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# RECONCILING FARMERS' AND PLANT BREEDERS' RIGHTS



**OXFAM**

*Farmers' Rights to save, reuse, exchange and sell farm-saved seed/propagating material, to maintain and create agro-biodiversity, and to manage plant genetic resources for food and agriculture (PGRFA), need to be protected and promoted. This applies particularly to smallholder farmers who have always managed and adapted their agro-biodiversity in the face of changing conditions by conserving, exchanging and adapting seeds thereby ensuring local and global food and nutrition security. The implementation of plant breeders' rights requires careful consideration in order not to weaken the role of smallholder farmers in their management of plant genetic resources.*

The right of farmers to save, use, exchange and sell farm-saved seeds and other propagating materials is a central component of Farmers' Rights as enshrined in the FAO Treaty on Plant Genetic Resources for Food and Agriculture of the FAO (the FAO Treaty).<sup>1</sup> The FAO Treaty also includes the rights of farmers to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from the use of, plant genetic resources for food and agriculture, as fundamental to the realization of Farmers' Rights (Preamble & Article 9).

In order to support the implementation of Farmers' Rights, the Governing Body of the Treaty adopted Resolution 8/2013 at its Fifth Session in Muscat, Oman, "request[ing] the Secretary to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments." In addition, through Notification GB6-028, the Governing Body invited Contracting Parties, stakeholders, and others to share any relevant information on the identification of interrelations between the FAO Treaty, especially its Article 9, and relevant instruments of UPOV and WIPO, pursuant to Resolution 8/2013.

## NOTE

<sup>1</sup> This Treaty has also been referred to as the Seeds Treaty or its acronym ITPGRFA.

<sup>2</sup> Visit [www.sdhsprogram.org](http://www.sdhsprogram.org) for more information.

This document provides Oxfam's position regarding this Resolution on the interrelations between the FAO Treaty and UPOV Convention in light of its recognition and support for Farmers' Rights, and presents some recommendations for improvement of the interface between these two international instruments.

## OXFAM AND THE SOWING DIVERSITY = HARVESTING SECURITY (SD=HS) PROGRAM

Oxfam's vision is a just world without poverty. We believe that people can build and strengthen their own livelihoods, provided their rights are respected and implemented. The Sowing Diversity = Harvesting Security (SD=HS) program<sup>2</sup> supports the rights of local and indigenous peoples and smallholder farmers, largely women, by enabling them to access and develop plant genetic resources for food and agriculture suited to their needs. This also enables these actors to manage agro-biodiversity in the context of adapting to climate change. The program aims to develop farmers' capacities in managing their genetic diversity and supports communities to claim their rights to do so effectively. Central in this context are the Right to Food as well as Farmers' Rights. The program supports communities to participate in decision-making processes related to these rights and aims for structural changes by engaging in necessary policy reform.

Farmers are the original plant breeders that created the basis of agro-biodiversity that exists today. Farmers today continue to improve food crop diversity through continuous adaptation to diverse and changing socio-economic, cultural and political conditions as well as changes in agro-ecological circumstances where adverse conditions are intensified due to climate change. Local and indigenous peoples and smallholder farmers manage their seeds and actively utilize Plant Genetic Resources for Food

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and Agriculture (PGRFA), subjecting cultivars under various selection pressures, testing, selecting and evaluating seeds, encouraging introgression and even actively crossing varieties to create new diversity. Seeds are saved for replanting, exchanged as public goods with family members and neighbors, or sold in the local markets. This is the system by which smallholder farmers maintain and create crop genetic diversity, in the process using agrobiodiversity for adaptation to opportunities and pressures related to markets, on- and off-farm livelihoods, and climate change.

**Reduction of smallholder farmers to the role of end-user would create undesirable dependency and dis-empowerment, and would result in a major loss of innovation in agriculture as smallholder farmers continue to provide the world with new, diverse and adapted cultivars.**

Multiple seed systems provide farmers with seeds. Generally speaking, one can distinguish formal and commercial seed systems from the so-called 'informal' or farmers' seed systems. In the latter, farmers are the main developers, producers and distributors of seed. The application of Intellectual Property Rights (IPRs) to new plant varieties or plant genetic material is one of the characteristics of formal and commercial seed systems. The direct and indirect consequences of the application of IPRs on plant varieties for farmers' seed systems require careful analysis and consideration so that it does not weaken the role of smallholder farmers in PGRFA management. Smallholder farmers cannot be seen as mere end-users of innovations from the formal system, since this would not recognize their practices and traditional role in the management of PGRFA. Such reduction to the role of end-user would create undesirable dependency and dis-empowerment, and would result in a major loss of innovation in agriculture as smallholder farmers continue to provide the world with new, diverse and adapted cultivars.



## UPOV AND PLANT BREEDERS' RIGHTS

Intellectual Property Rights give a person an exclusive right over the use of his/her creation for a certain period of time. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires member countries to “provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof”.<sup>3</sup> Least Developed Countries (LDCs) have till 2021 to comply with the TRIPs agreement or until the moment that they cease to be a LDC.<sup>4</sup> One example of a *sui generis* system is provided by the International Union for the Protection of New Varieties of Plants (UPOV), which aims to provide and promote an effective system of plant variety protection through which breeders of new plant varieties can be granted a Plant Breeder's Right (PBRs). The rationale is

that since plant breeding is a long and expensive process, while plant varieties can be easily and quickly reproduced, breeders need protection to recover their investments and encourage further plant breeding.

**UPOV's farmers' privilege does not fully recognize Farmers' Rights as enshrined in the FAO Treaty.**

Once granted a plant breeders' right, the authorization of the plant breeder is required for various uses including the production or multiplication and sales of the protected variety (Article 14). This nullifies the right of farmers to save, use, exchange and sell farm-saved seed where protected varieties are concerned. However, UPOV 1991 contains an optional 'farmers' privilege', through which countries may allow farmers to save and reuse seed of a protected variety “on their own holding” and “within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder” (Article 15.2). This means that the exemption may only apply to a limited set of crops and does not allow

### NOTE

<sup>3</sup> TRIPs Article 27(3)b. Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm).

<sup>4</sup> This transition period can be further extended according to Article 66.1 of the TRIPs Agreement (WTO document IP/C/64, 12 June 2013).



for any form of exchange of farm-saved seed across the fence. In addition, farmers may need to remunerate the breeder for re-using seed of a protected variety. In other words, UPOV's farmers' privilege does not fully recognize Farmers' Rights as enshrined in the FAO Treaty.

The UPOV 1991 Convention also contains a 'breeders' exemption' which allows protected varieties to be freely used for the purpose of breeding new varieties thereby allowing any breeder to have access to the latest improvements and new variation (Article 15.1.iii). This is an important difference with patent law, which plays an increasingly important role in plant breeding. In contrast to plant breeders' rights, patent law does not usually include a breeders' exemption. It is important to note that farmers and breeders alike depend on the continuous use of multiple existing crop varieties for the creation of new varieties. By not allowing for the free use of protected materials for further breeding, patents have an outright negative impact on innovation and the maintenance and development of agro-biodiversity, and promote further market concentration in the breeding sector. In particular, patents do not allow farmers to use, exchange or sell farm-saved seed of a patented variety. For these reasons, Oxfam strongly opposes patents on plants and propagating materials. Although the UPOV 1991 Convention contains a breeders' exemption, it is in its current form a barrier to the full realization of Farmers' Rights.

### UPOV'S LACK OF RECOGNITION OF FARMERS' RIGHTS: HOW CAN THIS BE OVERCOME?

**UPOV hampers the full realization and implementation of Farmers' Rights in three main ways:**

*The rights to save, use, exchange and sell farm-saved seed/propagating material (FAO Treaty Article 9.3)*

Most importantly, the UPOV 1991 Convention

does not allow smallholder farmers to freely save, exchange and sell farm-saved seed of a protected variety. Several studies have shown that smallholder resource-poor farmers in developing countries depend on the informal exchange of farm-saved seed for their seed security. In particular, a recent study, drawing conclusions from 9660 observations across six countries and covering 40 crops, shows that smallholder farmers access 91% of their seed from informal systems with the majority (51%) being bought from local markets.<sup>5</sup> Smallholder farmers access new improved varieties from the formal sector mainly through the same informal channels of seed exchange and local trade, primarily because farmers have very limited access to retailers or cannot afford the price of their seed.<sup>6</sup> Furthermore, the quality and the timely supply of these seeds are often unreliable in the remote, marginal areas. By not allowing for the practice to freely save, exchange and sell farm-saved seed/propagating material with regard to varieties protected by plant breeder's rights, smallholder farmers can be criminalized and their main channel to access and fully utilize new varieties produced by the formal sector is blocked.

Under its Frequently Asked Questions, UPOV states that "UPOV Contracting Parties have the flexibility to consider, where the legitimate interests of the breeders are not significantly affected, in the occasional case of propagating material of protected varieties, allowing subsistence farmers to exchange this against other vital goods

### NOTE

<sup>5</sup> McGuire, S.J., and Sperling, L. (2016). Seed systems smallholder farmers use. *Food Security*, 8(1), pp. 179–195. Available at <http://link.springer.com/article/10.1007/s12571-015-0528-8>.

<sup>6</sup> Louwaars, N.P., & De Boef, W.S. (2012). Integrated seed sector development in Africa: A conceptual framework for creating coherence between practices, programs, and policies. *Journal of Crop Improvement*, 26, pp. 39–59. Available at: <http://www.tandfonline.com/doi/abs/10.1080/15427528.2011.611277>.

within the local community.”<sup>7</sup> This interpretation of UPOV’s private and non-commercial use exemption (Article 15.1.i) is too narrow as any person farming for subsistence needs will aim to sell some of his or her harvest after a good season, or exchange seed with, for example, family members living outside the local community. Furthermore, the term ‘vital good’ is unclear and leaves unanswered if cash would qualify as vital good.

## NOTE

<sup>7</sup> See: <http://www.upov.int/about/en/faq.html#Q30>. Despite its limited scope, this interpretation of Article 15.1.i is already broader than UPOV’s interpretation of the same Article in its explanatory notes from 2009, which states: “[...] private acts which are undertaken for commercial purposes do not fall within the exception. Thus, a farmer saving his own seed of a variety on his own holding might be considered to be engaged in a private act, but could be considered not to be covered by the exception if the said saving of seed is for commercial purposes. [...] The wording [...] suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden (*i.e. no material of the variety being provided to others*), since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example “subsistence farming”, where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder’s right, and farmers who conduct these kinds of activities freely benefit from the availability of protected new varieties.” ([http://www.upov.int/edocs/expndocs/en/upov\\_exn\\_exc.pdf](http://www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf), p. 5, italics added). This interpretation does not seem to allow for the exchange of seeds amongst smallholder or subsistence farmers.

<sup>8</sup> For example, in examining the conformity of the Malaysian PVP law with the UPOV 1991 Convention, the UPOV secretariat expressly stated that “it is recommended to delete Section 31(1)(e) of the Act as the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act.” Section 31(1)(e) of the Malaysian Protection of New Plant Varieties Act contained the following exception: “any exchange of reasonable amounts of propagating materials among small farmers.” (UPOV doc. C(Extr.)/ 22/2, available at [http://www.upov.int/edocs/mdocs/upov/en/c\\_extr/22/c\\_extr\\_22\\_2.pdf](http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf)).

<sup>9</sup> European Seed Association, Position on Plant IP Protection and Biodiversity, ESA\_11.0049, 6 January 2011. Available at <http://www.euroseeds.org/esa110049-esa-position-plant-ip-protection-and-biodiversity>.

<sup>10</sup> See for more information: De Jonge, B., Munyi, P. (2016). A Differentiated Approach to Plant Variety Protection in Africa. *The Journal of World Intellectual Property*. Volume 19, Issue 1-2, March 2016, pp. 28–52. Available at <http://onlinelibrary.wiley.com/enhanced/doi/10.1111/jwip.12053>.

Whereas UPOV’s interpretation of the private and non-commercial use exemption has been notably narrow and restrictive,<sup>8</sup> the European Seed Association holds that “Subsistence farmers in developing countries however are not prohibited to exchange seed with or sell seeds to other subsistence farmers as according to the UPOV 1991 Convention the protection conferred by a plant breeders’ right does not extend to acts done privately and for non-commercial purposes.”<sup>9</sup>

Oxfam urges UPOV to establish a proper and explicit balance between Farmers’ Rights and Plant Breeders’ Rights in order not to obstruct the practice of seed exchange and trade amongst smallholder farmers, thus enhancing seed and food security as well as continuous innovation of the plant genetic resources used by smallholder farmers. This should be done by providing a clear interpretation of the private and non-commercial use exemption, allowing smallholder farmers to freely save, exchange and sell farm-saved seed of protected crop varieties amongst themselves and in local markets, and to assist (prospective) member states to include such interpretation in their national legislation. In order to make such broadened exemption to the breeders’ right legally and practically operational, a more precise definition of the targeted category of farmers is necessary. For example, the Ethiopian draft Plant Variety Protection (PVP) bill defines a smallholder farmer as someone whose total earnings from sales of crops produced do not exceed the average household income. By linking to a countries’ average income, this approach can equally be applied to different countries.<sup>10</sup>

**Oxfam urges UPOV to establish a proper and explicit balance between Farmers’ Rights and Plant Breeders’ Rights in order not to obstruct the practice of seed exchange and trade amongst smallholder farmers**





*Protection of traditional knowledge and the right to equitably participate in benefit-sharing (Article 9.2.a/b)*

UPOV does not support or facilitate Member States to align their Plant Variety Protection law with other international obligations under the Convention on Biological Diversity, the Nagoya Protocol and the FAO Treaty concerning the protection of traditional knowledge and benefit-sharing. The UPOV Conventions do not include concrete mechanisms that aim to prevent misappropriation of genetic resources and associated traditional knowledge. Some countries and CSOs have proposed to include disclosure requirements in PVP applications in order to verify the origin of the plant material used in breeding programs and whether this material has been acquired lawfully and in full respect of Access and Benefit-Sharing (ABS) provisions.<sup>11</sup> UPOV has repeatedly rejected these proposals on grounds that it “could not accept this as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability

and a suitable denomination and does not allow any further or different conditions for protection.”<sup>12</sup>

Oxfam urges UPOV to facilitate and support the possibility for Member States to secure that Plant Breeders’ Rights are only granted to applicants that can show compliance with relevant ABS requirements in order to prevent misappropriation of genetic resources and associated traditional knowledge. Whereas the UPOV conditions of protection are novelty, distinctness, uniformity, stability and a suitable denomination, UPOV should additionally recognize and facilitate measures that secure verification of compliance with relevant national and/or international ABS requirements in assessing grants for plant breeders’ rights.

#### NOTE

<sup>11</sup> For example, the Indian Protection of Plant Varieties and Farmers’ Rights act requires applicants, amongst other things, to include a “declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired” (Article 13.h). Available at <http://www.wipo.int/wipolex/en/details.jsp?id=2401>.

<sup>12</sup> UPOV reply of January 23, 2009, to the letter of the executive secretary of the secretariat of the convention on biological diversity (CBD) of December 19, 2008. Available at [http://www.upov.int/about/en/key\\_issues.html](http://www.upov.int/about/en/key_issues.html).



This can be done as part of the administrative requirements for filing an application for the grant of a breeder's right.

*The right to participate in making decisions (Article 9.2.c)*

Repeatedly, (prospective) UPOV members establish or upgrade their PVP laws 'behind closed doors' without a transparent and inclusive decision-making process. This does not respect the right of farmers "to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture" as enshrined in Article 9.2.c of the FAO Treaty. A recent example is the exclusion of farmer

organizations from the Arusha negotiations following which the African Regional Intellectual Property Organization (ARIPO) adopted the Arusha Protocol.

UPOV should promote transparency and democratic accountability in its decision-making processes and that of its (prospective) members. In respect to its own decision-making processes, UPOV should facilitate the constructive and active participation of farmers and provide accessible and unrestricted information. In particular, participation by farmer organizations and other stakeholders from developing countries should be promoted and financially supported. Regarding its (prospective) members, UPOV should promote transparent and inclusive decision-making processes with respect to the development or amendment of PVP laws.<sup>13</sup>

**NOTE**

<sup>13</sup>See for more information: Dutfield, 2011, Food, biological diversity and intellectual property: The role of the international union for the protection of new varieties of plants (UPOV). Intellectual property issue paper no. 9. Geneva: QUNO, p 17. Available at <http://www.quno.org/resource/2011/2/food-biological-diversity-and-intellectual-property>.





## TOWARDS MUTUALLY SUPPORTIVE IMPLEMENTATION OF UPOV AND THE FAO TREATY

For new members, UPOV demands strict conformity with its UPOV 1991 Convention. With the exception of South Africa and Argentina, all members were developed countries at the time this Convention was adopted. Since the adoption of the WTO TRIPs Agreement, several developing countries have joined UPOV for various reasons, including requirements in free-trade agreements. Despite the very different membership profile today, and a drastically changed context of relevant international treaties, the CBD, its Nagoya Protocol and the FAO Treaty having been adopted since, the UPOV 1991 Convention has so far remained unchanged. New members are expected to conform to a rigid PVP model that was never designed with the specific characteristics of developing countries and their diverse seed systems in mind. This fixed model creates challenges for new and existing members as it leaves them practically no room

to accommodate new or amended provisions in support of Farmers' Rights in their PVP legislation, in line with the needs of their smallholder farmers.

In order to support the implementation and realization of Farmers' Rights, in particular regarding local and indigenous communities and smallholder farmers in developing countries, Oxfam urges UPOV to consider and follow-up the following recommendations:

- ***Allow and support smallholder farmers the full execution of their right to save, exchange and sell farm-saved seed, including seed of protected varieties***
- ***Allow and support Member States to implement measures in their PVP law that secure compliance with relevant (inter) national obligations dealing with the protection of traditional knowledge and benefit-sharing relevant to PGRFA***



- **Improve transparency and democratic accountability in decision-making processes on PVP laws at the national and international levels, including by promoting and ensuring the full and active participation of farmers and their organizations in the further implementation of UPOV at the national and international levels**

By taking these recommendations seriously, UPOV can support Farmers' Rights and "the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and development

of plant genetic resources, which constitute the basis of food and agriculture production throughout the world". Without the above recommendations being fulfilled, Oxfam is of the opinion and will promote that developing countries better develop their own *sui generis* systems of plant variety protection, which - while being fully compliant with the WTO-TRIPS Agreement, allows countries to balance their PVP law with the need to protect Farmers' Rights and to comply with other relevant international treaties dealing with the protection of traditional knowledge and benefit-sharing.<sup>14</sup>

## NOTE

<sup>14</sup>See for more information: Correa, C.M., Shashikant, S. and Meienberg, F. (2015) Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991. APBEBES. Available at <http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>.

## 10 RECONCILING FARMERS' AND PLANT BREEDERS' RIGHTS



### SD=HS

Sowing Diversity = Harvesting Security supports the rights of indigenous peoples and smallholder farmers, in particular women, to enable them to access and develop the crops suited to their needs. The program supports communities to participate in decision-making processes related to their seed and food security, and aims for structural changes by engaging in necessary policy reform.

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### Oxfam

Oxfam is an international confederation of 18 organizations networked together in more than 90 countries, as part of a global movement for change, to build a future free from the injustice of poverty. Please write to any of the agencies for further information, or visit [www.oxfam.org](http://www.oxfam.org).



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This paper was written by Bram de Jonge, policy advisor for the SD=HS program, Oxfam Novib.

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