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Association for Plant Breeding for the Benefit of Society

## Intellectual Property Rights and the Realization of Farmers' Rights under the ITPGRFA – A Conflict?

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### Abstract

Contradictions between the right that farmers have to save, use, exchange and sell farm-saved seed/propagating material and the Breeders Rights in line with UPOV 91 are a major concern in the negotiations for the realization of Farmers' Rights under the ITPGRFA. Since the majority of the ITPGRFA Parties are not members of UPOV, the AHTEG, working under the treaty to develop options to encourage, guide, and promote the realization of Farmers' Rights, should only consider proposals that fully implement farmers' right to save, use, exchange and sell farm-saved seed/propagating material. The AHTEG should also build synergies with the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) and the Convention on Biological Diversity (CBD). The need for compatibility with UPOV 1991 has been rejected by the Governing Body of the ITPGRFA and hence should not be the benchmark for any proposal concerning implementation of Farmers' Rights.

### 1. Introduction

Resolution 7/2017 on the Implementation of Article 9, Farmers' Rights was adopted by the 7th Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which was held in Kigali from 30th October 2017 to 3rd November 2017. The Resolution<sup>1</sup> established an Ad Hoc Technical Expert Group (ATHEG) on Farmers' Rights. The Terms of Reference annexed to the Resolution mandate the ATHEG to:

- (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.

The same Resolution invited 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 the preparation of the inventory.

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<sup>1</sup> Resolution 7/2017: <http://www.fao.org/3/a-mv102e.pdf>

In the intersessional period the ATHEG met twice in Rome. The ATHEG designed the structure for the inventory and developed the *Inventory of National Measures, Best Practices and Lessons Learned from the Realization of Farmers' Rights, as set out in Article 9 of the International Treaty* (the Inventory).<sup>2</sup>

The ATHEG also developed an outline<sup>3</sup> for developing the Options for encouraging, guiding and promoting the realization of Farmers' Rights.<sup>4</sup>

During the 8th Session (held in Rome from 11-16 November 2019, in Resolution 6/2019<sup>5</sup> the Governing Body welcomed the inventory, endorsed its structure, took note of the outline for developing the options and decided to reconvene the Ad Hoc Technical Expert Group for the 2020–2021 biennium in order to complete its tasks based on the Terms of Reference established at the Seventh Session of the Governing Body and the provisions of this Resolution.

Throughout the process described above, the interlinkages and contradictions between the rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, as referred in Art. 9.3 of the ITPGRFA<sup>6</sup> and Intellectual Property Rights (especially UPOV-based plant variety protection laws) limiting these rights, was a highly contentious topic. And it seems probable that this discussion will go on when the ATHEG meets again in August 2020 (virtually) and March 2021 to develop the Options for encouraging, guiding and promoting the realization of Farmers' Rights.

This Policy Brief provides some background on the discussion about the interlinkages between Farmers' Rights and Intellectual Property Rights and presents some recommendations at the end.

## **2. Intellectual Property Rights: A key issue in the work on the development of the inventory and options for the realization of Farmers' Rights.**

Although the concept of Farmers' Rights is very broad including aspects, such as benefit-sharing, the right to participate in decision making or the protection of traditional knowledge – the right that farmers have to save, use, exchange and sell farm-saved seed/propagating material and its interlinkage with Intellectual Property Rights (most of all Breeders Rights and Patents) is a key concern in the implementation of Farmers' Rights. This is highlighted by the fact that more than 25 submissions have been made by various stakeholders on this topic for inclusion in the Inventory<sup>7</sup>.

It is also noteworthy that for the first two meetings of the ATHEG two out of five experts representing the North American delegation, were representatives of national intellectual property institutions<sup>8</sup>. In addition the Bureau has designated a representative of the UPOV Secretariat as one of the three «other» stakeholders (besides five experts per region and three experts from Farmer Organizations). This is surprising, as UPOV has so far not been known as an expert organization on Farmers' Rights. Farmers' Rights are not even mentioned in the acts of the UPOV Convention. In

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<sup>2</sup> See <http://www.fao.org/3/na906en/na906en.pdf>

<sup>3</sup> See Annex 4 of the Report of the Ad Hoc Technical Expert Group on Farmers' Rights to the Eighth Session of the Governing Body, <http://www.fao.org/3/na554en/na554en.pdf>

<sup>4</sup> More detailed information about the intersessional work of ATHEG: <http://www.fao.org/3/na554en/na554en.pdf>

<sup>5</sup> Resolution 6/2019: <http://www.fao.org/3/nb784en/nb784en.pdf>

<sup>6</sup> For the whole text of the Treaty: <http://www.fao.org/3/a-i0510e.pdf>

<sup>7</sup> In the version presented at the 8th Session of the Governing Body <http://www.fao.org/3/na906en/na906en.pdf>

<sup>8</sup> Mr Chris Hannon (U.S. Patent and Trademark Office) and Mr Anthony Parker/Mr Marc De Wit (Breeders' Rights Office, Canada)

UPOV 91 there is an optional exemption for farmed-saved seed (for certain crops) and only «within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder». UPOV does not know a legitimate interest of the farmer. The presence of these representatives is aimed at defending Intellectual Property Rights especially the UPOV's model of protection for plant breeders' rights. During the first two sessions of the AHTEG, these representatives focused their interventions and proposals to safeguard the interests of property rights owners against farmers' rights.

As shown by various other countries like India or Ethiopia, the right that farmers have to save, use, exchange and sell farm-saved seed/propagating material can be fully recognized and safeguarded in a plant variety protection legislation. This is not the case with the 1991 Act of the International Union for the Protection of New Plant Varieties (UPOV 91) where the sale and exchange are prohibited in principle and even the right to use farm-saved seed/propagating material is restricted.

### **3. The conflict : The right to save, use, exchange and sell farm-saved seed/propagating material vs. UPOV 91**

During the 8th session of the Governing Body of the ITPGRFA, a party proposed to incorporate in the Resolution on Farmer Rights, text encouraging the ATHEG to «finalize this work with particular attention paid to the compatibility of the proposed options [...] with other existing international instruments such as the UPOV Convention.» However as delegates from the North and the South objected to the proposal, it was finally rejected.

The compatibility with the UPOV Conventions or even with the 1991 Act should not be a yardstick for the development of options for « encouraging, guiding and promoting » the realization of Farmers' Rights. On the contrary. A study<sup>9</sup> published by the Centre for International Sustainable Development Law (CISDL, based in Canada) in January 2019 with the financial support of the Swiss Confederation concluded that «*The closest links between UPOV and the CBD and Nagoya Protocol for advancing ABS are the farmer's privilege and breeder's exemption. Sui generis PVP systems adopted outside of the UPOV Convention framework – as permitted by TRIPS – may provide a way to better balance rights and obligations relating to the Nagoya Protocol, Plant Treaty, and PVP.*» Another study<sup>10</sup> commissioned by GIZ on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) concludes that «*UPOV91-based PVP laws were found to not advance the realisation of Farmers' Rights; rather they are effective in the opposite direction.*»

In addition, the right to save, use, exchange and sell their farm-saved seed or propagating material is anchored in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP, Article 19.1). In particular, Article 19.8 says, that «*States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.*»

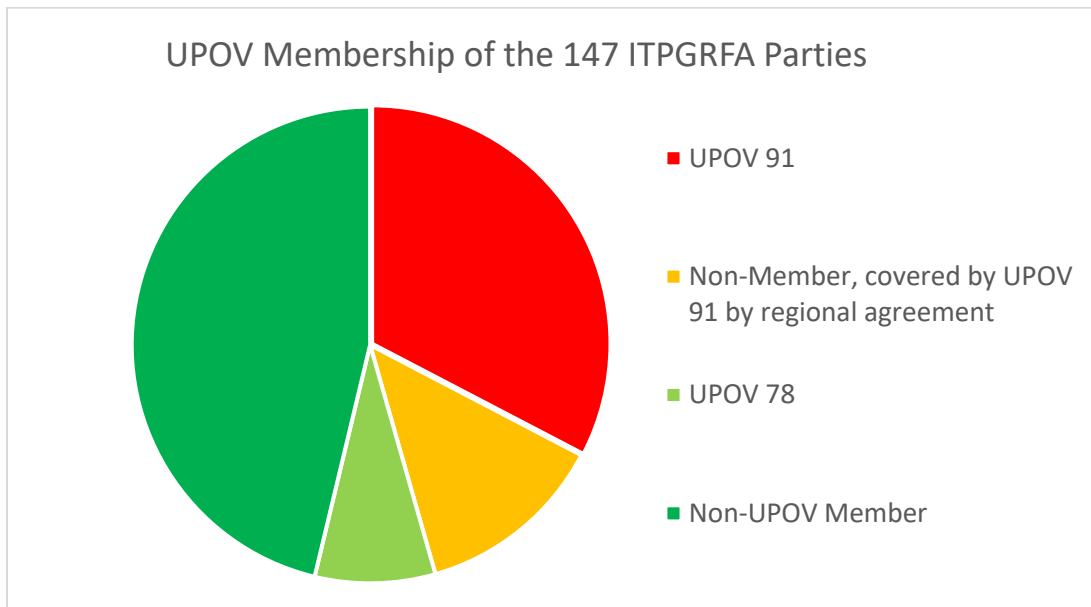
As of 1 May 2020, the International Treaty has 147 Contracting Parties including one member organization (EU). Out of this, only 48 Parties (incl. EU member states) have ratified UPOV 91, 12 have ratified UPOV 78 (allowing for more flexibilities to implement Farmers' Rights) and 87 Parties

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<sup>9</sup> Jorge Cabrera Medaglia, Chidi Oguamanam, Olivier Rukundo & Frederic Perron-Welch, CISDL Biodiversity and Biosafety Law Research Programme ; 2019 ; [Comparative Study of the Nagoya Protocol, the Plant Treaty and the UPOV Convention: The Interface of Access and Benefit Sharing and Plant Variety Protection](#)

<sup>10</sup> Christinck, Anja & Tvedt, Morten; (2015); [The UPOV Convention, Farmers' Rights and Human Rights. An Integrated Assessment of Potentially Conflicting Legal Frameworks](#)

are not members of UPOV. In 19 of these Parties who are not member to UPOV, a regional plant variety protection system in line with UPOV 91 is in place (OAPI<sup>11</sup>, EU<sup>12</sup>).



The majority of Contracting Parties to the Treaty have not ratified the UPOV Act of 1991. Instead, many of these parties very deliberately enacted a sui generis plant variety protection law, which tries at least to balance breeders' rights and farmers' rights. Some of these countries have implemented specific chapters on farmers' rights, are protecting farmer varieties and traditional knowledge or request the disclosure of origin in Plant Variety Protection applications. In this way they are trying to meet the requirements of Art. 9 and Art. 6 of the Treaty and to implement the Nagoya-Protocol and the UNDROP.

#### 4. How to deal with the UPOV issue in the further ATHEG negotiations

- The task of the ATHEG is now to develop options for encouraging, guiding and promoting the realization of Farmers' Rights. Obviously these options should also serve the majority of the Treaty Parties, countries who are not bound by the rules of UPOV 91.
- The idea that the proposed options should be compatible with UPOV has already been rejected by the Governing Body and is therefore out of discussion for the finalization of the work by the ATHEG.
- Developing Options which are in contradiction with UPOV 91 are not a problem for any Party, as the Art. 9.2 of the Treaty clearly states that that *«the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national*

<sup>11</sup> OAPI is a regional IP office for 17 franco-phone countries in central and west Africa. The OAPI Secretariat is a member of UPOV 1991 but none of 17 individual countries are members of UPOV 1991. The OAPI regional system under the regional Agreement Bangui Agreement is a dysfunctional system - <https://apbrebes.org/news/dysfunctional-plant-variety-protection-system-ten-years-upov-implementation-francophone-africa>

<sup>12</sup> The European Union Plant Variety Protection System is valid throughout the territory of the 27 Member States of the EU. Most of EU countries are members of UPOV 1991, except Cyprus, Greece, Malta and Luxembourg, which are not members of UPOV. Italy and Portugal are parties to the 1978 Act of the UPOV Convention.

*governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights.»* According to this paragraph every Party will finally choose options according to its needs, priorities and legislation.

- Nevertheless the ATHEG should, based on the inventory, develop proposals realizing the full right farmers have to save, use, exchange and sell farm-saved seed/propagating material. Options that only partially implement this right (e.g. limited to save and use protected seeds) while at the same time prohibiting another part of the right do not fulfil this requirement.
- In particular, options developed should also create synergies with the implementation of UNDPOP and the Convention on Biological Diversity which are widely supported by the majority of the Treaty parties. In both cases the Treaty Parties were present during the drafting process.