

Consultative Committee

CC/95/10

**Ninety-Fifth Session
Geneva, November 1, 2018**

**Original: English
Date: July 16, 2018**

INTERRELATIONS WITH THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE (ITPGRFA)

Document prepared by the Office of the Union

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1. The purpose of this document is to report on developments concerning interrelations with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and to present proposals for consideration.

2. The Consultative Committee is invited to:

(a) note that the Governing Body of the ITPGRFA, at its Seventh Session, adopted Resolution 7/2017 on “Implementation of Article 9, Farmers’ Rights” and Resolution 12/2017 on “Cooperation with other international bodies and organizations”;

(b) note that Resolution 7/2017 contained a decision to establish an *Ad Hoc* Technical Expert Group on Farmers’ Rights (AHTEG), with the terms of reference contained in the Annex to that Resolution (see Annex I to this document);

(c) note that the Office of the Union has accepted the invitation of the Secretary of the ITPGRFA to nominate an expert to attend the meetings of the AHTEG, the first meeting of which will be held in Rome, from September 11 to 14, 2018;

(d) consider the responses to UPOV Circular E-18/026 of March 20, 2018, containing proposals received from members of the Union and observers to the Council, as set out in Annexes II to XIII to this document and, in particular, to:

(i) consider the proposals for revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA,

(ii) consider the proposals on how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders, and

(iii) consider the other proposals received.

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BACKGROUND

Developments at the ninety-fourth session of the Consultative Committee

3. The Consultative Committee, at its ninety-fourth session, held in Geneva on October 25, 2017, considered document CC/94/10 "Interrelations with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)" (see document CC/94/18 "Report on the Conclusions", paragraphs 73 to 78.

4. The Consultative Committee noted the views presented by the Association for Plant Breeding for the Benefit of Society (APBREBES), the European Seed Association (ESA) and the International Seed Federation (ISF).

5. The Consultative Committee considered the responses to Circular E-16/295 received from members of the Union and observers, as reproduced in document CC/94/10, Annexes I to VII, and the views expressed at its ninety-fourth session, and agreed the following approach for the further actions on the matter of the interrelations with the ITPGRFA:

 “(i) to review the FAQ on the interrelations between the UPOV Convention and the ITPGRFA;
and

 (ii) exchange of experience and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders.

As a next step, the Consultative Committee would consider the need for a revision of the current guidance in the 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention' (document UPOV/EXN/EXC/1)."

6. In order to advance on items (i) and (ii), the Consultative Committee agreed that members of the Union and observers to the Council should be invited to make proposals on the revision of the above-mentioned FAQ and proposals on how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA with the involvement of stakeholders. The Office of the Union would prepare a document containing the proposals received for consideration by the Consultative Committee at its ninety-fifth session to be held in October 2018.

7. The Consultative Committee noted that the Proceedings of the “Symposium on Possible Interrelations between the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the International Convention for the Protection of New Varieties of Plants (UPOV Convention)”, held in Geneva, on October 26, 2016, had been published in English on the UPOV website (http://www.upov.int/meetings/en/details.jsp?meeting_id=40584) and that copies had been distributed at the session.

8. The Consultative Committee agreed to report the approach in paragraph 75 [paragraph 5 above] for consideration by the Council in order to inform the Seventh Session of the Governing Body of the ITPGRFA, to be held in Kigali, Rwanda, from October 30 to November 3, 2017.

Developments at the fifty-first ordinary session of the Council

9. The Council, at its fifty-first ordinary session held in Geneva on October 26, 2017, agreed the following concerning interrelations with the ITPGRFA (see document C/51/22 “Report”, paragraph 20):

“(i) to review the FAQ on the interrelations between the UPOV Convention and the ITPGRFA;
and

(ii) exchange of experience and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders.

As a next step, the Consultative Committee would consider the need for a revision of the current guidance in the ‘Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention’ (document UPOV/EXN/EXC/1).”

Developments at the International Treaty on Plant Genetic Resources for Food and Agriculture

10. The Office of the Union attended the Seventh Session of the Governing Body of the ITPGRFA, held in Kigali, Rwanda, from October 30 to November 3, 2017, where it reported the above decision of the Council.

11. The Governing Body of the ITPGRFA, at its Seventh Session, adopted Resolution 7/2017 on “Implementation of Article 9, Farmers’ Rights” and Resolution 12/2017 on “Cooperation with other international bodies and organizations”. The texts of the Resolutions are provided in Annex I to this document.

12. Resolution 7/2017 “Implementation of Article 9, Farmers’ Rights”, in its paragraph 7, contained a decision to establish an *Ad Hoc* Technical Expert Group on Farmers’ Rights, with the Terms of Reference contained in the Annex to that Resolution (see Annex I to this document).

13. By letter of April 18, 2018 from Mr. Kent Nnadozie, Secretary of the ITPGRFA, UPOV was invited to nominate an expert to attend the meetings of the AHTEG on Farmers’ Rights. Members of the Union were informed of this invitation by means of UPOV circular E-18/048, of May 1, 2018, which reported that the Office of the Union intended to nominate an expert to participate in the meetings of the AHTEG on Farmers’ Rights. The first meeting of the AHTEG on Farmers’ Rights will be held in Rome, from September 11 to 14, 2018.

Invitation to members of the Union and observers to the Council to make proposals

14. UPOV Circular E-18/026 of March 20, 2018 invited members of the Union and observers to the Council to make proposals on:

(i) the revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA;
and

(ii) how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders.

PROPOSALS RECEIVED FROM MEMBERS OF THE UNION AND OBSERVERS TO THE COUNCIL

15. The Office of the Union received proposals from the following in response to UPOV Circular E-18/026:

Members of the Union

- Argentina (original language: Spanish) – see Annex II
- Australia (original language: English) – see Annex III
- Colombia (original language: Spanish) – see Annex IV
- Mexico (original language: Spanish) – see Annex V
- Netherlands (original language: English) – see Annex VI
- Norway (original language: English) – see Annex VII
- Switzerland (original language: English) – see Annex VIII
- United States of America (original language: English) – see Annex IX

Observer States

- Senegal (original language: French) – see Annex X

Observer international non-governmental organizations

- Association for Plant Breeding for the Benefit of Society (APBREBES) (original language: English) – see Annex XI
- European Coordination Via Campesina (ECVC) (original languages: English and French) – see Annex XII
- European Seed Association (ESA)/International Seed Federation (ISF) (original language: English) – see Annex XIII

COLLATION OF PROPOSALS

16. For the purposes of facilitating consideration by the Consultative Committee at its ninety-fifth session, a summary of the proposals received has been collated into: (a) revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA; (b) how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders; and (c) other proposals.

Proposals for revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA

17. The wording of the adopted FAQ on the interrelations between the UPOV Convention and the ITPGRFA is as follows:

“What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)?

“The UPOV Convention, the CBD and the ITPGRFA are all international instruments.

“The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.

“Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. When implemented by UPOV members, the relevant legislations dealing with these matters should be compatible and mutually supportive.”

18. The following proposals were received with regard to a revision of the above FAQ, which are presented in revision mode, if applicable:

Members of the Union

Australia	<p>The UPOV Convention, the CBD and the ITPGRFA are all international instruments.</p> <p>The objectives of the CBD and the ITPGRFA are the conservation of biological diversity, and sustainable use of genetic resources its components and the <u>fair and equitable</u> sharing of benefits arising from their ir use <u>of genetic resources</u>. <u>In harmony with the CBD, the objectives of the ITPGRFA are the conservation and sustainable use of plant genetic resources and the fair and equitable sharing of benefits arising from their use.</u></p> <p>Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. When implemented by UPOV members, the relevant legislations dealing with these matters should be compatible and mutually supportive.</p>
Colombia	<p>The UPOV Convention, the CBD and the ITPGRFA are all international instruments. <u>treaties</u>. The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of <u>plant</u> genetic resources <u>for food and agriculture</u> and the <u>fair and equitable</u> sharing of <u>the</u> benefits arising from their use. <u>The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.</u></p> <p>Both<u>In acknowledging Farmer's Rights</u>, the ITPGRFA and the UPOV Convention<u>recognizes the contribution that farmers and local and indigenous communities make for the conservation and development of plant genetic resources. Farmers' Rights include the protection of traditional knowledge and the right to equitably participate both in benefit-sharing and in decision-making at the national level on matters related to plant genetic resources. The ITPGRFA stipulates that the responsibility for safeguarding these rights rests with governments.</u></p> <p><u>UPOV's mission is to provide and promote an effective system of plant variety protection, with the aim to support plant breeding activities and to encourage of encouraging the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the</u> for the benefit of society. <u>UPOV Members recognize and ensure the protection of the rights of breeders of new plant varieties by the grant of breeders' certificates, which promotes research activities for the genetic improvement of plants with new or improved characteristics that contribute to the competitiveness of the agricultural sector.</u></p> <p>The UPOV Convention does not regulate varieties that are not or are no longer covered by establishing a system for plant variety protection. When implemented by UPOV members, the relevant legislations dealing with these matters should<u>Therefore, many plant varieties can be compatible and mutually supportive. replanted by a farmer without any authorization from the breeder.</u></p>
Mexico	<p>The UPOV Convention, the CBD and the ITPGRFA are all international instruments.</p> <p>The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.</p> <p>Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. When <u>The relevant legislations</u> implemented by UPOV members, the relevant legislations dealing with <u>in respect of</u> these matters should be compatible and mutually supportive.</p> <p><u>It should also be borne in mind that the breeders of new plant varieties (UPOV) make use of diversity, which is the ITPGRFA objective for conservation and sustainable use. Those breeders therefore assume the obligation to participate in the fair and equitable distribution of the benefits arising from the use of this diversity.</u></p>

Netherlands	<p>“... [t]he government of the Netherlands funds a project in which Plantum (the Dutch seed association), Oxfam Novib and ESA are looking into possible pathways to better define the scope of the private and non-commercial use exemption under the UPOV 1991 Convention. The first results of this project are expected by the end of 2018.</p> <p>“Based on the above, at this moment we don't have specific proposals regarding the FAQ on the interrelations between the UPOV Convention and the Treaty, but would like to revisit this question in due time, using the results of said project.”</p>
Norway	<p>The UPOV Convention, the CBD and the ITPGRFA are all international instruments.</p> <p>The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.</p> <p>Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants, <u>and are meant to be compatible and mutually supportive</u>. The ITPGRFA does so by providing aims at recognizing the enormous contribution of farmers to the diversity of crops that feed the world; establishing a global system for facilitated <u>to provide farmers, plant breeders and scientists with</u> access to plant genetic resources, while the <u>materials; and ensuring that recipients share benefits they derive from the use of these genetic materials.</u> The UPOV Convention does so by establishing a aims at encouraging the development of new varieties of plants, for the benefit of society by providing and promoting an effective system forof plant variety protection. When implemented by UPOV members; implementing these international instruments, all the relevant legislations dealing with these matters should be compatible and mutually supportive.</p>
Switzerland	<p>“2nd paragraph: The objectives of the Treaty and the CBD should be reflected in their entirety.</p> <p>“The 3rd paragraph should take into account that the Treaty has a different scope compared to the UPOV Convention. In addition, the Treaty mainly contains provisions with regard to the conservation and sustainable use of PGRFA as well as the fair and equitable sharing of benefits arising from the use of such resources, while the UPOV Convention provides the basis to encourage plant breeding by granting breeders of new plant varieties an intellectual property right: the breeder's right. The Treaty addresses Farmers' Rights which includes, amongst others, the recognition of the past, present and future contributions and practices of farmers in conserving, improving and making available plant genetic resources, and it also refers to the exchange of plant genetic resources as well as to the right of farmers to participate in decision-making. The FAQ should more clearly address this.</p> <p>“There should be a 4th paragraph mentioning that if genetic resources used by the breeder were received out of the Multilateral System of the Treaty, the breeder will be bound by the terms and conditions of the SMTA. If the breeder transfers the Material supplied under an smta to another "subsequent recipient", the breeder shall apply also an smta and notify this to the IT-PGRFA.</p> <p>“A 5th paragraph should be added to underline that the Treaty interacts with different types of seed systems, while UPOV is one of them. In order to ensure food security in the long term and to provide farmers with the seeds they need to adapt to an ever faster changing environment, these different seed systems should co-exist and interact in a mutually supportive way.”</p>
United States of America	<p>“... [t]he United States does not advocate any changes to the current UPOV FAQ regarding the relationship between and the UPOV Convention and the ITPGRFA.”</p>

Observer States

Senegal	<p>“Based on the well-known objectives of the UPOV Convention (1991) and the ITPGRFA (2001) and their areas of activity, the comparative analysis of the two instruments also shows one clear goal and common purpose, namely, to ensure the well-being of present and future generations of urban and rural dwellers.</p> <p>“This goal can be met through the sustainable implementation of activities related to use as such and cultivation in creative selection of a considerable biodiversity for universally available and accessible food and agriculture.</p> <p>“However, there is no well-organized market that makes it possible to determine the commercial value of genetic resources for food and agriculture and to provide adequate financial resources both for <i>in-situ</i> conservation (ICS) and cultivation and for the sustainable use of agro-biodiversity. Combined with the evolutionary drive of any human society that wishes to self-perpetuate, this highlights the complex issue of how to maintain such biodiversity and thus how to apply the ITPGRFA, particularly Article 9, and Article 8(j) of the Convention on Biological Diversity, while relying on public funding. A further complication is the breeding of new varieties.</p> <p>“Achieving the aim of global food and nutritional security is based on the perception of opportunity costs that underpin the decisions of local populations in maintaining a broad biodiversity for food</p>
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and agriculture. Under current climatic, economic and demographic conditions, where agricultural production is increasingly commercialized, the considerably low ICS opportunity costs lead to a loss of agro-biodiversity owing to the abandonment of support activities. This amounts to a significant reduction in farmers' contributions to maintaining biodiversity for food and agriculture and, as a result, to a reduction of their use in creative selection. This situation affects the implementation of these two complementary international instruments, which strengthen each other in a mutually dependent relationship that makes for their effective application, advancing the well-being of current and future generations of urban and rural populations.

"In order to achieve this, the UPOV Convention and the ITPGRFA call for the establishment of a win-win public-private partnership. This shows that the cause, which is the UPOV protection system encouraging the production of new varieties, and the effect, determined by the dynamism of the available and accessible continuum of diversified genetic resources for plant breeding for creating an effective seed system and varieties that are efficient, adapted or resistant to pests and diseases, are so intertwined that it is difficult to distinguish them."

Observer international non-governmental organizations

APBREBES	<p>The UPOV Convention, the CBD and the ITPGRFA are all international instruments.</p> <p>The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the fair and equitable sharing of benefits arising from their use.</p> <p>The ITPGRFA addresses important aspects concerning the conservation, development and sustainable use plant genetic resources for food and agriculture. It stresses inter alia on sustainable use of plant genetic resources, Farmers' Rights and supports development of plant genetic resources for food and agriculture through its multilateral system for access to plant genetic resources subject to fair and equitable sharing of benefits arising from the utilization of these resources.</p> <p>Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. When implemented by UPOV members, the relevant legislations dealing with these matters should be compatible and mutually supportive.</p> <p>Governments should be aware that there are contradictions between the ITPGRFA and the UPOV Conventions and that implementing the UPOV Conventions especially the 1991 Act, will affect implementation of the provisions of the ITPGRFA including the full realization of Farmers' Rights.</p>
ESA/ISF	<p>The UPOV Convention, the CBD and the ITPGRFA are all international instruments.</p> <p>The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.</p> <p>Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection that also provides access for breeding. When implemented by UPOV members, the relevant legislations dealing with genetic resources should be compatible and mutually supportive, in particular in relation to the breeder's exemption which is a key feature of the UPOV Convention; the breeder's exemption constitutes an important means of benefit-sharing while both the CBD and the ITPGRFA attach high importance to the sharing of benefits resulting from the use of genetic resources.</p> <p>Regarding the interrelations between breeder's rights and Farmers Rights as set out in Article 9 of the ITPGRFA, please consult FAQs under the sub-title "For farmers".</p>

How to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders

19. The following proposals were received:

Members of the Union

Argentina	<p>“... [d]ifferent countries in UPOV should make a presentation on their approaches to the issue, how they interpret the question of access to resources and whether they request it in relation to breeders’ rights, whether they consider that the countries in the Union should have an agreed position or whether they should tread carefully on certain issues that should not be amended or discussed outside UPOV.”</p> <p>“Argentina is also considering the possibility of UPOV developing a background paper on its relationship with other international instruments including, inter alia, their points of agreement and examples of countries’ joint implementation of the agreements.”</p>
Mexico	<p>“It is recommended that regional fora be organized with the participation, in panel discussions, of representatives of the focal points responsible for national application of the relevant treaties, namely the UPOV Convention and the ITPGRFA, as well as the Nagoya Protocol to the CBD.</p> <p>Panel discussions can be used to make progress in areas such as:</p> <ul style="list-style-type: none"> • establishing benchmarks for the fair and equitable distribution of benefits; and • developing measures to ensure that exhaustive requirements on the traceability of original germplasms do not discourage small and medium-sized businesses from making genetic improvements.”
Netherlands	<p>“The Netherlands thinks that is equally important that at the ITPGRFA more clarity is given on the scope of farmers rights and breeders rights. The Netherlands therefore would like to encourage both secretariats to engage actively, organizing side-events or seminars aimed at giving clarification for the different stakeholders, highlighting best practices and showing good examples of mutually supportive implementation.”</p>
Norway	<p>“It is particularly important that the further process on exchange and information sharing focus on possible ways of realising Farmers’ Rights as recognized in the ITPGRFA as well as to contribute to the broader explanation of article 15.1 of the 1991 Act of the UPOV Convention in order to better reflect different agricultural practises.</p> <p>“This could be facilitated by different means. Norway suggests that one or more of the following actions could be appropriate:</p> <ul style="list-style-type: none"> ✓ <i>Side events.</i> Encourage Members of the Union to take initiatives to arrange side events in conjunction to ordinary meetings in UPOV in order to facilitate more discussions. If possible, UPOV might assist to facilitate suitable premises for any side event. ✓ <i>Global Consultation.</i> Encouraging Members of the Union to take initiatives to convene global consultations addressing interrelations between the ITPGRFA and the UPOV. Such a consultation could make it possible to have a wide range of farmers and other stakeholders to actively participate, giving priority to sharing views and experiences. ✓ <i>Study.</i> Exploring how different agricultural practises by farmers and seed systems effect on agricultural biodiversity, crop adaptation to biotic and abiotic stress and farmers access to seed (seed security). Members and observers to both the ITPGRFA and the UPOV should be invited to submit comments to the draft study before its publication. ✓ <i>Seminar.</i> A seminar could be arranged after the study in order to present and discuss the findings. A broad participation of both member countries of the Treaty and the Union as well as farmers and other stakeholders should be invited. <p>“Different views and experiences on the interrelations between the ITPGRFA and UPOV where shared at the symposium in October 2016: http://www.upov.int/meetings/en/details.jsp?meeting_id=40584.”</p>
Switzerland	<p>“We would like to reemphasize the proposal made at CC 91 to request that the secretariats of both bodies jointly undertake an expert study that would identify other areas of interrelations with regard to the question of how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA. These areas could address the list of issues related to the UPOV instruments as identified by the Technical Committee on Sustainable Use of the ITPGRFA and include inter alia the contribution of the UPOV system in strengthening the Multilateral System of the International Treaty. This study could be presented at the second joint Symposium and other relevant meetings of both the UPOV and the International Treaty and could serve as basis for further work in each of the bodies.</p> <p>“The study should include the views of all relevant stakeholders, especially farmers and their organizations as well as civil society organization, industry and research and academia. The study should also help to prevent possible contradictions between the two instruments.”</p>

Observer States

Senegal	<p>“The mechanism for cooperation and the exchange of technical and organizational tools, knowledge and expertise among UPOV members can be useful in transfers and assistance to significantly improve the system of documenting genetic resource collections; a contracting party may request the availability of such collections for multilateral purposes and facilitated access to the ITPGRFA.</p> <p>“The development of harmonized guidelines for examining varieties of minor species is part of improving the documentation system of reference collections of varieties; upgrading them to a type of exchangeable database, comparable to PLUTO, would be essential to their effective use, helping to further develop the genetic progress made by stakeholders in various fields.”</p>
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Observer international non-governmental organizations

APBREBES	<p>“On the exchange of experience and information on the implementation of the UPOV Convention and the ITPGRFA with the involvement of stakeholders, APBREBES would like to make the following suggestion:</p> <p>“(a) that UPOV invite civil society organizations and farmer representatives (especially those that are NOT observers to UPOV) to make submissions to the UPOV Consultative Committee on the interrelations between the ITPGRFA and the UPOV Convention. In implementing this proposal, it is important for UPOV to provide sufficient time for relevant civil society organizations and farmer representatives to make a submission (e.g. 5 months). This is to ensure that such organizations and representatives have sufficient time to undertake relevant consultations among their constituency for purposes of presenting a submission to UPOV.”</p>
ESA/ISF	<p>“With regard to this action decided by the UPOV Council, we would like to put the following proposals forward for consideration by the UPOV Council:</p> <ul style="list-style-type: none"> • In connection to upcoming UPOV sessions, UPOV could consider organizing a special event or specific training session for UPOV members with two parts. In one part, certain UPOV members could share examples of how the UPOV Convention and the Treaty are implemented on the national level. In another part, UPOV members could openly discuss national challenges in implementation, share experiences, look at each others’ models and simply learn from each other. • UPOV has already a good track record in participation to the Treaty’s Governing Body sessions, however, UPOV could consider organizing a side-event with a specific focus on the breeders’ exemption at the next session of the Governing Body where areas of interrelation between the two instruments could be addressed and experiences (case studies/best practices) on implementation could be shared by UPOV members. <p>“In addition, we would like to reiterate that it is crucial that UPOV continues to follow the work of the Treaty regarding Farmers’ Rights and obtains observer status in the Ad Hoc Technical Expert Group on Farmers’ Rights established by Resolution 7/2017 of the Governing body of the Treaty.</p> <p>“Lastly, we would like to draw the attention of UPOV to the new educational module of the Treaty on Farmers’ Rights: http://www.fao.org/3/I7820EN/I7820en.pdf. Lesson 3 of the educational module presents examples /case studies on how Farmers’ Rights have been implemented in some countries. One prominent example in the training module is the Norwegian approach as presented on pages 79-80 of the educational module. We find it inappropriate that instead of neutrally presenting examples from various countries the educational module allows for political statements arguing that the 1991 Act of the Convention does not provide for the necessary legal space for the realization of Farmers’ Rights on the national level. We therefore suggest that the UPOV Council requests the UPOV Secretariat to addresses this matter with the Secretariat of the Treaty.”</p>

Other proposals

20. The following other proposals were received:

Members of the Union

Switzerland	<p>“Beside the above-mentioned specific FAQ on the interrelation between the Treaty and the UPOV conventions, other FAQs would benefit from a review with the interrelation between the two international instruments in mind. Therefore, an opportunity to review those answers would be welcomed.”</p>
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Observer international non-governmental organizations

APBEBES

"1. [...] APBEBES has prepared a proposal for the revision of response to FAQ "What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)".

"2. In addition, as explained above, multiple FAQs impact implementation of the ITPGRFA and hence are relevant to the interrelations between the UPOV Convention and the ITPGRFA. Some key FAQs pertinent to the subject of interrelations have been highlighted above. It is obvious from the responses to these FAQs, that UPOV Conventions affect implementation of ITPGRFA. Clearly, these FAQs need to be revised if the interrelations between UPOV and the ITPGRFA are to be improved. "However the revision of the FAQs is only possible and logical once UPOV's legal documentation that informs implementation of UPOV's provisions (i.e. its Explanatory Notes and Guidance) are amended to allow freedom to Contracting Parties of the ITPGRFA to implement fully the provisions of the ITPGRFA.

"Accordingly, APBEBES would like to reiterate its call to the Consultative Committee to urgently take the following actions:

"(a) To revise the Explanatory Note on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention (UPOV/EXN/EXC/1) and the Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention (UPOV/INF/6/5) with regard to Article 15 of the 1991 Act.

"The aim of the revision should be generally to allow governments full freedom to implement in its PVP legislation provisions it considers are necessary to implement ITPGRFA, with regard to the use of protected varieties.

"More specifically, the revision should aim *inter alia* to incorporate within the scope of the exceptions all acts of smallholder farmers in relation to the protected variety i.e. to freely save, use, exchange and sell farm saved seed/propagating material as well as to clarify that all breeding activities of farmers, including breeding by selection, would fall within the scope of breeders' exemption. The latter aspect may also require revision of the Explanatory Note on Essentially Derived Varieties under the 1991 Act.

"APBEBES will provide specific inputs for the revision process.

"(b) To adopt a decision recognizing the right of governments to implement in its PVP legislation provisions to realize fair and equitable benefit sharing, in particular to require as part of the application process for an applicant to disclose the origin of the variety including the pedigree information and associated passport data, on the lines from which the variety has been derived, along with information relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety, evidence that the material used for breeding, evolving or developing the variety for which protection is sought has been lawfully acquired, and that the applicant has complied with prior informed consent and benefit-sharing requirements. This would also facilitate compliance with the Convention on Biological Diversity and its Nagoya Protocol on Access and Benefit-Sharing.

"The decision should be applicable to all UPOV Members and be followed by a revision of the Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention (UPOV/INF/6/5), to reflect the abovementioned decision.

"(c) To adopt a decision that the Office of the Union as well as all UPOV Members will respect, promote and implement Farmers' Right to participate in decision-making processes in all UPOV activities and subsequently develop guidelines to implement Farmers' Right to participate in decision-making in relation to activities of the UPOV secretariat (especially its technical assistance activities on plant variety protection) and of UPOV Member states. The guidelines should be developed through a credible, transparent and participatory process involving farmers and build on the good practices of the UN system for participatory mechanisms and processes, paying special attention to participation by disadvantaged groups, in particular smallholder farmers."

<p>ECVC</p>	<p>“UPOV must recognise the farmers' right to use seeds collected from their own harvest freely, unconditionally and without charge. These seeds include those collected from plants subject to a breeders' right, patent or other intellectual property right belonging to a plant breeder.</p> <p>“Member States impose a tax on the commercialisation of seeds which are neither technically nor legally freely reproducible on farms. This tax goes to the ITPGRFA Benefit-Sharing Fund or to a similar CBD fund. Its total amount is proportional to the needs of the Benefit Sharing Fund.</p> <p>“UPOV must make it obligatory for each contracting party to arrange for the farmers' participation in the drafting of laws or the making of other national or regional decisions concerning these Conventions.</p> <p>“UPOV must make it obligatory to open up the contracting parties' markets to seeds that come from farmers and which are not homogeneous or stable (eg. Heterogenous material and population).</p> <p>“UPOV must explicitly extend the application of article 15(1) to all small-scale farmers who practise small-scale subsistence farming for local markets. A small-scale farmer is a farmer who has enough land to provide his family with food, an income and a social and cultural life, according to international human rights. National laws define this particular aspect according to the national economic context.</p> <p>“UPOV must explicitly recognise:</p> <ul style="list-style-type: none"> • The farmers' right to benefit from the selection exception, including when they use evolutionary and adapted mass selections as part of their cultivations destined for the market. • The farmers' right to exchange and sell limited quantities of their own farm-saved seeds that come from a variety protected by a plant variety right, provided that the farmers do not practise variety maintenance nor claim to sell the protected variety denomination. These quantities are within the limits of what they use for their own farm.”
<p>ESA/ISF</p>	<p>“As indicated in our proposal above [see section “Proposals for revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA”], we are of the view that it would be useful in the FAQ on the interrelations to already anticipate the matter of interrelations between breeder's rights and Farmers Rights, and therefore to include a reference to those FAQs that elaborate more on what farmers are allowed to do with protected varieties. In this context we would like to reiterate that in our view the wording of the current FAQs relating to acts that subsistence farmers might carry out with regard to propagating material of protected varieties, is not satisfactory because it may be seen as too restrictive of certain practices which are carried out by subsistence farmers as part of their normal livelihoods. In that sense, we propose to review the answers to a number of FAQs under the sub-title “For farmers” in order to better clarify how the private and non-commercial use exception under the UPOV Convention can be interpreted in a flexible manner. For this purpose, please find our proposals annexed to the present letter.</p> <p>“Last under topic (i), we would like to mention that, within the framework of a project funded by the Dutch government, together with Plantum, the Dutch seed association and Oxfam Novib, ESA is looking into possible pathways to better define the scope of the private and non-commercial use exception under the UPOV 1991 Convention. The findings of this project will be shared with the UPOV Secretariat in due time.”</p>

21. *The Consultative Committee is invited to:*

(a) *note that the Governing Body of the ITPGRFA, at its Seventh Session, adopted Resolution 7/2017 on “Implementation of Article 9, Farmers’ Rights” and Resolution 12/2017 on “Cooperation with other international bodies and organizations”;*

(b) *note that Resolution 7/2017 contained a decision to establish an Ad Hoc Technical Expert Group on Farmers' Rights (AHTEG), with the terms of reference contained in the Annex to that Resolution (see Annex I to this document);*

(c) *note that the Office of the Union has accepted the invitation of the Secretary of the ITPGRFA to nominate an expert to attend the meetings of the AHTEG, the first meeting of which will be held in Rome, from September 11 to 14, 2018;*

(d) *consider the responses to UPOV Circular E-18/026 of March 20, 2018, containing proposals, received from members of the Union and observers to the Council, as set out in Annexes II to XIII to this document and, in particular, to:*

(i) *consider the proposals for revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA,*

(ii) *consider the proposals on how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders, and*

(iii) *consider the other proposals received.*

[Annexes follow]

RESOLUTIONS 7/2017 AND 12/2017 ADOPTED BY THE GOVERNING BODY OF THE ITPGRFA
AT ITS SEVENTH SESSION (GB-7)

IT/GB-7/17/Res7



Food and Agriculture
Organization of the
United Nations



The International Treaty
ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

RESOLUTION 7/2017

IMPLEMENTATION OF ARTICLE 9, FARMERS' RIGHTS

THE GOVERNING BODY,

Recalling the recognition, in the International Treaty, of the enormous contribution that the local and indigenous communities and farmers of all regions of the world have made, and will continue to make, for the conservation, development and use of plant genetic resources as the basis of food and agriculture production throughout the world;

Recalling its Resolutions 2/2007, 6/2009, 6/2011, 8/2013 and 5/2015;

Acknowledging the Informal International Consultation on Farmers' Rights in Lusaka, Zambia, in 2007 and the Global Consultation on Farmers' Rights in Addis Ababa, Ethiopia, 2010, and **noting** their recommendations;

1. **Notes with appreciation** the Proceedings of the Global Consultation on Farmers' Rights held in Bali, Indonesia, in 2016, **thanks** the Governments of Indonesia and Norway and others for their generous support in organizing it, and **further thanks** the Governments of Italy and Switzerland for their financial support to the consultation;

[...]

7. **Decides** to establish an Ad Hoc Technical Expert Group on Farmers' Rights, with the Terms of Reference contained in the *Annex* to this Resolution;

8. **Invites** Contracting Parties and all relevant stakeholders, especially farmers' organizations, to submit views, experiences and best practices as an example of possible options for national implementation of Article 9 of the International Treaty, as appropriate and subject to national legislation, in preparation for the inventory, and **requests** the Secretary to compile and submit this input to the Ad Hoc Technical Expert Group on Farmers' Rights;

[...]

11. **Thanks** the Secretary and the Office of UPOV for co-organizing the *Symposium on possible interrelations between the International Treaty on Plant Genetic Resources for Food and Agriculture and the International Convention for the Protection of New Varieties of Plants*, and **requests** the Secretary, subject to the availability of financial resources, to continue the process of identifying possible areas of interrelations between the International Treaty, in particular its Article 9, and the UPOV Convention as well as to explore the possibility of carrying out a similar process with the relevant instruments of WIPO, in cooperation with the WIPO Secretariat and in an inclusive and participatory manner;

12. **Welcomes** the decision of the UPOV Council to review the FAQ on the interrelations between the UPOV Convention and the International Treaty and exchange of experience and information on the implementation of the UPOV Convention and the International Treaty, and **requests** the Secretary to explore how Contracting Parties of the Treaty could further contribute to these processes, and to continue the dialogue with UPOV on these matters;

[...]

Annex

Terms of reference for the Ad Hoc Technical Expert Group on Farmers' Rights

1. The Ad Hoc Technical Expert Group on Farmers' Rights will:
 - i) Produce an inventory of national measures that may be adopted, best practices and lessons learned from the realization of Farmers' Rights, as set out in Article 9 of the International Treaty;
 - ii) Based on the inventory, develop options for encouraging, guiding and promoting the realization of Farmers' Rights as set out in Article 9 of the International Treaty.
2. In the development of its work, the Ad Hoc Technical Expert Group may consider the proceedings from the Global Consultation on Farmers' Rights held in Bali, Indonesia, in 2016, as well as other relevant consultations.
3. The Ad Hoc Technical Expert Group will comprise up to five members designated by each FAO region, up to three representatives of farmer organizations, particularly from the centers of origin and crop diversity, and up to three other stakeholders, including the seed sector, designated by the Bureau of the Eighth Session of the Governing Body.
4. The Bureau of the Eighth Session of the Governing Body will appoint two Co-Chairs from the Contracting Parties of the International Treaty - one from a developing country and one from a developed country.
5. The Ad Hoc Technical Expert Group may hold up to two meetings in the biennium 2018-2019, subject to the availability of financial resources.
6. The Ad Hoc Technical Expert Group will report back to the Governing Body on its work for further consideration at the Eight Session of the Governing Body.
7. The Secretary will facilitate the process and assist the Ad Hoc Technical Expert Group in its work.



Food and Agriculture
Organization of the
United Nations



The International Treaty
ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

RESOLUTION 12/2017

COOPERATION WITH OTHER INTERNATIONAL BODIES AND ORGANIZATIONS

PART I: INTERNATIONAL BODIES AND ORGANIZATIONS

THE GOVERNING BODY,

Recalling its Resolution 10/2015 and other previous relevant Resolutions and decisions;

Reaffirming the importance of maintaining and further strengthening cooperation with the relevant international organizations, institutions and partners in order to advance the objectives and implementation of the International Treaty;

Noting with appreciation the continued cooperation, collaboration and support provided by relevant international organizations during the current biennium;

Welcoming the active engagement of other relevant stakeholder groups, in particular civil society organizations, farmers' organizations and the seed industry, to support the implementation of the International Treaty and its relevant policy processes;

Cognizant of the importance of harmonious and mutually supportive implementation of the International Treaty with relevant instruments and processes especially at the national level, and noting the continued importance of assisting developing country Contracting Parties in this regard;

1. *Reaffirms* the need to continue the efforts necessary to ensure that the International Treaty's objectives and role in the conservation and sustainable use of plant genetic resources for food and agriculture are recognized and supported by relevant international institutions, organizations and processes;
2. *Takes note* of the collaboration with the African Union Commission and welcomes its interest to promote the Treaty and support Contracting Parties from the African Region in the implementation of the Treaty and, as appropriate, to play a coordinating role for the delegates and representatives from the region, and *requests* the Secretary to continue strengthening this collaboration as well as to seek opportunities to establish cooperation with other relevant regional organisations and institutions for the promotion and implementation of the International Treaty;
3. *Takes note* of the collaboration with the Global Forum on Agricultural Research, and *welcomes* their support in particular to the implementation of the Joint Capacity Building Programme on Farmers' Rights;
4. *Encourages* Contracting Parties to take initiatives to strengthen the harmonious and mutually supportive implementation of the International Treaty and other relevant international instruments and

processes, in order to promote policy coherence and improve efficiency at all levels and implement their various goals and commitments in a coherent, clear, and mutually supportive manner;

5. *Requests* the Secretary to facilitate such initiatives upon request and subject to the availability of resources;
6. *Affirms* the need to expand the Joint Capacity Building Programme with Bioversity International and to ensure that the Secretary continue play an active role of coordination, monitoring and analysis of results and impacts, and *calls upon* Contracting Parties and donors to provide additional funding to support its continuation;
7. *Requests* the Secretary to continue and further strengthen and expand the collaboration with Bioversity International, the Secretariat of the Convention on Biological Diversity, the ABS Capacity Development Initiative and other capacity building providers, in their support to Contracting Parties in implementing the International Treaty and the Convention on Biological Diversity and its Nagoya Protocol in a harmonious and mutually supportive manner;
8. *Encourages* the members of the Liaison Group of the Biodiversity-related Conventions to continue their collaboration in accordance with their respective mandates and, subject to availability of financial resources, *requests* the Secretary to continue participating actively in the relevant activities of the Biodiversity Liaison Group;
9. *Urges* Contracting Parties to take measures to enhance synergies in their implementation of or participation in biodiversity-related conventions to promote policy coherence, improve efficiency and enhance coordination and cooperation at all levels and *invites* international organizations and donors to provide financial resources to support efforts that encourage synergies in policy development and the fulfilment of obligations under the biodiversity-related conventions;
10. *Requests* the Secretary to continue participating in the Information and Knowledge Management Initiative (InforMEA) being coordinated by the United Nations Environment Programme and making information available to Contracting Parties and other stakeholders through the InforMEA Portal, including the publication of online training courses;
11. *Requests* the Secretary to continue participating in relevant meetings of UPOV and, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of WIPO, as appropriate and subject to the availability of financial resources;
12. *Encourages* other relevant stakeholder groups, in particular civil society organizations, farmers' organizations and the seed industry, to further strengthen their engagement and cooperation to advance the implementation of the International Treaty;
13. *Requests* the Secretary to continue to report to the Governing on cooperation with other relevant international bodies and organizations, and related collaborative activities.

PART II: ARTICLE 15 INSTITUTIONS

THE GOVERNING BODY,

Recalling the provisions of Article 15.1 of the International Treaty;

14. *Takes note* of the information provided in the reports by institutions that have concluded agreements under Article 15 of the International Treaty and *commends* those institutions that submitted reports for the valuable contents, and *urges* them to continue to provide similar information to future sessions of the Governing Body;
15. *Invites* those institutions that have not submitted any report, to do so at the Eighth Session of the Governing Body and *requests* the Secretary to communicate this invitation to such institutions;
16. *Requests* the Secretary, subject to the availability of financial resources, to hold regular or periodic consultations with institutions that have concluded agreements under Article 15 of the

International Treaty, on implementation of the agreements and policy guidance, and report to the Governing Body at each Session;

17. *Takes note* of the ongoing efforts to secure the international collections whose orderly maintenance is at risk or threatened, and *requests* the Secretary to continue exercising his responsibilities under Article 15 of the International Treaty, in close collaboration with host governments, as applicable, and in partnership with other interested governments and relevant institutions that are capable of providing technical and other necessary support to these efforts;

18. *Invites* Contracting Parties, donors and other stakeholders to provide necessary financial and material support to facilitate these efforts;

19. *Requests* the Secretary to continue in his efforts to secure agreements with other relevant international institutions that meet the requirements of Article 15 of the International Treaty.

PART III: MANAGEMENT OF THE SVALBARD GLOBAL SEED VAULT

THE GOVERNING BODY,

Taking note of the report provided by the Government of Norway on the management of the Svalbard Global Seed Vault and the suggestions of the Bureau of the Seventh Session;

Recalling that the adoption of the International Treaty gave the impetus to the Norwegian government to proceed with the establishment of the Svalbard Global Seed Vault;

Reaffirming the strong linkages between the Seed Vault and the International Treaty;

20. *Commends* the Government of Norway for the establishment and its management of the Svalbard Global Seed Vault (Seed Vault) and *renews* its commitment and support to the Seed Vault following its first ten years of operation;

21. *Acknowledges* that the Seed Vault is an important element of the Global System for *ex situ* conservation and use of plant genetic resources for food and agriculture;

22. *Welcomes* the invitation of the Government of Norway for the Chairperson of the Governing Body to act as the Chairperson of the Seed Vault's International Advisory Panel and *requests* the Chairperson of the Governing Body, for the time being, to carry out the functions as may be required by that role;

23. *Requests* the Secretary to further explore with the Government of Norway other practical means to further enhance the linkages between the International Treaty and the Seed Vault, and report to the Governing Body;

24. *Invites* Contracting Parties, international institutions and other relevant bodies to consider making use of the Seed Vault in their strategy for securing their important seed collections and for the purpose of long-term storage of plant genetic resources for food and agriculture;

25. *Invites* the Government of Norway to continue to update the Governing Body on the operations and management of the Seed Vault.

[Annex II follows]

REPLY FROM ARGENTINA*

Regarding the issue raised by UPOV concerning the interrelation between its Convention and other agreements, such as the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Nagoya Protocol to the CBD, Argentina is in the process of implementing these instruments and considers their concerted and harmonious functioning to be of the utmost importance.

The seventh session of the ITPGRFA Governing Body in Kigali, Rwanda, in late October 2017 showed that there has been progress towards amending the terms of compliance and implementation of this instrument and that due regard should be given to the potential impact on plant breeder's rights and payments to the system and to respect for farmers' rights, as provided for in ITPGRFA Article 9.

The Argentinian seed industry has raised the need to take into account its powers of compensation where it is necessary for the breeder's right to be fee-based and no longer considered a free and unrestricted resource.

It must be borne in mind that the ITPGRFA working groups on the funding strategy and on farmers' rights are responsible for proposing amendments to the next Governing Body. Argentina should therefore have a national position. From UPOV, we also have a consistent understanding of what constitutes interference and non-interference in breeders' rights and the impairment of those rights.

Regarding the concept of farmers' rights in Article 9, we believe that, until the "scope" of the term "farmer" is defined, it will be impossible to "determine either the rights of the farmer, or the obligations of others in this respect".

In Governing Body meetings, Argentina, backed by GRULAC, has also taken the position that before requiring breeders to make payments, the Governing Body should ensure that the patent system is enforced, given that breeders have already been identified as obliged to pay and have thus far not contributed as expected to the multilateral system.

In order to avoid undermining a system that has supported and championed plant breeding at the global level, it will be necessary to defend the advantages of breeders' rights over the patent system as regards the protection of plant varieties and not subsume the responsibilities established in the International Instrument.

There is no conclusion as to why patent payments are not in line with the current wording of SMTA Article 6.7 (available without restriction). Moreover, in any case, if the issue of payment by the seed industry was settled, the money collected should be put towards projects on conservation, sustainable use and development in plant breeding, as there would otherwise be a considerable outcry within the industry since the increase in costs would in turn increase transaction costs in national industry and the money would not remain in the countries in question.

It is also worth noting that the breeder is an exception as a unique and overarching aspect of the breeders' rights system compared to the patent system. The reason why the material is considered free and without restrictions should be addressed.

This Delegation proposes that by way of exchange activities, different countries in UPOV should make a presentation on their approaches to the issue, how they interpret the question of access to resources and whether they request it in relation to breeders' rights, whether they consider that the countries in the Union should have an agreed position or whether they should tread carefully on certain issues that should not be amended or discussed outside UPOV.

Argentina is also considering the possibility of UPOV developing a background paper on its relationship with other international instruments including, inter alia, their points of agreement and examples of countries' joint implementation of the agreements.

* Translation provided by the Office of the Union.

REPLY FROM AUSTRALIA

[...]

The Australian focal points for the International Treaty on Plant Genetic Resources for Food and Agriculture and the Convention on Biological Diversity are concerned with the current wording for the answer to the below question. This is mainly around the lack of reference to biodiversity when talking about the CBD. We would suggest re-wording the second sentence, as below.

What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)?

The UPOV Convention , the CBD and the ITPGRFA are all international instruments.

The objectives of the CBD ~~and the ITPGRFA~~ are the conservation of biological diversity, and sustainable use of genetic resources ~~its components~~ and the fair and equitable sharing of benefits arising from the ~~if~~ use of genetic resources. In harmony with the CBD, the objectives of the ITPGRFA are the conservation and sustainable use of plant genetic resources and the fair and equitable sharing of benefits arising from their use.

Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. When implemented by UPOV members, the relevant legislations dealing with these matters should be compatible and mutually supportive.

[...]

[Annex IV follows]

REPLY FROM COLOMBIA*

*Joint reply from the Colombian Agricultural Institute (ICA)
and the Ministry of Agriculture and Rural Development*

Invitation to members of the Union and observers to the Council to make proposals on:

The relationship between the UPOV Convention and international treaties concerning genetic resources, such as the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA with the involvement of stakeholders.

The UPOV Convention, the CBD and the ITPGRFA are international treaties. The objectives of the ITPGRFA are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising from their use. The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

In acknowledging Farmer's Rights, the ITPGRFA recognizes the contribution that farmers and local and indigenous communities make for the conservation and development of plant genetic resources. Farmers' Rights include the protection of traditional knowledge and the right to equitably participate both in benefit-sharing and in decision-making at the national level on matters related to plant genetic resources. The ITPGRFA stipulates that the responsibility for safeguarding these rights rests with governments.

UPOV's mission is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants for the benefit of society. UPOV Members recognize and ensure the protection of the rights of breeders of new plant varieties by the grant of breeders' certificates, which promotes research activities for the genetic improvement of plants with new or improved characteristics that contribute to the competitiveness of the agricultural sector.

The UPOV Convention does not regulate varieties that are not or are no longer covered by plant variety protection. Therefore, many plant varieties can be replanted by a farmer without any authorization from the breeder.

**Technical Seed Department of the Colombian Agricultural Institute (ICA)
Innovation, Technological Development and Health Protection Directorate of the Ministry of
Agriculture and Rural Development**

[Annex V follows]

* Translation provided by the Office of the Union.

REPLY FROM MEXICO*

- **What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)?**

The UPOV Convention, the CBD and the ITPGRFA are all international instruments.

The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.

Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. The relevant legislations implemented by UPOV members in respect of these matters should be compatible and mutually supportive.

It should also be borne in mind that the breeders of new plant varieties (UPOV) make use of diversity, which is the ITPGRFA objective for conservation and sustainable use. Those breeders therefore assume the obligation to participate in the fair and equitable distribution of the benefits arising from the use of this diversity.

- **How to facilitate exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA with the involvement of stakeholders.**

It is recommended that regional fora be organized with the participation, in panel discussions, of representatives of the focal points responsible for national application of the relevant treaties, namely the UPOV Convention and the ITPGRFA, as well as the Nagoya Protocol to the CBD.

Panel discussions can be used to make progress in areas such as:

- establishing benchmarks for the fair and equitable distribution of benefits; and
- developing measures to ensure that exhaustive requirements on the traceability of original germplasms do not discourage small and medium-sized businesses from making genetic improvements.

[Annex VI follows]

* Translation provided by the Office of the Union.

REPLY FROM NETHERLANDS

Comments from the Netherlands

The Netherlands thinks it is very important for all kind of farmers to operate in an enabling environment. This enabling environment should facilitate amongst other aspects access , to markets, to finance and to (other) technologies and also includes the opportunity to use a wide spectrum of plant varieties.

With regard to propagating material, the Netherlands recognizes farmers rights and breeders rights as dealt with and used in the ITPGRFA and in the UPOV Convention. Breeders and farmers are natural partners and mutually dependent. Both the ITPGRFA and the UPOV Convention play simultaneously an important role for future food security, the need to produce sustainably and to adapt to a changing climate.

A legal framework on a national level, based on only the UPOV Convention would not suffice, and at the same time legislation based on only the ITPGRFA would also not suffice. What is necessary is legislation on national levels that takes both breeders rights and farmers rights into account in a complementary and non-interfering manner. Furthermore, when talking about breeders rights and farmers rights also other legislation, such as seed legislation, should just as well be taken into account.

The Netherlands also recognizes another important feature of farmers rights: the right to choose and use the best available variety. This could be a local variety, but could also be a newly bred variety that has specific characteristics that are important to the farmer or to the market. It could be a variety with PVP or without PVP. The lack of PVP legislation in a country makes it for a farmer in that country much harder or even impossible to obtain the modern varieties that could be best in his/her situation.

The communication about what is or what is not allowed with protected varieties according to the UPOV1991 Convention should be improved. Not all farmers are equal and have equal opportunities. More specific information is needed of what the UPOV Convention means for different type of farmers (commercial farmers, smallholders, subsistence farmers). With a view to giving more clarity to farmers the government of the Netherlands funds a project in which Plantum (the Dutch seed association), Oxfam Novib and ESA are looking into possible pathways to better define the scope of the private and non-commercial use exemption under the UPOV 1991 Convention. The first results of this project are expected by the end of 2018.

Based on the above, at this moment we don't have specific proposals regarding the FAQ on the interrelations between the UPOV Convention and the Treaty, but would like to revisit this question in due time, using the results of said project.

The Netherlands thinks that is equally important that at the ITPGRFA more clarity is given on the scope of farmers rights and breeders rights. The Netherlands therefor would like to encourage both secretariats to engage actively, organizing side-events or seminars aimed at giving clarification for the different stakeholders, highlighting best practices and showing good examples of mutually supportive implementation.

[Annex VII follows]

REPLY FROM NORWAY

Proposal from Norway on:

1. the revision of the FAQ on the interrelations between the UPOV Convention and the ITPGRFA

“What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)”; and

Proposed amendments:

The UPOV Convention, the CBD and the ITPGRFA are all international instruments.

The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.

Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants, and are meant to be compatible and mutually supportive. The ITPGRFA ~~does so by providing a~~ aims at recognizing the enormous contribution of farmers to the diversity of crops that feed the world; establishing a global system for facilitated to provide farmers, plant breeders and scientists with access to plant genetic ~~resources, while the~~ materials; and ensuring that recipients share benefits they derive from the use of these genetic materials. The UPOV Convention ~~does so by establishing a~~ aims at encouraging the development of new varieties of plants, for the benefit of society by providing and promoting an effective system ~~for~~ of plant variety protection. When ~~implemented by UPOV members,~~ implementing these international instruments, all the relevant legislations dealing with these matters should be compatible and mutually supportive.

Comment [SM1]: The amended texts is from the official webpages of the Treaty and UPOV respectively.

Comment [SM2]: We suggest to rephrase the answer to ensure that the relevant legislation should be compatible and mutually supportive to each other.

2. how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders.

It is particularly important that the further process on exchange and information sharing focus on possible ways of realising Farmers' Rights as recognized in the ITPGRFA as well as to contribute to the broader explanation of article 15.1 of the 1991 Act of the UPOV Convention in order to better reflect different agricultural practises.

This could be facilitated by different means. Norway suggests that one or more of the following actions could be appropriate:

- ✓ *Side events.* Encourage Members of the Union to take initiatives to arrange side events in conjunction to ordinary meetings in UPOV in order to facilitate more discussions. If possible, UPOV might assist to facilitate suitable premises for any side event.
- ✓ *Global Consultation.* Encouraging Members of the Union to take initiatives to convene global consultations addressing interrelations between the ITPGRFA and the UPOV. Such a consultation could make it possible to have a wide range of farmers and other stakeholders to actively participate, giving priority to sharing views and experiences.
- ✓ *Study.* Exploring how different agricultural practises by farmers and seed systems effect on agricultural biodiversity, crop adaptation to biotic and abiotic stress and farmers access to seed (seed security). Members and observers to both the ITPGRFA and the UPOV should be invited to submit comments to the draft study before its publication.
- ✓ *Seminar.* A seminar could be arranged after the study in order to present and discuss the findings. A broad participation of both member countries of the Treaty and the Union as well as farmers and other stakeholders should be invited.

Different views and experiences on the interrelations between the ITPGRFA and UPOV where shared at the symposium in October 2016: http://www.upov.int/meetings/en/details.jsp?meeting_id=40584

[Annex VIII follows]

REPLY FROM SWITZERLAND



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

Federal Department of Economic Affairs,
Education and Research EAER

Federal Office for Agriculture FOAG
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Document ID:
Your reference:
Our reference: sga
Bern, 30 April 2018

UPOV Circular E18/026

Dear Mr Button,

We would like to thank the Secretariat of the *International Union for the Protection of New Varieties of Plants* for giving us the opportunity to comment the FAQ and to make suggestions on how to facilitate the exchange of experiences and information on the implementation of UPOV and the Treaty.

We are pleased to provide you with our comments below.

1) General remarks

- Switzerland regards the international instruments of the International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty) and UPOV as complementary and mutually supportive systems that share a common goal, that is to provide farmers with seeds which they need to help achieve food security and nutrition. We believe that it is important to be aware of the interrelations between these instruments in order to promote a coherent regulatory framework on a national level.

The revision of the FAQs is a useful first step. As Switzerland already mentioned following the CC 93, it should be followed by the review of the Explanatory Note (UPOV/EXN/EXC/1 adopted on October 22, 2009) with a view to providing Members with maximum flexibility to develop, adjust and implement their national legislation as necessary and in accordance with their farmers needs and priorities. This review process should be holistic in terms of substance-matter addressed and inclusive in terms of stakeholder participation.

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2) Comments regarding the FAQs

- With regard to the FAQ "What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)?":
- 2nd paragraph: The objectives of the Treaty and the CBD should be reflected in their entirety.
 - The 3rd paragraph should take into account that the Treaty has a different scope compared to the UPOV Convention. In addition, the Treaty mainly contains provisions with regard to the conservation and sustainable use of PGRFA as well as the fair and equitable sharing of benefits arising from the use of such resources, while the UPOV Convention provides the basis to encourage plant breeding by granting breeders of new plant varieties an intellectual property right: the breeder's right. The Treaty addresses Farmers' Rights which includes, amongst others, the recognition of the past, present and future contributions and practices of farmers in conserving, improving and making available plant genetic resources, and it also refers to the exchange of plant genetic resources as well as to the right of farmers to participate in decision-making. The FAQ should more clearly address this.
 - There should be a 4th paragraph mentioning that if genetic resources used by the breeder were received out of the Multilateral System of the Treaty, the breeder will be bound by the terms and conditions of the SMTA. If the breeder transfers the Material supplied under an smta to another "subsequent recipient", the breeder shall apply also an smta and notify this to the IT-PGRFA.
 - A 5th paragraph should be added to underline that the Treaty interacts with different types of seed systems, while UPOV is one of them. In order to ensure food security in the long term and to provide farmers with the seeds they need to adapt to an ever faster changing environment, these different seed systems should co-exist and interact in a mutually supportive way.
- Beside the above-mentioned specific FAQ on the interrelation between the Treaty and the UPOV conventions, other FAQs would benefit from a review with the interrelation between the two international instruments in mind. Therefore, an opportunity to review those answers would be welcomed.

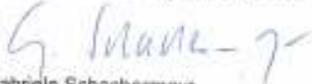
3) Facilitation of the exchange of experiences and information

- We would like to reemphasize the proposal made at CC 91 to request that the secretariats of both bodies jointly undertake an expert study that would identify other areas of interrelations with regard to the question of how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the ITPGRFA. These areas could address the list of issues related to the UPOV instruments as identified by the Technical Committee on Sustainable Use of the ITPGRFA and include *inter alia* the contribution of the UPOV system in strengthening the Multilateral System of the International Treaty. This study could be presented at the second joint Symposium and other relevant meetings of both the UPOV and the International Treaty and could serve as basis for further work in each of the bodies.

The study should include the views of all relevant stakeholders, especially farmers and their organizations as well as civil society organization, industry and research and academia. The study should also help to prevent possible contradictions between the two instruments.

Yours sincerely,

Federal Office for Agriculture FOAG


Gabriele Schachermayr
Head of Plant Health and Varieties Unit

[Annex IX follows]

REPLY FROM THE UNITED STATES OF AMERICA

[...]

As a Party to the 1991 Act of the International Union for the Protection of New Varieties of Plants Convention (UPOV '91) and a the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the United States does not advocate any changes to the current UPOV FAQ regarding the relationship between and the UPOV Convention and the ITPGRFA. In our view, the current language adequately illustrates the mutually supportive role these instruments play in promoting plant-breeding activities and encouraging the development of new plant varieties for the benefit of society.

The United States supports the recognition of rights for innovative plant breeders. We also recognize the need for a global system to facilitate access to plant genetic materials for food and agriculture. Each of these symbiotic aims is made evident by the fact that the United States is a Party to both UPOV '91 and the ITPGRFA.

The United States' participation in UPOV '91 provides an effective system for recognizing the rights of innovative plant breeders. Implementation of UPOV '91 affords plant breeders protection for innovative varieties sold in the U.S. market. Our participation in the ITPGRFA, enables U.S. citizens to access critical plant genetic resources for research, breeding, and education for food and agriculture through the treaty's Multilateral System. Both of these instruments support plant breeding activities and the development of new varieties of plants for the benefit of society and advancement of global food security.

[...]

[Annex X follows]

REPLY FROM SENEGAL^{*}

Comments sent to the Office of the Union, following UPOV Circular E-18/026 of March 20, 2018, for the attention of members and observers to the Council.

(1) *What is the relationship between the International Convention for the Protection of New Varieties of Plants (UPOV Convention) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)?*

Based on the well-known objectives of the UPOV Convention (1991) and the ITPGRFA (2001) and their areas of activity, the comparative analysis of the two instruments also shows one clear goal and common purpose, namely, to ensure the well-being of present and future generations of urban and rural dwellers.

This goal can be met through the sustainable implementation of activities related to use as such and cultivation in creative selection of a considerable biodiversity for universally available and accessible food and agriculture.

However, there is no well-organized market that makes it possible to determine the commercial value of genetic resources for food and agriculture and to provide adequate financial resources both for *in-situ* conservation (ICS) and cultivation and for the sustainable use of agro-biodiversity. Combined with the evolutionary drive of any human society that wishes to self-perpetuate, this highlights the complex issue of how to maintain such biodiversity and thus how to apply the ITPGRFA, particularly Article 9, and Article 8(j) of the Convention on Biological Diversity, while relying on public funding. A further complication is the breeding of new varieties.

Achieving the aim of global food and nutritional security is based on the perception of opportunity costs that underpin the decisions of local populations in maintaining a broad biodiversity for food and agriculture. Under current climatic, economic and demographic conditions, where agricultural production is increasingly commercialized, the considerably low ICS opportunity costs lead to a loss of agro-biodiversity owing to the abandonment of support activities. This amounts to a significant reduction in farmers' contributions to maintaining biodiversity for food and agriculture and, as a result, to a reduction of their use in creative selection. This situation affects the implementation of these two complementary international instruments, which strengthen each other in a mutually dependent relationship that makes for their effective application, advancing the well-being of current and future generations of urban and rural populations.

In order to achieve this, the UPOV Convention and the ITPGRFA call for the establishment of a win-win public-private partnership. This shows that the cause, which is the UPOV protection system encouraging the production of new varieties, and the effect, determined by the dynamism of the available and accessible continuum of diversified genetic resources for plant breeding for creating an effective seed system and varieties that are efficient, adapted or resistant to pests and diseases, are so intertwined that it is difficult to distinguish them.

(2) *Facilitating experience and information sharing on the implementation of the two instruments with the involvement of stakeholders*

The mechanism for cooperation and the exchange of technical and organizational tools, knowledge and expertise among UPOV members can be useful in transfers and assistance to significantly improve the system of documenting genetic resource collections; a contracting party may request the availability of such collections for multilateral purposes and facilitated access to the ITPGRFA.

The development of harmonized guidelines for examining varieties of minor species is part of improving the documentation system of reference collections of varieties; upgrading them to a type of exchangeable database, comparable to PLUTO, would be essential to their effective use, helping to further develop the genetic progress made by stakeholders in various fields.

Dakar, April 28, 2018

[Annex XI follows]

^{*} Translation provided by the Office of the Union.

REPLY FROM THE ASSOCIATION FOR PLANT BREEDING FOR THE BENEFIT OF SOCIETY
(APBREBES)

**SUBMISSION BY ASSOCIATION FOR PLANT BREEDING FOR THE BENEFIT
OF SOCIETY (APBREBES) ON INTERRELATIONS WITH ITPGRFA**

30TH APRIL 2018

The Council, based on the recommendation of the Consultative Committee adopted the following decision:

“agreed the following concerning interrelations with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA):

- (i) to review the FAQ on the interrelations between the UPOV Convention and the ITPGRFA; and
- (ii) exchange of experience and information on the implementation of the UPOV Convention and the ITPGRFA, with the involvement of stakeholders.”

As a next step, the Consultative Committee would consider the need for a revision of the current guidance in the “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention” (document UPOV/EXN/EXC/1).”

Based on this decision, UPOV Secretariat issued Circular E-18/026 which referred to a specific FAQ “What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)”.

However as shown below multiple FAQs impact implementation of the ITPGRFA and hence are relevant to the interrelations between the UPOV Convention and the ITPGRFA. The FAQs and the underlying UPOV documents (i.e. its Explanatory Notes and Guidance) that informed the development of the FAQs need to be revised in order to address the interrelations between the treaties.

**COMMENT ON FAQ ON RELATIONSHIP BETWEEN UPOV CONVENTION AND
INTERNATIONAL TREATIES**

(1) FAQ: “What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)”

The description of the ITPGRFA in the FAQ is significantly deficient. It is not merely about “providing a system for facilitated access”. The ITPGRFA is an international instrument, which supports the conservation, development and sustainable use of plant genetic resources for food and agriculture (PGRFA). In particular, Article 6 of the ITPGRFA requires its Contracting Parties to “develop and maintain appropriate policy and legal measures that promote the sustainable use of PGRFA” such as pursuing fair agricultural policies that promote the development and maintenance of diverse farming systems, promoting plant breeding efforts with the participation of farmers and strengthening capacity to develop varieties particularly adapted to social, economic and ecological conditions.

ITPGRFA also supports the development of new varieties through its multilateral system that facilitates access to PGRFA subject to fair and equitable benefits arising from the use of such resources (Articles 10 – 13 of ITPGRFA).

A central component of the ITPGRFA is Farmers' Rights. Article 9.1 of ITPGRFA acknowledges the "enormous contributions" that the local and indigenous communities and farmers "have made and will continue to make" not only in the conservation but also the "development of plant genetic resources" which constitute the foundation for food and agriculture globally.

Article 9.2 of the ITPGRFA highlights its Parties' responsibility for realizing Farmers' Rights including (a) protection of traditional knowledge relevant to PGRFA; (b) the right to equitably participate in sharing benefits arising from the utilization of PGRFA; (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA.

Article 9.3 confirms farmers' right to save, use, exchange and sell farm-saved seed/propagating material.

The Preamble of the ITPGRFA affirms that "rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and 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, are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels".

These core aspects of the ITPGRFA are regrettably ignored by the FAQ, hence so is the issue of the impact of UPOV Convention's on implementation of the provisions of ITPGRFA, in particular on Farmers' Rights.

The FAQ asserts, "When implemented by UPOV members, the relevant legislations dealing with these matters should be compatible and mutually supportive". This sentence is misleading as it suggests that a country has full flexibility to implement all provisions of the ITPGRFA including all aspects of Farmers' Rights and at the same time be a member of the 1991 Act of UPOV which is the only Convention available to new member states. In reality there are fundamental contradictions between the instruments as evidenced by the concrete examples presented below.

(i) In examining the conformity of Malaysia's national PVP legislation with UPOV 1991, UPOV said "the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act" and on that basis recommended deletion of Section 31(1)(e) of Malaysia's Protection of New Plant Varieties Act 2004 which contained the following exception: "any exchange of reasonable amounts of propagating materials among small farmers."¹ "Small farmer" is defined as having a total land holding of 0.2 hectares.

UPOV also did not accept the following clause as an exception to breeder's right: "the sale of farm-saved seeds in situations where a small farmer cannot make use of the farm-saved seeds on his own holding due to natural disaster or emergency or any other factor beyond the control of the small farmer, if the amount sold is not more than what is required in his own holding".²

Further, UPOV questioned requirements in Malaysia's PVP legislation that are aimed at protecting the rights of farmers including their traditional knowledge and right to fair and equitable benefit sharing arising from the use PGRFA. Section 12 of Malaysia's PVP legislation contains a disclosure obligation which stipulates an application must: "... (e)

1 UPOV doc. C(Extr.)/ 22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.

2 UPOV doc. C(Extr.)/ 22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf

contain information relating to the source of the genetic material or the immediate parental lines of the plant variety; (f) be accompanied with the prior written consent of the authority representing the local community or the indigenous people in cases where the plant variety is developed from traditional varieties; (g) be supported by documents relating to the compliance of any law regulating access to genetic or biological resources.”

In addition, Malaysia’s PVP legislation includes specific provisions concerning the protection of farmer varieties, based on the specificities of such varieties. These provisions are aimed at *inter alia* pursuing fair agricultural policies including the development and maintenance of diverse farming systems and supporting farmer plant breeding and the protection of traditional knowledge as required by Article 6 and 9 of the ITPGRFA. However, UPOV did not accept these provisions.

(ii) In the case of the Philippines, UPOV found the farmer’s exception in Section 43(d) of the PVP legislation to be incompatible with the 1991 Act. Section 43(d) states:

“The Certificate of Plant Variety Protection shall not extend to: ... d) The traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act, except when a sale is for the purpose of reproduction under a commercial marketing agreement. The Board shall determine the condition under which this exception shall apply, taking into consideration the nature of the plant cultivated, grown or sown. This provision shall also extend to the exchange and sale of seeds among and between said small farmers: Provided, That the small farmers may exchange or sell seeds for reproduction and replanting in their own land.”

In its comments UPOV states “if ‘exchange, share or sell (sic) of their farm produce of a variety protected under this Act’ is for the purpose of reproduction, those acts would constitute infringements to the breeder’s right [...] The exception under Article 15(2) of the 1991 Act requires that such an exception be implemented “within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder [...] 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 [...]” (emphasis added). The exchange and sale of seeds among and between the said small farmers in their own land, as provided in the third sentence of Section 43(d) of the Law, go beyond the exception of Article 15 (2) of 1991 Act and therefore would constitute an infringement to the breeder’s right (Article 14(1) of the 1991 Act).”³

(iii) In the case of Myanmar, its existing PVP legislation contains two very important exceptions (i) exchange of varieties between farmers according to permitted amount in the rules; (ii) cultivation for non-commercial purposes. Following technical assistance and legal advice from UPOV, the new draft PVP legislation mirrors the 1991 Act. Farmers’ right to exchange varieties has been deleted. The broad exception of “non-commercial purposes” has been replaced with the narrow exception of “private and non-commercial use”, which is generally interpreted by UPOV as not allowing exchange of farm-saved seeds or sale of such seeds to the local/rural markets. The new draft law also contains restrictions to seed saving by farmers.

(iv) Another inconsistency with the ITPGRFA, which could be observed, is regarding essentially derived varieties (EDVs). UPOV 1991 extends breeders’ rights to varieties essentially derived from the protected variety. This means that if a farmer makes a small derogation from a protected variety (e.g. by selection), the farmer would need authorization from the breeder (of the protected variety) to commercialize the newly bred variety (as it would be considered an EDV). The given rationale for EDVs is to prevent claims for plant

³ UPOV doc. C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf

breeder rights (PBRs) on newly bred varieties, which are essentially similar to the initial protected variety.

However, if a public or private commercial breeder uses a variety bred by farmers (not protected by PBRs) to breed a new plant variety, the breeder may obtain PBRs but the farmer has no similar rights, despite having developed and conserved the variety. Furthermore, as noted above, UPOV refuses to allow the introduction of a disclosure of origin requirement and any mechanism to prevent misappropriation and facilitate benefit sharing arising from the utilization of plant genetic resource developed by farmers.

This inequality contradicts ITPGRFA in particular Article 9 which stresses on farmers' rights to fair and equitable benefit sharing as well as its Contracting Parties recognizing the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres 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.

These examples present concrete evidence of the contradictions between UPOV Conventions and the ITPGRFA. It also shows how adoption of a PVP system based on the 1991 Act affects implementation of the provisions of the ITPGRFA, including full realization of Farmers' Rights.

Box: Proposal For Revision of FAQ

The UPOV Convention, the CBD and the ITPGRFA are all international instruments.

The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the **fair and equitable** sharing of benefits arising from their use.

The ITPGRFA addresses important aspects concerning the conservation, development and sustainable use plant genetic resources for food and agriculture. It stresses *inter alia* on sustainable use of plant genetic resources, Farmers' Rights and supports development of plant genetic resources for food and agriculture through its multilateral system for access to plant genetic resources subject to fair and equitable sharing of benefits arising from the utilization of these resources.

~~Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection. When implemented by UPOV members, the relevant legislations dealing with these matters should be compatible and mutually supportive.~~

Governments should be aware that there are contradictions between the ITPGRFA and the UPOV Conventions and that implementing the UPOV Conventions especially the 1991 Act, will affect implementation of the provisions of the ITPGRFA including the full realization of Farmers' Rights.

COMMENT ON OTHER KEY FAQs THAT ARE RELEVANT TO
INTERRELATIONS BETWEEN UPOV AND THE ITPGRFA

2. FAQ: Why do farmers and growers need new plant varieties?

The FAQ response states "...there is continuous demand by farmers/growers of new plant varieties and development by breeders of such new plant varieties". This sentence suggests that farmers are only users of new plant varieties and are not involved in the development of new plant varieties. This sentence is in direct contradiction with the spirit and provisions of the ITPGRFA.

For instance Article 6 of ITPGRFA *inter alia* emphasizes participatory plant breeding with farmers, strengthening the capacity to develop varieties particularly adapted to social, economic and ecological conditions. Article 9.1 of ITPGRFA recognizes "the enormous contribution that local and indigenous communities and farmers of all regions of the world, particularly those in the centres 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*" (emphasis added).

The FAQ needs to recognize the important role of farmers in the development of new plant varieties especially those adapted to the social, economic and ecological conditions of a country. Further the FAQ should recognize and promote the freedom of governments especially in developing countries to develop a PVP system that reflects the diversity of farming systems in a country and to protect the interests of farmers that have bred traditional varieties and are breeding new plant varieties.

3. FAQ: Can a farmer sell seed of a protected variety without the authorization of the breeder?

The FAQ response states, "The authorization of the breeder is required for the selling of a protected variety by any person".

This means that a Contracting party of the ITPGRFA will not be able to realize farmers' right to sell farm-saved seed/propagating material, if the party becomes an UPOV member. This is so even if the amounts sold is small and/or for local communities and rural markets and does not affect breeder's interests. Effectively implementation of the ITPGRFA is being undermined, as farmers' right to sell farm-saved seed/propagating material is fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels (see Preamble of the ITPGRFA).

4. FAQ: Can a farmer replant seed of a protected variety without the authorization of the breeder?

The FAQ response differentiates between "commercial farmers" and "subsistence farmers" although such a distinction does not appear in the UPOV Conventions. The FAQ response adds "With subsistence farming, it is observed that the farmer produces barely enough food for their own consumption and that of their dependents. Thus, the propagation of a protected variety by a farmer exclusively for the production of a food crop to be consumed by that farmer and the dependents of the farmer, may be considered to fall within the meaning of acts done privately and for non-commercial purposes." This narrow definition also found in UPOV's Guidance (UPOV/INF/6/5) and Explanatory Note (UPOV/EXN/EXC/1) means that generally the seed saving activity of smallholder farmers, who may in addition to planting crops for their own consumption may also engage with exchange and sale of produce with their neighbors or within their communities in local markets, will not be covered by the

exception of “private and non-commercial use”. Instead these farmers will be treated as “commercial farmers”, even though they are not, in the general sense of the word, commercial farmers

With regard to “commercial farmers” the FAQ response, UPOV’s Guidance (UPOV/INF/6/5) and Explanatory Note (UPOV/EXN/EXC/1), suggests that farmers’ right to save and replant is limited to certain circumstances and subject to conditions such as payment of remuneration to the breeder. Particularly concerning is that UPOV’s Guidance (UPOV/INF/6/5) and Explanatory Note (UPOV/EXN/EXC/1) which suggests (although such a requirement is not included in the text of UPOV Conventions) that it may be considered inappropriate to introduce the optional exception for agricultural or horticultural sectors, such as fruit, ornamentals and vegetables, where it has not been a common practice for the harvested material to be used as propagating material. Based on the Guidance and Explanatory Note, UPOV has been advising governments considering joining UPOV 1991 to limit the application of the optional exception in Article 15(2) of the 1991 Act.

In short, the right to save seeds/propagating material and to replant them is fundamental to the realization of Farmers’ Rights, as well as the promotion of Farmers’ Rights at national and international levels (see Preamble of ITPGRFA), and yet it is being undermined by the requirements of UPOV and the technical assistance provided by UPOV based on the UPOV UPOV’s Guidance (UPOV/INF/6/5) and Explanatory Note (UPOV/EXN/EXC/1).

5. FAQ: Is it possible for subsistence farmers to exchange propagating material of protected varieties against other vital goods within the local community?

The response to the FAQ raises several issues and concerns.

The FAQ is only applicable to “subsistence farmers” and the response asserts “Since the 1991 Act and 1978 Act do not specifically address or define subsistence farmers it is necessary to consult the legislation of each UPOV Contracting Party for the answer to this question specific to that UPOV members”.

This response is not accurate. While it is true that the 1991 Act and 1978 Act do not specifically address or define subsistence farmers, the FAQ, UPOV’s Guidance (UPOV/INF/6/5) and Explanatory Note (UPOV/EXN/EXC/1) suggests that subsistence farmers refers to a situation where a farmer produces barely enough food for their own consumption and that of their dependents. This narrow definition means that generally smallholder farmers will not be allowed to exchange propagating material of protected varieties as it is a norm for smallholder farmers to engage with local markets to support the basic needs of their family, beyond planting crops for their own consumption

The FAQ response further states: “Within the scope of the breeder’s right exceptions provided under the UPOV Conventions, 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 within the local community.”

This response is not supported by UPOV’s interpretation of Article 15 in its Explanatory Note (UPOV/EXN/EXC/1) or Guidance (UPOV/INF/6/5) whereby it is explicitly stated “The wording of Article 15(1)(i) 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” (emphasis added). This clearly means no exchange is allowed.

The FAQ response is also not supported by the practices of UPOV, as it has consistently rejected national draft PVP legislation that allows exchange of seeds/propagating material, as illustrated by the country examples presented above.

In any case, the FAQ response only allows for “occasional” exchange, meaning exchange of seeds/propagating material as a regular component of farming and the basis for the agricultural biodiversity and PGRFA we have today and need for the future, is not recognized by UPOV.

UPOV’s restrictions directly contradict Farmers’ Rights in the ITPGRFA that recognizes the right to exchange farm-saved seeds/propagating material to be fundamental to the realization of Farmers’ Rights, as well as the promotion of Farmers’ Rights at national and international levels (see Preamble of ITPGRFA).

6. FAQ: Under the UPOV system, breeders decide the conditions and limitations under which they authorize the exploitation of their protected varieties. Can farmers, for instance, be allowed to exchange seeds of protected varieties freely within the local community?

The FAQ response states, “Therefore any breeder may decide on the conditions and limitations under which he authorizes the exploitation of his/her protected variety. He may, for instance, allow the farmer to exchange seeds of protected varieties freely within the local community.”

This response confirms the contradictions between the ITPGRFA and UPOV Conventions. The Conventions especially the 1991 Act, does not support implementation of Farmers’ Rights. Common farmers’ practices of exchange and sale of farm-saved seeds/propagating material, which are considered to be fundamental to the realization of Farmers’ Rights, as well as the promotion of Farmers’ Rights at national and international levels (see Preamble of ITPGRFA), are subject to a breeder’s authorisation.

PROPOSALS OF APBEBES

1. The contradictions between the ITPGRFA and the UPOV Conventions are a reality as evidenced above. This should be recognized by the FAQ and not ignored under the false pretext of “mutual supportiveness”.

In the Box (on pg. 4), APBEBES has prepared a proposal for the revision of response to FAQ “What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)”.

2. In addition, as explained above, multiple FAQs impact implementation of the ITPGRFA and hence are relevant to the interrelations between the UPOV Convention and the ITPGRFA. Some key FAQs pertinent to the subject of interrelations have been highlighted above. It is obvious from the responses to these FAQs, that UPOV Conventions affect implementation of ITPGRFA. Clearly, these FAQs need to be revised if the interrelations between UPOV and the ITPGRFA are to be improved.

However the revision of the FAQs is only possible and logical once UPOV’s legal documentation that informs implementation of UPOV’s provisions (i.e. its Explanatory Notes and Guidance) are amended to allow freedom to Contracting Parties of the ITPGRFA to implement fully the provisions of the ITPGRFA.

Accordingly, APBREBES would like to reiterate its call to the Consultative Committee to urgently take the following actions:

- (a) To revise the Explanatory Note on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention (UPOV/EXN/EXC/1) and the Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention (UPOV/INF/6/5) with regard to Article 15 of the 1991 Act.

The aim of the revision should be generally to allow governments full freedom to implement in its PVP legislation provisions it considers are necessary to implement ITPGRFA, with regard to the use of protected varieties.

More specifically, the revision should aim *inter alia* to incorporate within the scope of the exceptions all acts of smallholder farmers in relation to the protected variety i.e. to freely save, use, exchange and sell farm saved seed/propagating material as well as to clarify that all breeding activities of farmers, including breeding by selection, would fall within the scope of breeders' exemption. The latter aspect may also require revision of the Explanatory Note on Essentially Derived Varieties under the 1991 Act.

APBREBES will provide specific inputs for the revision process.

- (b) To adopt a decision recognizing the right of governments to implement in its PVP legislation provisions to realize fair and equitable benefit sharing, in particular to require as part of the application process for an applicant to disclose the origin of the variety including the pedigree information and associated passport data, on the lines from which the variety has been derived, along with information relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety, evidence that the material used for breeding, evolving or developing the variety for which protection is sought has been lawfully acquired, and that the applicant has complied with prior informed consent and benefit-sharing requirements. This would also facilitate compliance with the Convention on Biological Diversity and its Nagoya Protocol on Access and Benefit-Sharing.

The decision should be applicable to all UPOV Members and be followed by a revision of the Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention (UPOV/INF/6/5), to reflect the abovementioned decision.

- (c) To adopt a decision that the Office of the Union as well as all UPOV Members will respect, promote and implement Farmers' Right to participate in decision-making processes in all UPOV activities and subsequently develop guidelines to implement Farmers' Right to participate in decision-making in relation to activities of the UPOV secretariat (especially its technical assistance activities on plant variety protection) and of UPOV Member states. The guidelines should be developed through a credible, transparent and participatory process involving farmers and build on the good practices of the UN system for participatory mechanisms and processes, paying special attention to participation by disadvantaged groups, in particular smallholder farmers.⁴

(3) On the exchange of experience and information on the implementation of the UPOV Convention and the ITPGRFA with the involvement of stakeholders, APBREBES would like to make the following suggestion:

⁴ Chee Yoke Ling et al., Farmers' Right to Participate in Decision-making – implementing Article 9.2 (c) of the International Treaty on Plant Genetic Resources for Food and Agriculture, Working Paper, APBREBES, 2016, available at http://www.apbrebes.org/files/seeds/files/PE_farmers%20right_9-16_def-high.pdf?pk_campaign=part

- (a) that UPOV invite civil society organizations and farmer representatives (especially those that are NOT observers to UPOV) to make submissions to the UPOV Consultative Committee on the interrelations between the ITPGRFA and the UPOV Convention. In implementing this proposal, it is important for UPOV to provide sufficient time for relevant civil society organizations and farmer representatives to make a submission (e.g. 5 months). This is to ensure that such organizations and representatives have sufficient time to undertake relevant consultations among their constituency for purposes of presenting a submission to UPOV.

Finally, kindly note that this submission is made without prejudice to the right of APBRES to make further proposals and clarifications on further action concerning interrelations between the ITPGRFA and the UPOV Convention.

[Annex XII follows]

REPLY FROM THE EUROPEAN COORDINATION VIA CAMPESINA (ECVC)



30th April 2018, Brussels

European Coordination Via Campesina (ECVC) proposals for a positive interaction between the ITPGRFA – particularly article 9 – and the UPOV Convention

I – Introduction

All the plant breeders' varieties come from seeds collected in farmers' fields. The aim of the ITPGRFA is the conservation of these plant genetic resources.

Resources stored in cooling banks can no longer develop. Only those that farmers cultivate and select year after year adapt to the particular conditions of each field, to each type of farming and to developments in these conditions. Their diversity and their intra-varietal variability are the main factors that contribute to their adaptability and resilience. The diversity of the soil guarantees their immense inter-varietal diversity. New polygenic features, which are essential in each piece of land to adapt to increasingly rapid changes to cultivation conditions, particularly climate change, are not created in gene banks, but rather in the fields of farmers who choose their seeds.

The varieties that the plant breeders select are uniform and stabilised in research centres that use chemical inputs for suiting better to the monoculture production conditions. These varieties can develop specific features that react more favourably to inputs, resist against a particular new pathogen or another such feature. However, the more precise the selection technique, the less diverse the genetic pool and the quicker the new chosen monogenetic characteristics are bypassed. The adaptation of the whole plant genotype to each piece of land and its climatic variability can only take place following the farmers' multiplication and selection of the seeds without relying heavily on inputs. The same applies to the varieties that plant breeders own.

We enjoy the enormous contribution that farmers have made, and will continue to make, to the conservation and promotion of plant genetic resources on the condition that we secure farmers' rights, as defined in article 9 of the ITPGRFA. This contribution is essential to guarantee agricultural production and food through the renewal of resources and the selection of new varieties that have adapted to climate change. It is also essential to the reduction of the use of chemical inputs.

II – Farmers' rights to protect their knowledge, receive a share of the benefits and participate in national decision making.

a) These rights concern plant genetic resources for food and agriculture (PGRFA) as a whole. The protection of knowledge and the sharing of benefits depend on the ITPGRFA multilateral system (MLS) for the species specified in Annex 1 and in the Nagoya Protocol for other species.

While it remains possible to bypass the MLS and the protocol through access to multiple collections that are not part of the MLS nor under the control of any public authority, and while there is no effective system to track exchanges of PGRFAs, all the financial benefits of accessing this system will be limited to a few symbolic donations (as is the case today).

The seeds that the farmers select and store, as well as their knowledge, have been provided to the numerous researchers who have collected and put them in the MLS, or another public or private collection, freely and without any conditions. UPOV believes that the exception for plant breeders, which allows the use of a protected variety to select another, constitutes a non-monetary form of benefit sharing. This sharing is not fair since it only benefits the plant breeders, whereas farmers have provided most PGRFAs free of charge.

ECVC supports a fair and simple system that cannot be bypassed for benefit sharing, whether these benefits are non-monetary (as for seeds that can be reproduced in farms) or monetary (as for seeds that cannot be reproduced in farms).

UPOV must recognise the farmers' right to use seeds collected from their own harvest freely, unconditionally and without charge. These seeds include those collected from plants subject to a breeders' right, patent or other intellectual property right belonging to a plant breeder.

Farmers who select and adapt their seeds according to their own cultivation conditions will be able to once again enrich the diversity of plant genetic resources.

b) Seeds that cannot be reproduced (F1 hybrids, male seeds that are infertile, terminator seeds...) do not allow for this fair and non-monetary sharing, nor the improvement of the diversity of plant genetic resources. ECVC is against all intellectual property rights that limit the free use of farm-saved seeds. However, while Member States allow the use of such intellectual property rights, the seeds that these intellectual property rights protect prevent non-monetary sharing.

Member States impose a tax on the commercialisation of seeds which are neither technically nor legally freely reproducible on farms. This tax goes to the ITPGRFA Benefit-Sharing Fund or to a similar CBD fund. Its total amount is proportional to the needs of the Benefit Sharing Fund.

This fair sharing of the benefits requires an equivalent interpretation in the UPOV Conventions, as proposed hereunder.

c) The application at national level of the UPOV conventions has a significant impact on farmers' rights and the conservation of PGRFAs.

UPOV must make it obligatory for each contracting party to arrange for the farmers' participation in the drafting of laws or the making of other national or regional decisions concerning these Conventions.

III – Farmers' rights to save, use, exchange and sell farm-saved seeds or propagating material.

These rights apply to all “farm-saved seeds”, regardless of whether they belong to a variety registered in an official catalogue and/or are subject to a plant variety certificate or a patent. The owners of these rights are farmers who have stored their farm-saved seeds rather than the other people or companies who would like to multiply and sell them. Farmers’ rights do not apply to seed growers that the seed industry subcontracts to produce commercial seeds.

The ITPGRFA does not set out any limits to these rights and entrusts their protection to governments, as appropriate and subject to national legislation.

UPOV sets out the plant breeders' right to stable, uniform varieties. It impels governments to adopt laws that can violate farmers' rights.

- The 1978 Convention limits plant breeders' rights to produce for commercial purposes and market the variety's reproduction material. It does not question the farmers' right to store or use their farm-saved seeds. However, it can prevent the farmers from selling the seeds and also exchanging them in countries where an exchange constitutes a business transaction.
- The 1991 Convention extends the plant breeders' right to reproduce seed varieties. It infringes farmers' rights to save, use, exchange and sell their farm-saved seeds once they reproduce a protected variety.

a) Most countries that have adopted the UPOV convention limit the sale of seeds to varieties that are distinct, uniform, stable and that could fall under the protection of a plant breeder's right. Moreover, registration and certification costs limit most of these seeds to varieties covered by such a plant breeder's right. Therefore, farmers who only have access to protected seed varieties and/or F1 hybrids lose all of their rights to their seeds.

UPOV must make it obligatory to open up the contracting parties' markets to seeds that come from farmers and which are not homogeneous or stable (eg. Heterogenous material and population).

b) According to article 15(i) of the 1991 UPOV convention, plant variety rights do not cover acts carried out privately for non-commercial purposes. A strict interpretation of this exception limits it only to gardeners who do not sell their harvest. Such an interpretation goes against the human right to food. 70% of food available on the planet comes from subsistence farming, which small-scale farmers carry out and who only use a quarter of cultivated land. The vast majority of their seeds come from informal peasant seed systems because they do not have the financial means to buy commercial seeds and the inputs essential to their cultivation. They sell their crops at local markets where they also exchange their seeds.

UPOV must explicitly extend the application of article 15(1) to all small-scale farmers who practise small-scale subsistence farming for local markets. A small-scale farmer is a farmer who has enough land to provide his family with food, an income and a social and cultural life, according to international human rights. National laws define this particular aspect according to the national economic context.

c) According to article 15(ii) of the 1991 UPOV convention, the plant variety right does not extend to the experimentation nor the selection of new varieties. Farmers who use their farm-saved seeds never reproduce the protected variety identically. Rather, they adapt it to their local cultivation conditions. Farmers rarely do directed pollination. They practise evolutionary mass selections that require free pollination, to a greater or lesser extent depending on the species (i.e. whether the plant is cross-pollinating or self-pollinating), before obtaining a new variety distinct from the initial variety. Banning them from practising these selections on the basis that the harvests are destined for the commercial market is equal to banning peasant selections and their main benefit, which is their use in conditions which will encourage the best possible local adaptation.

UPOV must explicitly recognise:

- **The farmers' right to benefit from the selection exception, including when they use evolutionary and adapted mass selections as part of their cultivations destined for the market.**
- **The farmers' right to exchange and sell limited quantities of their own farm-saved seeds that come from a variety protected by a plant variety right, provided that the farmers do not practise variety maintenance nor claim to sell the protected variety denomination. These quantities are within the limits of what they use for their own farm.**

REPLY FROM THE EUROPEAN SEED ASSOCIATION (ESA) AND
THE INTERNATIONAL SEED FEDERATION (ISF)



Mr. Peter Button
Vice Secretary-General

**International Union for the Protection of
New Varieties of Plants (UPOV)**
34, chemin des Colombettes
CH-1211 Geneva 20
Switzerland

e-mail: upov.mail@upov.int

Ref: ESA_18.0277.2

Object: Joint input from ESA and ISF to UPOV Circular E-18/026 – Interrelations with IT PGRFA

Brussels, 26.04.2018

Dear Mr. Button,

In response to UPOV circular E-18/026 inviting UPOV members and observers to make proposals on (i) the revision of the FAQ on the interrelations between the UPOV Convention and the IT PGRFA; and on (ii) how to facilitate the exchange of experiences and information on the implementation of the UPOV Convention and the Treaty, ESA and ISF wish to make the following proposals:

- (i) On the revision of the FAQ on the interrelations between the UPOV Convention and the Treaty

We are of the opinion that the current FAQ does not sufficiently elaborate on elements of the UPOV Convention that may have a direct influence on the implementation of the objectives of the Treaty. One very important element that needs to be emphasized in a revised FAQ is that the UPOV Convention allows the use of protected varieties for further breeding through the breeder's exemption. One of the objectives of the Treaty is the sharing of benefits and the Treaty recognizes in its Article 13(1) that facilitated access to genetic resources for further breeding in itself is a major benefit. Therefore, it is important to point out that facilitated access is ensured through the UPOV system.

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We would like to make the following proposals regarding the FAQ on the interrelations between the UPOV Convention and the Treaty:

What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)?

The UPOV Convention, the CBD and the ITPGRFA are all international instruments.

The objectives of the CBD and the ITPGRFA are the conservation and sustainable use of genetic resources and the sharing of benefits arising from their use.

Both the ITPGRFA and the UPOV Convention aim to support plant breeding activities and to encourage the development of new varieties of plants. The ITPGRFA does so by providing a system for facilitated access to plant genetic resources, while the UPOV Convention does so by establishing a system for plant variety protection that also provides access for breeding.

When implemented by UPOV members, the relevant legislations dealing with ~~these matters~~genetic resources should be compatible and mutually supportive, in particular in relation to the breeder's exemption which is a key feature of the UPOV Convention; the breeder's exemption constitutes an important means of benefit-sharing while both the CBD and the ITPGRFA attach high importance to the sharing of benefits resulting from the use of genetic resources.

Regarding the interrelations between breeder's rights and Farmers Rights as set out in Article 9 of the ITPGRFA, please consult FAQs under the sub-title "For farmers".

As indicated in our proposal above, we are of the view that it would be useful in the FAQ on the interrelations to already anticipate the matter of interrelations between breeder's rights and Farmers Rights, and therefore to include a reference to those FAQs that elaborate more on what farmers are allowed to do with protected varieties. In this context we would like to reiterate that in our view the wording of the current FAQs relating to acts that subsistence farmers might carry out with regard to propagating material of protected varieties, is not satisfactory because it may be seen as too restrictive of certain practices which are carried out by subsistence farmers as part of their normal livelihoods. In that sense, we propose to review the answers to a number of FAQs under the sub-title "For farmers" in order to better clarify how the private and non-commercial use exception under the UPOV Convention can be interpreted in a flexible manner. For this purpose, please find our proposals annexed to the present letter.

Last under topic (i), we would like to mention that, within the framework of a project funded by the Dutch government, together with Plantum, the Dutch seed association and Oxfam Novib, ESA is looking into possible pathways to better define the scope of the private and non-commercial use exception under the UPOV 1991 Convention. The findings of this project will be shared with the UPOV Secretariat in due time.

(ii) On how to facilitate the exchanges of experiences and information on the implementation of the UPOV Convention and the Treaty, with the involvement of stakeholders

With regard to this action decided by the UPOV Council, we would like to put the following proposals forward for consideration by the UPOV Council:

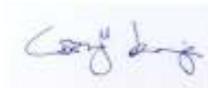
- In connection to upcoming UPOV sessions, UPOV could consider organizing a special event or specific training session for UPOV members with two parts. In one part, certain UPOV members could share examples of how the UPOV Convention and the Treaty are implemented on the national level. In another part, UPOV members could openly discuss national challenges in implementation, share experiences, look at each others' models and simply learn from each other.
- UPOV has already a good track record in participation to the Treaty's Governing Body sessions, however, UPOV could consider organizing a side-event with a specific focus on the breeders' exemption at the next session of the Governing Body where areas of interrelation between the two instruments could be addressed and experiences (case studies/best practices) on implementation could be shared by UPOV members.

In addition, we would like to reiterate that it is crucial that UPOV continues to follow the work of the Treaty regarding Farmers' Rights and obtains observer status in the Ad Hoc Technical Expert Group on Farmers' Rights established by Resolution 7/2017 of the Governing body of the Treaty.

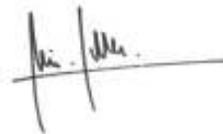
Lastly, we would like to draw the attention of UPOV to the new educational module of the Treaty on Farmers' Rights: <http://www.fao.org/3/i7820EN/i7820en.pdf>. Lesson 3 of the educational module presents examples /case studies on how Farmers' Rights have been implemented in some countries. One prominent example in the training module is the Norwegian approach as presented on pages 79-80 of the educational module. We find it inappropriate that instead of neutrally presenting examples from various countries the educational module allows for political statements arguing that the 1991 Act of the Convention does not provide for the necessary legal space for the realization of Farmers' Rights on the national level. We therefore suggest that the UPOV Council requests the UPOV Secretariat to address this matter with the Secretariat of the Treaty.

We trust that you will give due consideration to the above proposals and we remain at your disposal for any questions that you may have on the above.

Sincerely yours,



Szonja Csörgő
Director IP & Legal Affairs ESA



Michael Keller
Secretary General ISF

ANNEX

FAQs under sub-title “For farmers”:

Can a farmer replant seed of a protected variety without the authorization of the breeder?

Commercial farmers

~~It is necessary to consult the legislation in each UPOV member to know the answer to this question.~~

Under the [1978 Act](#) of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for the production for purposes of commercial marketing of the reproductive or vegetative propagating material, as such, of the variety. However, no specific mention is made of replanting seed of a protected variety by farmers. Therefore, it is necessary to consult the legislation in each UPOV member.

Under the [1991 Act](#) of the UPOV Convention (see Article 15(2)), there is an optional exception to the breeder’s rights according to which UPOV members can decide to allow farmers to replant seed of protected varieties on their own farms without the authorization of the breeder, under certain circumstances. The wording of this optional exception is as follows:

“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 Article 14(5)(a)(ii).”

It is a matter for each UPOV member to decide if, and how, to incorporate this option in its legislation.

Subsistence farmers

~~Since the 1991 Act and 1978 Act give no definition of the words “commercial” and “subsistence farming”, it is necessary to consult the legislation in each UPOV member to know the answer to this question specific for that UPOV member.~~

Under the 1978 Act of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for the production for purposes of commercial marketing of the reproductive or vegetative propagating material, as such, of the variety. ~~The 1978 Act of the UPOV Convention is silent on the question of subsistence farmers, and therefore it totally depends on the national legislation. The replanting of seeds by a farmer exclusively for the production of a food crop to be consumed by that farmer and the dependents of the farmer should not be considered as production for purposes of commercial marketing.~~

Under the 1991 Act of the UPOV Convention (see Article 15(1)(i)), a compulsory exception sets out that the breeder’s right does not extend to “acts done privately and for non-commercial purposes”. With subsistence farming, it is observed that the farmer produces barely enough food for their own consumption and that of their dependents. Thus, ~~the propagation of a protected variety the replanting of seeds~~ by a farmer exclusively for the production of a food crop to be consumed by that farmer and the dependents of the farmer, ~~may-should~~ be considered to fall within the meaning of acts done privately and for non-commercial purposes.

Can a farmer sell seed of a protected variety without the authorization of the breeder?

~~In general, The the~~ authorization of the breeder is required for the selling of seed of a protected variety by any person.

Under the [1978 Act](#) of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for “the offering for sale” and “the marketing” of the reproductive or vegetative propagating material, as such, of the variety, [i.e. for acts carried out for commercial purposes](#).

Under the [1991 Act](#) of the UPOV Convention (see Article 14(1)) the “offering for sale” and “selling or other marketing” of the propagating material of the protected variety requires the authorization of the breeder.

[Despite these provisions, subsistence farmers in developing countries should not be prohibited to sell seeds to obtain other vital goods for themselves and their dependents as this is considered to be an act done privately and for non-commercial purposes](#).

[It is to be noted though that the matter which activities qualify as “commercial” or “for commercial purposes” remains to be regulated by national laws and is therefore not further determined by the UPOV Convention](#).

Is it possible for subsistence farmers to exchange propagating material of protected varieties against other vital goods within the local community?

~~[Since the 1991 Act and 1978 Act do not specifically address or define subsistence farmers it is necessary to consult the legislation of each UPOV Contracting Party for the answer to this question specific to that UPOV member](#)~~.

~~[Within the scope of the breeder’s right exceptions provided under the UPOV Conventions, 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 within the local community](#)~~.

[Under the 1978 Act of the UPOV Convention \(see Article 5\), the prior authorization of the breeder is required for acts performed for commercial purposes. The exchange of propagating material of a protected variety by a subsistence farmer against other vital goods \(such as other seeds\) should not be considered as an act performed for commercial purposes](#).

[Under the 1991 Act of the UPOV Convention \(see Article 15\(1\)\(i\)\), a compulsory exception sets out that the breeder’s right does not extend to “acts done privately and for non-commercial purposes”. Subsistence farmers produce barely enough food for their own consumption and that of their dependents. Thus, the exchange of propagating material of a protected variety by a subsistence farmer against other vital goods \(such as other seeds\), should be considered to fall within the meaning of acts done privately and for non-commercial purposes](#).

Under the UPOV system, breeders decide the conditions and limitations under which they authorize the exploitation of their protected varieties. Can farmers, for instance, be allowed to exchange seeds of protected varieties freely within the local community?

[Commercial farmers](#)

Article 14(1)(a) of UPOV 1991 and article 5(1) of UPOV 1978 define the acts in respect of the propagating material for which the breeder authorization shall be required; Article 14(1)(b) and respectively Article 5(2) state that the breeder may make his authorization subject to conditions and limitations.

Therefore, any breeder may decide on the conditions and limitations under which he authorizes the exploitation of his/her protected variety. He may, for instance, allow the farmer to exchange seeds of protected varieties freely within the local community.

Subsistence farmers

Under the 1978 Act of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for acts performed for commercial purposes. The exchange of propagating material of a protected variety by a subsistence farmer against other vital goods (such as other seeds) should not be considered as an act performed for commercial purposes.

Under the 1991 Act of the UPOV Convention (see Article 15(1)(i)), a compulsory exception sets out that the breeder's right does not extend to "acts done privately and for non-commercial purposes". Subsistence farmers produce barely enough food for their own consumption and that of their dependents. Thus, the exchange of propagating material of a protected variety by a subsistence farmer against other vital goods (such as other seeds), should be considered to fall within the meaning of acts done privately and for non-commercial purposes.

[End of Annex XIII and of document]