



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



INFORMATION ON POSSIBLE INTERRELATIONS BETWEEN THE INTERNATIONAL TREATY AND RELEVANT INSTRUMENTS OF UPOV AND WIPO

Note by the Secretary

*This document contains the submission by **South Centre** on possible interrelations between the International Treaty, in particular its Article 9 (Farmers' Rights), and the relevant instruments of UPOV and WIPO.*

*The submission is presented in the form and language, in which it was received on **28 November 2014**.*

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Interrelations between the International Treaty, especially its Article 9, and relevant instruments of UPOV and WIPO, pursuant to Resolution 8/2013.

Submission by the South Centre.

This document is submitted in response to the notification by the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture inviting Contracting Parties, stakeholders, and others to share any relevant information on the identification of interrelations between the International Treaty and relevant instruments of UPOV and WIPO pursuant to Resolution 8/2013. The Resolution, adopted by the Governing Body at its Fifth Session, requested “*the Secretary to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments.*”

The realization of Farmers’ Rights is a long-standing concern of the South Centre.¹ In the South Centre’s view the effective implementation of such rights is key to ensure equity in the farming systems and to promote the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA). The achievement of these objectives requires, in particular, the protection of farmers’ practices with respect to saving, selling and exchanging seeds.

The examination of the interrelations mandated by Resolution 8/2013 is most relevant. The origin of the concept of Farmers’ Rights - first developed in the context of the International Undertaking on PGRFA adopted in 1983²- can be traced in the debates held within FAO on the asymmetry in the distribution of benefits between farmers as donors of germplasm, and the producers of commercial varieties that ultimately rely on such germplasm. The underlying notion was that while a commercial variety could generate returns to the commercial breeder (notably on the basis of Plant Breeders’ Rights (PBRs), “no system of compensation or incentives for the providers of germplasm” had been developed.³ The relationship between Farmers’ Rights and intellectual property rights was, hence, at the very inception of that concept.

¹ See the working paper published by the South Centre in 2000 (Carlos Correa, South Centre, *Options for the Implementation of Farmers’ Rights at the National Level*, South Centre, Working Paper No. 8, Geneva, 2000).

² See FAO Resolution 5/89 on Farmers’ Rights.

³ Esquinas Alcazar, José (1996), “The realisation of Farmers Rights”, in *Agrobiodiversity and Farmers’ Rights*, Madras: Swaminathan Research Foundation, No.14, p. 4.

Farmers' Rights are one of the important elements in the International Treaty on Plant Genetic Resources for Food and Agriculture ('the Treaty'). The Preamble to the Treaty affirms that 'the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material...are fundamental to the realization of Farmers' Rights...'. Article 9 of the Treaty spells out various components of Farmers' Rights. Hence, any provision in other international instruments that limit or impede such farmers' acts would not contribute but rather impair the realization of Farmers' Rights.

Interrelation with UPOV

It is a generally accepted interpretation that under the UPOV Convention as amended in 1978, the breeder's right does not extend to the farmers' acts of saving and exchanging seeds, since the Convention only provides for exclusive rights in relation to acts entailing the marketing (or the offer for sale) of the reproductive or vegetative propagating material.⁴

The concept of Farmers' Rights, although well recognized by the international community at the time of the 1991 revision of the UPOV Convention,⁵ was overlooked in the process of revision and ignored in the final text adopted by the diplomatic conference.⁶ The UPOV Convention, as amended in 1991, is more restrictive than the UPOV 1978 version regarding the rights of farmers. The breeder's exclusive rights conferred under article 14(1) would allow the breeder to prevent farmers' acts of saving seeds, unless an (optional) exception is established by the national law. The scope of the permissible exception is, in addition, limited by a number of conditions.⁷ Further, the UPOV explanatory note on exceptions to breeder's rights recalls that the Diplomatic Conference recommended that the provisions laid down in Article 15(2) of UPOV 1991, should not be read so as to be intended to open the possibility of extending the practice commonly called 'farmer's privilege,' to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting

⁴ It is worth noting that *FAO Resolution 4/89* stated, at the time where, UPOV as amended in 1978 was still open to accession, that "Plant Breeders' Rights, as provided for under UPOV (International Union for the Protection of New Varieties of Plant) are not incompatible with the International Undertaking" (Article 1. of the Agreed Interpretation).

⁵ *FAO Resolution 5/89 on Farmers' Rights* referred, in particular, to allowing 'farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods'.

⁶ This revision was negotiated and adopted by 20 UPOV member countries, out of which only one (South Africa) was a developing country. See UPOV, *Record of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Plant Varieties*, Geneva, 1991, p. 535-543.

⁷ Article 15(2): 'Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii)'.

Party concerned. The explanatory note adopted by the UPOV Council has elevated this recommendation, in practice, to the status of an additional condition.⁸ It adds another – ambiguously defined- restriction on the farmers’ ability to save and use protected seeds.

The purpose of the UPOV system is to protect the rights of breeders. While this objective is legitimate, it should be pursued taking broader public interests into account.⁹ The application of the UPOV Convention, as revised in 1991, does not contribute but can effectively undermine the implementation of Farmer’s Rights.

There is, thus, an incoherence in the international legal system which, on the one side, recognizes the rights of farmers to save, exchange and sell seeds and, on the other, restrict such rights if a country is bound under the UPOV Convention in its 1991 version, as currently interpreted. Some aspects of this incoherence may be solved by way of a less restrictive interpretation of the Convention’s provisions that takes into account the essential components of Farmers Rights. Other aspects would require an amendment of the Convention in order to make it compatible with the ITPGRFA, as *lex posterior*.

While the Preamble of the ITPGRFA affirms that ‘nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements’, it also clarifies that this recital ‘is not intended to create a hierarchy between this Treaty and other international agreements’. This means that the UPOV Convention cannot be read as prevailing over the ITPGRFA, and that the international community will have to take action to ensure consistency of the international legal system.

The normative incompatibility described above makes it unnecessary any additional fact-finding regarding the impact of UPOV-conferred breeder’s rights on the implementation of Farmers’ Rights. Farmers face, in countries that have adopted the UPOV model as enshrined in the 1991 version of the Convention, civil (and, in some cases, even criminal sanctions) for conduct that should be deemed legitimate and which is functional to society’s interest in a sustainable agriculture and the attainment of food security.

Interrelation with WIPO Instruments

None of the instruments administered by the World Intellectual Property Organization (WIPO) has addressed the issues arising from the implementation of Farmers’ Rights. Moreover, although the WIPO and FAO have signed a Memorandum of Understanding

⁸ UPOV, Explanatory Notes on Exceptions to the Breeder’s Right Under the 1991 Act of the UPOV Convention http://www.upov.int/explanatory_notes/en/, para. 13 and 14.

⁹ The Preamble of the 1978 revision of the UPOV Convention noted that Contracting Parties were ‘conscious of the special problems arising from the recognition and protection of the rights of breeders and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right’.

(MOU) that was approved by the WIPO Coordination Committee in 2010¹⁰, under which the cooperation should include matters where intellectual property rights may intersect aspects of Farmers' Rights and traditional knowledge, there has been limited discussion in the WIPO committees on these issues and thus there is no agreed WIPO common position. This is despite the fact that the grant of patents in relation to plants or plant varieties can negatively affect the implementation of Farmers' Rights. The exercise of patent rights can not only prevent the traditional practices of saving and exchanging seeds, but also the possibility of using protected material as a source for further improvement of a plant variety.

The WIPO committee on Standing Committee on Patents (SCP) recently requested the Secretariat of WIPO to produce a study on "exceptions and limitations to patent rights: farmers' and/or breeders' use of patented inventions".¹¹ The mandate of the study was on the implementation of exceptions and limitations in Member States, without evaluating the effectiveness of those exceptions and limitations. Accordingly, the study was produced and was presented by the Secretariat to the SCP 28th session held from 3-7 November 2014. Based on the questionnaire responses from Member States and a regional patent office, the study provides factual information on national laws providing for exceptions and/or limitations related to farmers' and/or breeders' use of patented inventions, and the public policy objectives pursued in providing the farmers' exception. To date there has been no substantive discussion of the study by the SCP and there is no defined future work on this issue.

Considerations about Farmers Rights are also ostensibly absent in WIPO's *Methodology for the Development of National Intellectual Property Strategies*.¹² Part B: 'Problems, Challenges, Priorities and Strategic Issues' of *Tool 2: Baseline Survey Questionnaire* of said Methodology includes no question relating to the implementation of Farmers' Rights, nor about ways to develop a regime compatible with the ITPGRFA (at least for the case of countries that are contracting parties). This is a major omission in a document intended to guide developing countries how to develop their intellectual property systems in the context of the WIPO Development Agenda.

Similarly, in '*Tool 3: Benchmarking Indicators*' of the same methodology there is no reference to the contributions that farmers have made, and continue to make, in the development of varieties adapted to local evolving conditions, nor to the importance of farmers' varieties to preserve diversity in the fields. In most developing countries, the

¹⁰ See WIPO document WO/CC/63/8, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=137234.

¹¹ See WIPO document SCP SCP/21/6, Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=284436. The Questionnaire and responses from Member States are available at <http://www.wipo.int/scp/en/exceptions>.

¹² Available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/958/wipo_pub_958_3.pdf.

largest proportion of seeds is produced by farmers themselves, a fact that is not mentioned in the Methodology. This document also omits any reference to *sui generis* systems (such as those adopted in India, Malaysia and Thailand) that do not follow the UPOV model and which recognize rights over farmers' varieties.

Farmers' Rights and the possible means to implement them are, thus, issues ignored in WIPO's *Methodology for the Development of National Intellectual Property Strategies*. This reveals a total dissociation of WIPO's Secretariat work from that carried out in the context of the Treaty.

Conclusions

While article 9 of the ITPGRFA stipulates that 'that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments', this task cannot be undertaken if the international legal system is incoherent and dysfunctional to the implementation of such rights. The protection of breeders' rights under the UPOV Convention should be made compatible with the recognition of Farmers' Rights, via interpretation and amendment of the relevant provisions.

WIPO, as the UN agency specialized in intellectual property, also has the responsibility of addressing in its committees the issue of Farmers' Rights and of providing countries with advice that contributes to their realization at the national level.