multilateral system to develop a product protected by patents must pay 1.1% of its sales revenue from that product into a benefit-sharing fund managed by the Treaty. In order to ensure that companies comply with this provision, all exchanges must be recorded in a written Material Transfer Agreement and communicated to the Treaty secretariat. Those who protect their products with PBRs, however, are exempt from this obligation on the grounds that varieties protected by PBRs are freely available for research and further plant breeding. The funds collected through this mechanism are to be used to strengthen the capacities of the poorest countries to save their plant genetic resources *ex situ* and *in situ*, which would seem to mean that they must also compensate the farmers who maintain or maintained these resources.

2 THE ISSUES AT STAKE AT THE TUNIS MEETING

With the signing of the Treaty, the countries of the South have demanded the implementation of benefit-sharing and the recognition of farmers' rights. Many countries, including Brazil, made access to their resources conditional upon the implementation of these parts of the Treaty. Meanwhile, the rich countries, led by Canada, Australia, Germany and France, made their financial contributions towards the operations of the Treaty and the benefit-sharing mechanism conditional on free access to all the planet's plant genetic resources for their seed companies. The interests of the United States, which has not ratified the Treaty, were openly defended by Canada, which spoke on behalf of the "North American region". As long as the Convention of the International Union for the Protection of New Varieties of Plants (UPOV) and patent laws covering synthetic genes and genetic technologies continue to by-pass benefit-sharing and undermine the rights of farmers to protect their traditional knowledge and to save, use, exchange and sell their seeds, the Treaty will be unable to move forward.

2 a) Financing the Treaty

The Treaty secretariat's mission is to implement the whole Treaty, including what it says on *in situ* conservation and farmers' rights. The operations of the Secretariat should be financed by contributions from each state in proportion to their wealth. But the seed industry has no interest in a properly funded Secretariat. It wants to keep it alive merely to provide a cover for the multilateral access system. This is why many rich countries refuse to pay their contributions. Discussions at the second session of the Governing Body in Rome, in 2006,

were blocked by the refusal of signatories to finance the operation of the secretariat until, on the final day, Italy and Spain promised to pay the necessary sum to keep it on a drip feed until the following session. No time was left to discuss the other items on the agenda, including farmers' rights.

The Tunis meeting began with the same blackmail. Pro-Maïs, the association of French seed companies, announced at the start of the session that it was making its supposedly private collection available to the multilateral system, but forgot to mention that its seed collection is essentially made up of public resources located at the National Agronomic Research Institute. Pro-Maïs spoke about plant breeders' concerns about the limitations on access to genetic resources stemming from the CBD and called for the Treaty to remove these limitations. The Peruvian Indian community was also widely congratulated for making its potato park resources available under the Treaty. The intervention set the tone for the meeting. Access to resources was going to be the main issue for discussion, taking precedence over funding and farmers' rights. Spain's promise to pay its contribution, also announced at the beginning of the session, did nothing to convince the recalcitrant rich countries to accept a binding system for calculating voluntary payments, which had been demanded by the countries of the South. The rich countries argued that the session should deal with problems related to the "non-application of the treaty" before turning to funding issues. Without publicly saying so, this demand was aimed at countries like Brazil, which makes access to its resources subject to the effective regulation of benefit-sharing. The survival of the Treaty therefore remains dependent on negotiations over voluntary contributions, which, on the final day, ended with only the small amount necessary for the maintenance of a Secretariat, but not enough for it to carry-out its work.

Rich countries favour multilateralism when it means sharing what belongs to the poor, but refuse to take part when it comes to their own money. They prefer to keep control over any money they contribute. So France, which had never contributed to the Treaty prior to the US$50,000 it pledged in Tunis, a sum easily ten times less than what it should be contributing, argued that it pays its contributions in the form of bilateral aid that it directs itself. In fact, under the guise of support for programmes that build the capacity of legal systems in poor countries, it imposes seed laws modelled on French laws that deny farmers' rights for the benefit of plant breeders. Similarly, the Rockefeller and Bill Gates Foundations are the largest funders of the Global Crop Diversity Trust, a fund, independent of the Treaty, that finances *ex situ* gene banks, and last year inaugurated the Svalbard seed vault in Norway. These industrial agriculture foundations take great care to avoid funding *in situ* conservation and farmers' rights.

2 b) Financing the benefit-sharing fund

On the very first day of the Tunis meeting, the FAO published a triumphal communiqué announcing the start of the benefit-sharing mechanism. The evening before the meeting, the benefit-sharing fund had decided to allocate US$550,000 to a dozen projects "to reward farmers in poor countries for having saved and propagated plant varieties likely to be able to safeguard world food security over the course of the coming decades". What should we make of this? First, no peasant organisation will receive anything. Only official institutions and universities will receive grants. Moreover, despite more than 100,000 resource exchange contracts signed during the last ten years, the fund has collected very little money for the purpose of benefit-sharing since it was set up. Norway, Italy, Spain and Switzerland have directly contributed their own capital to "help get it started". But the big transnational seed

companies that still use patents on varieties – the only type of IPR through which industry agrees to contribute to the fund – are based mainly in the United States, which has not signed the Treaty. In addition, PBRs accompanied by patents on genes or processes of biotechnology are becoming more common, and industry believes that there is no reason why it should contribute to the fund if it uses this kind of IPR.

The mechanism put in place to finance the fund allows those who should be paying to exempt themselves from any obligation to do so. The start-up funds will quickly run out if they are not constantly renewed, and this obvious fact has sparked two discussions:

- a demand from the countries of the South for a binding mechanism with which to calculate each country's contribution to the fund. The idea is categorically refused by the rich countries, who use their occasional voluntary contributions as leverage in the negotiations for access to plant genetic resources. Only Norway, where the agricultural sector is very small, pays a contribution proportional to the sale of seeds within its territory. No other country has followed its example.
- a very "lively" exchange on the subject of material transfer agreements (MTAs). While an official working group of the Governing Body brought forward a unanimous proposal for the effective and restrictive implementation of MTAs, Canada vehemently opposed their use as a tool for tracing resource exchanges on the alleged grounds that MTAs are too bureaucratic. Although nobody suggested that the proper use of MTAs could facilitate the fight against biopiracy, this was the only subject of discussion! Contrary to Europe, which uses PBRs and made only a perfunctory intervention in the debate, Canada spoke on behalf of the North American region, and therefore on behalf of the United States, where companies still use patents on varieties.

2 c) Sustainable use and farmers' rights

Articles 6 and 9 of the Treaty dealing with sustainable use and farmers' rights, which had been displaced from the agenda of the second session of the Treaty by financial discussions, were once again on the agenda of the third session in Tunis. The chair had to make a dramatic intervention on the second day of discussions, and in a very formal statement sought to refer the financial negotiations to a contact group outside the plenary session, so that the agenda would be respected this time.

Discussions on the sustainable use of plant genetic resources, concerning first and foremost *in situ* conservation, participatory plant breeding and the protection of agro-ecological systems that promote crop biodiversity, were cut short because of insufficient funding commitments. The urgency of the food and climate crises was apparently not enough to release the amounts necessary, even though these sums are derisory when compared with the mountains of dollars and euros squandered on the bail-out of the bankrupt world financial system.

Discussions on farmers' rights were much more interesting, despite the absence of any financial commitments to fund their implementation. With the support of all the countries of the South, Brazil presented a draft statement that provoked strong opposition from Canada. Canada refused to accept the first article in the draft statement requiring member countries to evaluate, and if necessary correct, national measures likely to interfere with farmers' rights. After long negotiations, the article was watered down to make it non-binding. Similarly, Canada succeeded in making the organisation of the Treaty's regional workshops, which involve the participation of farmers' organisations and NGOs, conditional on the availability

of funds -- which are always dependent on the goodwill of the rich countries! Canada, however, could not prevent farmers' rights from being placed on the agenda of the Governing Body's next session. That session will take place with reference to reports from the parties concerned, including those from farmers' organisations.

2 d) UPOV and patents on genes versus farmers' rights

Europe curiously approved the first draft of the statement on farmers' rights proposed by Brazil, which was more restrictive than the version finally adopted. Europe's position has to be seen in light of the importance of UPOV in Europe and the French contribution to the discussions. It is the difference between PBRs and patents that accounts for Europe's position vis-à-vis North America. UPOV claims to respect farmers' rights because it allows them to use farm-saved seeds and to protect their knowledge by registering PBRs. It omits to mention that use of farm-saved seeds depends on the good will of countries and is subject to the payment of royalties and, secondly, that the PBR criteria for distinctiveness, uniformity and stability still apply even in the case of the diverse and adaptable seeds of farmers. Moreover, the varieties that the biotech seed companies are now spreading around the world contain patented genes or molecular markers from patented biotechnology processes, are the free use of these seeds requires the extraction of the patented material, something which no farmer can do. Only the laboratories of transnational companies can do that. A farmer's freedom also disappears when the patented genes contaminate the farmer's own seeds.

The combined use of PBRs for varieties and patents for genes and processes of biotechnology presages industry's definitive confiscation of all the planet's seeds. The possibly imminent ratification of the Treaty by the Obama administration in the US, announced by Canada on the first day of the Tunis meeting, could signal a move by the US seed industry away from patents on varieties to this new, more sophisticated form of biopiracy. Direct pressure from the United States to make all countries adopt the "UPOV + patent for genes and technology" legislative model within the framework of the free trade agreements it negotiates appears to confirm this slow but sure trend.

For France, the right to protect traditional knowledge is respected by PBRs because they only protect new varieties – as if these varieties could be separated from traditional knowledge or from the patented processes of biotechnology used in their breeding. France is not cynical enough to add that new varieties protected under PBRs could be varieties that already exist in farmers' fields that were not registered, since PBRs protect "discoveries", unlike patents, which protect only inventions. Neither does France mention that PBRs legalise biopiracy and flagrantly violate the rights of people to protect their traditional knowledge by not requiring the applicants to indicate the origin of the genetic resources used to breed their varieties. France also claims to enable farmers to protect their traditional knowledge and use their farm seeds through the "heritage" or "conservation" seed lists it has created, while carefully omitting to say that these variety lists are an obstacle to farmer varieties because they impose UPOV uniformity and stability criteria. France also claims to respect farmers' right to participate in decision-making by inviting them to sit on the committees that are composed overwhelmingly of plant breeders, seed companies and commercial seed growers. Finally, France has invented the practice of one-way sharing: from the fields and pockets of farmers to the wallets of the breeders, but never in the other direction! In fact, France believes that the right to benefit-sharing is respected in so far as farmers benefit from the genetic progress brought by new varieties. It forgets that breeders shared nothing when they took seeds from farmers' fields, and thus freely benefited from all the improvements to the world's plant

genetic resources that accrued through thousands of years of breeding work by farmers. Meanwhile, farmers in France must pay when they buy the industry's commercial seeds, and pay again when they want to save them. The French government also maintains that PBRs contribute to benefit-sharing by allowing breeders to use the protected varieties in further breeding work; in reality the use is only free for the development of stable and uniform varieties by breeders. As for the rights of farmers to exchange and sell seeds, France says nothing -- assuming that, by making recognition of farmers' rights subject to national legislation, the Treaty authorises states to ignore such rights, as though national legislation could simply prohibit internationally recognised freedoms and human rights instead of providing them with a framework.

3 WHAT OPPORTUNITIES ARE THERE FOR FARMERS?

The Tunis meeting confirmed that the Treaty is still a fool's bargain, but it could become a powerful lever for food sovereignty if farmers and civil society seize the opportunity to obtain comprehensive implementation of its stated principles.

At the opening of the first plenary session, the International Planning Committee for Food Sovereignty (IPC), made up of farmers and indigenous peoples organisations and NGOs, announced that if the ITPGR Governing Body was unable to implement the collective rights of farmers it would call for the formation of a coalition of countries willing to do so. Via Campesina (VC) also came forward to declare that the industry's sterile and locked-up seeds are the chief cause of the disappearance of crop biodiversity and a significant cause of food crises, and in no circumstances are these seeds capable of solving such crises. VC demanded a tax on commercial seeds to fund local community-managed seed banks and participatory plant breeding. These declarations were supported by almost all delegations from the South and, at the explicit request of some of them, were annexed to the Governing Body's official report. Many countries from the North also supported the improved recognition of farmers' rights, at least for farmers in the South (not their own!). Norway demanded that farmer representatives be allowed to speak during the negotiations and, along with Switzerland and Italy, worked hard to persuade the most reluctant delegations to accept the declaration on farmers' rights. Only Canada, France, Germany and Australia fought tooth and nail to protect the interests of the transnational seed companies. However restrictive this declaration on farmers rights is, it is now an official document unanimously approved by the Governing Body, which therefore explicitly recognises that many national laws are obstacles to farmers' rights. This is a formidable lever that may allow farmers' organisations and civil society groups to challenge their governments and force them to respect the Treaty to which they are party.

The position defended by UPOV shows that the Treaty will never be implemented as long as the rights of breeders and patent owners over living organisms are not redefined in such a way as to respect farmers' rights. The Treaty came after UPOV, and it is therefore for UPOV to conform to the Treaty and not the reverse. A global awareness-raising campaign should be launched to denounce the way that the combined use of PBRs and patents on genes and biotechnology methods facilitates biopiracy and undermines benefit-sharing, and to expose the schizophrenic attitude of governments that ratified the Treaty with one hand while holding the pen that ratified UPOV and TRIPS in the other.

The Treaty Secretariat can only organise the regional workshops on farmers' rights if it has the money to do so. These funds will not be raised without a strong mobilisation by farmers' organisations and civil society, region by region, country by country. The position defended by France shows that the discussions will be lively, but the cynicism of the states protecting their seed companies cannot triumph if it is held up to public scrutiny. If the Treaty proves incapable of continuing work on the collective rights of farmers, the coalition of countries and civil society organisations determined to implement them immediately, which began to take shape in Tunis, needs to be quickly pulled together, country by country, region by region and eventually at the global level as an autonomous structure or under the authority of an international organisation other than the Treaty.

The international debates that will take place on the food crisis at the FAO in Rome in November, the Climate Convention in Copenhagen in December, the regional conferences of the collectives for food sovereignty (2010 in Hungary for Europe) also provide spaces for these coalitions to consolidate. The collective rights of farmers and indigenous peoples to their seeds must be included or be imposed on the agenda of these meetings, as an essential contribution to solving the food and climate crises and achieving food sovereignty.

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