

MALAYSIAN CIVIL SOCIETY & FARMER GROUPS' MEMORANDUM ON RCEP & PLANT VARIETY PROTECTION

21 February 2019

RCEP Negotiations Must Not Include Obligation to Join or Implement UPOV Systems and In Anyway Undermine Farmers' Rights

The undersigned signatories are writing to strongly stress that the Regional Comprehensive Economic Partnership (RCEP) negotiations must not place any obligation on Malaysia or any other developing country to join or implement UPOV systems or impose any other obligation and/or limitation in relation to plant variety protection. Nothing in the RCEP negotiations must affect the Farmers' Rights especially their freedom to operate with respect to farm saved seed/propagating material.

In 2004, utilizing the policy space accorded by the TRIPS Agreement, Malaysia enacted the Protection of New Varieties of Plants Act. This law is unique as it delicately balances the different interests (public interests, commercial plant breeders, public breeders and smallholder farmers). The Act also promotes realization of the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the Convention on Biological Diversity (CBD), and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and mutual supportiveness among national laws. Some of the key unique features of this law are:

- (a) The recognition of farmer seed systems and their need for protection as well as their need for distinct criteria for registration. It grants protection to varieties of farmers, local communities or indigenous people if the plant variety is “new, distinct and identifiable”.
- (b) Recognition of government's right to refuse the grant of plant breeder's right in the public interest.
- (c) Requiring an applicant for plant breeders' rights to *inter alia* declare the source of the genetic material or the immediate parental lines of the variety, present evidence of prior informed consent as well as show compliance with access and benefit sharing and biosafety legislation. These requirements are aimed at preventing ‘biopiracy’, facilitating

fair and equitable benefit sharing, supporting implementation of other national laws including protecting Malaysians from varieties that are injurious to health or the environment. These are also linked to implementation of Malaysia's obligations under international law including the ITPGRFA, CBD and its Cartagena Protocol on Biosafety.

(d) Recognizing as an exception to PBRs, the absolute right of small farmers to save seeds/propagating materials on their own holding, to exchange seed/propagating material among small farmers and to sell farm saved seeds in situations where a small farmer cannot make use of the farm saved seed on his own holdings due to circumstances beyond the farmer's control. The average land holding for farmers is 1.32 hectares, and for smallholder farmers in Malaysia, the main source of seeds is often from local markets, farm saved seed, relatives and neighbours.

Joining or implementing the UPOV system will require Malaysia to delete the above features and many other provisions from its national PVP law.

UPOV system lacks policy space for Malaysia to implement measures to reflect national realities, protect public interests and farmer seeds systems. In fact, the UPOV system conflicts with requirements of Article 6 and 9 of the ITPGRFA.ⁱ Article 6 requires Contracting Parties to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture including supporting the development and maintenance of diverse farming systems, promote participatory plant breeding, strengthen the capacity to develop varieties adapted to social, economic and ecological conditions, broaden the genetic base of crops etc.

Article 9 of the ITPGRFA states it is government's responsibility to take measures to "protect and promote" Farmers' Rights including farmers' right to save, use, exchange and sell farm saved seeds, their right to the protection of tradition knowledge and to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture.

A recent study undertaken on behalf of the German Federal Ministry for Economic Cooperation and Development concluded that "UPOV 91-based PVP laws were found to not advance the realization of Farmers' Rights; rather they are effective in the opposite direction".ⁱⁱ

A human rights impact assessment of the 1991 Act of UPOV implementation concluded “...if implemented and enforced, UPOV 91 would sever the beneficial inter-linkages between the formal and informal seed systems”, and its “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” as well as “other human rights, by reducing the amount of household income which is available for food, healthcare or education.”ⁱⁱⁱ It is estimated that joining or complying with UPOV 91 will increase the cost of seeds by more than 4 times.^{iv}

The assessment further adds that traditional knowledge applied by farmers in the selection, preservation and storing of seed is the basis of local innovation and *in situ* seed conservation and “UPOV’s restrictions on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and preservation. 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.” “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, and that from a human rights perspective, restrictions on traditional practices and seed management systems ... adversely impact on farmers’ rights, cultural rights, minority rights, indigenous peoples’ rights, women’s rights, as well as on biodiversity and the right to food”.

According to the General Comment 12 of the Committee on Economic, Social and Cultural Rights, the right to food requires States to pro-actively engage in activities intended to strengthen people's access to and utilization of resources [includes seeds] and means to ensure their livelihoods including *not* taking any measures that result in preventing such access.^v Therefore intellectual property regimes and seed policies must be compatible with and conducive to the realization of the right to adequate food.

The former Special Rapporteur on the Right to Food in its 2009 report to the General Assembly highlights that “States – particularly developing countries where the function of traditional, farmers’ seed systems is even more important both for the prevention of genetic

erosion and for the livelihoods of farming communities – should design sui generis forms of protection of plant varieties which allow these systems to flourish, even if this means adopting non-UPOV compliant legislations”. He concludes: “No State should be forced to establish a regime for the protection of intellectual property rights which goes beyond the minimum requirements of the TRIPS Agreement: free trade agreements obliging countries to join the 1991 UPOV Convention or to adopt UPOV-compliant legislation, therefore, are questionable.”^{vi}

A major concern with the UPOV system is that facilitates bio-piracy of genetic resources. It does not recognize the principles of the CBD that access to local genetic resources should be subject to prior informed consent (PIC) and fair and equitable benefit sharing (BS). Instead it allows PVP protection for varieties developed by misappropriating local genetic resources. Hence UPOV conflicts with CBD and efforts in the international fora such as the WTO and WIPO, whereby Malaysia and other developing countries have advocated for the right to require applicants to disclose origin, proof of PIC and benefit sharing as a condition for receiving intellectual property (IP) protection.

In short, UPOV system offers an extremely rigid and inappropriate legal framework for developing countries. It was developed in the 60s’ for seed production modalities prevailing in developed countries especially in Europe. Malaysia and other developing countries never participated in UPOV negotiations. Hence, unsurprisingly multiple independent experts recommend that developing countries should not join or implement the UPOV system.^{vii}

Finally, we applaud Malaysia’s support for the “Declaration on the right of peasants and other people working in rural areas” adopted by the Human Rights Council and the UN General Assembly which requires States to “take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas” which include Farmers’ Rights. Implementation of the Declaration requires Malaysia to have maintain full policy space to put in place relevant measures.

We stress that the UPOV system would be inconsistent with and undermine farmer seed systems in Malaysia and the international rights and obligations of Malaysia under the various international instruments. Most importantly nothing must affect

the right of Malaysian farmers to freely save, use, exchange and sell farm saved seeds/propagating material.

We recall that Article 27.3(b) of the WTO-TRIPS Agreement allows countries complete freedom to adopt a PVP system suitable to its agricultural condition and needs. Nothing in the RCEP negotiations should affect and limit this freedom. Malaysia must have policy space to implement a PVP system that is appropriate for its agricultural system, protects its local plant genetic resources, its farmers and safeguards public interest as well as enable it to take measures to implement the Declaration on the Right of Peasants and other people working in rural areas.

Endorsed by:

1. Consumers Association of Penang (CAP)
2. Sahabat Alam Malaysia (SAM)
3. Pertubuhan Pembangunan Antarabangsa & Penyelidikan Untuk Kelestarian (IDRIS)
4. Jaringan Nelayan Pantai Semenanjung Malaysia (Jaring Malaysia)
5. Persatuan Nelayan Dan Komuniti Setempat Muara Sg Klebang Melaka
6. Angkatan Rela Laut Melaka
7. Badan Bertindak Pesawah MADA
8. Pertubuhan Persaudaraan Pesawah Malaysia (PeSAWAH)
9. GRASS Malaysia
10. Persatuan Aktivis Sahabat Alam - KUASA
11. Badan Kebajikan Nun (BAKUN)
12. Rice And Roses Humanitarian
13. Terminal Insani Malaysia (TI)
14. Pertubuhan Warga Desa Malaysia (Rural Citizen)
15. Pertubuhan Masyarakat Prihatin Malaysia (Prihatin)
16. Pertubuhan Aktivis Pengupayaan Insan Malaysia (API Malaysia)
17. Angkatan Belia Islam Malaysia Kuala Muda
18. Persatuan Pencinta Hutan Paya Kerian
19. Basatin Filahah Permaculture
20. Sustainable Development Network Malaysia (SUSDEN Malaysia)
21. ARMADA Caw. Kuala Selangor

22. Pemuda UMNO Caw. Klebang Besar
23. Majlis Tindakan Ekonomi Melayu (MTEM)
24. Badan Bertindak Selamatkan Industri Padi Beras Malaysia (Padi Rescue)
25. UNGGAS Malaysia
26. Yayasan Isra' Malaysia
27. Lajnah Asas Tani dan Alam Sekitar PAS Pusat
28. Komuniti Pergerakan Perkhidmatan Masyarakat (Komuniti PPM)
29. Persatuan Sayang Sungai Petani Persatuan Kebajikan Asas Tani (AGROCARE)
30. Persatuan Kebajikan Alam Sekitar Malaysia (RAKAN ALAM)

ⁱ International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9 on Farmers' Rights and Relevant Instruments of UPOV and WIPO, available at

https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2015_BD_Saatgut_EN_9-15_def.pdf

ⁱⁱ Available at <https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>

ⁱⁱⁱ "Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the MALAYSIA," October 2014. Available at

<https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/seeds/owning-seeds-accessing-food/>

^{iv} "Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the MALAYSIA," October 2014. Available at

<https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/seeds/owning-seeds-accessing-food/>;

^v Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), May 1999, available at: <http://www.refworld.org/pdfid/4538838c11.pdf>

^{vi} Olivier De Shutter, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation, 2009, available at

http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf

^{vii} The UPOV Convention, Farmers' Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks" published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development" (June 2015) available at

<https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>; UNDP (2008) "Towards a Balanced Sui Generis Plant Variety Regime", available at

[http://www.undp.org/content/undp/en/home/librarypage/poverty-](http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/toward-a-balanced-sui-generis-plant-variety-regime.html)

[reduction/toward-a-balanced-sui-generis-plant-variety-regime.html](http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/toward-a-balanced-sui-generis-plant-variety-regime.html); "Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the MALAYSIA," October 2014. Available at

<https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/seeds/owning-seeds-accessing-food/>;

Carlos M. Correa et al. (2015), « Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 », APBEBES, available at

<http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>