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STATUS AND TRENDS OF SEED POLICIES AND LAWS

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CGRFA 17

I. INTRODUCTION

1. The Commission, at its last session, included as a major output in its Multi-Year Programme of Work, a review of the status and trends of seed policies.¹ In response to this request, FAO prepared a *Review of the status and trends of seed policies and seed laws*² (Review), an analysis of national seed policies, laws, regulations and ancillary provisions. The Review assesses the extent to which seed-related legal, policy and regulatory instruments may impact on-farm diversity of plant genetic resources for food and agriculture (PGRFA).

2. The Intergovernmental Technical Working Group on Plant Genetic Resources for Food and Agriculture (Working Group), at its last session, took note of the Review and recommended that the Commission request FAO to carry out in-depth case studies of the effects of seed policies, laws and regulations on farm-diversity of PGRFA. The Working Group requested to receive the in-depth case studies for consideration at its next session. The Working Group also stressed the need to clarify the term “farmers’ seed systems” and requested the Secretariat to collaborate closely with the International Treaty on Plant Genetic Resources for Food and Agriculture (Treaty) in the preparation of the in-depth case studies to avoid any duplication of activities.³

3. This document gives a brief introduction into the rationale of seed policies and legislation. It describes the methodology used for the assessment and gives an overview of possible effects seed policies and legislation may have on specific aspects relevant to the conservation and sustainable use of PGRFA.

II. RATIONALE OF SEED LAWS AND POLICIES

4. The primary purpose of seed policies, laws and regulations is to provide assurance of the quality and varietal identity of seeds and planting materials. Seed legislation aims to protect farmers as consumers of seeds. This is particularly important as seeds, from their external appearance disclose very little information about their quality and the characteristics of the plant that will originate. Seed legislation therefore usually prescribes some form of variety description and evaluation, seed field inspection and laboratory testing procedures, which aim to assure seed identity and quality. Seed legislation also aims to support seed producers and vendors by establishing governance mechanisms for the sector, which typically include the enforcement of fair competition. For the administration and enforcement of seed legislation, countries usually designate competent authorities and mandate them with the enforcement of seed production and quality standards. The competent authorities, together with the seeds and planting materials they regulate, and the chain of organizations that breed, produce, market and distribute the seeds under the applicable seed legislation, comprise what is commonly considered the “formal” seed system.

5. Seed legislation usually includes provisions for variety registration, which requires a variety’s performance to be assessed, and its characteristics described, before the variety can be listed among those eligible for commercial production and sale. In addition, seed legislation usually regulates the quality of seeds and provides a system for assuring seed quality in terms of genetic purity (true-to-type), analytical purity (freedom from contamination) and germination. The most common system for seed quality control is certification, where a neutral third party inspects seed production, and certifies the variety identity and quality of the seed lots produced for sale. However, in some countries there are seed quality systems in place that set quality standards without providing for mandatory inspections.

6. Farmers’ seed systems also manage and circulate seed and planting material, but are separate from the chain of seed production organizations in the formal system. Farmers’ seed systems include practices such as seed selection, and may use a range of possible channels for sourcing seed and planting materials, including their own harvests, exchanges or sales among farmers, or local markets. In many countries, particularly developing countries, a large proportion, if not most of the seeds and

¹ CGRFA-16/17/Report Rev.1, *Appendix C*.

² CGRFA-17/19/9.3/Inf.1.

³ CGRFA-17/19/9.1, paragraph 19.

planting materials of staple crops are sourced from farmers' seed systems. Through these systems seeds of farmers' varieties/landraces and released crop varieties, often initially sourced from the formal system, are supplied. Farmers' seed systems are an important component of the management of PGRFA, particularly the on-farm diversity of farmers' varieties/landraces.

II. METHODS OF THE REVIEW OF THE STATUS AND TRENDS OF SEED POLICIES AND SEED LAWS

7. Recent reviews of seed laws and their impacts on PGRFA mostly focused on a single region or set of countries.⁴ While the methodologies of these reviews varied, they were usually based on country case studies. For the purpose of identifying common trends of national seed legislations and policies and their possible impacts on the diversity of PGRFA grown by farmers, a different approach has been chosen for the Review.⁵

8. The Review is based on an analysis of seed legislation of 96 countries, as documented in FAOLEX, an electronic collection of national laws, regulations and policies on food, agriculture and natural resources. The Review focuses on provisions that directly or indirectly ban or restrict the number of varieties available to farmers, by prohibiting sale, exchange or even use of seeds of farmers' varieties/landraces. The Review also considers provisions, such as registration requirements, that may affect the participation of small-scale farmers or of farmers' organizations in the formal seed sector. It is important to note that the Review is based on the existence of relevant legal provisions; it neither takes into account the level of implementation or enforcement of these provisions nor any administrative practice which at times may differ from the letter of the law.

9. Based on the Voluntary Guide for National Seed Policy Formulation,⁶ 15 questions were used to query the provisions of the legal instruments for possible impacts on on-farm diversity of PGRFA. These questions addressed, *inter alia*: (i) variety registration as a requirement for the marketing/exchange of seeds or other propagating materials; (ii) seed quality control systems, such as seed certification; and (iii) the representation of farmers in governing bodies of national seed authorities. For each question, a set of possible answers, reflecting the range of existing scenarios, was provided. All but two of the questions allowed for only a single answer.

10. When the Review was conducted in March 2018, the FAOLEX database contained over 4 000 documents on legal instruments pertaining to seeds and planting materials for 171 countries and regional legislative unions. The Review examined 288 documents in the four most common languages of the database, English, French, Spanish and Russian, and included any country whose available documents addressed the 15 questions of the analysis, arriving at 94 countries and two regional organizations with capacity to approve legislation that is directly applicable in their member states – the Andean Community and the European Union.

11. The answers for each country were then combined into a master worksheet, which listed the answers for all 96 countries/regional legislative unions. This was used to tally the frequency of answers to individual questions. The interactions between two or more questions were also recorded and analysed (e.g. in instances of a seed law stipulating that both the registration of all commercialized varieties and seed certification were compulsory).

III. POTENTIAL EFFECTS OF LEGAL INSTRUMENTS ON THE DIVERSITY OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

12. Seed laws may restrict the use and exchange, including the commercialization of seeds and other propagating materials, in various ways. They may confine the right to sell seeds to registered seed sellers. They may limit commercial and/or non-commercial exchanges of seeds to certified seeds of registered varieties, either for all or for selected crops. They may also make it difficult for small-

⁴ Visser, B. 2017. The impact of national seed laws on the functioning of small-scale seed systems. A country case study. Amsterdam, Oxfam-Novib. https://www.sdhsprogram.org/assets/wbb-publications/770/Seedlawstudy_Bert%20Visser.pdf;

⁵ CGRFA-17/19/9.3/Inf.1.

⁶ <http://www.fao.org/3/a-i4916e.pdf>

scale farmers to register as seed sellers or to meet the requirements for variety registration or seed certification, which may make it difficult for farmers to exchange seeds on a commercial or even non-commercial basis.

Registration requirements for seed producers

13. Relevant laws of nearly three-quarters of the countries studied require seed producers to be registered in order to operate; 53 percent require registration of seed producers for every crop, and 21 percent made this a requirement only for some crops. The laws of 26 percent of the countries studied did not mention any requirement for seed producers to be registered as such, but it is likely that the decision to register seed producers is being delegated to the national seed authority.

14. A registration requirement for seed producers may affect the ability of small-scale farmers or farmer groups to produce and market seeds on a commercial scale. This is particularly true where direct or indirect costs and fees for registration are prohibitive.

Variety registration

15. While seed legislation is usually mainly concerned with regulating the formal seed sector, it may have direct or indirect impacts on the functioning of farmers' seed systems. This is the case where seed legislation prohibits the sale or even non-commercial exchange of seeds of plant varieties that are not registered in the national or regional varietal list.

16. The seed legislations of nearly three-quarters of the countries studied requires registration of a crop variety for any commercial production or sale of seeds and planting materials of the variety. Most of these countries (63 percent) apply this registration requirement to all crops, while 11 percent require compulsory variety registration only for some species. For the remaining 26 percent of countries, the available legal documents either did not mention variety registration or the requirements were unclear.

17. The reason for this is the variety registration conditions. The laws of 69 percent of the countries studied specifically require that for a variety to be registered it has to meet the requirements of distinctness, uniformity and stability (DUS). The laws of 37 percent of the countries studied require, at least for specific crops, a test for value for cultivation and use (VCU). The DUS and VCU requirements may constitute significant hurdles for the farmers' varieties/landraces, which, in fact, will usually not fulfil these criteria. While there is some flexibility in interpreting and applying the DUS, the VCU requirement usually requires an added value of the variety (most often in terms of yield) compared with existing registered varieties of the same species. Even though farmers' varieties/landraces may have desirable traits other than those measured under the VCU test, the VCU requirement may present a serious hurdle to their registration as farmers' varieties/landraces will usually not outperform the other registered modern varieties, or meet the minimum yield requirements, where those are explicitly set as a condition for passing a VCU test.

18. Variety registration schemes that ban the exchange/commercialization of seeds of unregistered varieties may put at risk the commercialization and, thus, the conservation and sustainable use of seeds of farmers' varieties/landraces, which often will not meet the registration requirements. Stringent and cost-intensive registration procedures for seed producers may also restrict the number and diversity of seed producers, including of farmers' groups or local enterprises that could otherwise participate in the formal seed system. Such conditions may affect the range of actors receiving official recognition and support, and ultimately threaten the diversity of PGRFA produced and promoted through these channels.

19. Where seed legislation does not restrict the exchange and commercialization of seeds of unregistered varieties it is unlikely that the seed legislation has any direct impact on the diversity of farmers' varieties and landraces used by farmers. It may, however, have indirect impacts, for instance, by setting significant incentives for the formal seed sector to produce or import new varieties.

20. Obviously in response to the possible impact seed laws may have on the conservation and sustainable use of farmers' varieties/landraces, some countries have created specific exemptions or other mechanisms in their seed laws with the aim of facilitating the registration of farmers' varieties/landraces.

Seed quality control

21. Countries have adopted different systems for seed quality control, all of them aimed at ensuring that farmers who plant grow what they expect. One quality control system is seed certification (voluntary or compulsory), whereby a neutral party carries out inspections to confirm if the variety is registered and true-to-type, and to confirm the quality of the seed lot with respect to germination, health and absence of contaminants. Alternative quality control systems, in which seed producers are responsible for the quality control without external inspections, include Quality Declared Seeds,⁷ which has a less intensive third-party inspection regime and lower cost. Quality Declared Seeds systems complement seed certification systems, are most applicable to low-input production systems, and are seen as a transition phase between the informal and formal seed systems.

22. Legislation in over three-quarters of countries requires some form of seed quality control for seed that is to be commercialized. Certification was required in 62 percent of countries, with 30 percent specifying that the requirement of certification is for all crops (the remainder defined a set of crops requiring certification).

23. Considering that seed certification or other forms of compulsory seed quality control are difficult or impractical to implement in some communities of small-scale farmers, especially those in remote areas, it may make it difficult, if not impossible, for those farmers to produce seed that is legally recognized. Thus, even if a farmer's variety/landrace takes the hurdle of registration, from the legal point of view its seed may not be allowed to be commercialized. Only seeds of registered varieties can be certified. Compulsory seed certification therefore exerts an indirect impact on PGRFA diversity, comparable to the impact of compulsory variety registration.

24. Driven by the desire to achieve cost-efficiency for seed lot inspections, the seed laws of some countries define a minimum size of the seed lot for field inspections. This requirement could prevent small-scale farmers or farmers' associations from marketing seeds of their varieties/landraces because they fail to fulfil specific seed production standards. However, a minimum size of the seed lot is required in only 2 percent of countries whose legislation was analysed.

25. Twenty-nine percent of countries studied explicitly ban the sale of seeds that were not certified, while another 42 percent allow uncertified seed to be sold, at least for some crops. Bans on commercial production and exchange of uncertified seeds may limit the diversity of farmers' varieties/landraces used and conserved by farmers as they make it legally risky for farmers to produce and exchange seeds of their varieties/landraces.

26. Some countries recognize Quality Declared Seeds as a quality standard and define the degree of intervention or control by the national seed authority in that standard. Other countries set out clear rules that require seed producers to label their seeds, comply with the quality standards and provide farmers with the necessary information through accurate labelling; both cases refer to registered varieties. Those systems are considered to ease the production of seed in farmer's communities, bringing a potential positive effect on diversity of PGRFA.

27. In addition, the laws of 19 percent of countries provided for specific incentives or discounts for small-scale farmers or small-scale farming enterprises, such as lower fees for seed inspections or variety registration, again a potential positive effect on diversity. The remaining 81 percent of countries did not mention any provision to provide for such incentives in their seed laws.

Representativeness of decision-making bodies

28. The representation of small-scale farmers and seed producers on decision-making governing bodies of national seed authorities may enhance the probability of decisions that are favourable to the interests of small farmers.

29. Seed legislation of some countries provides for the involvement of farmers and seed producers in advisory bodies or even in the decision-making of governing bodies of national seed authorities

⁷ <http://www.fao.org/3/a-a0503e.pdf>

charged with the implementation of the seed legislation. Such arrangements may help to reflect the needs and interests of relevant stakeholders in the implementation of seed legislation. The review of the documents excluded bodies that had only advisory roles, focusing on documents that assign participation in decision-making.

30. Under the laws of 35 percent of the countries studied, representatives of seed producers have to be represented on the governing council or board of the national seed authority, and the laws of 28 percent of the countries require seed consumers (farmers) to be represented in these bodies. Some countries (14 percent) explicitly require small-scale farmers to be represented on the board (normally representing cooperatives, or farmers' associations). Most of the latter countries are in Africa, a few in Asia, none in Latin America or Europe.

Multiple aspects of seed legislation in combination

31. Finally, the Review examined the impact of interactive effects of the typical provisions of seed laws and their potential impacts on the diversity of PGRFA available to farmers.

32. The analysis shows that, although a considerable number of the countries studied (63 percent) require the registration of all varieties sold commercially, 26 percent of these countries, while having a compulsory registration system, recognize farmers' seed systems in their legal documents. This indicates the possibility of seed legislation that accommodates and supports different seed systems at the same time, including the formal as well as farmers' seed systems. The seed laws of other countries suggest, on the other hand, that regulating all commercial seeds and recognizing farmers' seed systems at the same time, is not always considered desirable, be it for reasons of consistency or other reasons.

33. The Review further shows that 28 percent of the countries studied require both the registration of all varieties and the certification of all seeds of all crops as a condition for their commercialization. This combination implies a system that exerts total control over varieties released and the way they are multiplied.

Key conclusions

34. It is important to note that the findings of the Review are largely indicative. The Review focused on the legal documents available in FAOLEX. It did not analyse the level of implementation or enforcement of the legal documents, nor did it take into account administrative practice.

35. It should also be noted that many factors affect the diversity of PGRFA directly or indirectly and it is therefore difficult to make rigorous claims about the impacts of seed policies in isolation. A follow-up to the current Review could investigate whether, in fact, seed legislation that accepts or aims to incentivize the continuation or proliferation of informal seed delivery systems, or that facilitates the registration of farmers' varieties, or the imports of varieties, actually promotes the diversity of PGRFA used by farmers.

36. It should further be noted that many countries exempt specific practices such as seed sales among farmers from their seed legislation. Other countries only exempt non-commercial seed exchanges or barter arrangements from their seed laws. Some countries exempt informal seed sales; others regulate them. A comparison between countries that regulate specific practices typical for farmers' seed systems and countries that do not regulate them, and an analysis of the effects of these two regulatory approaches on the level of diversity of PGRFA on-farm, could therefore be useful.

37. The Working Group, at its last session, took note of the Review and recommended that the Commission request FAO to carry out in-depth case studies on the effects of seed policies, laws and regulations on-farm diversity of PGRFA. The Working Group requested to receive the in-depth case studies for consideration at its next session. The Working Group also stressed the need to clarify the term "farmers' seed systems" and requested the Secretariat to collaborate closely with the Treaty in the preparation of the in-depth case studies to avoid any duplication of activities.⁸

⁸ CGRFA-17/19/9.1, paragraph 19.

IV. GUIDANCE SOUGHT

38. The Commission may wish to
- a) Take note of the Review.
 - b) Request FAO to
 - carry out, in close collaboration with the Treaty, in-depth case studies on the effects of seed policies, laws and regulations on on-farm diversity of PGRFA, for consideration by the Working Group, at its next session; and
 - clarify the term “farmers’ seed systems”.