The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

INFORMATION ON POSSIBLE INTERRELATIONS BETWEEN THE INTERNATIONAL TREATY AND RELEVANT INTRUMENTS OF UPOV AND WIPO

Note by the Secretary

*This document contains the submission by **Berne Declaration and Third World Network** on possible interrelations between the International Treaty, in particular its Article 9 (Farmers' Rights), and the relevant instruments of UPOV and WIPO.*

*The submission is presented in the form and language, in which it was received on **28 November 2014**.*

Information on interrelations between the International Treaty, especially its Article 9, and relevant instruments of UPOV and WIPO, pursuant to Resolution 8/2013

28th November 2014

Dr. Shakeel Bhatti
Secretary
International Treaty on Plant Genetic Resources
for Food and Agriculture (ITPGRFA)
by email: PGRFA-Treaty@fao.org

Dear Dr. Bhatti,

Thank you very much for giving us the opportunity to send you information about the interrelations between the International Treaty, especially its Article 9, and relevant instruments of UPOV and WIPO, pursuant to Resolution 8/2013.

Please find attached a submission by the Berne Declaration and Third World Network. This Submission is supported by the African Centre for Biosafety (ACB) & Southeast Asia Regional Initiatives for Community Empowerment (SEARICE).

Yours sincerely,

Berne Declaration & Third World Network

SUBMISSION BY BERNE DECLARATION & THIRD WORLD NETWORK

Supported by the African Centre for Biosafety (ACB) & Southeast Asia Regional Initiatives for Community Empowerment (SEARICE)

Introduction

"Farmers' Rights" is a core component of the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as "the Treaty"), and as such its full implementation is a pre-requisite to achieving the Treaty objectives. However, there is much concern that the instruments and/or activities of UPOV and WIPO are not supportive of Farmers' Rights, and even undermine those rights, thereby hindering implementation of the Treaty provisions.

Thus the upcoming work on Resolution 8/2013 should question the way in which way UPOV and WIPO supports or hinders implementation of Article 9 of the Treaty. Further it will be crucial to propose solutions in order to eliminate the contradictions.

Article 9 of the Treaty

The identification of interrelations was made in the context of Implementation of Article 9, which pertains to Farmers' Rights as such the starting point should be to understand the scope of Article 9 of the Treaty.

Article 9.1 states that Parties to the Treaty "recognize 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".

Article 9.1 is essentially recognition of the important past contributions of farmers as well as an acknowledgement of the important role they will play not only in the conservation but also the "development of plant genetic resources" which constitute the foundation for food and agriculture globally.

Existing literature provides irrefutable evidence of the contribution of farmers particularly small-scale farmers to the development of PGRFA as well as to food security.[1]

Article 9.2 places the responsibility of realizing Farmers Rights in the hands of national governments. It further states that each party should "as appropriate" and "subject to national legislation", "take measures to protect and promote Farmers' Rights ***including***"

(a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;

(b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and

[1] Putting family farmers first to eradicate hunger, FAO Press Release (16 October 2014). Available at

(c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

Article 9.2(c) should not be read as being applicable only to decision making processes at the national level. Regional and international processes often result in agreements with far reaching impacts at the national level. Thus Article 9.2(c) should be interpreted as including participation in processes, which will directly affect the national level.

The use of "including" suggests that **the list** of what is considered to be Farmers' Right **is non-exhaustive/open.**

Further though not mentioned in Article 9.2, the Preamble recognizes the most fundamental aspect of Farmers' Rights. It states: "***Affirming also that the 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 level***".

The importance of this fundamental aspect is reinforced by Article 9.3 which states: "Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate".

Thus the right to freely save, uses, exchange and sell farm-saved seed and other propagating material should be considered to be an important right of farmers.

Further throughout the Treaty there are various aspects, which are important with regard to ***implementation of Farmers' rights*** such as:

- Article 6.1(a): pursuing fair agricultural policies that promote, as appropriate, the development and maintenance of diverse farming systems that enhance the sustainable use of agricultural biological diversity and other natural resources;

- Article 6.1(c): promoting, as appropriate, plant breeding efforts which, with the participation of farmers, particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas;

- Article 6.1(d): broadening the genetic base of crops and increasing the range of genetic diversity available to farmers;

- Article 6.1(e): promoting, as appropriate, the expanded use of local and locally adapted crops, varieties and underutilized species;

- Article 6.1(f): supporting, as appropriate, the wider use of diversity of varieties and species in on- farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development; and

- Article 6.1(g): reviewing, and, as appropriate, adjusting breeding strategies and regulations concerning variety release and seed distribution.

Implementation of these elements is fundamental to the realization of farmers' rights.

A. INTERRELATION BETWEEN UPOV AND THE TREATY WITH REGARDS TO IMPLEMENTATION OF FARMERS RIGHTS

A.1. The right to save, use, exchange and sell farm-saved seed and other propagating material.

It is noted in the preamble of the Treaty that the right to save, use, exchange and sell farm-saved seed and other propagating material is fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at the national and international level. As such it is a crucial farmers' right.

There are major differences between the UPOV Acts of 1978 and 1991 regarding the right to save, use, exchange and sell farm-saved seeds and propagating materials. Relevant features of UPOV's instruments (the scope of breeders' rights and exceptions) and the implications for farmers' right to save, use, exchange and sell farm-saved seed and other propagating material are discussed below.

UPOV 1978

Article 5 of UPOV 1978, provides for breeders' rights however limited to "production for purposes of commercial marketing, the offering for sale and the marketing of the reproductive or vegetative propagating material, as such, of the variety". It is generally accepted that farmers using the protected varieties have the freedom to save and exchange farm-saved seed/propagating material. However the sale of the propagating material of the protected variety needs the authorization of the right holder. **In contrast to UPOV 1991 (discussed below), UPOV 1978 offered greater leeway to implement farmers' rights. It is worth noting that though UPOV 1978 provided more flexibility, there are limitations to implementation of farmers' rights.**

For example Section 39(1)(iv) of the Indian PVP Law states: "a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act: "Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act."

UPOV was not convinced of the conformity of the Indian PVP legislation with the 1978 Act. It said in its comment on the legislation: "An explanation is needed on how the possibility for a farmer to "exchange, share or sell his farm produce including seed" can be reconciled with Article 5(1) of the 1978 Act, which requires the breeder's prior authorization for the production for purposes of commercial marketing, offering for sale or the marketing of the reproductive or vegetative propagating material, as such, of the variety."[2]

[2] See UPOV Doc. CC/64/2. Available at http://www.upov.int/restrict/edocs/mdocs/upov/en/cc/64/cc_64_2.pdf

In any case the ratification of UPOV 1978 is no longer possible for *new* members joining UPOV. New members have to be in line with UPOV 1991. UPOV members that have only ratified the 1978 Act do not have any obligation to ratify the Act of 1991.

UPOV 1991

UPOV 1991 greatly expands the scope of breeders' rights and severely limits farmers' rights. Breeders' rights are expanded to "producing, conditioning, offering for sale, selling or other marketing, exporting, importing or stocking for purposes of propagating material of the variety"[3]. These rights also extend to acts in relation to harvested material if obtained through an unauthorized use of propagating material, unless the breeder has had reasonable opportunity to exercise his/her right in relation to the said propagating material[4].

An optional exception to breeders' right is provided under Article 15.2 of UPOV 1991 which states: "to be defined in national law, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, […] 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."

UPOV advocates the following interpretation for this article: "The Diplomatic Conference recommendation indicates that the optional exception was aimed at those crops where, for the member of the Union concerned, *there was a common practice of farmers saving harvested material for further propagation*. […] The wording 'product of the harvest' indicates that the *optional exception may be considered to relate to selected crops where the product of the harvest is used for propagating purposes, for example small-grained cereals where the harvested grain can equally be used as seed* i.e. propagating material. […] Examples of factors which might be used to establish reasonable limits and to safeguard the legitimate interests of the breeder are the size of the farmer's holding, the area of crop concerned grown by the farmer, or the value of the harvested crop. Thus, '*small farmers' with small holdings (or small areas of crop) might be permitted to use farm-saved seed to a different extent and with a different level of remuneration to breeders than 'large farmers'*. […] For those crops where the optional exception is introduced, a requirement to provide remuneration to breeders might be considered as a means of safeguarding the legitimate interests of the breeders."[5]

It is important to note that the exception only allows a farmer using a protected variety, to save seed and replant on his/her own holdings. Exchange and sale of seeds or propagation material is not allowed. This really limited exception is subject to conditions (e.g. payment of remuneration). Further following the interpretation contained in UPOV's guidance, application of this limited exception is limited to certain circumstances.

Another relevant exception to discuss is Article 15(1)(i) which states breeders' rights shall not extend to "acts done privately *and* for non-commercial purposes".

The Article itself does not define the scope of the exception. UPOV's guidance and interpretation of the scope of the exception is extremely restrictive and narrow. UPOV Guidance states that the exception covers: "[….]acts which are *both* of a private nature *and*

[3] Article 14(1) of UPOV 1991.
[4] Article 14 (2) of UPOV 1991.
[5] Guidance for the Preparation of Laws based on the 1991 Act of the UPOV Convention (UPOV/INF/6/3), available at http://www.upov.int/edocs/infdocs/en/upov_inf_6_3.pdf

for non-commercial purposes are covered by the exception. Thus, non-private acts, even where for non-commercial purposes, may be outside the scope of the exception [….]. Furthermore, […] private acts which are undertaken for commercial purposes do not fall within the exception. Thus, a farmer saving his own seed of a variety on his own holding might be considered to be engaged in a private act, but could be considered not to be covered by the exception if the said saving of seed is for commercial purposes. The wording [….] suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden (i.e. no material of the variety being provided to others), since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop *to be consumed entirely by that farmer and the dependents of the farmer living on that holding*, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example "subsistence farming", where these constitute acts done privately and for non- commercial purposes, may be considered to be excluded from the scope of the breeder's right, and farmers who conduct these kinds of activities freely benefit from the availability of protected new varieties."[6]

This interpretation is extremely limited. Even the multiplication of the protected variety to produce food crop to be consumed by a neighbor (not living on the holding) is not seen as falling within the scope of the exception. The interpretation applied by UPOV does not address the needs and realities of subsistence farmers, which do in their daily lives, exchange seeds/propagating material with neighbors and sell seeds at the local market.

In response to increasing criticisms over the adverse implications of UPOV's provisions for farmers' rights, in October 2014, UPOV's Council adopted the following Question and Answer as part of a list of "Frequently Asked Questions"[7].

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

APBREBES[8] report called the response "legally incorrect and deliberately misleading". It argued that the response cannot be supported by the interpretation of Article 15(1) that has been applicable thus far or the practices of UPOV, which has consistently rejected national draft PVP legislation that allow exchanges of seeds/propagating material. In addition, there are conditions incorporated in the Response (such as such "the legitimate interests of the breeders are not significantly affected" or "in the occasional case") that cannot be justified under Article 15(1). Further, the Response is also not supported by the text of Article 15(2) of the Act.

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[6] Guidance for the Preparation of Laws based on the 1991 Act of the UPOV Convention (UPOV/INF/6/3), available at http://www.upov.int/edocs/infdocs/en/upov_inf_6_3.pdf

[7] See http://www.upov.int/about/en/faq.html#Q1

[8] See APBREBES Report on the UPOV Autumn Session, Newsletter Issue #11 November 18, 2014, available at http://www.apbrebes.org/files/seeds/files/newsletter11%2018nov2014short.pdf

APBREBES argues that the suggestion that each UPOV Contracting Party has flexibility to interpret Article 15 of the 1991 Act, which concerns exceptions to breeders' rights, is misleading. When examining conformity of national PVP legislations with the 1991 Act, the UPOV Secretariat tends to require strict compliance with the content of the 1991 Act, refusing to accept any interpretation of the exception, other than the narrow interpretation contained in the UPOV Guidance.

APBREBES gives the example of Malaysia. In examining the conformity of national PVP legislations with UPOV 1991 (e.g. in the case of Malaysia), the Secretariat expressly stated "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 the Malaysian Protection of New Plant Varieties Act which contained the following exception "any exchange of reasonable amounts of propagating materials among small farmers".[9]

The discussion shows that the provisions of UPOV 1991 are not conducive for the implementation of the right to freely use, save, exchange and sell seed/propagating material.

UPOV has consistently disapproved of provisions in national legislation that promote the freedom to save, exchange and sell seed/propagating material, even if among small-scale farmers. One such example is that of Malaysia.

In the case of Philippines, UPOV found the farmers exception in Section 34(d) of the PVP legislation to be incompatible with the 1991 Act. Section 34(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 sell 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."[10]

UPOV in its comments notes *inter alia* that "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"[11]. UPOV also calls for the Section to be amended.

Alternative Sui Generis PVP Legislations

Several countries (e.g. India, Malaysia, Thailand, Ethiopia) have opted to depart significantly from the one-size fits all model of UPOV 1991 and adopt innovative national PVP legislations that balance the different interests (public interests, interests of commercial breeders and the interests of small-scale farmers), as well as implements the requirements and obligations of the Treaty, the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access and Benefit Sharing.

[9] See UPOV document C(Extr.)/22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf
[10] See UPOV Doc. C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf.
[11] See UPOV Doc. C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf

This shows it is entirely possible to put in place a sui generis PVP legislation that advances implementation of Article 9. However it has also been shown in section A6 below that there are significant pressures on Treaty Members to adopt the UPOV 1991 model and forgo farmers' rights.

It would be beneficial if the joint expert report would include comparison between UPOV Acts and non-UPOV PVP laws regarding implementation of farmers' rights.

In summary:

UPOV 91 hinders implementation of farmers' right to freely use, save, exchange and sell seeds/propagating material, which is fundamental to the realization and promotion of farmers' rights). When using a protected variety, farmers may save the seeds for replanting on their own holdings, but this Article 15(2) exception is restricted to seeds of certain crops grown on their own farm, and even in this case remuneration to breeders may be required to safeguard the legitimate interests of the breeders. Farmers are prohibited to sell and exchange farm-saved seeds/propagating material.

The effects of restrictions on farmers' right to freely use, save, exchange and sell seeds/propagating material can be quite devastating. A human rights impact assessment of UPOV (hereinafter referred to as "HRIA of UPOV") that examined the potential impact of UPOV in Philippines, Peru and Kenya concludes that "UPOV 91 restrictions on the use, exchange and sale of farm-saved PVP seeds will make it harder for resource-poor farmers to access improved seeds. This could negatively impact on the functioning of the informal seed system, as the beneficial inter-linkages between the formal and informal seed systems will be cut off. Moreover, selling seeds is an important source of income for many farmers. From a human rights perspective, restrictions on the use, exchange and sale of protected seeds could adversely affect the right to food, as seeds might become either more costly or harder to access. They could also affect the right to food, as well as other human rights, by reducing the amount of household income which is available for food, healthcare or education".[12]

To facilitate implementation of Article 9 of the Treaty, it would be important to revise UPOV 1991 and provide greater flexibility to governments to implement the right to freely use, save, exchange and sell farm-saved seed/propagating material.

A.2 The right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture (Article 9.2(b))

Disclosure of origin and evidence of compliance with access and benefit sharing requirements in IP applications is widely seen as a crucial tool to prevent misappropriation of genetic resources and traditional knowledge[13] and to facilitate implementation of prior informed consent and fair and equitable benefit sharing arising from the utilization of the genetic resources or traditional knowledge. There are numerous documented cases of such misappropriation.[14] For example with regard to PGRFA, Hammond found that Seminis (a

[12] "Owning Seeds, Accessing Food - A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines", October 2014. Available at http://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf

[13] ibid, p. 42

[14] McGown, J., (2006). "Out of Africa: Mysteries of Access and Benefit Sharing", Edmonds Institute, Washington, available

subsidiary of Monsanto) planted farmers' carrot seeds from Turkey, and through a simple process of selection – mainly selecting plants that were slow to bolt and which had a desirable root shape and shade of purple (associated with health benefits) – emerged with a new carrot variety over which it has obtained PVP protection in the United States and Europe[15].

Hammond also highlights the case of a purple rice variety named Blanca Isable protected by plant breeders' rights, and promoted by Rush Rice Products. Research publications state the variety owes its color and other characteristics to "Hitan Kitan", a Sri Lankan farmers' variety. Hammond concludes: "In the case of Blanca Isabel, the willingness of the US Plant Variety Protection Office.....to grant intellectual property (plant breeder's rights in this case) over a seed whose salable traits are of an essentially unknown origin has led to biopiracy. Blanca Isabel thereby illustrates the importance of requiring disclosure of origin of genetic resources in plant breeder's rights application".[16]

Disclosure requirements have been incorporated into IP legislations in many countries, and have been advocated by many different countries in international forums such as the World Trade Organization (WTO), the Convention on Biological Diversity (CBD) and the World Intellectual Property Organization (WIPO).

In the case of UPOV, in 2003 its Council in a reply to the Executive Secretary of the CBD stated: "[I]f a country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection […..] With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, […] the UPOV Convention requires that the breeder's right should not be subject to any further or different conditions than [distinctness, uniformity, stability and novelty] in order to obtain protection".[17]

The effect of this reply is that national legislations that incorporate disclosure requirements as a condition for plant variety protection would be considered to be inconsistent with the 1991 Act. See the examples of Malaysia and Peru below in Section A.6.

In summary: As UPOV has taken the position that disclosure requirements are incompatible with its provisions, UPOV reduces countries' ability to effectively implement their obligations (including the obligation for a fair and equitable benefit-sharing) under the Treaty, the CBD and its Nagoya Protocol as well as under the UN Declaration on the Rights of Indigenous Peoples.

Further UPOV does not have any mechanism to prevent misappropriation and facilitate benefit-sharing arising from the utilization of plant genetic resource developed by farmers.

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at http://bit.ly/1uSCXHa; Hammond, E., (2013). "Biopiracy Watch: A compilation of some recent cases", Vol. 1. Third World Network, Penang; Hammond, E. (2014), "Biopiracy of Turkey's purple carrot", Third World Network, Penang, available at http://www.twn.my/title2/intellectual_property/info.service/2014/ip140212.htm

[15] Hammond, E., (2014). "Biopiracy of Turkey's purple carrot", Third World Network, Penang, available at http://www.twn.my/title2/intellectual_property/info.service/2014/ip140212.htm

[16] Hammond, E., (2014). „Mardi Gras Misappropriation: Sri Lankan Purple Rice Served up at Louisiana Celebration", Third World Network, available at http://www.twn.my/title2/intellectual_property/info.service/2014/ip141005.htm

[17] UPOV (International Union for the Protection of New Varieties of Plants). 2003. Access to genetic resources and benefit-sharing. Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD). Geneva, available at www.upov.int/export/sites/upov/news/en/2003/ pdf/cbd_response_oct232003.pdf

To facilitate implementation of Article 9.2(b) of the Treaty, disclosure requirements in PVP applications are imperative. This will require a change in UPOV's position on that matter.

A.3 <u>The recognition of 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. (Article 9.1)</u>

The word "farmer" does not appear in UPOV 1978, while in UPOV 1991, "farmer" is only mentioned in Article 15.2 with regard to the limited farm-saved seed exception. There is nothing in the Acts, which could be interpreted as recognition of the contribution farmers, local and indigenous communities have made and continue to make with regard to plant genetic resources. Such recognition or consideration of farmers' rights is similarly lacking with regard to decisions taken during UPOV Sessions as well as the activities of the UPOV Secretariat.

Instead the UPOV's instruments and activities are heavily tilted in favour of commercial breeders, to the detriment of farmers' rights and interests. For example, most varieties bred by farmers, (and which tend to be not uniform or stable), could not be protected under UPOV (according Article 5 of UPOV 1991 breeder's right shall only be granted where the variety is novel, distinct, uniform and stable).

Further the definition of "novelty" in UPOV 1991 is narrow. If a variety "has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety" (Art. 6 UPOV 1991) it is considered to be "new". This suggests varieties in farmer fields may not destroy novelty. This facilitates misappropriation of farmer varieties.

Another inequality, which could be observed, is regarding essentially derived varieties (EDVs). Article 14(a) of UPOV 1991 extends breeders' rights to varieties, which are essentially derived from the protected variety. This means that if a farmer makes a small derogation from a protected variety (e.g. by selection), he needs authorization from the breeder (of the protected variety) to commercialize the newly bred variety (which would be considered to be an EDV). The given rationale for EDVs is to prevent claims for plant 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 rights. As noted above, UPOV refuses to allow the introduction of a disclosure of origin requirement and does not have any mechanism to prevent misappropriation and facilitate benefit sharing arising from the utilization of plant genetic resource developed by farmers.

In addition, as discussed above, UPOV undermines the exercise of farmers' right to freely use, save, exchange and sell seeds/propagating material which facilitated farmer experimentation and breeding, that has underpinned their contribution to the conservation and development of plant genetic resources.

In summary: UPOV's instruments and activities fail to give due recognition to the contribution of local, indigenous communities and farmers, or acknowledge their continuing important role in the development of plant genetic resources. Its instruments (especially UPOV 1991) while safeguarding the interests of commercial breeders are detrimental to the interests local and indigenous communities as well as farmers.

A.4 The protection of traditional knowledge relevant to plant genetic resources for food and agriculture (Article 9.2(a))

The HRIA of UPOV[18] shows that traditional knowledge is applied by farmers in the selection, preservation and storing of seed. Traditional knowledge is the basis of local innovation and in situ seed conservation. It is also the basis of the informal seed system, which is crucial to achieve food security in many developing countries.[19] Relevant literature confirms the importance of traditional knowledge especially traditional knowledge held by women for food security and conservation of agrobiodiversity.[20]

However the wealth of practices that farmers use and develop at the local level, including the preservation, sustainable use and creation of agrobiodiversity goes largely unnoticed and unacknowledged by UPOV. UPOV 1991 does not acknowledge farmer know-how regarding varietal selection nor the knowledge systems of women in the management of plant genetic resources. Farmers' varieties in most cases cannot be protected (as they often cannot meet the uniformity or stability criteria). There is no provision recognizing that breeders have (over generations) been sourcing and continue to source their genetic material from farming communities. In addition, UPOV does not allow disclosure of origin and legal provenance in PVP applications – an important tool to deal with misappropriation of traditional knowledge and nor does it have any mechanism to facilitate benefit sharing arising from the utilization of plant genetic resource developed by farmers (see above A2).

Moreover implementation of UPOV 1991 restrictions on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and seed preservation.[21] They would also gradually lose their ability to make informed decisions about what to grow and on which type of land, how to respond to pest infestation, or how to adapt their seed system to changing climatic conditions.[22] The process of "deskilling" of farmers – which is already underway with the decline of local agrobiodiversity – could become more acute with restrictions on use of seeds introduced through UPOV 91-style laws.[23]

In summary: UPOV does not protect traditional knowledge relevant to PGRFA. In fact the UPOV system which was crafted to further the interests of commercial breeder and its

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[18] Owning Seeds, Accessing Food - A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, October 2014. Available at http://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf

[19] See for example Joseph M. Wekundah, Why Informal Seed Sector is Important in Food Security, published by the African Technology Policy Studies Network (ATPS), Nairobi 2012

[20] IAASTD (International Assessment of Agricultural Knowledge, Science and Technology for Development). 2009. *Synthesis Report – A Synthesis of the Global and Sub-Global IAASTD Reports* (edited by B. McIntyre). Island Press, Washington, D.C; FAO (Food and Agriculture Organization). 2005b. Building on Gender, Agrobiodiversity and Local Knowldege – a training manual. FAO, Rome. www.fao.org/sd/links/documents_download/ manual.pdf

[21] Owning Seeds, Accessing Food - A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, October 2014. Available at http://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf

[22] ibid

[23] ibid

restrictions on saving, exchanging and selling protected seeds could have a detrimental effect on the protection of traditional knowledge.

A.5 The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture (Article 9.2 (c)

As explained above UPOV (especially the 1991 Act) is a restrictive regime. To be a member of the UPOV family, the PVP law has to conform strictly with the 1991 Act. It offers limited flexibility to governments to implement provisions that governments feel are necessary to implement the Treaty obligations. Thus once a country decides to join UPOV 1991 (and as shown below (A.6) there is enormous pressure on countries to adopt UPOV 1991), any participation in decision-making related to the conservation and sustainable use of PGRFA is of limited value.

The HRIA of UPOV[24] examined the extent of participation of farmers and farmer organizations in the drafting of national PVP laws. Findings from case studies in Peru, Kenya and the Philippines showed that processes for drafting the national PVP law were deficient in all three countries. Nevertheless, comparing the three case studies, it also found that in the case of Philippines, the law was amended by the Parliament to include exceptions to breeders' rights in order to better protect farmers' rights. This is probably not a coincidence, because the process in the Philippines was the only one where adherence to UPOV 1991 was not an implicit goal of the reform of the PVP law. If it had been the implicit goal, there would have been almost no room for manoeuvre, because the law would have to be in compliance with UPOV 1991. In such a case, even if stakeholders are consulted, they would not have had a big impact, as UPOV 91 does not allow much flexibility in national implementation.

For a meaningful participatory process with regard to PVP law, it is crucial to undertake thorough consultations as well as objective and evidence based investigations on the type of PVP regime (if any) that is suitable for the agricultural conditions prevailing in the country. Such a process would also objectively enquire and assess the suitability of UPOV 1991 as the basis for the national PVP law.

However often amid the pressure applied by donor countries and international entities, consultations with farmers at the national level (when they do take place) tend to be superficial and often about trying to explain to farmers the benefits of UPOV 1991 while disregarding any concerns that farmers or their representatives may have.

Further when a developing country wishes to design a legal framework for PVP, it is likely to seek assistance from the UPOV Secretariat, thinking it would receive objective advice from the Secretariat. Sometimes, a developing country approaches the WIPO Secretariat for assistance, however WIPO would also refer the country to the UPOV Secretariat.

UPOV's mandate is to promote UPOV 1991 and thus its assistance is focused on how to develop a legal framework based on UPOV 1991. In providing technical assistance UPOV does not objectively evaluate the suitability of UPOV 1991 for the particular country, thus this one-size fits all model is to promoted equally to all countries (developed, developing countries and LDCs) irrespective of the size of the formal sector, the type of agricultural system, the existence of a commercial market, local commercial breeders and seed industry. It

[24]Owning Seeds, Accessing Food - A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, October 2014 - Page 37ff, more references are included in the original text, available at http://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf

has been noted above, that if the starting point for developing a PVP legal framework is UPOV 1991, participation in decision-making processes is of limited value as there is limited flexibility with regard to national implementation.

Apart from the lack of evaluation, in providing technical assistance and support UPOV also does not require the beneficiary country (where such a country is a member of the Treaty) to guarantee participation of farmers in decision-making processes. In fact, UPOV is known to support processes that are not participatory or inclusive of farmers or their representatives.

For example the UPOV Secretariat has provided extensive technical assistance to the African Regional Intellectual Property Organization (ARIPO) on the development of a regional protocol on plant variety protection. The UPOV Secretariat prepared the draft ARIPO Protocol on plant variety protection[25], participated as experts in various ARIPO meetings as well as assisted/cooperated with, ARIPO to organize at least two regional workshops on the same matter. However the entire process has been criticised for being dominated by foreign interests (e.g. the US Patent & Trademark Office (USPTO), the Community Plant Variety Office of the European Union (CPVO) and the seed industry (e.g. the African Seed Trade Association (AFSTA) and the French National Seed and Seedling Association (GNIS)) and failing to adequately inform and include farmers groups from across the ARIPO region[26].

Regional processes have significant implications nationally. The draft ARIPO Protocol is about adopting a centralized system for the grant and administration of PBRs modelled on UPOV 1991. Issues such as compulsory licenses, cancellation and nullification that are usually in the hands of national governments, would be determined centrally by the ARIPO authority. This raises questions about national sovereignty, implications for national agricultural systems including the informal seed sector and farmers. As such it would be imperative for the entire process of developing the draft ARIPO Protocol to be transparent and inclusive at the national as well as at the regional level. However as noted above, participation at the regional level was not inclusive.

At the national level, discussions on the draft ARIPO Protocol were similarly not transparent or inclusive. For example, the HRIA of UPOV[27] found in Kenya (a ARIPO member) organizations such as the Kenya National Federation of Farmers Union (KENFAP) were not aware of, involved in or consulted in the ARIPO process. Further although informed observers expressed concern that implementation of UPOV 91 would have "significant adverse consequences for small-scale farmers that dominate the agricultural landscape of ARIPO Member States (including Kenya), as well as for food security, agricultural biodiversity, and national sovereignty in Africa", the Kenyan research team of the HRIA could find no evidence that the government mandated any assessments of the likely impacts of the UPOV 91 based draft ARIPO Protocol.

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[25] ARIPO Document (ARIPO/CM/XIII/8) dated 30th September 2011 prepared for the 13th session of the Council of Ministers in Ghana states: 'Following the decision of the Council of Ministers, the ARIPO Secretariat requested technical assistance from UPOV in the preparation of policy and legislative frameworks on the protection of new varieties of plants. As a result of the request, UPOV prepared draft legislative framework for the Organization.'

[26] AFSA Press Release (3 November 2014): AFSA Appeals to ARIPO Member States For Postponement of Diplomatic Conference and National Consultations, available at http://afsafrica.org/afsa-appeals-to-aripo-member-states/; AFSA Press Release (3 April 2014) AFSA Strongly Condemns Sleight of Hand Moves By ARIPO to JOIN UPOV 1991, Bypass National Laws and Outlaw Farmers' Rights, available at http://afsafrica.org/afsa-strongly-condemns-sleight-of-hand-moves-by-aripo-to-join-upov-1991-bypass-national-laws-and-outlaw-farmers-rights/; AFSA Press Release (6th October 2014) ARIPO's Plant Variety Protection Law Based on UPOV 1991 criminalises Farmers' Rights and Undermines Seed Systems in Africa, available at http://afsafrica.org/aripos-plant-variety-protection-law-based-on-upov-1991-criminalises-farmers-rights-and-undermines-seed-systems-in-africa/

[27] Owning Seeds, Accessing Food - a human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines, October 2014 – page 37, more references are included in the original text.

The draft ARIPO Protocol has raised significant concerns because of the flawed, non-participatory and un-transparent process, whereby the views and interests of small-scale farmers which dominate more than 80% of the agricultural systems of ARIPO member states has not been taken into account.[28] The draft Protocol is also considered to be unbalanced and not suitable for ARIPO's 19 member states (13 of which are least developed countries). Concern has also been raised that the content of the draft ARIPO protocol undermines the Treaty and the Convention on Biological Diversity, as it limits the ability of the Members to those instruments to effectively and fully fulfil obligations undertaken.[29]

In view of these criticisms, UPOV should have insisted for the ARIPO processes to be participatory and to ensure that farmers across the ARIPO region participate in the decision-making processes for the development of the draft PVP Protocol. However this was not the case, although UPOV has had significant influence over the ARIPO process.

From the above discussion, it is apparent that UPOV enables and supports the non-fulfilment of the Treaty obligations under Article 9.

It is worth recalling that the UN Special Rapporteur on the Right to Food has also recommended that governments: "Put in place mechanism ensuring the active participation of farmers in decisions related to the conservation and sustainable use of plant genetic resources for food and agriculture particularly in the design of legislation covering…. the protection of plant varieties so as to strike the right balance between the development of commercial and farmers' seed systems"[30]

In addition, in sharp contrast to practices of other international bodies such as WIPO, the Convention on Biological Diversity and the FAO Seed Treaty that encourage participation of a broad spectrum of stakeholders and interests, UPOV has a high number of observers representing private sector interests, as opposed to those focused primarily on the public interest in food security and sustainability. In particular participation of farmers inside UPOV is weak. Until recently, participation in UPOV was dominated by the seed industry.

On 21st October 2009, UPOV's Consultative Committee rejected application by the European Coordination Via Campesina (ECVC) for observer status in UPOV Bodies[31]. ECVC is a member of Via Campesina, the biggest international movement of peasants, small- and medium-sized producers, landless, rural women, indigenous people, rural youth and agricultural workers. This decision was overturned in 2010.

However in 2012, the UPOV Council adopted new observer rules, which will exacerbate the current imbalance in the representation of stakeholder groups. For example, a new rule is that "In the case of an international NGO with different coordination entities, observer status will

[28] Civil Society Concerned With ARIPO 's Draft Regional Policy and Legal Framework for Plant Variety Protection. See www.tinyurl.com/a4v5gte; AFSA's Comments on ARIPO's Responses to civil Society: Draft Legal Framework for Plant Variety Protection. http://www.acbio.org.za/images/stories/dmdocuments/AFSA-letter-ARIPO-March2014%20.pdf; AFSA Submission for Urgent Intervention in respect to Draft ARIPO Protocol. http://tinyurl.com/ka2ad7k

[29] Ibid. See also Civil Society Letter to UPOV Members on the ARIPO's Draft Protocol for the Protection of New Varieties of Plants ("DRAFT Protocol") Undermines Farmers' Rights, Lacks Credibility & Legitimacy, 9th April 2014. Available at http://www.apbrebes.org/files/seeds/Open%20Letter%20to%20UPOV%20Members%20on%20ARIPO.pdf

[30] See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation"

[31] See http://viacampesina.org/en/index.php/main-issues-mainmenu-27/biodiversity-and-genetic-resources-mainmenu-37/782-upov-denies-participation-to-farmers-and-civil-organizations

be granted to only one coordination per organization". Such provision is not found in the rules of any other international organization. This rule was aimed at targeting farmer groups such as La Via Campesina, which has "regional coordination entities" as part of its structure.

In 2010, only the European Coordination of La Via Campesina (ECVC) obtained observer status at UPOV bodies. The new rule will prevent other coordination entities such as Latin American Coordination of Countryside Organizations (CLOC-Via Campesina) from obtaining observer status although La Via Campesina is the biggest and most important organization of farmers worldwide.

In contrast regional and sectoral organisations of the seed industry are allowed. Companies such as Monsanto or Syngenta are represented several times. Syngenta for example is represented in UPOV by CropLife, the International Seed Federation, the European Seed Association, CIOPORA, the African Seed and Trade Association and the Asian and Pacific Seed Association. This multiple representation of multinational seed companies does not pose any problem to UPOV, but the small and only potential possibility of a double representation of a farmer organization inspired UPOV to adopt a new rule to prevent such double representation.

In summary: UPOV is involved in many processes on national and regional level where the farmers right to participate in making decisions on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture is ignored.

In our view, UPOV should only take part in national and regional discussions when it is secured that the process is in line with Article 9.2 (c) of the Treaty and the participation of farmers in the decision-making process guaranteed.

A.6 Pressure to Give Up Farmers' Rights

It is often argued that the responsibility for realizing farmers' rights rests with national governments. In short, Treaty members are free to implement Farmers' rights should they wish to do so. In reality, the situation is very different.

Today there is enormous pressure on developing country governments to adopt the UPOV 1991 model for the protection of plant varieties. In particular developed countries negotiating bilateral and regional North-South free trade agreements make it a requirement for developing countries to adopt the UPOV 1991 model and/or become a party to the 1991 Act[32]. Donors (e.g. Japan, US, EU) also provide aid on condition that the beneficiary country adopts the UPOV 1991 model. Further, as shown below, WIPO which is one of the biggest provider of technical assistance on IP also stresses on adoption of the UPOV 1991 legal framework. This pressure is accompanied with one-sided (and oftentimes even inaccurate or misleading) information about the benefits of the UPOV system. Usually no information is provided on alternative sui generis pvp systems, the importance of the informal sector or on the Treaty or farmers' rights.

Countries joining UPOV 1991 have very little room to maneuver. Article 34(3) of the 1991 Act requires new Members to present its legislation to the UPOV Council "to advise it in

[32] GRAIN (18 November 2014), Trade deals criminalise farmers seed, available at http://www.grain.org/article/entries/5070-trade-deals-criminalise-farmers-seeds . See also http://www.grain.org/attachments/3247/download

respect of the conformity of its laws with the provisions of this Convention". Only if the decision is positive (in conformity) can the said country become a Member of UPOV 1991. To assess conformity, the UPOV Secretariat peruses the country's legislation, rejecting any clause that in its view is inconsistent with its understanding of the 1991 Act.

A case on point is that of Malaysia which acceded the Treaty in 2003. In its 2004 PVP law[33], Malaysia incorporated exceptions to breeders' rights intended to safeguard farmers' rights. This includes: "any exchange of reasonable amounts of propagating materials among small farmers" (Section 31(1)(e)) and "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" (Section 31(1)(f). Further Section 12 of the PVP law also requires an applicant to disclose the source of the genetic material or the immediate parental lines of the plant variety; application 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; application be supported by documents relating to the compliance of any law regulating access to genetic or biological resources. The Malaysian PVP law adopts many of the UPOV 1991 provisions, but it also includes provisions to accommodate aspects of farmers' rights.

However Malaysia is continuously under pressure to dismantle the provisions on farmers' rights by joining UPOV 1991.[34] In 2005, under pressure to become a member of UPOV 1991, Malaysia submitted its legislation to the UPOV Council for assessment of conformity with UPOV 1991. The Secretariat recommended significant changes to the entire text including deleting Section 31(1)(e) and removing Section 31(1)(f) from the list of exceptions.[35] It also did not accept disclosure requirements in Section 12. Presently in the context of the Trans Pacific Partnership Agreement negotiations, Malaysia is being asked to ratify UPOV 1991, and should it do so, Malaysia would have to remove from its PVP legislation provisions that safeguard farmers' rights.[36]

Another case is that of Peru, also a member of the Treaty. The disclosure requirement was initially integrated into the Peruvian PVP regulation[37]. Article 15(e) of the PVP regulation stated that applications for granting a Breeder's Certificate shall contain "the geographical origin of the raw plant material of the new variety to be protected, including, as the case may be, the document that proves the legal origin of the genetic resources, issued by the Competent National Authority as regards access to genetic resources". Ten years later the US-Peru FTA, signed on 12 April 2006, forced Peru to join UPOV 1991 by 2008. In order to fulfill the requirement of the US-Peru FTA, Peru changed its PVP regulation and deleted Article 15 (e). The new draft decree was examined by the UPOV Council on 3 April 2009 and it concluded that the draft was in conformity with the provisions of UPOV 91. Clearly in view of UPOV Council's position on disclosure, it was most likely that Article 15 (e) of the Peruvian PVP regulation would not be accepted if Peru were to ask the UPOV Council to advise it in respect of the conformity of its laws with UPOV 91.

[33] Malaysia's Protection of New Plant Varieties Act 2004 Act 634.
[34] For example in the context of the US-Malaysia Free Trade Agreement negotiations (presently suspended). See also Proposed Malaysia-United States Free Trade Agreement (MUFTA): Implications for Malaysian Economic and Social Development, Third World Network, available at ww.twn.my/title2/par/MUFTA.doc
[35] See UPOV document C(Extr.)/22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf
[36] https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf
[37] Supreme Decree 008-1996-ITINCI of May 1996, based on Decision 345 of the Andean Community.

The lack of a disclosure requirement in its PVP legislation, reduces the ability of Peru to fulfil its obligations under the Treaty, the CBD and the Nagoya Protocol, and allows for PVP rights to be given to a person or an entity that may not be legally entitled to it. In addition, it also reduces Peru's capacity to fulfill its obligations under the United Nations Declaration on the Rights of Indigenous Peoples as far as traditional knowledge and/or resources held by indigenous peoples are concerned.[38]

In Summary:

Increasingly, developed countries (particularly the US, EU and Japan) and institutions such as UPOV, WIPO, the Community Plant Variety Office (CPVO) employ different methods and means to pressure developing countries to adopt strengthened breeders' rights at the expense of farmers rights including the right to use, save, exchange and sell farm-saved seed/propagating material. This limits the flexibility of Treaty members to take the necessary steps to implement the Treaty obligations including Farmers' Rights.

Article 9 of the Treaty stipulates 'that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments'. However implementation of Article 9 is not posible due to the incoherence in the international legal system. Thus it is imperative to interpret and revise the UPOV Convention to make it compatible with the recognition Farmers' Rights.

B. INTERRELATIONS BETWEEN WIPO AND THE TREATY WITH REGARDS TO IMPLEMENTATION OF FARMERS RIGHTS

B.1. General

WIPO became a specialized agency of the UN with the signing of the UN-WIPO Agreement[39]. However, there are many concerns with regard to orientation of WIPO and its activities (e.g. technical assistance and norm-setting).

In 2004, a group of developing countries[40] known as the Group of Friends of Development (GFOD) submitted to the WIPO Assembly a "Proposal to Establish a Development Agenda for WIPO"[41]. According to the proponents, the main purpose of the proposal was to incorporate "the development dimension into WIPO's work". The proponents argued "Experience demonstrates that WIPO has concentrated its efforts in the diffusion of standardized approaches to IP policies that assume, from an uncritical standpoint, that development follows suit as intellectual property rights protection is strengthened. Current worldwide debate questioning the appropriateness of such an approach has not been reflected in WIPO's work. Rather, discussions in WIPO have overlooked the importance of a systematic assessment of the implications of increased and standardized IPR protection in

[38] See Articles 26 and 31 of UNDRIP in regard to indigenous peoples' rights on (genetic) resources and their traditional knowledge. www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[39] Agreement between the United Nations and the World Intellectual Property Organization available at http://www.wipo.int/treaties/en/text.jsp?file_id=305623

[40] Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela

[41] See WIPO Doc. WO/GA/31/11 and IIM/1/1 available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf and http://www.wipo int/meetings/en/doc_details.jsp?doc_id=42376

terms of access to and diffusion of science, technology and related knowledge and know-how, especially for LDCs and developing countries"[42].

The GFOD also raised concerns with the underlying philosophy, content and process of WIPO's technical assistance in particular that IP is often seen as an objective in itself, with broader policy concerns addressed in a very limited manner; the tendency to over-emphasize the benefits of intellectual property while giving very little attention to the limitations and actual costs; content of the technical assistance programmes mostly focused on the implementation and enforcement of obligations and not on the use of in-built rights and flexibilities in international treaties for developing countries; little attention has been given to different levels of development and cultural differences; little independent evaluation of the technical assistance provided by WIPO, including to determine the impact and effectiveness of the assistance programmes.

The GFOD proposal led to three years of intensive discussions on "Development Agenda" in WIPO resulting in 2007 with the adoption of 45 Development Agenda (DA) recommendations.[43]

B.2 Technical Assistance

Generally WIPO's technical assistance is subject to much criticism. In 2011, for the first time an independent External Review of WIPO's technical assistance was completed. This Review found significant critical shortcomings and deficiencies in the orientation, management and coordination of the technical assistance activities of WIPO.[44] In particular, the experts found that WIPO's staff and activities lacked a development orientation, including a clear understanding of the overall purposes of WIPO's development cooperation activities. The experts also highlighted the lack of detailed information, transparency and appropriate accountability (monitoring, evaluation and oversight) mechanisms over those technical assistance activities.[45]

Plant Variety Protection

With regard to implementation of Farmers' Rights (Article 9), a relevant issue is the kind of legal framework in place for plant variety protection. As shown above a restrictive legal framework such as UPOV 1991 can adversely impact implementation of Farmers Rights.

Article 27.3(b) of the TRIPS Agreement expressly allows WTO Members to provide for the protection of plant varieties by an effective *sui generis* system. This means that countries have full flexibility to implement a legal PVP framework that suits their agricultural conditions. Further the WTO grants least developed countries (LDCs) WTO members a transition period until I July 2021, during which period, the LDCs need not implement TRIPS provisions

[42] See WIPO Doc. WO/GA/31/11 and IIM/1/1 available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf and http://www.wipo int/meetings/en/doc_details.jsp?doc_id=42376

[43] http://www.wipo.int/ip-development/en/agenda/recommendations.html

[44] An External Review of WIPO Technical Assistance in the Area of Cooperation for Development (CDIP/8/INF/1). Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=182842.

[45] Sangeeta S., "Technical assistance criticized for shortcomings", at http://www.twn.my/title2/intellectual_property/info.service/2011/ipr.info.111105.htm and Sangeeta S., "Expert Review Calls For Technical Assistance Reforms, Further Investigation" at http://www.twn.my/title2/intellectual_property/info.service/2011/ipr.info.111106.htm

except for Articles 3, 4 and 5. This transition period was granted in view of the vulnerabilities and contraints that LDCs face. This transition period may be extended.

Despite the policy space available with regard to the formulation of a legal framework, WIPO's technical assistance is all about promoting the adoption of a PVP legal framework based on UPOV 1991.

An area where WIPO provides technical assistance is the development of a national IP strategy, which presumably would guide development of national laws, policies and practices. To this end, WIPO has developed a set of tools on the Methodology for the Development of National Intellectual Property Strategies. The tools are: the Process (Tool 1); Baseline Questionnaire (Tool 2) and Benchmarking Indicators (Tool 3).

Tools 2 and 3 contain an entire Chapter on plant variety. Chapter 6 in Tool 3 titled - Plant Variety Rights and Seed Industries - provides an incomplete and misleading view about PVP protection. Essentially it champions UPOV as *the* legal framework for the protection of PVP. There is no mention that under the TRIPS Agreement, countries have full freedom to adopt alternative sui generis systems of protection or elaboration of such alternative systems of protection (e.g. as implemented in India, Thailand, Malaysia etc.). It makes no mention of LDCs and the policy space (transition period) available to them. The Chapter speaks of the success of PVP protection in Kenya but the information is misleading and not supported by empirical data. It also fails to explain that the claimed PVP growth began before Kenya became a member of UPOV and continued as Kenya was implementing UPOV 1978, which in comparison to UPOV 1991 provides greater leeway for implementation of farmers' rights. The Chapter shows no appreciation of the differences between UPOV 1991 and UPOV 1978, and fails to explain that membership to UPOV 1978 is no longer possible.

The section on -Agricultural policy and strategy- simply ignores the realities prevailing in LDCs and most of other developing countries i.e. that the informal seed sector and small-scale farmers are the backbone of the agricultural system supported by practices of freely using, sharing, saving, exchanging and selling seeds and other propogating material. As recognized by the Treaty, farmers and the freedom of freely using, sharing, saving, exchanging and selling seeds/propagating material constitutes the basis of food and agriculture production throughout the world and are critical for sustainable agriculture and for food security. The issues the Treaty champions (e.g. farmers' rights, fair agricultural practices, recognition of diverse farming systems), though relevant are simply disregarded by the Chapter.

The primary concern of the Tools is to guide countries to become a member of UPOV. This is reinforced by Cluster 5 in Tool 2 (Baseline Questionnaire) which asks "Is the country a member of the International Union for the Protection of New Varieties of Plants (UPOV) or has it initiated the procedure to become a member of UPOV?" None of the questions in Tool 2 are directed towards understanding the make-up of the agricultural system especially the role of farmers (particularly small-scale farmers) and the informal seed sector. Further in Tool 2, the word "farmer" or "farmers rights" does not even exist. The Questionnaire asks about partnerships between breeders, research organizations and industry, but not about partnerships with farmers – which certainly would be important when drafting a national PVP law.

Apart from the Tools, the various technical assistance missions of WIPO are also about promoting UPOV 1991. For example, the technical assistance database of WIPO mentions a "Mission to Nay Pyi Taw, Myanmar, to provide presentations on the Plant Variety Protection system in line with the UPOV Convention and to participate in the consultation meeting for

the drafting of the PVP legislation, from January 7 to 9, 2014"[46]. The meeting was organized by WIPO, Japan and Myanmar. In 2013, WIPO supported ARIPO to co-organize (with USPTO and UPOV) a regional workshop on a legal framework for PVP in Malawi. In 2014, WIPO co-organized with ARIPO and UPOV another regional workshop in Harare from 29-31 October described, as "The ARIPO Workshop is a critical step in the ARIPO roadmap to becoming a UPOV member"[47]. It has been noted above that many concerns have been raised with regard to this draft legal framework, in particular the suitability of UPOV 1991 for ARIPO especially since most of its members are LDCs. And yet, the regional workshops only discussed the UPOV 1991 model as the basis for the legal framework.

WIPO's technical assistance and support is always about introduction of PVP laws modeled on UPOV 91, even if such a model is unsuitable for the beneficiary country. WIPOs "one size fits all" approach does not take into account the specific needs and circumstances of developing countries, and nor does it consider that other PVP laws could be more supportive of Farmers Rights (including their right to save, use, exchange and sell farm-saved seed) and the implementation of Article 9 of the Treaty.

WIPO's assistance including tools is based on the assumption that PVP frameworks based on UPOV 1991 are a prerequisite for the development plant varieties. This is not surprising considering that the information promoted and contained in the tools is based on information produced by UPOV. WIPO completely ignores the work of many independent research institutions or commissions (Wageningen University, Bioversity International, UK Commission on IPR[48]) which have questioned the suitability of the UPOV 1991 model for developing countries and LDCs and have always taken into account, or even promoted alternatives to UPOV. The technical assistance given is not evidence-based but rather takes an ideological approach.

WIPO's technical assistance on plant variety protection is inconsistent with the spirit and intent of WIPO Development Agenda particularly Recommendations 1[49], 6[50], 12[51], 13[52], and 24[53]. These recommendations require WIPOs' technical assistance to be development oriented, transparent and take into account the needs and levels of development of developing countries and LDCs. The WIPO staff and consultant are to be neutral and accountable and WIPO is to make available advice on the use of flexibilities contained in the TRIPS Agreement.

Patents

[46] http://www.wipo.int/tad/en/activitysearchresult.jsp
[47] http://www.wipo.int/tad/en/activitydetails.jsp?id=7426
[48] http://www.iprcommission.org/
[49] DA Recommendation 1: WIPO technical assistance shall be, *inter alia*, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.
[50] DA Recommendation 6: WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest.
[51] DA Recommendation 12: To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate
[52] DA Recommendation 13: WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.
[53] DA Recommendation 14: Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.

The TRIPS Agreement allows WTO members to exclude "plants" from patentability. However many countries limit such exclusion to 'plant varieties' thereby allowing for the patenting of plants and their parts and components. Further even in countries where the legislation excludes plants and plant varieties from patent protection, patents have been sought and granted on genetic constructs, cells and other parts and components of plants. Exclusive rights granted by patents prevent farming practices of freely using, saving, exchanging and selling seeds as well as the option of using protected material as a source for further improvement of a plant variety.

There is a need for clarity about WIPO's technical assistance on plant genetic resources particularly what specifically is advocated by WIPO with regard to patenting of plant genetic resources. Thereafter there would be a need to assess the impact of this assistance on implementation of farmers' rights and the Treaty objectives.

In summary: WIPO's technical assistance is undermining implementation of Article 9, and consequently achievement of the Treaty's objectives. As a specialized UN Agency, WIPO has a responsibility to provide technical assistance that enables realization of Farmers Rights at the national and regional levels.

B. 3 Recognition of the enormous contribution of 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 (Article 9.1 of the Treaty)

The above-mentioned Benchmarking Indicators (Tool 3) concerning the Methodology for the development of National IP Strategies is a good indicator of WIPO's thinking with regard to the role of local and indigenous communities and farmers and their contribution to PGRFA.

It states: "Most decision-makers in African countries have also realized that traditional agricultural practices have limitations, and have led to poverty, hunger and food insecurity."

This view is flawed. It also shows that WIPO has little understanding of issues dealing with PGRFA and that WIPO does not share the Treaty's views with regard to local and indigenous communities and farmers, and their role in the conservation and development of PGRFA which constitutes the basis of food and agriculture production globally and the importance of farmers' rights.

WIPO also promotes UPOV 1991 as the sui generis PVP legal framework that countries should adopt. And as discussed above, UPOV's instruments and activities fail to give due recognition to the contribution of local, indigenous communities and farmers, or acknowledge their continuing important role in the development of plant genetic resources.

In summary: WIPO's thinking and orientation on farmers' rights and contribution to PGRFA is NOT consistent with the Treaty's provisions and objectives.

B.4 Right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture

Patents and PBRs are often obtained on PGRFA but without prior informed consent and fair and equitable benefit sharing. As discussed above, disclosure in IP applications (patent and

PVP applications) is an important mechanism to prevent misappropriation of genetic resources.

The Intergovernmental Committee on Genetic Resources, Traditional Knowledge & Folklore (IGC) has been negotiating a treaty on genetic resources and associated traditional knowledge focused on disclosure of origin and evidence of compliance with access and benefit sharing requirements. Despite negotiations taking place for many years, little headway has been made.[54]

Further presently WIPO's treaties on patents do not require disclosure of origin and evidence of compliance with access and benefit sharing requirements.

In addition, WIPO also promotes UPOV 1991 as the sui generis PVP legal framework that countries should adopt. And as discussed above, UPOV has taken the position that disclosure requirements are incompatible with its provisions.

In summary: The above leads to the conclusion that WIPO's instruments, activities and assistance are not supportive of (but rather undermines) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture mentioned in Article 9.2(b) of the Treaty**.**

B. 5 Right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture (Article 9.2(c)

The examples below show that WIPO's actions and activities are not supportive of Article 9.2(c).

WIPO tools developed for the development of national IP strategies makes no mention of Article 9(c). Tool 1 on the process for developing national IP strategies makes no specific mention of involving farmers in making decisions[55]. Further Chapter 6 of Tool 3 on benchmarking indicators contains a list of plant breeding and seed associations but no information is available on farmer groups and civil society organizations working with farmer groups. This perhaps suggests that to WIPO the main stakeholders on the issue are plant breeding and seed associations.

In 2013, WIPO co-organized with ARIPO, the US Patent and Trademark Office (USPTO) and UPOV a regional workshop in Malawi on the ARIPO Legal Framework for the Protection of New Varieties of Plants. In 2014, WIPO co-organized with ARIPO and UPOV another regional workshop from 29-31 October in Harare. It has been noted above that the process for developing the regional draft PVP Protocol for ARIPO has been criticized as being not inclusive of farmers and non-transparent. Clearly WIPO has not required ARIPO to ensure compliance with Article 9.2(c) prior to supporting ARIPO.

In 2012 WIPO hosted a workshop on Intellectual Property, Innovation and Food Security focused on East Africa particularly Tanzania, that took place in Geneva on 10 and 11 of

[54] See Gopakumar, Failure to reach consensus, "no decision" adopted on four issues, Third World Network. Available at http://www.twn.my/title2/intellectual_property/info.service/2014/ip141001.htm See also http://www.ip-watch.org/2014/07/09/wipo-meeting-on-tk-protection-ends-with-no-agreement-draft-texts-heading-to-assembly/ and http://www.ip-watch.org/2014/10/01/inauspicious-start-to-gurrys-second-term-as-ip-policymaking-hits-wall-at-wipo/

[55] http://www.wipo.int/export/sites/www/freepublications/en/intproperty/958/wipo_pub_958_1.pdf

May[56]. Following the workshop, Tanzanian civil society organizations and others in a letter addressed to Francis Gurry dated 18th July 2012 raised concerns *inter alia that* "The programme and participants' list suggests that participants representing the interests of the industry in particular the multinational corporations heavily dominated the workshop" adding that the "programme and participants' list shows hardly any representation of civil society organizations that champion farmers' rights or even key national farmer organizations such as the Tanzania based Eastern and Southern Africa Farmers Forum (ESAFF), and MVIWATA (representing farmers associations in Tanzania). In addition, the programme fails to reflect the full range of views that exist on the topic of IP and food security such as critical views about the IP system relating to the adverse impacts on food security or agro-biodiversity."

In Summary: The abovementioned examples show that WIPO's actions and activities are not supportive of or even ignore Article 9.2(c).

[56] http://www.wipo.int/meetings/en/details.jsp?meeting_id=26182