

Policy Brief

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UPOV Faulty Agreement and Coercive Practices



INTRODUCTION

No agreement of the World Trade Organisation (WTO) allows its members to impose any conditions, which transcend WTO obligations, on the acceding countries. However, the developed member countries often clamp down such conditions. In trade jargon, such conditions are referred to as 'WTO-plus' conditions. Such practices are not only seen during the pre or post accession negotiations but are also observed during other bilateral negotiations.

One such coercive practice is evident in the area of plant variety protection (PVP). In order to protect new plant varieties, the developed member countries have been forcing the developing countries to become a member of the International Union for the Protection of New Varieties of Plants (UPOV) Convention, which only promotes the interests of their own commercial plant breeders and multinational companies (MNCs). Surprisingly, no WTO agreement, including the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), has indicated that the adoption of UPOV is compulsory.

The TRIPS Agreement requires member countries to protect their new plant varieties by one of the three

means: 1) patent; or 2) an effective *sui generis* system; or 3) any combination thereof. The developing countries have preferred the second option. The word '*sui generis*' means 'of its own kind'. Therefore, countries can design and implement their PVP laws by themselves according to their national interests and local realities. Unfortunately, they are not being able to follow this option. Since the definition of 'effective' word is still ambiguous, the developed countries have taken full advantage of it. They refer to the UPOV Convention as the only effective *sui generis* model for PVP.

Some developing countries have already enacted PVP laws based on UPOV. While China and South Korea have adopted the UPOV model to prepare their PVP laws, India and Thailand have enacted their own *sui generis* laws, recognising both the breeders' and the farmers' rights. In many other Asian countries, draft laws on PVP are in various stages of discussion. The countries reported to be consulting UPOV are Indonesia, Malaysia, Pakistan, Philippines and Sri Lanka. They are reported to be under varied degree of pressure to join UPOV.¹

Against this backdrop, the objective of this Policy Brief is to sensitise the policymakers of the developing

countries to remain alert of the coercive practices followed by the developed countries and make use of alternative mechanisms for the protection of plant varieties.

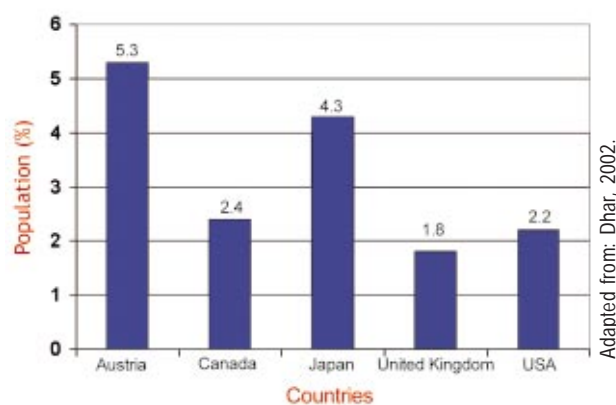
UPOV: A WRONG MODEL

The developing countries have criticised the UPOV model on several grounds, not least because becoming a member of UPOV or enacting the legislation in tune with this model is not a requirement of TRIPS.

The developed countries must understand that *sui generis* means of its own kind of system that suits countries' own agro-biodiversity and farming systems and practices. How can one '*sui generis* system' be the model for all countries? Does *sui generis* imply that? Do all countries have same nature of agricultural systems and practices and share same plant varieties?

The developed countries have chosen UPOV because it suits the requirement of their industrial farming – where farmers' constitute merely one to five percent of their total population (See Diagram:1). Agriculture for them is, therefore, a matter of trade and business but for the developing countries, it is a matter of 'life and death'. Most of their population comprises farmers, whose main livelihood is farming, and their economies are heavily dependent on agriculture.

DIAGRAM 1: FARMING POPULATION IN SELECT INDUSTRIAL COUNTRIES



Farmers in the developing countries practice subsistence farming and have been saving and reusing seeds for time immemorial. They have been exchanging their seeds with their neighbours. Some farmers, who do not have enough land to engage in full-fledged agricultural productions, are engaged in production of seeds, though in a very limited quantity, and do sell them at the local market to eke out their living. Thus, saving, exchanging, reusing and selling seeds are the means of their livelihood. The UPOV Convention, however, restricts the ability of farmers to exercise these livelihood options.

The UPOV Convention has undergone three revisions since it was signed in 1961. The 1972, 1978 and 1991 amendments to UPOV progressively strengthened the protection afforded to plant breeders. Compared to the earlier versions, UPOV 1991 provides the highest

possible level of protection to the breeders, severely diluting Farmers' Privilege and restricting farmers' rights to save, reuse, exchange and sell seeds.

For example, Article 15.2 of the latest UPOV Convention is in sharp contrast to the earlier system, which had allowed farmers to reuse protected materials without paying any royalty to commercial breeders.

But the new provisions allow farmers

to reuse protected material only if the 'legitimate interests of the breeders' are taken care of - the legitimate interests being nothing but the royalty that the breeders should be paid. The United Nations Food and Agriculture Organisation (FAO) views it as "downgrading of the Farmers' Privilege".²

Under UPOV 1978, though farmers were not allowed to sell seeds obtained from the protected varieties, there was no bar on them to store these seeds for cultivation, replant them and develop new plants from them, which was considered Farmers' Privilege. UPOV 1991 gives wider protection to plant breeders. Farmers are permitted use of the protected varieties only with respect to acts done: privately and for non-commercial purposes; for experimental purposes; and for the purpose of breeding varieties other than those which are 'essentially derived varieties'.³

In the developing countries, almost all agricultural researches and plant breeding activities are financed by taxpayers' money. Public institutions in these countries play a vital role in this regard. Such researches in these countries, therefore, belong to the public. However, the laws under UPOV are formulated by societies where research on seed is conducted more in private domains than in public institutions, and where private capital finances plant breeding. Because they invest in expensive breeding methods and need to secure returns on their investments, seed companies in Europe and North America seek market control through strong intellectual property rights. But these conditions do not apply to the developing countries.⁴ The developing countries do not have big seed companies. Their major seed producers are farmers and farmers' cooperatives. Logically, their laws will have to concentrate on protecting the interests of the farmer in his/her role as producer as well as consumer of seed.

Moreover, obtaining an UPOV authorised Breeders' Right Certificate could cost several thousand or even hundreds of thousand dollars. Such rates will effectively preclude the participation of developing countries' small companies, farmers' cooperatives and farmers/breeders.

In the developing countries, farmers play a significant role as breeders of new varieties of plants. They often release very successful varieties by crossing and selection from their fields. These varieties are released for use as such. In addition, in almost all cases, these varieties are taken up by agriculture research stations as breeding materials for producing other varieties. Such farmers/breeders would not be able to participate in an expensive system like UPOV. Their material along with their labour and innovation would be misappropriated

by those with the money to translate such valuable germplasm into money-spinning varieties registered under the UPOV system. Poor farmers unable to pay the costs for getting an UPOV Certificate would tend to sell their varieties to larger seed companies, just for small sums. This will be the ultimate irony, creating an institution that will snatch away from a farmer, his/her material and opportunities.⁵

TACTICS USED TO TRAP DEVELOPING COUNTRIES IN THE UPOV COBWEB

During WTO Accession Negotiations

Despite the reluctance of the developing and least developed countries, majority of them, which have acceded to the WTO, have been forced to join UPOV as a part of their accession deal. China and Kyrgyzstan are the living examples. So much so that Cambodia, the first least developed country to become a WTO member through accession, too was not spared. It agreed to apply its PVP law complying with the UPOV provisions by 2004. Nepal is also not an exception in this case (See the case study below).

During Bilateral Deals

In 1999, the EU pressurised Bangladesh to become a member of UPOV as a precondition to sign a Trade

and Aid Agreement with it.⁶ Similarly, Vietnam was compelled to become its member as a precondition to signing the USA-Vietnam Bilateral Trade Agreement. The promulgation of Decree 13 and Circular 119 would bring the Vietnamese intellectual property law into closer conformity with TRIPS. The conditions outlined in the Decree conform to the standard criteria for the granting of protection under the UPOV Convention.⁷

A detailed account of the Asia and Pacific countries, which are either facing bilateral pressures from the two major economic giants (the USA and the EU) or have already succumbed to such pressures, is provided on Table 1.

After WTO Membership

The pressure on India to become a UPOV member came after its membership.⁸ Despite the fact that India has already enacted a progressive legislation on farmers' rights in 2001, the Indian government's decision to join UPOV has stunned the international community at large. The government points out that India has applied to join the 1978 UPOV Convention, not the far more draconian 1991 version. In this context, it needs to be understood that a soft landing into UPOV via the 1978 Convention is only temporary in nature. Article 37(3) of the UPOV 1991 Convention clearly states that after 31 December 1995 all countries, who wish to join

TABLE 1: PVP LAWS AND THE ASIA PACIFIC DEVELOPING COUNTRIES

Country	National PVP adopted	Member of UPOV	In process of joining UPOV	Consulting UPOV	US Trade Agreements for TRIPS Plus Standards	EU Trade Agreements for TRIPS Plus Standards	WTO Member
Afghanistan							
Bahrain							
Bangladesh							
Cambodia							Accession approved
Fiji							
Hong Kong							
India							
Indonesia							
Jordan							
Korea N.							
Korea S.							
Kuwait							
Laos							Observer
Lebanon							Observer
Malaysia							
Mongolia							
Myanmar							
Nepal							Accession approved
Oman							
Pakistan							
PNG							
Philippines							
Qatar							
Saudi Arabia							Observer
Singapore							
Sri Lanka							
Syria							
Taiwan							
Thailand							
UAE							
Vietnam							Observer

Adapted from: Kanniah, 2003.

UPOV, must accede to the 1991 Convention. Yet, India has been allowed to join the 1978 Convention.⁹

The obvious benefit to UPOV in bending their own regulations [Article 37(3) UPOV 1991] is that in encouraging India, a large developing country with major public and private plant breeding sectors, to join, other Asian countries will follow suit rather than try and introduce their own *sui generis* legislation. Non-governmental organisations (NGOs) are highly critical of the government's decision to join UPOV.¹⁰

To overturn the government's decision, Gene Campaign, a New Delhi based NGO, filed a public interest litigation in Delhi High Court on 01 October 2002. However, the case is still sub-judice.¹¹ Consumer Unity & Trust Society (CUTS), a network institution of SAWTEE, and several other civil society organisations (CSOs) in India are also remonstrating against such move. CUTS, in its recently published research report on *Intellectual Property Rights and Access to Seed: A Case Study of Himalayan Region in India* has come out strongly against the Indian government's decision to join UPOV 1978.¹²

Similarly, the pressures to join UPOV are also mounting on Bangladesh, Pakistan and Sri Lanka. But, along with other like-minded CSOs, SAWTEE's network institutions, namely Bangladesh Environmental Lawyers Association (BELA) in Bangladesh, Sustainable Development Policy Institute (SDPI) in Pakistan and Law & Society Trust (LST) in Sri Lanka are strongly advocating for the enactment of their own *sui generis* PVP laws.

DEVELOPING COUNTRIES' INITIATIVES AGAINST UPOV

Based on the justifications mentioned above, it is imperative for developing countries to resist the UPOV model and devise an alternate *sui generis* PVP legislation. India's initiative in this regard can be illustrated as an effective example.

India enacted Protection of Plant Varieties and Farmers' Rights (PPVFR) Act in 2001. The Act has taken a balanced approach in ensuring the rights of both – the farmers and the breeders. It aims to establish “an effective system for the protection of plant varieties, the rights of farmers and plant breeders to encourage the development of new varieties of plants” in line with Article 27.3 (b) of TRIPS. The Act has ensured the mechanisms for: 1) allowing the farmers to save, use, sow, resow, exchange, share or sell his/her farm produce including seed of a variety protected under this Act¹³; 2) protection of the rights of farmers for their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties; 3) protection of plant breeders' rights to stimulate investment for research and development, both in the public and private sector, for the development of new plant varieties; and 4) giving effect to Article 27.3 (b) of TRIPS on PVP.¹⁴

The *sui generis* legislation introduced by the Namibian government is also an important initiative. Developed by the Organisation for African Unity (OAU), it is based on the African Model Law for the Protection of the

Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources. The Access to Biological Resources and Associated Traditional Knowledge (ABRATK) Act provides for the grant of farmers' rights and plant breeders' rights, while recognising the rights of local communities over their biological resources and associated knowledge, innovations and practices.¹⁵

Similarly, there has been another major initiative by Gene Campaign in drafting an alternate mechanism for the protection of farmers' rights, i.e., Convention of Farmers and Breeders (CoFaB). The United Nations Development Programme (UNDP) has recognised CoFaB as a strong and coordinated international proposal in response to UPOV (*See Box: 1*).

Box 1

COFAB: A NON-UPOV PLATFORM

Unlike the provisions of UPOV, the CoFaB treaty seeks to fulfill the following goals:

- Provide reliable, good quality seeds to the small and large farmers;
- Maintain genetic diversity in the field;
- Provide for breeders of new varieties to have protection for their varieties in the market, without prejudice to public interest;
- Acknowledge the enormous contribution of farmers to the identification, maintenance and refinement of germplasm;
- Acknowledge the role of farmers as creators of land races and traditional varieties which form the foundation of agriculture and modern plant breeding;
- Emphasise that the countries of the tropics are germplasm owning countries and the primary source of agricultural varieties; and
- Develop a system wherein farmers and breeders have recognition and rights accruing from their respective contribution to the creation of new varieties.

Adapted from: Sahai, 2003.

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), approved by the FAO Conference on 3 November 2001, also seeks to secure the farmers' rights in different ways (*See Box: 2*).

FENDING OFF THE UPOV PRESSURE: A CASE STUDY OF NEPAL

At its final stage of accession negotiations, Nepal was under pressure by the USA to become a member of UPOV. The pressure came to the notice of the government on 9 August 2003. Surprisingly, the very next day the Nepalese delegation had to leave for Geneva to finalise its accession to the WTO. This was a tactical move by the US as it would give little time to the government to take any unpopular decision.

On the same day, the government authorities invited a member of SAWTEE to prepare a brief on Why Nepal cannot and should not join UPOV? The brief prepared by SAWTEE clearly cited various reasons suggesting the government authorities not to agree for UPOV, even if such a refusal could hamper the prospect of Nepal's membership to the WTO.

The government officials had made public announcement that they would not compromise with the

interests of the Nepalese farmers while obtaining WTO membership. Prior to their departure for Geneva, they promised that they would bilaterally deal with it and close the chapter once and for all.

Based on the assurance from the government [which was shared with the core members of National Alliance for Food Security – Nepal (NAFOS)]¹⁶ on 11 August, the CSOs did not feel it wise to launch any agitation at that moment. However, members of SAWTEE remained in constant touch with the government delegates through telephonic conversation. Meanwhile, a meeting of core NAFOS members was organised on 11 August to discuss the possible future strategy. One of the major decisions of the meeting was to publish articles in the daily newspapers against the pressure to join UPOV. Two members of SAWTEE published three articles within four days in two of the leading national dailies. Similarly, two posters, one in Nepali and other in English, were also published and distributed to all the concerned stakeholder groups. These posters had a clear message: "Say NO to UPOV".

The CSOs were hopeful that the government delegates would be able to maintain their promises. However, to their utter dismay, while talking to one of the delegates in Geneva on 13 August, it came to be known that the government officials had almost lost hope for any major breakthrough by then.

Without wasting a moment, the CSOs then organised a press conference in Kathmandu on the same day under

the banner of NAFOS. Journalists from all the leading media organisations, farmers' groups, lawyers and other stakeholder groups participated in the conference.

The press coverage of the event was one of the best among the CSOs' advocacy campaign. The next day almost all the media provided prominent coverage to the news. The news also came to the notice of the United States Trade Representative Office in Geneva.



On the final day of the accession negotiation, i.e., on 15 August, the CSOs' pressure ultimately became a boon for the entire Nepalese farming community. The USA agreed to include only minimalist text in the final Working Party Report, which states:

"...Nepal would also look at other WIPO and IP related Conventions, e.g., Geneva Phonograms Convention, UPOV 91, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, *in terms of national interest* and explore the possibility of joining them in the future, as appropriate."¹⁷ (emphasis added)

On one hand, the CSOs felt that the Nepalese delegation should not even have agreed to include the above text, howsoever minimalist it might be, because this opens the door for another round of pressure at a future date. On the other hand, they took pride in the fact that they were able to block the possibility of Nepal falling into 'UPOV trap' like other countries acceding to the WTO.

Considering the fact that the same pressure could be exerted at a future date, and that the officials who supported the position of the CSOs might be transferred to some other ministries or departments and there being no institutional memory within the government, the CSOs are planning the following strategy:

- To continue sensitising the government officials as well as other stakeholders on the imperatives of staying out of the UPOV system;
- To remain vigilant so as to ward off any future attempt to pressurise Nepal to join UPOV; and
- Even if the government decides to join UPOV at a future date under pressure, in order to block this decision, file a writ petition at the Supreme Court of Nepal by interpreting the 'national interest' as farmers' interest because more than 80 percent of the Nepalese population constitutes farmers.

CONCLUSION AND RECOMMENDATIONS

As if the TRIPS Agreement was not enough to harass the developing countries, TRIPS-plus conditions are

Box 2

ITPGRFA AND FARMERS' RIGHTS

Article 9 of the ITPGRFA states:

9.1 The Contracting Parties recognise the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

9.2 The Contracting Parties agree that the responsibility for realising Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, 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 utilisation 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.

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.

Source: Correa, Carlos M. 2002. *Traditional Knowledge and Intellectual Property*, A Discussion Paper, Quaker United Nations Office, April 2002, Geneva.

being imposed on them. UPOV is not the requirement of WTO/TRIPS. It is seeking a backdoor entry to the WTO. Since this model only suits the interests of the developed countries' commercial plant breeders and MNCs, its membership could have severe repercussions for the rights of the farmers in the developing countries. Therefore, these countries should protest against this model with a unified effort. In order to save the 1.4 billion farming population of the world, which are depending on farm saved seed for their livelihood, the following recommendations are worth taking note of by the developing countries:

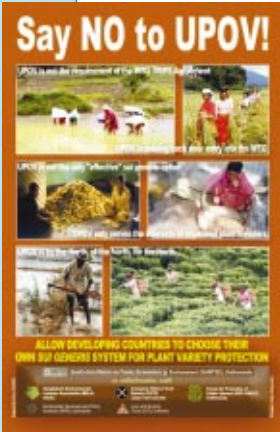
- To remain vigilant and resist the pressure to join UPOV (not even the UPOV 1978 version) at any cost and create a critical mass of like-minded countries to fight such menace at the international level including making use of the TRIPS Council (which is engaged in the review process of TRIPS) and World Intellectual Property Organisation (WIPO) platforms.

- To ratify ITPGRFA and seek ways to capitalise on the flexibilities that the TRIPS Agreement has provided.
- To design a *sui generis* legislation that suits their socio-economic, cultural and political realities.
- To make use of alternative international instruments such as ITPGRFA, OAU Model Legislation and CoFaB while designing *sui generis* legislation and also take note of the Indian PVPFR Act and the Namibian ABRATK Act as the models.
- To consult the farmers' groups and CSOs while designing *sui generis* legislation and preparing negotiating positions for the international negotiations. ■

ENDNOTES

¹ In the case of Malaysia, a draft PVP legislation was recently presented in the Parliament. See also ActionAid, Consumers International and Gene Campaign. 2002. *Why we oppose UPOV and why it is urgent that developing countries enact their own plant variety protection laws*, Media Briefing, 17 October 2002, Geneva.

- ² Dhar, Bishwajit. 2002. *Sui Generis Systems for Plant Variety Protection: Options under TRIPS*, A Discussion Paper, Quaker United Nations Office, April 2002, Geneva.
- ³ Kanniah, Rajeswari. 2003. *TRIPS, Farmers' Rights and Food Security: The Issues at Stake*, Consumers International, Asia Pacific Office, Kuala Lumpur.
- ⁴ Sahai, Suman. 2003. "CoFaB: A Developing Country Alternative to UPOV" in Ratnakar Adhikari and Kamallesh Adhikari. eds. *Farmers' Rights to Livelihood in the Hindu-Kush Himalayas*, SAWTEE, Kathmandu.
- ⁵ Sahai, Suman. 2003. above note 4.
- ⁶ Raja, Kanaga. 2002. "NGOs Urge India to Take Lead, Reject UPOV" in *Third World Economics*, No. 294, 1-15 December 2002, Third World Network, Penang.
- ⁷ <http://www.asialaw.com/directories/ipprofiles2002/vietnam/Default.htm>
- ⁸ India was a founding member of the General Agreement on Tariffs and Trade (GATT). After the GATT was transformed into the WTO in 1995, it automatically became a WTO member.
- ⁹ Sahai, Suman. 2003. above note 4.
- ¹⁰ Raja, Kanaga. 2002. above note 6.
- ¹¹ Sahai, Suman. 2003. above note 4.
- ¹² CUTS. 2003. *Intellectual Property Rights and Access to Seed: A Case Study of Himalayan Region in India*, A Research Book, Calcutta.
- ¹³ Atul. 2002. *Protecting Mountain Farmers' Rights in India*, Policy Brief, SAWTEE, Kathmandu.
- ¹⁴ Kumar, Ujjwal. 2001. "The Protection of Plant Varieties and Farmers' Rights Bill (2001) of India" in *SAWTEE Newsletter*, September-November 2001, Kathmandu.
- ¹⁵ Dhar, Bishwajit. 2002. above note 2.
- ¹⁶ NAFOS is a network of more than 20 NGOs and INGOs working in Nepal for the cause of protecting and promoting food security and farmers' rights. This was founded by ActionAid Nepal, together with other like-minded organisations, including SAWTEE in 1999. SAWTEE is currently the Secretariat of this network.
- ¹⁷ WTO. 2003. *Working Party Report on the Accession of the Kingdom of Nepal to the World Trade Organisation*, WT/ACC/NPL/16, WTO, Geneva.



Launched in December 1994 at Nagarkot, Nepal by a consortium of South Asian non-governmental organisations, South Asia Watch on Trade, Economics & Environment (SAWTEE) is a recognised, registered, non-profit and non-governmental organisation. Its mission is to build the capacity of the concerned stakeholders in South Asia by equipping them with knowledge, information and skills to voice their concerns particularly in the context of liberalisation and globalisation.



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