

# THE IMPACT OF TRIPS/ WTO ON FARMERS AND FOOD SECURITY

**Suman Sahai**

TRIPS Article 27.3(b), which requires all WTO countries to provide some kind of intellectual property rights (IPR) on plant varieties, was up for review in 1999. Seattle intervened and the review did not materialise. However, as originally planned, the entire TRIPS Agreement is slated to be reviewed in 2000.

TRIPS is a clearly anti-developing country treaty. Its provisions seriously threaten self reliance in agriculture and the livelihoods of farmers, by seeking to establish a monopoly for the Life Science Corporations on seed production and sale. TRIPS does not allow for the exercise of national sovereignty over biodiversity as mandated by the Convention on Biological Diversity because it obliges countries to enact intellectual property rights on plant varieties which are a part of biodiversity. TRIPS does not contain any elements of equity or benefit sharing. It does not allow countries to claim a share of benefits from companies who breed new varieties using farmers varieties as the base since there is no provision requiring disclosure of the country of origin from where base materials have been taken. TRIPS does not require users of biodiversity like traditional plant varieties and land races to fulfil access obligations like Prior Informed Consent and Material Transfer Agreements. It therefore condones and facilitates biopiracy, respecting neither the ownership of communities over bioresources nor the indigenous knowledge that goes into maintaining and refining biological resources.

The pre -Seattle developments indicated clearly that the US is pushing for compliance on the *sui generis* option for protecting plant varieties within the framework of the Union for the Protection of New Plant Varieties (UPOV). A number of influential bodies, including the WTO itself, are pushing for a narrowing of the *sui generis* option to this one legislative model. This is unfair and uncalled for. UPOV is not mentioned in the TRIPS Agreement when other relevant IPR treaties like the Patent Cooperation treaty are. Independent legal and economic experts have reiterated that UPOV should not be accepted as an effective *sui generis* system for TRIPS and that there is ample scope for manoeuvre, flexibility and national discretion in interpreting the *sui generis* option.

Implementing a UPOV derived *sui generis* system will have an all round negative impact. This will include exacerbating genetic erosion, limiting the growth of research and hurting farmers economically. UPOV introduces legal and economic restrictions on farmers' livelihood practices. Farmers' rights are reduced by law to a mere exemption which will be subject to compliance of the seed company under the 1991 treaty. As a general principle, access to genetic resources declines through their privatisation and becomes subject to restrictive terms, whether for production or breeding purposes. Although farmers are responsible for 80-90% of the seed supply in the countries of the South, this will massively shift to private control under plant variety rights regimes. Contrary to what many people assume, corporate breeders very much take farmers to court for alleged piracy of proprietary seed. This has happened in the US. In fact corporations are actively pursuing more powerful means such as contract law governing purchase agreements, "terminator" type sterile seed technologies and hybridisation to prevent farmers from saving seed out of their harvests for another planting.

UPOV is biased towards the needs of industrial agriculture, especially through its DUSN (Distinct - Uniform - Stable - Novel) criteria; the uniformity criterion alone has been singled out as favouring, for example, pure lines as opposed to varietal mixtures on the market. By allowing companies to collect royalties on seed sales, UPOV stimulates the corporate take-over of plant breeding which means fewer actors supplying the market. Corporations are not in the business of genetic conservation or genetic diversity and tend to work with highly stabilised elite material with wide adaptation. These highly marketed varieties tend to replace more diverse traditional materials, and consequently the diversity being used by farmers declines.

Impact studies conducted in one UPOV member state, the USA, report a decline in the flow of germplasm among breeders, a decline in the sharing of scientific information and a decline in the rate of progress in

plant breeding. It is noteworthy, however, that UPOV was obliged to revise its treaty in 1991 in order to address an important dysfunction in its own system: instead of providing an incentive for innovation (breeding truly novel varieties), UPOV was providing an incentive for plagiarism (making slight changes on existing varieties and calling them “new” and worthy of protection).

Gene Campaign has consistently opposed India joining the UPOV since this model does not address the needs of India and other developing countries. The reasons for this are several.

The UPOV system is not suited for developing countries because it embodies the philosophy of the industrialised nations where it was developed and where the primary goal is to protect the interests of powerful seed companies who are the breeders. In the UPOV system, rights are granted only to the breeder, there are no rights for the farmer. In India the position is very different. We do not have big seed companies in essential seed sectors and our major seed producers are farmers and farmers cooperatives. Logically, our law will have to concentrate on protecting the interests of the farmer in his role as producer as well as consumer of seed.

Once we are in the system, we shall be forced to go in the direction that UPOV goes. If not today then tomorrow. The writing on the wall in UPOV is clear. It is a system headed towards outright patents. Starting with its first amendment in 1978 when limited restrictions were placed on protected seed, the 1991 amendment brought in very strong protection for the plant breeder. In this version, breeders are not exempt from royalty payments for breeding work and the exemption for farmers to save seed has become provisional.

UPOV now also permits dual protection of varieties, that means in the UPOV system, the same variety can be protected by Plant Breeders Right (PBR) and patents. It would seem obvious that UPOV is ultimately headed towards patent protection for plant varieties. It would be wise for India to stay out of a system which has plant patents as its goal since that is neither our goal nor our interest.

UPOV laws are formulated by countries which are industrial, not agricultural economies. In these countries the farming community is by and large rich and constitutes from 1 to 5% of the population. These countries do not have the large numbers of small and marginal farmers like we do.

UPOV laws are framed in countries with a completely different agriculture profile to ours. These are countries where subsidy to agriculture is of a very high order unlike India. Because they produce a massive food surplus, farmers in industrialised countries get paid for leaving their fields fallow. The UPOV system does not have to protect the farming community of Europe in the way that our seed law will have to protect ours.

In Europe agriculture is a purely commercial activity. For the majority of Indian farmers however, it is a livelihood. These farmers are the very people who have nurtured and conserved genetic resources. The same genetic resources that breeders want to corner under Breeders Rights. We must protect the rights of our farmers and these rights must be stated unambiguously in our sui generis legislation.

Almost all agricultural research and plant breeding in India is financed with the taxpayers money. It is conducted in public institutions like agricultural universities and institutions of the Indian Council of Agricultural Research (ICAR). This research belongs to the public. The laws of UPOV on the other hand are formulated by societies where seed research is conducted more in the private domain than in public institutions; where big money is put into breeding using recombinant DNA technology which is expensive. Because they invest in expensive breeding methods and need to secure returns on their investments, seed companies in Europe seek market control through strong IPRs. These conditions do not apply in India.

The UPOV system is far too expensive. The costs of testing, approval and acquiring an UPOV authorised Breeders Right certificate could be in thousands, even lakhs. Such rates will effectively preclude the

participation of all but the largest seed companies. There certainly will be no space in such a system for small companies, farmers co-operatives or farmer/breeders.

Farmers play a significant role as breeders of new varieties. They often release very successful varieties by crossing and selection from their fields. These varieties are released for use as such. In addition, in almost all cases, these varieties are taken up by agriculture universities as breeding material for producing other varieties. Such farmer/breeders would not be able to participate in an expensive system like UPOV.

Their material along with their labour and innovation would be misappropriated by those with the money to translate such valuable germplasm into money-spinning varieties registered in UPOV. Poor farmers unable to pay the costs of getting an UPOV certificate, would tend to sell their varieties for small sums to larger seed companies. This will be the ultimate irony, creating an institution that will snatch away from the farmer his material and his opportunities.

Since the Agriculture Ministry refused to take any action in developing alternatives to UPOV, Gene Campaign together with the Centre for Environment and Development drafted a developing country alternative to UPOV called the Convention of Farmers and Breeders (CoFaB ). This proposed treaty is designed to protect Farmers and Breeders Rights in the germplasm owning countries of the South, to secure their interests in agriculture and to fulfil the food and nutritional security goals of their people.

The salient features of CoFaB are an unambiguous and well defined Farmers Rights which recognises the farmers' sophisticated knowledge of germplasm, their contribution to the conservation of this germplasm and their role in breeding and selecting well adapted, effective varieties of food and cash crops. Breeders Rights in CoFaB are protected without granting exclusive monopolies as in UPOV. CoFaB provides for strong and reasonable Breeders Rights which fully rewards their labour and innovation. It also places on them part of the responsibility of working towards the common goal of food and nutritional security.

In its Human development Report of 1999, the UNDP has commended CoFaB as an alternative to UPOV. It has described CoFaB as a "strong and co-ordinated international proposal" which "offers developing countries an alternative to following European legislation by focusing legislation on needs to protect farmers' rights to save and reuse seed and to fulfil the food and nutritional security goals of their people".

Unfortunately, the government is more keen to toe the TRIPS and UPOV line than do any pro active thinking on how to protect Indian agriculture and the Indian farmer. Despite widespread acknowledgement at the national and international level that UPOV is detrimental to the interest of developing country agriculture and an acceptance that CoFaB is a suitable alternative, the Agriculture Ministry has drafted a sui generis legislation conforming fully to TRIPS and UPOV. This mindless if not perverse action is difficult to explain since a debate against UPOV has been conducted nationally and internationally for a long time. In fact several countries in Asia, Africa and Latin America are strongly urging the rejection of UPOV as a model for the sui generis system in the WTO.

The Indian draft bill called the Plant Variety Protection and Farmers Rights Bill is a flawed legislation. The philosophy and language is not Indian. It is anchored in the WTO and UPOV. The preamble itself states that this Bill is being drafted in order to comply with the requirements of the TRIPs regime. In fact the Bill opens with the text....*to provide for the establishment of an Authority to give an effective system for protection of the rights of plant breeders and farmers, and to encourage the development of new varieties of plants and to give effect to sub-paragraph (b) of paragraph 3 of article 27 in Part II of the Agreement on Trade Related aspects of Intellectual Property Rights.* The purpose of the Bill is to encourage the development of new plant varieties, as it is in UPOV, not to provide conditions to ensure food security.

The Indian Bill also sets out to essentially protect the rights of the Breeder as in UPOV. Farmers Rights found mention in the Bill only after aggressive campaigning by groups concerned with agriculture, food security, the issues of agriculture and Intellectual Property Rights. Gene Campaign and others who lobbied to get the original Bill re-examined and introduced suggestions for strengthening Indian interests, were

consistently opposed by the lobby of the seed industry which had just as much interest in keeping the Bill weak on issues like Farmers Rights and strong on Breeders Rights. Even today this tussle between the pro-farmer NGO lobby and the pro-breeder industry lobby can be seen. It is certainly reflected in the tug of war within the Agriculture Ministry over the formulation of important clauses relating to the scope of Farmers Rights and restrictions on Breeders Rights.

The current version of the Bill has essentially three major flaws of which the most alarming is the weak farmers rights, the second is the irrational conditions for operationalising Compulsory Licensing and the third is the thoroughly inadequate, bureaucratic Authority constituted to oversee the implementation of the Act. The diluted Farmers Rights in the Act strikes at the very root of food security and hence it should not be accepted under any circumstances. What the Act contains under Section 31 which spells out Farmers Rights is , “Nothing contained in this Act shall affect the right of a farmer to save, use, exchange, share or sell his farm produce of a variety protected under this Act. Provided that *a farmer shall not be entitled for such right in case where the sale is for the purpose of reproduction under a commercial marketing arrangement.*”

Simply stated this means that once the farmer plants a variety of seed on which someone has a Breeders Right, Farmers Rights will allow that he or she can sell the produce of the farm. The farmer will also have the right to save this seed, it could be interpreted, to sow the next crop, although this is left ambiguous in the language. The Farmers Right does not clearly spell out that the farmer has the unequivocal right to save his farm produce in the form of seed for himself, to sow the next crop. The new law also allows the farmer to exchange and share his farm produce with others.

However, what the farmer can not do, according to the new law, is sell seed. And this is really the most devastating blow to the rights that farmers have today. According to Section 31, the farmer is not entitled to sell any part of his farm produce for reproduction that is for the purpose of seed. Any lawyer will tell you, and Gene Campaign has consulted them, that prohibiting sale of seed under ‘commercial marketing arrangement’ means a complete denial of the right to sell, whether the sale is of one kilogram or 1000 kilograms. It is clear that under the new law, sale of seed is prohibited to the farmer.

When confronted with this, the babus in the Agriculture Ministry have waffled endlessly and unconvincingly, that the wording denying sale under ‘commercial marketing arrangement does not impinge on the farmers’ right to sell seed. It only restricts they argue, the farmer selling seed branded with the Breeders registered name. The obvious question then is, if that is what is truthfully intended, why not just make the wording of the draft Act clear and unambiguous? Why do it in such a complicated way, saying one thing but meaning something else ?

The second portion can quite easily read.... *“Provided that a farmer shall not be entitled for such right in case where the sale is for the purpose of reproduction under a branded marketing arrangement.”* Or another version could be “ .....*not be entitled to such a right where the sale is in the form of packaged and labeled seed.*”

These formulations would protect the rights of the breeder over his/her certified variety. They would also protect the rights of the farmer to sell seeds of a variety protected by a Breeders Right but the special advantage conferred by the registered name would be available only to the breeder, not the farmer. The breeder would be monetarily compensated by the royalty payment included in the price of the first sale but would not be allowed to perpetuate this royalty in every sale

The farmer having the right to sell seed is an essential component of our food security and simply can not be trifled with. The consequences of denying the farmer the right to sell seed will lead to impoverishment and dependence for farming communities. It will also impact on national security in a quite dangerous way.

The denial of the right to sell will lead to loss of income for the farmer, from seed sale. Far more worrying is that it will lead to the farming community losing control over seed production. This will ultimately threaten

self reliance in agriculture. There is a real danger that farmers could become dependent on multinational seed companies for seed supply, with all the implications that this could have.

What are the implications for India of these curtailed farmers rights? The short answer to that is, a compromise with national security. Food security, as we are all aware, is a critically important part of national security. A nation that does not produce its own seed and its own food can not be a secure nation.

Today India plants over 60 lakh tons of seeds every year into its fields. The National Seeds Corporation and the various State Seed Corporations together produce less than 15 % of this requirement. Over 85 % of the seeds amounting to roughly 52 lakh tons that are planted in Indian fields every year are supplied by the farming community. In other words, India's largest seed producer is the Indian farmer.

This right and freedom to function as the biggest, most de-centralised supplier of locally well-adapted seeds has helped India to make the transition from a grain deficient to a grain surplus nation, even if it is a precarious surplus. Once the farmers' right to sell seed is taken away, the shortfall in the market of 50 to 52 lakh tons of seed will be filled by MNCs . If that happens, India will lose control of its seed production, its agriculture and its food security.

Given that India's food security is monsoon dependent and uncertain and given that India has just about emerged from the humiliation of food imports, it is amazing that the Agriculture Ministry can have the nerve to put out a draft legislation with such a threatening component for food security.

What then needs to be done so that our genetic resources are not plundered and our agricultural security is not harmed? At the national level, civil society must mobilise public opinion against the damaging clauses concerning Farmers Rights in the new legislation. The Joint Parliamentary Committee re-examining the legislation is hearing views on the bill. Concerned citizens must demand a fully protective Farmers Right and a rejection of the UPOV. At the international level, in the WTO, India must lobby for establishing a linkage between the Convention on Biological Diversity (CBD) and TRIPS, stating that it is the CBD which must have primacy over the TRIPS and not the other way round.

Demanding primacy for the CBD is justified and supported by Article 22 of the CBD which says - *The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.* It is clear that the implementation of TRIPs is detrimental to the health of biological diversity and therefore its implementation must be made subservient to the conditions of the CBD.