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INTERNATIONAL TREATIES AND DECLARATIONS RELEVANT TO PLANT GENETIC RESOURCES AND FARMERS' RIGHTS



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By Nurfitri Amir Muhammad

Malaysia is a Party to several international treaties and has supported human rights declarations relevant to plant genetic resources and Farmers' Rights. Hence when drafting policies and laws, the government should address the objectives of these instruments in a coherent manner and avoid contradiction and non-compliance with international obligations and commitments. The related international instruments include the International Treaty on Plant Genetic Resources for Food and Agriculture, the Convention on Biological Diversity and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, the United Nations Declaration on the Rights of Indigenous Peoples, and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.



International Treaty on Plant Genetic Resources for Food and Agriculture

The ITPGRFA was adopted by the 31st Session of the Conference of the Food and Agriculture Organization of the United Nations on 3 November 2001 and came into force on 29 June 2004 with the objectives of conservation and sustainable use of plant genetic resources for food and agriculture, and the fair and equitable sharing of the benefits arising out of their use, for sustainable agriculture and food security.



The Treaty aims at recognizing the enormous contribution of farmers to the diversity of crops that feed the world; establishing a global system to provide farmers, plant breeders and scientists with access to plant genetic materials; and ensuring that recipients share benefits derived from the use of these genetic materials with the countries where they have been originated (FAO, 2020). The main provisions of the Treaty are concerned with Farmers' Rights, conservation, sustainable use, and a multilateral system for access and benefit sharing for plant genetic resources for food and agriculture.

The preamble of the ITPGRFA affirms “that the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving, improving and making available these resources, [are] the basis of Farmers' Rights”.

Specifically, Farmers' Rights are set out in Article 9 of the Treaty whereby the government that is Party to the ITPGRFA is responsible for taking steps at the national level to “protect and promote” the rights of farmers.

Article 9.1 further provides that the Contracting Parties recognize the enormous contribution that the 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 plant genetic resources.



In Article 9.2, each member of the Treaty also agrees to take measures to “protect and promote Farmers’ Rights” including:

- The right to the protection of traditional knowledge relevant to PGRFA;
- The right to equitably participate in sharing benefits arising from the utilization of PGRFA;
- The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA.



Article 9.3 of the ITPGRFA clarifies that nothing in Article 9 “shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material”. Importantly, the preamble of the ITPGRFA reaffirms “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 levels ...”



Article 6 is also relevant as it requires the Contracting Parties to develop and maintain appropriate policy and legal measures that promote the sustainable use of PGRFA, as mentioned in Article 6.1. Furthermore, Article 6.2 of the Treaty describes the measures as:

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;

b) Strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests;

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;

d) Broadening the genetic base of crops and increasing the range of genetic diversity available to farmers;

e) Promoting, as appropriate, the expanded use of local and locally adapted crops, varieties and underutilized species;

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

g) Reviewing, and, as appropriate, adjusting breeding strategies and regulations concerning variety release and seed distribution.



Convention on Biological Diversity

The CBD is a legally binding international agreement concluded in 1992, and entered into force in December 1993, with three main objectives: biodiversity conservation, sustainable use of components of biological diversity, and fair and equitable sharing of the benefits arising from the use of genetic resources. Malaysia ratified the CBD on 22 September 1994.

The CBD looks at biodiversity in the framework of ecosystems, species and genetic resources. It also regulates modern biotechnology through its 2000 Cartagena Protocol on Biosafety and implements the benefit-sharing objective through its 2010 Nagoya Protocol on Access and Benefit Sharing. The CBD plays a direct and indirect role in matters related to biodiversity in politics, education, business, science, culture and agriculture (United Nations, n.d.).

Article 8(j) of the CBD recognizes the role played by indigenous peoples and local communities in maintaining biodiversity and their reliance on nature. Through this provision, Parties to the Convention must respect, preserve and maintain the knowledge, innovation and practices of indigenous peoples and local communities. Parties are also responsible for promoting the sharing of benefits arising from the knowledge, innovations and practices of indigenous peoples and local communities.

Article 8(j) of the CBD provides that each Party shall, as far as possible and as appropriate:

“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”.



The CBD provisions on access and benefit sharing acknowledge the sovereign rights of States over their natural resources. It is the responsibility of Parties to put in place conditions that facilitate access to their resources on mutually agreed terms and subject to prior informed consent. A Party is entitled to fair and equitable benefit sharing arising from commercialization and other utilization of the genetic resources on mutually agreed terms. The implementation of these provisions is set out in the Nagoya Protocol on Access and Benefit Sharing, to which Malaysia became a Party on 3 February 2019 (CBD, n.d.).

Malaysia is one of the world's megadiverse countries. It is ranked 12th in the world in the National Biodiversity Index. As a country rich in biodiversity, it has played a leading role in the CBD negotiations including as a leader of like-minded megadiverse countries.

Malaysia has gazetted the Access to Biological Resources and Benefit Sharing Act 2017 to implement the CBD and its Nagoya Protocol.

However, in the case of protection of new plant varieties, the access and benefit-sharing principles are operationalized through Section 12 of the PNPV Act, which requires that an applicant disclose the source of the genetic material or the immediate parental lines of the plant variety; that the application be accompanied by 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; and that the application be supported by documents relating to the

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compliance of any law regulating access to genetic or biological resources. The idea here is to ensure compliance with access and benefit-sharing requirements to prevent misappropriation of genetic resources and traditional knowledge and to facilitate the implementation of prior informed consent and fair and equitable benefit sharing arising from the utilization of the genetic resources or traditional knowledge.



Article 12 of the Nagoya Protocol addresses traditional knowledge associated with genetic resources. Parties to the Protocol shall, in accordance with domestic law, take into consideration indigenous peoples and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

Article 12.4 states that:

“Parties in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and among indigenous and local communities in accordance with the objectives of the Convention.”

International Human Rights Instruments

Consideration of human rights principles and norms is imperative when formulating or adopting national law and policy. International human rights instruments have primacy of norms over other international instruments, including those protecting intellectual property (Golay et al., 2022). The promotion and protection of human rights is one of the main purposes of the UN (Article 1.3 of the UN Charter), and UN Member States have pledged to take joint and separate action to promote universal respect for human rights (Articles 55 and 56).



The UN Charter also provides that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail” (Article 103). In the Vienna Declaration and Programme of Action, all UN Member States reaffirmed that the promotion and protection of human rights is the first responsibility of governments (United Nations General Assembly, 1993).

The range of human rights that could be impacted by intellectual property (IP) in agriculture and plant variety protection more specifically is broad as all human rights are interdependent and interrelated. Olivier De Schutter (2009), in his capacity as the UN Special Rapporteur on the right to food, stressed in his report “Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation” that access to seed is a critical element of the universal right to food. His report states: “The right

to food requires that we place the needs of the most marginalized groups, including in particular smallholders in developing countries, at the centre of our efforts.” It adds that “The oligopolistic structure of the input providers’ market may result in poor farmers being deprived of access to seeds productive resources essential for their livelihoods, and it could raise the price of food, thus making food less affordable for the poorest”.

From a human rights perspective, restrictions on the use, exchange and sale of protected seeds could also adversely affect the right to food, as seeds might become either more costly or harder to access, as well as affect other human rights, by reducing the amount of household income available for food, healthcare and education (Braunschweig et al., 2014).



Fakhri (2019) in his Report of the Special Rapporteur on the right to food to the Human Rights Council also stresses that Member States should base their national seed systems on the International Treaty on Plant Genetic Resources for Food and Agriculture and human rights law as articulated in instruments such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.

In this section, we discuss three specific human rights instruments that are relevant to Malaysia.

I. UN Declaration on the Rights of Peasants and Other People Working in Rural Areas

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas was adopted by the UN General Assembly on 19 November 2018. This established, for the first time, the rights of peasants and other people working in rural areas in international human rights law, including the right to seeds as per Article 19 of the Declaration (see box). Malaysia voted in favour of the Declaration.

States have the responsibility to realize the rights of peasants and rural workers as set out in the Declaration. Notably the Declaration explicitly recognizes that the right to protection of traditional knowledge relevant to PGRFA; the right to equitably participate in sharing the benefits arising from the utilization of PGRFA; the right to participate in the making of decisions on matters relating to the conservation and sustainable use of PGRFA, and the right to save, use, exchange and sell farm-saved seed or propagating



The 8th Global Forum of the United Nations Alliance of Civilizations gets underway at UN Headquarters in New York on 19 November 2018.



material are fundamental prerequisites of the right to seeds and that States are required to take “measures to respect, protect and fulfil” these rights.

UNDROP strongly reaffirms the primacy of the human rights of peasants over other international norms. Article 2.4 provides that “States shall elaborate, interpret and apply relevant international agreements and standards to which they are party in a manner consistent with their human rights obligations as applicable to peasants.” In Article 19.8, UNDROP calls on States *inter alia* to ensure that plant variety protection laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas. Experts argue that these provisions reflect the fact that “as higher-order norms, human rights cannot be traded off or undermined” (Golay et al., 2022).

It is also important to note that in accordance with Article 15.5, States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in UNDROP.

II. UN Declaration on the Rights of Indigenous Peoples

UNDRIP was adopted by the UN General Assembly on 13 September 2007 and Malaysia supported its adoption. This historic Declaration sets out the responsibility of the State to fulfil the collective and individual rights of indigenous peoples for their survival, dignity and well-being.

Article 31 explicitly states that indigenous peoples have the right to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, ... knowledge of the properties of fauna and flora, oral

traditions...”, with States having the obligation to “take effective measures to recognize and protect the exercise of these rights”.

Articles 18, 28 and 29 of UNDRIP stress on the responsibility of States to support indigenous peoples to realize their rights to the conservation and protection of the environment and the productive capacity of their lands or territories and resources, their right to free, prior and informed consent to use their natural resources, and their right to be involved in the decision-making process. Furthermore, the Declaration guarantees indigenous peoples the right to practise their culture and beliefs, including their traditional agricultural practices, without restriction as long as they do not violate international human rights. In addition, Article 20 recognizes the right of indigenous peoples to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.



S. James Anaya

S. James Anaya (2008), in his capacity as the UN Special Rapporteur on the rights of indigenous peoples, recognized UNDRIP to be “an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples”.

III. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW was adopted on 18 December 1979 by the United Nations General Assembly and entered into force as an international treaty on 3 September 1981. Malaysia became a Party in 1995.



Article 14 of CEDAW recognizes the rights of rural women and provides that States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas. In its General Recommendation No. 34 adopted in 2016, in which it interpreted Article 14, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) underlined that “rural women are critical to achieving food security, reducing poverty, malnutrition and hunger, and in promoting rural development, yet their contribution is often unpaid, unacknowledged, and poorly supported” (CEDAW Committee, 2016). It then described the measures that States Parties to the CEDAW Convention should take to better protect rural women’s right to food. These include measures to ensure that they have the authority to manage and control their natural resources, within the framework of food sovereignty, and the adoption of effective policies to ensure that they have access to adequate food and nutrition.

The CEDAW Committee has also recognized that rural women’s right to seeds is a fundamental human right (CEDAW Committee, 2016), recommending that Parties to the CEDAW Convention should, among others:

- 1 implement agricultural policies which support rural women farmers, recognize and protect the natural commons, promote organic farming and protect rural women from harmful pesticides and fertilizers;
- 2 ensure that rural women have effective access to agricultural resources, including high-quality seeds, tools, knowledge and information, as well as equipment and resources for organic farming;
- 3 respect and protect rural women’s traditional and eco-friendly agricultural knowledge and particularly the right of women to preserve, use, and exchange traditional and native seeds;



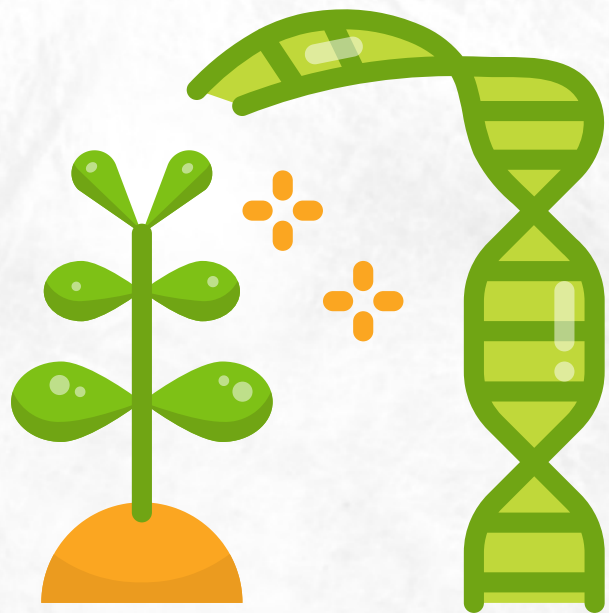
4 protect and conserve native and endemic plant species and varieties that are a source of food and medicine, and prevent patenting by national and transnational companies to the extent that it threatens the rights of rural women;

5 ensure the realization of the right to food and nutrition of rural women within the framework of food sovereignty and ensure that they have the authority to manage and control their natural resources; and

6 adopt laws, policies and measures to promote and protect rural women's diverse local agricultural methods and products, and their access to markets. They should ensure diversity of crops and medicinal resources to improve rural women's food security and health, as well as access to livestock.

Conclusion

Access to plant genetic resources and sharing of benefits arising from their utilization, mechanisms to prevent biopiracy of such resources, and the rights of local and indigenous communities and farmers that have been involved in the conservation and development of plant genetic resources, are among the aspects that are germane to any legal framework pertaining to plant genetic resources.



Consequently, these factors have to be considered and addressed within a PVP system. As discussed above, each of these areas is governed by international law, notably in some instances as a direct result of



Malaysia's leadership at the international level.

Operationalizing rights and fulfilling commitments in international treaties and human right instruments underscores the imperative for a distinctive PVP framework as well as mutually supportive national laws. The PNPV Act 2004 is a step in that direction. In contrast, as discussed in the next chapter, the UPOV 1991 legal framework does not recognize the rights and obligations that countries have in the abovementioned international instruments, nor does it allow its Parties the flexibility and policy space to implement the same in the context of a PVP system.

This is a chapter from a full report titled *The Potential Impact Of UPOV 1991 On The Malaysian Seed Sector, Farmers And Their Practices* published by Third World Network and APBEBES

