



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 **Southeast Asia Regional Initiatives for Community Empowerment (SEARICE)** 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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Submission by the Southeast Asia Regional Initiatives for Community Empowerment

Foremost, we echo the views expressed by other civil society organizations in its open letter dated 18 September 2014 to the Secretary of the ITPGRFA, that the Resolution “concerns implementation of Article 9, thus identification of interrelations should be with regard to Farmers' Rights and be supportive of the implementation of Article 9 and the Treaty.” Therefore, discussing innovation and plant genetic resources is inconsistent with the mandate given by the Resolution.

Plant genetic resources are the subject of an increasingly common phenomenon in international law referred to as the ‘regime complex.’¹ Regime complexes are characterized by an overlapping of non-hierarchical legal regimes for the same issue-area, where the component legal regimes are created and administered in distinct forums by different sets of actors. Regime complexes give rise to legal inconsistencies because rule-making in the different regimes are rarely coordinated with one another, yet there is no agreed-upon hierarchy for resolving conflicts. According to authors Raustiala and Victor², there are four consequences of this phenomenon: 1) existing rules in the various component regimes will constrain and direct the process of creating new rules, 2) “the existence of distinct negotiating fora will spur actors to seek out the forum most favourable to their interests”, 3) “a dense array of international institutions will lead to legal inconsistencies”, and 4) “states contend with inconsistencies through the process of implementation and interpretation,” with “diplomats often negotiat[ing] broad ex ante rules and then defer[ing] the task of working out detailed implications to the process of implementation.”

Because farmers have traditionally been the ones responsible for maintaining and refining humanity’s past and current set of available PGRFA, farmers’ rights are inherently linked to and are affected by treaties governing PGRFA. Thus, farmers’ rights must be discussed within the context of the regime complex in plant genetic resources, specifically in food and agriculture. However, the four consequences described in the previous paragraph must be avoided or at least minimized to ensure that the relevant international agreements are mutually supportive of each other. Otherwise, inconsistencies will lead to new problems in national implementation.

More than a third of UPOV member states are contracting parties to the plant treaty whereas almost all of WIPO’s contracting states are also contracting parties to the plant treaty. This situation vigorously calls for these international agreements to be mutually supportive of each other with a view to achieving sustainable agriculture and food security.³

The implementation of farmers’ rights is an overarching mandate of contracting parties to the plant treaty. UPOV also concerns itself with farmers’ rights as the convention

¹ Kal Raustiala and David G. Victor. *The Regime Complex for Plant Genetic Resources*. International Organization, Vol. 58, No. 2 (Spring, 2004), pp. 277-309. MIT Press.

² Ibid., p. 279-280.

³ Paragraph 9 of the preambular text of the plant treaty states: Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security;

imposes certain prohibitions on farmers, particularly on the commercial exploitation over plant varieties subjected to PBRs. On the other hand, the WIPO Convention, through its Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore has started drafting text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.

Shared Recognition and Definition of Farmers' Rights

Inasmuch as farmers' rights is a common thread in the ITPGRFA, the UPOV and WIPO conventions, there is a need to share a common perspective and understanding of farmers' rights. Farmers' rights, and its spirit of recognizing the immense contributions of farmers, must, at the very least, not be diminished or trampled upon by the UPOV and WIPO. Do UPOV and WIPO, which also have a development agenda, share farmers' rights as embodied in Article 9 in relation to Article 5 of the ITPGRFA? If so, is there any possibility for the three international agreements to share a common vision of implementing farmers' rights and thereby repeal, cancel, reverse or nullify proprietary laws that interfere with these rights, or render these rights nugatory, in efforts to benefit society in general, to sustainable life processes throughout generations? How can the Secretary, the ACSU, and the parties to the Plant Treaty safeguard the commitments made under the Plant Treaty, particularly in implementing farmers' rights, ensure that commitments made under the UPOV and WIPO are consistent with commitments under the Plant Treaty? These are the questions that the Secretary, in its mandate given through Resolution 8/2013, and the ACSU must answer. These are the underlying questions in the efforts to ensure that the relevant international agreements are mutually supportive of each other within the context of the Plant Treaty.

Foremost, Farmers' Rights must be recognized, prominent and adequately provided for in the relevant instruments of the UPOV and the WIPO, although this is hardly the case. These instruments are located differently along a property rights spectrum from the public to the private domain, and thus illustrate the tension between the need to preserve the traditional practices of farmers with regard to the propagating materials, on the one hand, and the grant of intellectual property rights to spur research, on the other. The ITPGRFA mimics the common heritage of mankind principle of old by placing PGRFA in the international commons. Article 9 lays down three core, non-exclusive, components of farmers rights: protection of traditional knowledge, benefit-sharing, and participation in decision-making. Notably, the ITPGRFA still fails to define the scope of farmers' rights. The precise set of rights and obligations that the concept entails was a bone of contention among the negotiators even while the rationale was generally accepted. It is expected that the boundaries of farmers' rights would be the subject of subsequent negotiations of the ITPGRFA. Article 9.2 provides a non-exclusive list of the scope of farmer's rights, which, together with Article 9.3, can be said to provide the core of farmers' rights, at least as agreed upon by the parties to the ITPGRFA so far, and which remains to be the most detailed elaboration of farmers' rights in an international agreement to date.

However, the UPOV deals specifically with the grant of a form of intellectual property right called plant breeders' rights, which is less exclusive than a patent and allows for the provision of a "farmers' privilege." Thus, under UPOV 1991, farmers may be permitted to use for propagation "on their own holdings" the product of the harvest obtained by planting a protected variety "on their own holdings", provided that such privilege is exercised "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder." This limited farmers' privilege does not allow farmers to sell or exchange seeds with other farmers for propagation, which is a practice for purposes of crop and variety rotation in many

developing countries.⁴ Further, "reasonable limits" has been interpreted to mean that states are to restrict the acreage, quantity of seed and species subject to the farmers' privilege, while breeders' "legitimate interests" requires compensation to the breeder.⁵ Given this very limited farmers' privilege, with the word 'privilege' itself denoting something less than a right, the UPOV is a major threat to the farmers' rights agenda. Obviously, the contribution of farmers is hardly recognized, and instead is marginalized, under the UPOV. Even the "farmers' privilege," weak enough as it is, is merely an optional exception that Parties may or may not adopt.

On the other hand, the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations with the mandate to "promote the protection of intellectual property throughout the world"⁶ has yet to produce an international instrument relating to plant genetic resources and farmers' rights. The neglect of farmers' rights in recent negotiations and the current draft text is alarming.⁷ The work of the Secretariat and the ACSU must address this further marginalization of farmers' rights in the international law agenda.

It has long been recognized that plant genetic resources lie at the very beginning of the food chain, and that for thousands of years farmers, particularly smallholder farmers have been involved in the development, conservation, and sustainable use of this vital resource. No less than the UN special rapporteur of the right to food has emphasized the importance of smallholder farmers in providing the world's food needs.

Before Gregor Mendel first published the first theory in genetics, smallholder farmers worldwide were already engaged in the selection of plant traits and the continuous breeding of plant species in accordance with their needs. It is important for farmers, particularly smallholder farmers to continue unhampered, with the *in situ* conservation of plant genetic resources, as much as or even more than they have for the past thousands of years. The paltry benefits arising from intellectual property rights, should be measured against the multifarious benefits that spillover as a result of implementing farmers' rights – in terms of sustaining present and future efforts in plant breeding, and most especially in sustaining present and future food and other needs of humans. The benefits of intellectual property rights to a chosen few, should not be prioritized over the benefits of the numerous needy people of the world, whose only existence depends on the availability of food.

The three international agreements will gather significance with shared definitions on farmers' rights, as well as methodologies on how to implement farmers rights within their respective spheres. To tread the opposite path will only lead to the atrophy of these treaties. It must be stressed that since farmers' rights is a cross cutting issue in the ITPGRFA, WIPO, and the UPOV, a gathering confusion over provisions on farmers rights and how these rights are treated may convince contracting parties to any one of these two or three international treaties to altogether shun the application of treaty provisions in their national jurisdictions.

⁴ IPRs in plant varieties, p. 29; citing Watal, 2000 and Leskien & Flitner, 1997

⁵ IPRS in plant varieties, p. 29; citing International Association of Plant Breeders (FIS, ASSINSEL, 2001a)

⁶ Article 3(i) of the WIPO Convention

⁷ „Small-scale Farmers' Innovation Overlooked in WIPO Negotiations, Panellists Say.“ Maeli Astruc, IP Watch (7 February 2014) Available at: <http://www.ip-watch.org/2014/02/07/small-scale-farmers-innovation-overlooked-in-wipo-negotiations-panellists-say/>

More definitions and scope

With the emergence of technologies that enable the digitization of genetic data, and its application such as through synthetic biology, the implementation of farmers rights, if it is to follow the spirit for which it was agreed-upon, must seriously examine the definition of “plant genetic resources for food and agriculture” and “genetic material.” These terms should be understood, or amended if necessary, to enable the identification of genetic resources and traditional knowledge, and enable its proper protection and sharing of benefits therefrom.

Protection of Traditional Knowledge

Protection of traditional knowledge is not specifically provided for under the UPOV. However, one can argue that the requirement of newness and distinctness already accounts for it to a certain degree by keeping the non-new and non-distinct varieties within the public domain. However, farmers' rights require much more than that. Farmers' rights require a positive recognition of the source farming community. This would entail three key components: mandatory disclosure of origin, effective mechanisms for farmer varieties to establish ownership, and effective mechanisms for farmers to dispute the claim of others. The same mechanisms should be part of the WIPO agreement.

Benefit-sharing

The ITPGRFA already has a mechanism for benefit-sharing in place although its effectiveness is sorely lacking. The UPOV does not, as it effectively puts all non-protected varieties in the public domain, which requires no compensation to the origin. The WIPO could still provide for one. The Secretariat and the ACSU must take into account how the UPOV and WIPO could circumvent the benefit-sharing requirement under the ITPGRFA and its national implementation.

A Legally Binding Instrument on the Implementation of Farmers' Rights

It is strongly suggested that the drafting of a legally binding instrument on farmers' rights be initiated by the secretariat of the plant treaty, in line with its mandate to implement farmers' rights, and the conservation and sustainable use of PGRFA. Recent developments on proprietary rights as discussed in the WIPO and UPOV, as well as recent developments on climate change, food and nutrition security, and biotechnological developments such as nanotechnology and synthetic biology necessitates a serious review and recalibration of how contracting states to the plant treaty, and the governing body as a whole, implement farmers' rights.

For this purpose, it is requested that the secretariat initiate discussions, assessing developments reached by the WIPO IGC, and UPOV and their impact on the implementation of farmers' rights. The governing body or the secretariat of the plant treaty needs also, to support provisions in the WIPO draft text, that strengthen CBD provisions relating to plant genetic resources, particularly Article 15 thereof, which requires contracting parties to the CBD to enter into contracts respecting genetic resources only on the basis of mutually agreed terms, prior informed consent, disclosure, and benefit sharing.

The implementation of farmers' rights will be best achieved with farmers' free and prior informed consent over access and control of PGRFA. The plant treaty recognizes the past, present and future contributions of farmers in all regions of the world, particularly those

in centres of origin and diversity, in conserving, improving and making available plant genetic resources, this being the basis of farmers' rights. Yet most often, farmers are the last to know that the PGRFA that they have long used was already appropriated, and that they are no longer allowed to use, access, exchange, and sell the seeds. It is the obligation of the contracting parties to the plant treaty to end this scenario hence, it is only appropriate that any access to or any effort to control PGRFA must first be with the free and prior informed consent of farmers who are the direct and consequential users of PGRFA.

The disclosure of the origin of the PGRFA and disclosure of who uses, and continues to use the resource; for commercial or any other purposes, be it for scientific or academic purposes; is also necessary to implement farmers' rights. The provisions of the plant treaty on the benefit-sharing fund continues to befuddle most contracting parties on how it can operate to actually produce money to benefit farmers, particularly smallholder farmers in the developing regions of the world. Making disclosure legally binding in an international agreement on farmers' rights, will ultimately trace the origin of all PGRFA to farmers, and consequently, they are entitled by right to the numerous benefits of PGRFA technology, provided these technologies do not contravene the objectives of the plant treaty, as well as the CBD.

In harmony with the plant treaty, benefits arising from the sustainable use of PGRFA, need to be shared to farmers, who are expected to do the backbreaking work of in situ conservation of PGRFA.

Enforcement mechanisms

Enforcement mechanisms under the UPOV and the WIPO (for those agreements that it administers, and which will likely be a model for the emerging agreement on GIs, TK and TCEs) are far ahead of the ITPGRFA, in terms of its specificity and adoption by Party-States. For this very reason, these interrelations that impact on the implementation of farmers' rights must be identified and addressed. Enforcement mechanisms should be part of the package of implementation of farmers' rights.

Enforcement mechanisms are essential in effectively giving the rights-holders, the farmers, the power to claim what is theirs. This enforcement mechanism should match the level of specificity, the technical training for national adoption of those under UPOV and WIPO, and yet take into account the special limitations that small farmers may face in terms of resources and access to justice.

Another option is to follow the route of the WTO in allowing State-to-State dispute settlement. Although this imposes a bigger hurdle to farmers in claiming their right, State-to-State disputes address the international dimensions of trade, can have far-reaching effects as it entails scrutiny of State action such as its legislation and rules, and allows for sanctions that will make economic actors actually sit up and listen.

Ensure the participation of small farming families and relevant stakeholders

Discussions on farmers' rights, or any discussions to identify common grounds for interrelations of the three international agreements, as well as discussions on a a legally binding international instrument on the implementation of farmers' rights will need to consider farmers' perspectives and farmers' voices.