

15 Questions & Answers

on
**TRIPSs &
Farmers' Rights**

By:
Chubashini Suntharalingam

Edited by:
Indrani Thuraisingham



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**SOUTHEAST ASIAN COUNCIL
FOR FOOD SECURITY
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SEACON**

15 Questions & Answers on TRIPs & Farmers' Rights: A Primer

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Foreword

The Agreement on Trade-related Intellectual Property Rights (TRIPS) is an important part of all the agreements that come under the WTO. It requires developing countries to grant either patent or sui generis (unique) protection for the ownership of plant varieties. The International Union for the Protection of New Varieties of Plants (UPOV) is seen to be the ready made solution for compliance with TRIPs. Even though the TRIPs agreement does not mention UPOV, nevertheless the governments from the South East Asian region are promoting and developing their own Plant Protection Acts and Bills in the pretext of being compliant with WTO.

A controversial issue that is of concern to the South East Asian countries these days in relation to UPOV is farmers' rights. Patenting plants/seeds are of no help to the South East Asian countries because farmers cannot afford to pay exorbitant prices for these seeds. Moreover, farmers' right to save seeds is curtailed as they are no longer allowed to save seeds from their harvest. In view of this, farmers do not get to preserve and conserve their existing knowledge on seeds, hence traditional knowledge and Access Benefit Sharing (ABS) are forsaken. UPOV also does not recognize farmers' rights to biodiversity and their space to innovate. Thus, this raises the question of who actually benefits from UPOV. In reality, UPOV paves the way for Transnational Corporations (TNCs) to dominate agricultural markets, especially in the developing countries (i.e. countries in the South East Asian region). This means that joining a biased system like UPOV will ensure that the South's integration into Northern-controlled markets increases, but unfortunately not for the benefit of the South or those who are hungry today (i.e. countries in the South East Asian region)

SEACON conducted a workshop on TRIPS and Farmers' Rights to provide a better understanding to representatives coming from Non Governmental Organisations working with farmers in the South East Asia region on the importance of protecting the rights of farmers, i.e. the marginalized group in the society. This booklet seeks to provide answers to questions that are often asked.

I would like to extend SEACON's utmost gratitude to SEACA and MISEREOR for providing us the financial assistance to conduct the workshop and to publish this booklet.



Marimuthu Nadason
CHAIRPERSON

Glossary Terms

ABRATK	Access to Biological Resources and Associated Traditional Knowledge
ABS	Access and Benefit Sharing
CBD	Convention on Biological Diversity
CFPRA	Campagao Farmers' Production and Research Association
CoFaB	Convention of Farmers and Breeders
CSO	Civil Society Organization
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
IPR	Intellectual Property Rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
OAU	Organization for African Unity
PGR	Plant Genetic Resources
PPVFR	Protection of Plant Varieties and Farmers' Rights
PVP	Plant Variety Protection
TRIPs	Trade Related Intellectual Property Rights
UPOV	Union of Protection of New Plant Varieties
WTO	World Trade Organization

1. What is World Trade Organization?

The legal and institutional foundation of the multilateral trading system and successor to the General Agreement on Tariffs and Trade (GATT) as of January 1, 1995. The WTO acts as a forum for multinational trade negotiations, administers dispute settlements, reviews the trade policies of member nations, and works with organizations such as the International Monetary Fund and the World Bank in developing coherent global economic policies. The WTO also covers new commercial activities beyond the jurisdiction of GATT, such as intellectual property rights, services, and investment

2. Which agreement in the WTO that affects the agriculture sector in general and the farmers specifically?

The Trade Related Intellectual Property Rights (TRIPs) agreement

3. What does the TRIPs agreement cover?

The most comprehensive international treaty that sets global standards for Intellectual Property Rights (IPRs). Although the standards that are set are minimum, however they were based on the level found in developed countries during the 1990s. These standards are in fact a burden to developing countries

4. Which Article in the TRIPs agreement is of concern to the agriculture sector generally and farmers specifically?

Article 27.3 (b)

5. What does Article 27.3 (b) of the TRIPs agreement mean?

It requires member countries to legislate for the protection of their new plant varieties by either of the following means:

- a) Patent – right granted to an inventor to prevent all others from making, using, and/or selling the patented invention for 20 years. Mandatory patent protection is required for microorganisms, non-biological and microbiological processes.

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- b) *Sui Generis* (of its own kind) – Countries can design and implement their Plant Variety Protection (PVP) laws by themselves according to their national interests and local realities. Developing countries have chosen to adopt this system when developing their own PVP law. Nevertheless in this article, it requires members to adopt an ‘effective’ *sui generis* system but does not mention what effective means.
- c) The ambiguity of this word has strengthened the position of developed countries to interpret what an effective *sui generis* system is.
- d) Combination of patent and *Sui Generis*

6. **How does Article 27.3 (b) affect the agriculture sector generally and farmers specifically?**

There are no agreements of the WTO that allows its members to impose any conditions related to WTO conditions upon one another, nevertheless in the field of agriculture and in the area of PVP, developed countries have managed to do so. Due to the ambiguity of the word ‘effective’ *sui generis* system in Article 27.3(b), the developed countries are forcing the developing countries to become members of the UPOV Convention because UPOV is an effective model for PVP laws.

7. **What is Union of Protection of New Plant Varieties (UPOV)?**

UPOV champions the interests of commercial breeders and Multi National Corporations (MNCs) while marginalizes the small farmers. UPOV is a model that is suited for agricultural systems of developed countries. As of June 2004, there are 54 countries that are members of UPOV.

UPOV was introduced in 1961, amended in 1972, 1978 and 1991. The amendments made in 1991 no longer have Farmers’ Privilege in it.

The South East Asian countries that are not members of UPOV but have in consultation with UPOV enacted PVP laws are:

- a) Thailand (1999)
- b) Indonesia (2000)

- c) Philippines (2002)
- d) Vietnam (2004) – has applied to be member of UPOV
- e) Malaysia (2004)

The South East Asian countries that are not members of UPOV but are drafting PVP laws in consultation with UPOV are;

- a) Cambodia
- b) Laos
- c) Myanmar (Burma)

Responses against UPOV

- UPOV denies farmers' rights
- Northern companies will take over national breeding systems in the South
- Northern companies will get ownership of the South's biodiversity with no obligation to share the benefits
- UPOV criteria for protection will exacerbate erosion of biodiversity
- Privatization of genetic resources affects research negatively
- Moves to keep biodiversity under negotiated access systems
- Joining UPOV means becoming party to a system that increasingly supports the rights of industrial breeders over those of farmers and communities
- UPOV is not in harmony with TRIPs
- TRIPs is being reviewed
- The benefits will be received by the North

8. What are IPRs?

Intellectual Property Rights (IPRs) are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his /her creation for a certain period of time (20 years).

9. Why are IPRs a concern to the agriculture sector in the developing countries?

Farmers from developing countries grow food crops for their own subsistence and extras are sold to the market. These farmers save, exchange, reuse and share crop seeds with one another. With the introduction of IPRs, farmers are no longer allowed to do so because they need to buy these seeds and obtain a license for using them. Hence, when farmers are no longer able to practice their life long culture of saving seeds in order for them to feed themselves and their families, they become frustrated and angry because they feel their rights have been violated. By saving seeds to be reused in the next planting season, they were freed from worrying of spending extra on their escalating production expenses. Currently, when seeds have to be bought, farmers no longer have the urge to continue farming, they seek other livelihood alternatives to feed and clothe themselves and their families. This option jeopardizes the food security situation in a country, especially a developing country because if it is unable to feed its own population, how do you expect it to feed others around the world.

10. What are the Farmers' Rights that are affected by the IPRs?

The four farmers' rights that are affected by IPRs are:

- a) **Right to Seed**— farmers in developing countries depend on informal seed supply. They save, exchange, reuse and sell seeds informally in close connection with their neighbours, friends and local people. Nevertheless, under the IPR, farmers will be denied the right to save patented or protected seeds for subsequent planting and they have to buy seeds for each new planting season. Inevitably, farmers will loose control over plant varieties to corporations that control the seed market
- b) **Right to Traditional Knowledge**—Although developing countries are home to 90% of the world's genetic resources and traditional knowledge, however, more that 90% of world's research and development activity takes place in developed countries. It has been reported that although prominent companies in the North (developed countries) have used the traditional knowledge of the farmers in the South (developing countries) as well as plants and genetic resources found in these gene-rich and technology-poor countries,

nevertheless there were no remuneration for these folks and for their countries. Bio-piracy and knowledge- piracy are common phenomenon

- c) **Right to Equity in Benefit Sharing Process** – Farmers and their communities have developed a vast portfolio of genetic diversity within crops and other plant species, which form the raw material for all agricultural activities. Nevertheless, it has been reported that a large number of patents have been granted on genetic resources and knowledge from developing countries without the consent of the possessors of the resource and knowledge.
- d) **Right to Participate in Decision Making Process** – Majority of farmers in the developing countries are unorganized, thus they are not consulted in the decision making process on matters related to their resources. Such an exclusion from the decision making process, which determines their fate, which is indeed a violation of their rights.

11. What are the two International Instruments in Securing Farmers' Rights?

The two United Nations sponsored treaties that seek to secure the rights of farmers and indigenous communities to Plant Genetic Resources (PGRs) and recognize their role in conserving biological diversity are:

- a) **Convention on Biological Diversity (CBD), 1992** – There are 187 countries that are parties to CBD. Article 8(j) binds each contracting party to:
 - i) Respect, preserve and maintain traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.
 - ii) Promote wider application with the approval and involvement of the holders of such knowledge/innovations/practices
 - iii) Encourage equitable sharing of benefits arising from the utilization
 - iv) Prior informed consent and under mutually agreed terms are stressed

The shortcoming of CBD is that this convention is a bilateral agreement, i.e. country-to-country deals. If a variety is found in more than one country, this poses a problem as to who the actual owner of the variety is.

- b) **International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001** – was adopted by the Food and Agriculture Organization (FAO) conference in November 2001. As of May 2003, only eighteen countries have ratified and accepted this treaty.
- i) Article 9.2 of this treaty states that each contracting party in accordance with their needs and priorities, should, as appropriate, and subject to its national legislation, take measures to protect and promote farmers' rights, including;
 - Protection of traditional knowledge relevant to plant genetic resources for food and agriculture
 - The right to equitable participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture
 - The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture
 - ii) Article 9.3 of this treaty states 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

The shortcomings of ITPGRFA are

- Only 64 Plant Genetic Resources are covered in this treaty
- It is vague in dealing with IPR regime
- It is unclear as to the extent to which farmers will be allowed to freely use, exchange and breed the seeds
- Unclear about the multilateral fund

- Enforcement procedure to be used by national governments for ensuring compliance is not detailed out
- Policies are stated broadly and often without significant practical detail

12. What are the Alternative Models in Securing Farmers' Rights?

- a) **Convention of Farmers and Breeders (CoFaB)**– developed by Gene Campaign, a Delhi based non-governmental organization. It seeks to secure the interests of developing countries in agriculture and protects farmers' rights. Each contracting state will recognize the rights of farmers by making arrangements to collect farmers' rights fee from the breeders of new varieties. Revenue collected from farmers' rights fees will flow into a National Gene Fund, the use of which will be decided by a multi-stakeholder body set up for that purpose
- b) **Legislation of Namibia** (The Access to Biological Resources and Associated Traditional Knowledge (ABRATK) Act) was developed by the Organisation for African Unity (OAU). It was based on the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources. It provides for the grant of farmers' rights and plant breeders' rights, while recognizing the rights of local communities over their biological resources and associated knowledge, innovations and practices.
- c) **Community Registry** – established by the Campagao Farmers' Production and Research Association (CFPRA).

13. What is an example of a pro-farmers' rights PVP legislation?

Legislation of India (The Protection of Plant Varieties and Farmers' Rights (PPVFR)) Act was enacted by India in 2001. It has a balance approach in ensuring the rights of both – the farmers and breeders. The Act ensured the mechanisms for:

- i) Allowing farmers to save, use, sow, resow, exchange, share or sell his/her farm produce including seed of a variety protected under

this Act.

- ii) Protection of the rights of farmers for their contribution made at any given time in conserving, improving and making available plant genetic resources for the development of new plant varieties
- iii) Protection of plant breeders' rights to stimulate investment for research and development, both in the public and private sector, for the development of new plant varieties
- iv) Giving effect to Article 27.3(b) of TRIPs on PVP

14. What is an example of a not pro-poor farmers' rights PVP legislation?

Legislation of Nepal – Nepal has committed at the WTO to devise a plant variety protection (PVP) law in compliance with TRIPs by December 2005. There has been initiatives by the Nepalese government to devise a law in time. The Ministry of Industry, Commerce and Supplies in coordination with Multilateral Trade Integration and Human Development in Nepal project of the United Nations Development Programme (UNDP) has prepared a bill on Plant Variety for the Protection of the Rights of Farmers and Breeders. However, there are some concerns that need to be addressed in this bill before it is passed. Following are the concerns;

- i) The bill does not mention anywhere that it has been prepared in line with Nepal's commitment to be in compliance with Article 27.3(b) of TRIPs
- ii) The bill provides for a department and a registrar but does not clearly state the roles that they play
- iii) Section 14 of the bill indicates the situations when a new plant variety will not be eligible for registration. Although the bill states that if any new plant variety is harmful to the environment, the registration of it will be not be carried out. Nevertheless, there are no provisions in the bill that states the same if a new plant variety affects food security, human, animal and plant health
- iv) The bill is vague about Farmers' Rights in relation to Access and Benefit Sharing (ABS)
- v) It does not mention the benefits a farmer could obtain for providing access to his/her resources and traditional knowledge

- vi) Although the bill has made provisions to raise fees from breeders and farmers but it does not mention how will the fees be collected and how would it be utilized
- vii) Section 44 of the bill provides for fines and punishment and clearly states the amount to be fined. However, by merely fixing an amount without knowing the extend of damage is not fair
- viii) Section 49 provisions that the local institution or the village development committee will represent farmers. However, two questions are raised from this provision: Where will local institution or village development committee represent and if they represent, will they truly reflect the concerns of the farmers?
- ix) Section 50 requires farmers to pay fee, which is irrational since farmers are poor and cannot afford to pay fees
- x) Section 54, weakest provisions of the bill. It states about government official working in 'good faith' and though if his/her conduct violates the law, he/she will not be punished. Who is responsible in deciding whether the government official is working on good faith?

It is hoped that the government of Nepal will address the concerns above and make the necessary amendments before coming up with a law.

15. What are the Recommendations for countries that have PVP existing laws and for those who are developing one?

- a) Design a *sui generis* legislation that suits the respective countries socio-economic, cultural and political realities
- b) Adopt a *sui generis* PVP law to protect farmers' and community rights
- c) Refer to the international instruments (CBD and ITPFGRA) and alternative models (PVPFRAAct, India; ABRATK Act, Namibia; CoFaB, Gene Campaign; OAU Model Legislation, Africa; Community Registry, Bohol) while designing *sui generis* legislation
- d) Consult farmers' groups and CSOs while designing *sui generis* legislation and preparing negotiating positions for the international negotiations
- e) Engage in the TRIPs review process to advocate for appropriate reforms to Article 27.3(b)

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- f) Oppose the UPOV model of PVP law
- g) Refrain from becoming a member of UPOV
- h) Ratify the CBD and ITPGRFA

About **SEACON**

The Southeast Asian Council for Food Security and Fair Trade (SEACON) provides a coordinated approach to food security, agriculture and trade issues. We integrate local initiatives of agrarian reform and agricultural development with trade concerns at the Southeast Asian level. In each of our member countries, we support people centred national based food security councils that enable government, private sector and civil society representatives to meet and dialogue on agriculture and trade issues.

The establishment of the national food council is to ensure that whatever analysis / positions taken on at the regional level, would have the secure backing from the grassroots and vice versa.

Our role is thus to:

- Monitor and keep in check the adverse effects of free trade on peasant farmers
- Monitor the development of relevant economic and social domestic policies in the region ecologically that promote economically and sustainable production
- Offer alternative agro-trade strategies based on the principles of fair trade and food sovereignty
- Improve and lobby for policies related to food, agriculture and trade at regional and international levels



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**SOUTHEAST ASIAN COUNCIL FOR
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No. 24, Jalan SS1/22A, 47300 Petaling Jaya,
Selangor Darul Ehsan, Malaysia.

Tel : (6) 03-7876 0520

Fax : (6) 03-7873 0636

Email : seacon@tm.net.my /
seaconfood@yahoo.com

Web : www.seacouncil.org

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