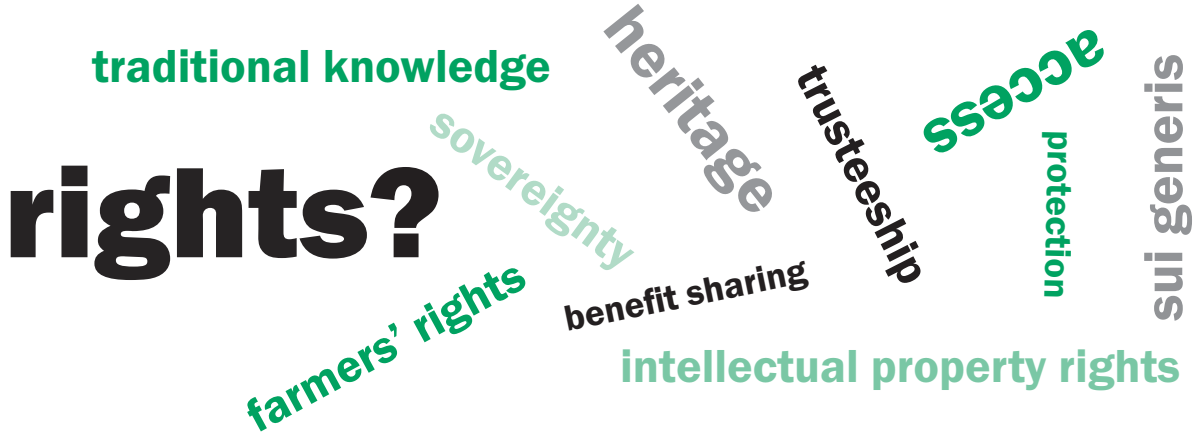

Good ideas turned bad?

A glossary of rights-related terminology

GRAIN

Many of us often have to struggle with words and concepts that are used as though they have one single and simple meaning, while in reality they hide strong bias and very specific worldviews. Not surprisingly, they are usually biased towards the worldviews of those in power. There have also been well-intentioned words and concepts when coined but that have been corrupted over time through inappropriate usage, thereby acquiring more complicated connotations and implications. When we use these words, we often unwillingly but unavoidably become trapped in political and philosophical frameworks which block our ability to challenge the power that backs those views.

In the following pages, GRAIN takes a critical look at some such key concepts related to knowledge, biodiversity and intellectual property rights. Many of these words and phrases look innocent enough at a first glance, but on deeper examination, we can see how they have been twisted, manipulated, usurped, devalued and/or denatured. Some are used to constrain us and lock us into a particular way of thinking, and others are used against us. This is not an exercise aimed at drawing final conclusions, but an invitation to deconstruct some definitions and start the search for new terminology and ways of thinking that may help us untangle us from some of the conceptual traps we are stuck in.

As readers will see, one key concept is missing: *rights*. After some discussion, we concluded that this concept is so central to current debates, so loaded with implicit values, and its bias so deeply ingrained in our minds, that much longer and careful consideration is needed before we can attempt a useful discussion on the subject. We expect to include a discussion on 'rights' in a later issue of *Seedling*. Meanwhile, your comments are welcome.

ACCESS

The term *"access"* simply means a right to use or visit. In the context of biodiversity it suggests either admittance to bio-rich areas for bioprospecting, or the permission to use such resources or the traditional knowledge associated with them for research, industrial application and/or commercial exploitation. Initially heralded as a safeguard against biopiracy, the expectation was that access rules and regulations would help to keep control of biological resources and knowledge in the hands of communities. Any decision on access would require prior informed consent from the relevant communities. But access regimes have turned into mere negotiating tools between governments and commercial interests. The potential (market) value of biodiversity and its associated knowledge in the development of new medicines, crops and cosmetics has transformed access into a tug of war between countries. In this way, access has become synonymous with biotrade.

Take the way in which *access* is currently being discussed within the CBD's *Ad Hoc Open-ended Working Group on Access and Benefit Sharing*. Governments must now respond to Rio+10's call to negotiate an international regime on access and benefit sharing, on the basis of the (voluntary) Bonn Guidelines adopted by the parties to the Convention in April 2002. The CBD does not define *"access"*, but envisages several dimensions to it:

- Access to plant genetic resources and traditional knowledge of these resources from the South
- Access to technology transfer from the North
- Access to benefits derived from the use of genetic material.

Sadly but predictably, the preoccupation is only with the first dimension, without any reciprocal and/or balanced attention to the two others. Moreover under the CBD, countries are bound to *"facilitate"* access, not restrict it. Access to plant germplasm is receiving the same treatment in FAO's International Treaty on Plant Genetic Resources.

What is troublesome in all these discussions is the pro-IPR (intellectual property rights) approach. Access negotiations in many cases are obliged to accommodate the international legal regimes on IPRs as prescribed by WTO's TRIPs Agreement and WIPO. This is unacceptable. If we are presented the argument 'no patents, no benefits', we must respond with 'if patents, no access'. No amount of 'benefit sharing' can make up for the loss of access by communities to their local resources and knowledge.

Jargon buster

CBD – the Convention of Biological Diversity was the result of prolonged international pressure to respond to the destruction and piracy of the biodiversity of the Southern hemisphere. After years of debate, the Convention was agreed upon in 1992 and came into force in 1993. Now adhered to by 188 nations, the CBD was hailed as an important watershed in international efforts to promote biodiversity conservation, and was applauded for giving formal recognition to indigenous and local communities for the central role they play in biodiversity conservation. Ten years on, much of the hope has evaporated.

CGIAR – the Consultative Group on International Agricultural Research – a group of donors established the CGIAR in the early 1970s to fund agricultural research around the world. It does this via 16 International Agricultural Research Centres, which now call themselves *"Future Harvest"* Centres comprising more than 8,500 scientists and support staff working in more than 100 countries.

FAO – the United Nations Food and Agriculture Organisation. The only international negotiating forum that has ever seriously attempted to take on the issue of Farmers' Rights – at least it did for a while. Also home of the International Treaty on Plant Genetic Resources, which was drawn up to protect farmers' crops and ensure their conservation, exchange and sustainable use. But its core provisions on access and benefit sharing only apply to a small and specific list of crops and its value to farmers remains unclear.

GATT – the General Agreement on Tariffs and Trade, see WTO below.

TRIPS – Under the WTO's Trade Related Intellectual Property Rights Agreement (Article 27.b), countries are obliged to provide intellectual property protection for plant varieties at the national level either through patents or *"an effective sui generis system"* or both. TRIPS negotiations have been stalled for quite a while, and many developed countries are negotiating special closed deals with governments in the South instead. These TRIPS-plus deals establish much stronger requirements for IPRs than TRIPS itself and are being introduced through a range of bilateral, regional and subregional agreements. They are making so much headway that TRIPS may soon be obsolete.

WIPO – World Intellectual Property Organisation. A rising star in the international negotiating scene as the US and other patent-pushing countries are looking to it as the body to establish a world patent regime (see *Seedling*, October 2003, p 11)

WTO – Established in 1995, the World Trade Organisation is a global agency that transformed the GATT into an imposing body with the power to define the rules of global trade, enforce them and punish renegades. At its heart are a whole series of WTO agreements from agriculture to investment, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The WTO is one of the main forces of corporate globalisation.

BENEFIT SHARING

Benefit sharing was originally seen as a way to bring equity and justice to a world in which industrialised countries and their transnational corporations had long been plundering the biodiversity and traditional knowledge of communities in the South. In the early 1990s, it became one of the three central pillars of the CBD, which calls for *"the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources"*. Later, the parties to the CBD developed guidelines on how to go about it, and similar wording was incorporated in FAO's International Treaty on Plant Genetic Resources. Benefit sharing, it was argued, would put a stop to biopiracy and the custodians of biodiversity – local communities – would get a fairer deal and a bigger say in how to manage those resources.

More than a decade later, it seems that the benefit-sharing discussion is moving in quite the opposite direction. Governments and corporate lawyers negotiate benefit-sharing agreements while local communities sit on the sidelines. Money dominates the agenda and the multiple benefits of biodiversity at the local level are all but forgotten. Despite some talk about capacity building and empowerment, most approaches to benefit-sharing are dominated by the commercial bottom-line: 'no patents, no benefits'. Instead of supporting the collective forms of innovation that sustain the knowledge and practices of local communities and the biodiversity that they generate and maintain, benefit sharing is increasingly becoming a tool for pushing IPRs, promoting 'biotrade' and turning biodiversity in another commodity for sale (see box opposite).

It is time to go back to the basics: this main issue is to strengthen the control of local communities over the biodiversity they nurture (and that nurtures them) in order to improve the benefits they derive from it for their livelihood systems. Any benefit sharing scheme that doesn't take this as a central element is bound to contribute to the problem rather than providing a solution.

FARMERS RIGHTS

What Farmers Rights are depends to a large extent with whom you talk. A farmers' organisation in the Philippines defines it as an issue of farmers' control over their seed, land, knowledge and livelihoods, while an article in the *Hindu Business Line* describes it as the right for farmers to have access to transgenic crops. The International Seed Federation has little respect for the concept, saying that: *"Farmers' Rights were introduced rather emotionally, without careful consideration* (…) *and have led to endless discussions"*. The Farmers Rights Information Service set up by the M.S. Swaminathan Research Foundation explains its existence on the grounds that indigenous groups and farmers also need to gain *economic* rewards from the exploitation of biodiversity along with commercial interests.

The official definition laid down in Article 9 of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture doesn't help us much further. It says that countries should protect and promote Farmers Rights by giving farmers an equitable share in the benefits, and by letting them participate in decision-making. But these 'rights' are limited by the country's *"needs and priorities"* and are *"subject to national legislation"*. Even the age-old right of farmers to save and exchange farm-saved seed is not clearly guaranteed, but made subject to *"national law and as appropriate"*

Farmers' Rights has been a central battle issue for many NGOs and farmers' organisations, including GRAIN, for most of the past decade. The central objective was – and continues to be – to ensure control of and access to agricultural biodiversity by local communities, so that they can continue to develop and improve their farming systems. Rather than a simple financial compensation mechanism, we pushed for Farmers Rights to be socio-economic rights, including the right to food, land, to decent livelihoods, and for the protection of knowledge systems. Not much has been achieved at the international level between governments. But it is a battle that continues for many farming communities at the local level.

HERITAGE

Heritage is a nation's or people's historic legacy that is deemed worthy of preservation. Inheritance is something that is passed on from one generation to the next, suggesting that heritage is outside the purview of buying and selling. This is what the FAO had in mind when the concept of *"common heritage of mankind"* was developed in relation to plant genetic resources. By acknowledging the 'heritage' status of seeds and plants, the idea was to keep them in the public domain, free of restrictive and exclusive property rights. But the concept was then revised to accommodate the *"sovereignty"* principle enshrined in the CBD, which meant giving heritage a price tag. The sanctity of seeds in farming cultures as something inalienable and to be shared has long been violated by ever-increasing privatisation, particularly through the abuse of patents and plant breeders' rights. This is an ironic situation in which the IPR system, which so hankers for this heritage, is sounding its death knell.

Sharing a few crumbs with the San

For thousands of years, San bushmen have eaten the *Hoodia* cactus (left) to stave off hunger and thirst on long hunting trips. But in 2002, the *Hoodia* became the centre of a biopiracy row. A UK company Phytopharm patented P57, the appetite suppressing ingredient in the *Hoodia*, claiming to have 'discovered' a potential cure for obesity. It then sold the rights to license the drug for $21 million to Pfizer, the US pharmaceutical giant, which hopes to have the treatment ready in pill form by 2005. But while the drug companies were busy seducing the media, their shareholders and financiers about the wonders of their new drug, they had forgotten to tell the bushmen, whose knowledge they had used and patented.

Phytopharm's excuse appears to be that it believed the tribes which used the *Hoodia* cactus were extinct. Richard Dixey, the firm's chief executive, said: *"We're doing what we can to pay back, but it's a really fraught problem... especially as the people who discovered the plant have disappeared"*. Having woken up to the fact that the San are alive, well and organising a campaign for compensation, Dixey backtracked fast and a benefit sharing agreement was drawn up between Phytopharm, the South African Council for Scientific and Industrial Research (CSIR), which was responsible for leading Phytopharm to the *Hoodia* plant (and misleading the company about the extinction of the San). Ironically, CSIR's failure to consult with the San early in the commercial development of *Hoodia* considerably strengthened the bargaining arm and political leverage of the San, resulting in a high-profile case followed throughout the world. But even in this 'best case' benefit sharing scenario, the San will receive only a fraction of a percent – less than 0.003% - of net sales. The San's money will come from the CSIR's share, while profits received by Phytopharm and Pfizer will remain unchanged. Not only are Pfizer and Phytopharm exempt from sharing their king-sized portions, but also are protected by the agreement from any further financial demands by the San.

There are also other concerns. Chief amongst them is that the agreement is confined almost exclusively to monetary benefits, which hinge on product sales and successful commercialisation. Yet commercialisation is far from certain, highlighting the need for a more comprehensive and holistic approach to benefit-sharing that is not exclusively financial, is not contingent on successful drug development, and provides immediate and tangible benefits to the San. Additional worries include the fraught questions of administering the funds, of determining beneficiaries and specific benefits across geographical boundaries and within different communities, and of minimising the social and economic impacts and conflicts that could arise with the introduction of large sums of money into impoverished communities. A critical moral dilemma relates to the patenting and privatisation of knowledge. In communities such as the San, the sharing of knowledge is a culture and basic to their way of life.

Sources: Antony Barnett, "In Africa the Hoodia cactus keeps men alive. Now its secret is 'stolen' to make us thin", *The Observer* (London), 17 June 2001; Rachel Wynberg (2002), *Sharing the Crumbs with the San*, www.biowatch.org.za/csir-san.htm

Across the globe people are fighting to keep heritage and what it needs to thrive alive. The international farmers' organisation Via Campesina has launched a campaign to defend seeds as peoples´ heritage for the service of humankind. This global campaign was launched at the World Social Forum in Porto Alegre, Brazil in 2003, where thousands of participants committed themselves to defending seeds as collective heritage, the basis of cultures, and the foundation of farming and food sovereignty.

IPRs

There are many ways to encourage innovation and there are many ways for people to guard against the misuse of their creative works. But, over the course of the last century, these functions have increasingly become the domain of the courts and the various legal systems that they govern, such as copyrights, patents, trademarks, plant breeders' rights, geographical indications and industrial designs. These laws are supposed to maximise the public interest: society gets access to creative works and inventors/authors get a reward for their efforts and investments in the form of temporary monopoly rights. It was agreed that each country needed to be able to limit the scope of the laws and the rights they afford according to their own particular conditions and interests. But recently the courts in some countries have increasingly confused these legal systems with property law, and the scope and monopoly of rights conferred is getting totally out of hand. What's worse, some governments, led by the US and supported by big business, are pushing to make this situation the norm around the world, They are even pushing for a single global patent system based on this distorted model.

The growing use of the term *"intellectual property rights"* (IPRs) is part of the problem. IPRs came on the scene in 1967 when the World Intellectual Property Organisation was set up to bring the various legal systems under a single umbrella. The concept of IPRs is tied to a neo-liberal worldview that says that everything in the world – material goods, creative works, even DNA – can and should be privatised: i.e. parcelled up, owned and governed by a set of legal monopoly rights. If people do not own things and are not able to accumulate more ownership over things, there can be no progress; commons and collective processes create nothing but tragedy and upset the efficient functioning of 'free' markets. But, in practice, we see that property rights only serve the interests of the few. They facilitate the concentration of wealth by expanding the control of property owners and by devaluing and dispossessing people of 'unclaimed' wealth, such as the lands of indigenous peoples, or traditional plant varieties.

IPRs, as they exist today, also favour a very particular form of innovation – that of private individualised authorship that is generally controlled by big industry and suits the needs of commercial mass production. IPRs undermine the more important collective processes of innovation at the heart of agricultural biodiversity, culture, science, and community. For instance, while patents and plant varieties reward the seed industry for making subtle modifications to existing plant varieties, they obstruct the collective forms of plant breeding that generations of farmers have used to produce the earth's tremendous agricultural biodiversity. We are now at the point where the legal systems designed to enhance innovation are doing precisely the opposite: strangling innovation, locking up ideas, and ripping people off.

Fortunately, there is a growing global movement of resistance to this trend. Farmers are fighting the criminalisation of seed saving and the patenting of life. Digital innovators are struggling to preserve and expand the space to freely create and use software. Activists and scientists are fighting against obscene pharmaceutical patents and looking to alternative, 'open' models of research that avoid patents altogether.

PROTECTION

The English dictionary defines *"protect"* as to shield from harm or danger; shelter, defend and guard. But the interpretation of protection can also imply confinement, coercion, constraint, repression, limitation, restriction, monopoly and prohibition. So protection can not be understood without reference to what we want to defend, in whose favour, and at whose expense. Without this, we can easily destroy what we are supposed to be protecting, as is the case with IPRs. These are supposedly used as shields to protect knowledge, but are actually instruments to make profit from so-called *"scientific"* research. The economic horizon is its value measurement: nothing else. Not much is being protected except someone's wallet.

Part of the problem is that protection means very different things in intellectual property law and in ordinary usage. In the intellectual property sense, protection means protecting property over something in a very specific way, but in ordinary usage it has a much broader meaning. This has proved particularly problematic in the discussions on protecting traditional knowledge at WIPO (see p 13). When human knowledge is transformed into property in convenient IPR-sized bites, it exits the commons leaving social rights unprotected. To truly protect human knowledge – scientific, traditional, indigenous or whatever – several conditions must be met. First, we need to assign it greater value and create the conditions for that knowledge to flourish, such as by preserving cultural diversity and expressions, and conserving ecosystems diversity. Second, knowledge must flow free without limitations, monopolies or prohibition. Last but not least, this freedom must be applied to all types of knowledge, which means no IPRs in any form.

SOVEREIGNTY

Sovereignty implies self-governance. International law states that sovereignty means each country has *"supreme control over its internal affairs"*. Back in 1958, the UN General Assembly established a Commission on Permanent Sovereignty over Natural Resources, followed by an eight-point resolution in 1962. But sovereignty did not become an important concept in relation to biodiversity until the drafting of the CBD. During the 1980s, discussions in the FAO on the politics of plant genetic resources had centred around the principle that they were a 'common heritage of mankind.' The dramatic change in the perceived 'ownership' of biodiversity brought in by the CBD was said to be to allow states and their constituent populations to take decisions on how biological resources within their jurisdiction should be used, conserved, exchanged and shared. The conceptual shift towards sovereignty was supposed to recognise peoples' contributions (especially in the South) to the development of biodiversity, and include them in decisions on how to manage and share the benefits from the fruits of their labours.

More than a decade later, how is sovereignty being exercised? In biodiversity-rich countries around the world, it is governments and state agencies that are wielding the power. They seem to have hijacked the concept. State sovereignty is neither an absolute right, nor was it meant to grant any kind of ownership over genetic resources to governmental authority. Breathing new life into sovereignty necessarily mandates the empowerment and enfranchisement of communities. Farming groups are attempting to do this by promoting the concept of *"food sovereignty"*, which implies the right of the people of each country to determine what they eat.

SUI GENERIS

In Latin, *sui generis* means *"of its own kind"*, something unique, something special. It implies, especially in Spanish, something exceptional or strange. The concept of *sui generis* legislation was first introduced in the negotiations on intellectual property within the GATT agreement, as a way to grant intellectual property over plants instead of patents, which had met with widespread and strong rejection worldwide. Although *sui generis* legislation was initially designed exclusively for plant varieties, the concept has been gradually expanded to cover property claims over traditional knowledge and other cultural expressions.

There is a lot of conceptual and historical twisting behind the idea of *sui generis* legislation. The first and most fundamental twist was in its very inception in WTO's TRIPS agreement. By saying that the exclusion from patents was *sui generis* (unique, different), it implies that patents over life are the norm, despite the fact that exactly the opposite is true. A second twist is that the way it is defined in TRIPS means that *sui generis* is really a mirage: the only 'alternatives' allowed are still patent-like IPRs, just modified slightly to adapt them to plants.

Despite these basic flaws, the *sui generis* idea remained unquestioned for a decade, and in the meantime we have witnessed or entangled ourselves in numerous contradictions as part of many often courageous but hopeless searches for a 'better' IPR system. This has been the case for many groups fighting against intellectual property through WIPO, a body that was specifically and exclusively created to defend intellectual property. After so many years of fruitless battles, we should perhaps turn the argument on its head. The fact is that IPRs are an extreme case of *sui generis* legislation. As such, they should be drafted, applied and interpreted under the severe scrutiny of and the strict limitations set by societies and their different fundamental, *non-sui generis* norms. From this standpoint, the overwhelming conclusion would be that intellectual property should not be granted over life or knowledge.

KNOWLEDGE

Have you ever noticed that almost every concept or device that is permanently attached to an adjective becomes degraded and devalued? Like organic agriculture, sustainable development, participatory breeding, alternative technology, protected democracy, market economy. Traditional knowledge is no exception.

Traditional knowledge is knowledge, just like mathematics, biology or sociology. What makes it distinct is that it has been carefully and patiently created, built, nourished, circulated and promoted by common, non-powerful people: small farmers, fisherfolk, hunter-gatherers, traditional healers, midwives, artisans, traditional poets, and many others. Because the majority of these people belong to rural cultures or have close links with rural cultures, such knowledge is intimately linked to the understanding of natural processes. It is a form of knowledge that is continuously evolving, integrating new knowledge into a rich pool that has been tested and enriched over centuries.

We don't go around talking of *"mathematical knowledge"* or *"sociological knowledge"*. The reason we always hear about *"traditional knowledge"* is that this way we can diminish a form of knowledge that

could become subversive, because of its collective nature and its autonomy from the circles of power. The labelling also allows the same circles of power to excuse themselves from understanding a type of knowledge which is way too sophisticated to fit their current models. Most of all, it conveys the message that traditional knowledge is fixed, mummified, and unfit for modern times. Once traditional knowledge has been portrayed as a second-class knowledge, it becomes easier and cheaper to turn it into a commodity.

That is what we are seeing these days. The result of centuries of on-going human creativity is now being sold in pieces, with the active assistance of WIPO and WTO. But just as you cannot sell or buy number five, nor can you sell or buy people's knowledge of plants or nature, or any knowledge for that matter. What is really being done is crushing or violating the right of many peoples of the world to continue freely creating, promoting, protecting, exchanging and enjoying knowledge. Can you imagine a world where no one except a few corporations could use the number five?

TRUSTEESHIP

Trusteeship refers to a legal responsibility to supervise and administer some kind of property or asset – as in a 'trust fund' – on someone else's behalf. It comes from the Anglo-Saxon legal tradition. It was introduced into the political debate over plant genetic resources in the early 1990s as a means to protect the world's stock of *ex situ* germplasm collections from both physical destruction and legal misappropriation. The way it was set up meant that the international agricultural research centres of the CGIAR were granted the responsibility to maintain the seed collections held in their gene banks 'in trust' for the benefit of the international community. This responsibility was granted to them by the members of FAO's Commission on Plant Genetic Resources – that is to say, national governments. The trust agreement, originally signed in 1994, was meant to shake off doubts about who owns the materials in the CGIAR's gene banks. It formally instructs the centres to preserve their germplasm collections in perpetuity and keep them free from IPRs. On the surface, it seems like a noble effort. The world's most important institutional collections of genetic diversity for a number of food crops are supposedly going to be kept safe and sound (in deep freeze), and put to proper use (by scientists), for the public good. The key word here is *"public"*. The seed collections held in trust are considered *"international public goods"* which should not be privatised and should benefit everyone. But the whole system – from the text of the FAO-CGIAR agreement to the way it is implemented – carries a number of hidden weaknesses. Neither the CGIAR centres nor the CGIAR itself have the legal capacity to prevent people from getting patents or other forms of IPRs on the material in trust. The centres distribute seed samples, but they cannot police what happens to them, either in the lab or in the courts. Nor can FAO or the CGIAR stop researchers from getting IPR on the components or derivatives of these materials. Sometimes sensitivities blow up.

In 2000, Thai rice farmers, NGOs and politicians became furious when they learned that samples of Jasmine rice were sent from the International Rice Research Institute (a CGIAR centre) to scientists in the US without the required material transfer agreement stating that IPRs were prohibited. In 2001, Peruvian scientists raised a stink about how the International Potato Centre (another CGIAR institute) mishandled the trust agreement when it ferried yacon samples from Peru to Japan. But most importantly, the very people who provided all these diverse and unique plant materials to the trust pot – local farming communities and indigenous peoples throughout the developing world – were never consulted about whether they wanted the seeds put in this system, whether they trusted the CGIAR centres, who they thought should benefit, whether they considered the seeds to be international public goods and whether they wanted to play a role in the whole thing.

There's no reason to doubt the good intentions behind the system. But the political reality of it is that the authority to take decisions has been abrogated from the farmers who contributed the seeds in the first place. This is what's wrong and it needs to be righted. (Did someone say something about 'farmers' rights'?)