

# **UPOV 1991 and the Implications for Farmers' Rights**

International Conference on “From Food Security to Food  
Sovereignty in the Framework of Good Governance”

27 February 2017, Tehran, Iran

*Lim Li Ching*

# Plant variety protection

- Article 27.3(b) of the WTO Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS) requires Members to provide plant variety protection (PVP) either by patents or by an effective *sui generis* system or by any combination thereof
- Iran is not a WTO Member

# UPOV 1991

- Objective of UPOV Convention is the protection of new varieties of plants by breeder's rights
- Adopted: 1961 (only European countries and US)
- Revised Acts (with progressively stronger intellectual property protection): 1972, 1978, 1991
- Some major developing economies (e.g. Argentina, Brazil, China) and some developed countries (e.g. Norway) continue to be UPOV 1978 members
- The only possibility today is to join UPOV 1991 as it is no longer possible to accede to UPOV 1978
- UPOV 1978 (more flexible) vs. UPOV 1991 (strengthened breeders' rights/restrictive)

TWN

Third World Network

# UPOV 1991 and developing countries

- UPOV 1991 conceived for the agricultural systems and modalities of seed production prevailing in Europe and US
- Inflexible framework aimed primarily at benefitting commercial developers of uniform varieties, largely based in developed countries
- Negotiations did not take into account interests of developing countries, or their agricultural systems based on farm-saved seeds and exchange and sale of seeds
- Only 13 developing countries are UPOV 1991 members
- Most developing countries that have joined have done so due to bilateral pressure from US/EU free trade agreements

# UPOV 1991: Breeder's right

- Art. 14 (a): Subject to Article 15 and Article 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:
  - (i) production or reproduction (multiplication),
  - (ii) conditioning for the purpose of propagation,
  - (iii) offering for sale,
  - (iv) selling or other marketing,
  - (v) exporting,
  - (vi) importing,
  - (vii) stocking for any of the purposes mentioned in (i) to (vi), above
- (b) The breeder may make his authorization subject to conditions and limitations

# UPOV 1991: Farmers' exception

- Article 15.2 (Optional Exception):
- Each contracting Party may, **within the reasonable limits and subject to the safeguarding of the legitimate interest of the breeder**, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings **the product of the harvest** which they have obtained by planting, **on their own holdings** the protected variety

# Farmers' exception (cont'd)

- **Allows:** When using protected varieties, farmers allowed to save “product of harvest” (seed) for further propagation only own his/her own holding
- **Not allowed:** To exchange and sell seed/propagating material (even small amounts)
- *UPOV Guidance:* “product of harvest” is used for propagating purposes...for e.g. small grained cereals where the harvested grain can also be used as seed for propagating purposes”

# Farmers' exception (cont'd)

- *UPOV Guidance*: “optional exception...aimed at...crops ...where for the Member there was common practice of farmers saving harvested material for further propagation”
- *Concludes*: “***inappropriate to introduce*** the optional exception for agricultural or horticultural sectors such as fruit, ornamentals and vegetables.....***where it has not been a common practice for the harvested material to be used as propagating material***”
- Use of **farmers' exception subject to** “within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder”: **Farm-saved seed may be subject to payment of royalties to the breeder** TWN



# Iran's national PVP law/by-law

- Act of Plant Varieties Registration, Control and Certification of Seeds and Plant Materials (2003)
- By-Law on Registration of Plant Varieties (2009)
  - Provides exception for acts done for non-commercial purposes and saving of seed by small farmers

# Interest in UPOV 1991

- Iran initiated procedure for acceding to the Convention of the Protection of New Varieties of Plants in 2015 by requesting examination of its laws for conformity with UPOV 1991
- UPOV Office has examined the Act of Plant Varieties Registration, Control and Certification of Seeds and Plant Materials (2003)
- UPOV Council in August 2015 recommended incorporation of additional provisions and amendments

# Current status

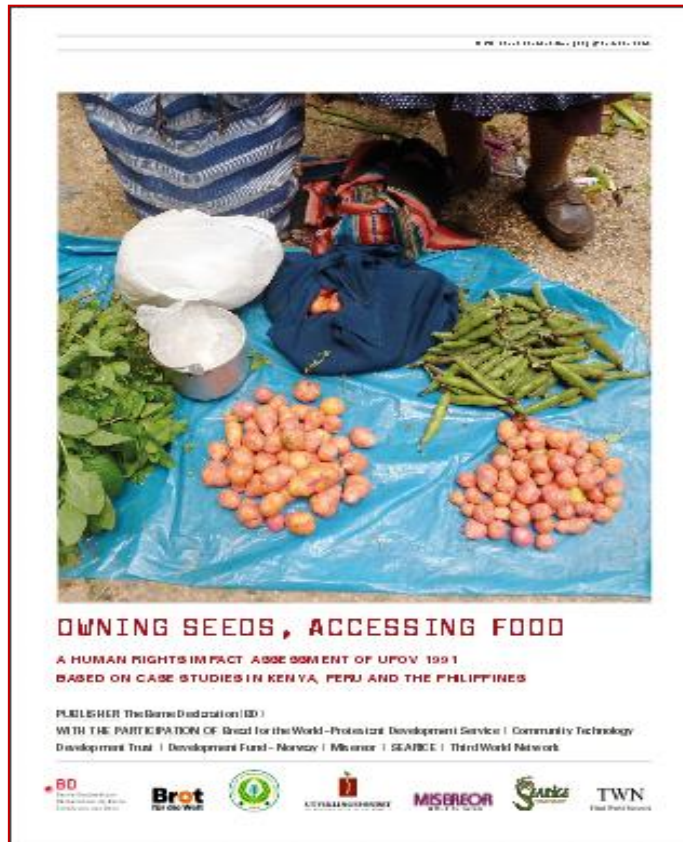
- August 2016: Seed and Plant Certification and Registration Institute informed UPOV that the text of UPOV 1991 had been approved by Government and submitted to Parliament for ratification
- This provides an opportunity to amend the national law to conform with UPOV 1991
- Not known whether the law has been amended yet

What are the implications of  
joining UPOV 1991?

# Seed policies and the right to food

- 70-80% of seed planted by smallholder farmers originates from informal seeds systems; key features are freely saving, re-using, exchanging seeds and selling to local markets
- States have an obligation to respect existing access to adequate food
- *The introduction of legislation or other measures which creates obstacles to the reliance of farmers on informal seeds systems may violate this obligation, since it would deprive farmers from a means of achieving their livelihood – UN Special Rapporteur on the right to food, 2009*

# Owning Seeds, Accessing Food



- Published in October 2014.
- Case studies in Peru, Kenya and the Philippines
- With support of the Swiss Development Cooperation (SDC)
- Download at [www.publiceye.ch](http://www.publiceye.ch)

TWN  
Third World Network

# Human rights impact assessment of UPOV 1991

- The field studies revealed that **the informal seed system, based on farm-saved seeds and the exchange and sale of seeds by farmers, is the most important system for smallholder farmers to access seeds (including improved and protected varieties)**
- **The informal seed sector guarantees access to affordable seed for small-scale, resource-poor farmers-producers** and protects them from the uncertainties of the formal seed supply (in price, availability, quantity) and from the risks associated with high-input agriculture
- There is **interaction between the formal and informal sectors**

# Potential impacts of UPOV 1991 on the Right to Food

- 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 originating from the formal sector**
- With the restriction to sell protected varieties **farmers will loose an important source of income**
- UPOV '91 restrictions on the use, exchange and sale of farm-saved PVP seeds, could **negatively impact the functioning of the informal seed system**, as beneficial interlinkages between formal and informal seed systems will be cut off



# Farmers' Rights (1)

- International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA); Iran is a Contracting Party
- Article 9.1: The Contracting Parties 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

# Farmers' Rights (2)

- Article 9.2: [...] each Contracting Party should, [...] 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
  - (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

# Farmers' Rights (3)

- Article 9.3: 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
- Preamble: *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...

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

- Concern: this right cannot be fully implemented in view of UPOV 1991 obligations, whereby farmers not allowed to exchange and sell farm saved seed/propagating material (even small amounts)
- E.g. Malaysian PVP Act contains an exception allowing “any exchange of reasonable amounts of propagating materials among small farmers”; however, in examining conformity of this law with UPOV 1991, UPOV concluded that such exchange would not be covered under the exceptions
- Alternative *sui generis* PVP laws tend to have more innovative approaches that allow better realization of Farmers’ Rights

## 2. Recognition of the contribution of local and indigenous communities and farmers of all regions of the world have made and will continue to make for the conservation and development of PGR

- Concern: the lack of recognition of the contribution of local and indigenous communities and farmers
- Criteria for protection: novel, distinct, uniform and stable but **farmers' varieties may not meet the criteria and so do not receive protection as uniform varieties**; most farmers cannot bear the costs of filing, maintaining & enforcing
- Inequality regarding Essentially Derived Varieties: if a small derogation is made from protected variety, breeders' authorization is needed for commercialization; **however farmers' varieties can be freely used for further breeding but farmers have no rights**

### 3. The right to equitably participate in benefits arising from the utilization of PGRFA

- Concern: the **lack of mechanism or safeguards to prevent misappropriation (biopiracy) and facilitate benefit sharing** arising from the utilization of PGR developed by farmers
- Requiring applicants to disclose the origin of the genetic material, or provide evidence of compliance with benefit sharing rules is not recognized by UPOV 1991 (2003 Decision of UPOV Council)
- Undermines effective implementation of the ITPGRFA (and CBD), which require fair and equitable sharing of benefits arising from utilization of plant genetic resources for food and agriculture

TWN

Third World Network

## 4. The protection of traditional knowledge relevant to PGRFA

- Issue: UPOV does not facilitate protection of traditional knowledge relevant to PGRFA
- Its restrictions on saving, exchange and selling protected seeds/propagating material could have a **detrimental effect on the protection of traditional knowledge** – farmers gradually losing their know-how related to seed selection and seed preservation

## 5. Right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA

- Issue: How is the UPOV Convention and technical assistance of UPOV supporting implementation of this right?
- Concern: **Inadequate consultations**
- UPOV often involved in processes for developing new PVP laws where farmers are not participating in decision making
- E.g. In UPOV member countries Kenya and Peru there was insufficient participation of affected stakeholders in the process of revising or adapting PVP laws



# Other concerns: One-size-fits-all

- UPOV 1991 has very **limited leeway/flexibility** for countries to design a PVP regime that reflects their conditions/realities
- For new members, the draft bill is scrutinized by the UPOV Council to assess conformity with UPOV 1991 and **as understood by the UPOV Secretariat**
- **Flexibility is critical for developing countries** as it allows governments to adopt policies cautiously and to adapt them as circumstances and conditions evolve

# Other concerns: Erosion of biodiversity

- **UPOV only rewards homogeneity and not agricultural biodiversity**
  - Estimated that about 75% of plant genetic diversity has been lost as farmers worldwide have abandoned their local varieties for genetically uniform varieties
  - With climate change, there is urgent need to build resilience by farmers to relying on a diversity of crops
  - “The preservation of agrobiodiversity and the development of farmers’ seed systems relies not only on the use of landraces (traditional, non-PVP-protected varieties) but also on the saving, exchange or sale of harvested seeds, since it is often the case that traditional varieties can be combined with modern varieties in order to produce varieties which perform better in specific local environments.” – *former UN Special Rapporteur on the right to food*

TWN

Third World Network

# UPOV, farmers' rights and human rights

The UPOV Convention, Farmers' Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks (published by GIZ on behalf of the German Federal Ministry for Economic Cooperation and Development in June 2015)

Recommendations:

- Developing countries that have not yet joined UPOV should consider opting for alternative *sui generis* systems of PVP that allow for more flexibility in meeting the obligations of different treaties, for balancing the interests of diverse actors, and for protecting and promoting Farmers' Rights, compared with the UPOV system

# Conclusions (1)

- Concern that UPOV 1991 may not be appropriate
- PVP regimes should be appropriate to the agricultural profile of the country:
  - Able to achieve balance between breeders' rights, farmers' rights and protection of public interest
  - Supports both the formal and informal seed systems and particularly smallholder farmers
  - Includes mechanisms to prevent misappropriation

# Conclusions (2)

- Preserve traditional farming practices of saving, using, exchanging and selling seeds/propagating material, having in view the importance of ensuring livelihoods of farming communities, the continuous adaptation of seeds/propagating material to the evolution of agricultural ecosystems, and food security
- PVP regimes should be supportive of and not counter the objectives and obligations under the CBD and ITPGRFA

Thank you!

[www.twn.my](http://www.twn.my)