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Farmers' Privilege under the Protection of New Plant Varieties

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Abstract This paper studies farmers' privilege under the protection of new plant varieties, and points out that farmers' privilege is given to balance interests of plant breeders and relevant public. Based on this, it analyzes shortcomings of farmers' privilege regulations, and puts forward that it is required to improve farmers' privilege regulations in subjects, objects and contents of rights on the basis of learning from advanced legislation experience of foreign countries, and build the interest sharing mechanism between breeders and farmers.

Key words Protection of new plant varieties, Farmers' privilege, Interest sharing

As the central intellectual property right in agricultural field, the new plant variety right is a strategic guarantee for grain security, racing to control a commanding point of the biological industry and controlling biological resources. The new plant variety protection is intellectual property protection system in plant field. It is exclusive right granted to new variety selection unit or individual for production, sales and use of propagated material of the protected variety by the state examination and approval authority in accordance with laws and regulations. No other entities or persons shall, without the authorization of the owner of the variety right, produce or sell for commercial purposes the propagating material of the said protected variety, or use repeatedly for commercial purposes the propagating material of the said protected variety in the production of the propagating material of another variety. The new plant variety protection is objective demand of market economic development. The *International Convention for the Protection of New Varieties of Plants* (hereafter referred to as the *Convention*), signed by some American-European countries in 1961, came into force in 1968. From then on, the *Convention* formed 1961/1972 Act, 1978 Act and 1991 Act. The International Union for the Protection of New Varieties of Plants (UPOV), founded in accordance with the *Convention*, is an intergovernmental organization with legal personality. Its purpose is to coordinate policies, laws and regulations, technologies and implementing steps of member states in protection of new varieties of plants. By now, this Union has 70 member states, of which 47 states have joined the 1991 Act and 22 states have joined 1978 Act^[1]. Strengthening protection of variety rights is a fundamental approach to promoting breeding innovation. Farmers' privilege is an indispensable part of the new plant variety protection system. Here, farmers' privilege under the protection of new plant varieties is studied to provide reference for relevant departments.

1 Farmers' privilege system

Farmers' privilege, domestically called "farmers' exemption" or "farmers' right to save seed", is the right of land farming, owning, managing people or entrusted people to save, breed, exchange and sell seeds for genetic materials of final harvested products. In the *Convention*, the farmers' privilege allows farmers to use harvested materials of authorized varieties as breeding materials in their land. This right is called privilege just in compliance with international practice, it belongs to private right, rather than public right^[2].

The legislation of farmers' privilege system is to balance interests of plant breeders and relevant public. The 1978 Act of the *Convention* limits the rights of the owner of the variety right within the scope of commercial production and sales of propagating materials of protected varieties. It stipulates that every member state should give its farmers privilege, approve the legitimacy of farmers' saving and utilizing seed of protected varieties to produce agriculture products or processed goods and put them on market. In Paragraph (2) of Article 15 of 1991 *Act of the Convention*, it stipulates that each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests 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. This indicates that the member state or government can determine privilege of farmers and the extent of privilege at its discretion, and turns farmers' privilege from compulsory exceptions into optional exceptions. In other words, seed exchange between farmers is forbidden in 1991 Act. In accordance with this, selling harvest produced by propagated material without permission of the right owner also belongs to tort, and farmers' commercial act, such as sales of grain, flower and fruit, may lead to encroachment of right^[3]. This, in fact, cancels farmers' privilege in a disguised form, and tends to protect breeders' right. In addition, it does not grant privilege to farmers for industrial crops, such as ornamental plants, fruit trees

and forest trees. China joined the 1978 Act of the *Convention* in March of 1999 and officially became its 39th member state. To adapt to new situation of new plant variety protection after China's entry to the WTO, it is urgent to study problems of farmers' privilege, variety right financing and subscription of new shares.

2 Shortcomings in existing farmers' privilege of China

China's new plant variety protection system mainly consists of laws, administrative regulations, and relevant judicial interpretation. The provisions of farmers' privilege are mainly seen in *Regulations of the People's Republic of China on Protection of New Varieties of Plants* (hereafter referred to as these *Regulations*) issued in 1997. Article 10 of these *Regulations* stipulates that "Without prejudice to other rights of the variety right owner under these *Regulations*, the exploitation of the protected variety may not require authorization from, or payment of royalties to, the variety right owner for the following purposes: (i) exploitation of the protected variety for breeding and other scientific research activities; (ii) the use by farmers for propagating purposes, on their own holdings, of the propagating material of the protected variety which they have obtained by planting on their own holdings. This indicates that for farmers can use the propagating material of the protected variety on their own holdings for propagating purposes without permission of variety right owner. That is to say, in China, farmers can use any propagating material of the protected variety on their own holdings for propagating purposes and it will not be deemed as tort. Generally, these *Regulations* are too simple for farmers' privilege, and there are shortcomings in subjects, objects and contents of rights.

2.1 Subjects of right are not thinning enough All rights include three elements: subjects, objects and contents. As to farmers' privilege, the subjects are obviously farmers. However, compared with relevant legislation of foreign countries, it can be seen that the concept of farmers is different. In developed countries, the plant variety protection laws divide subjects of farmers' privilege into "big farmers", "small farmers" and "entrusted third persons"^[2]. For example, the *Plant Variety Law of European Union* divides farmers into different levels: small farmers and other farmers. These farmers enjoy different rights. Small farmers do not need to pay royalty to right owners for use of self-saved seed of protected varieties; other farmers have the right to save seed of protected varieties, but should pay royalty to right owners or right holders. Besides, relevant laws of European Union stipulate that farmers' privilege is only applicable to 21 varieties of 4 types of plants (feed, cereal, potato, oil seed and fiber plant) in agricultural plants, but not suitable for gardening, ornamental and other types of plants^[4].

In these *Regulations* of China, there is only one article of privilege, so it is extremely imperfect, especially it lacks clear definition of subjects of rights. From the issue and implementation of *Regulations of the People's Republic of China on Protection of New Varieties of Plants* in 1997 to the present, on the

one hand, with improvement of agricultural commercialization and input of substantial amount of social capital into agriculture, agricultural production subjects are changing silently. More and more large-scale industrialized farms gradually appear, and there are more and more big contracting households, big professional households, big planting households, and specialized agricultural planting companies^[4]. On the other hand, most Chinese farmers are still small individual operators, and they have little land and the planting area is small. In China, the subjects of farmers' privilege adopt the concept of big farmers, which lacks thinning of different groups, so it is difficult to provide classified services for different types of farmers.

2.2 Objects of rights are narrow In accordance with provisions of these *Regulations*, the objects of farmers' privilege are limited to propagated materials, and derived varieties are not protected. The 1978 Act of the *Convention* stipulates that member state can freely choose harvested material of some authorized varieties to protect. Although these *Regulations* stipulate that the whole plant (including seedling), seed (including root, stalks, leaves, flowers and fruits) and any part (tissue and cell, for instance) constituting the plant of authorized variety should be protected, the scope of protection is wider than harvested material^[5].

From the April of 1999, states newly joined the International Union for the Protection of New Varieties of Plants shall only execute the 1991 Act, therefore, the expansion of objects of farmers' privilege has become mainstream trend of the international new plant variety protection. Japan joined the 1978 Act of the *Convention*, and started to implement the 1991 Act from December of 1998. The *Seeds and Seedlings Law of Japan* newly revised in June of 2003 stipulates that Japanese farmers can't use the propagating material of the 23 varieties of ornamental plants and edible fungus on their own holdings for propagating purposes, and can use propagating material of other protected varieties for propagating materials. However, in the *Regulations* of China, farmers can use any propagating material of the protected variety on their own holdings for propagating purposes and it will not be deemed as tort. This possibly causes that a breeder applies the slightly improved variety for new variety protection^[6].

2.3 Contents of rights are single China's *Regulations* limit the farmers' privilege to "propagating material of the protected variety on their own holdings for propagating purposes" and exclude non-commercial production from variety right protection. Besides, the *Regulations* neither stipulates right of inheritance, nor grants right of import to variety right owner, and it lacks the provision of Article 51 Suspension of Release by Customs Authorities in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Single contents of rights generally lead to difficult safeguarding of basic rights of variety right owners.

According to the 1991 Act of the *Convention*, the new plant variety protection not only includes propagated materials of protected varieties for commercial production or sales, but also includes production, propagation, sales, and provides harvested

material and processed goods for sales, import, export, storage and processing.

3 Suggestions for improving farmers' privilege in China

China is a large agricultural developing country. Issues concerning agriculture, farmers and countryside are always difficult, important and starting points of China's social development. In this situation, China is faced with how to properly solve problems of new plant variety protection and popularization of new plant variety.

3.1 Thinning subjects of rights In developing countries, breeders and farmers are mutually dependent, while developed countries are inclined to limit and cancel farmers' privilege. China is a large agricultural country, and its agricultural production mode is still mainly the family workshop type. Weakening of farmers' privilege will certainly harm farmers' interests, which becomes an urgent problem to be solved^[7]. In this situation, it is required to learn experience of European Union and India, subdivide right subjects of farmers' privilege, and emphasize protection of farmers' rights and interests. Firstly, it is proposed to issue appropriate standard for distinguishing different farmer groups, such as "farmers living in other places for a long time", "farmers starting an undertaking in hometown", etc. Secondly, it is recommended to specify different rights and obligations for different types of farmers. For example, big contracting households, big professional households, big planting households, and specialized agricultural planting companies may have the right to save seed of protected varieties, but should pay royalty to right owners or right holders; family households can save seed of protected varieties without needing paying royalty to right owners.

Farmers' privilege is a double-edged sword. On the one hand, it creates favorable condition for member states to flexibly balance rights of breeders and interests of farmers; on the other hand, it provides an excuse for developed countries for asking Chinese government to limit farmers' privilege^[8]. Indian experience is worth learning from. In the *Protection of Plant Varieties and Farmers' Rights Act* issued by India in 2004, it stipulates that even if breeders have been grant with rights, farmers still have the right to sell their harvested seed (not including trademark) in their local places; it also exempts farmers from infringement upon rights of breeders on the condition that farmers are ignorant about the matter. To prevent germplasm resource loss, India also has established source disclosure system and benefit sharing mechanism for biological genetic resources, and saved the compensation fund for genetic resources into the national genetic fund, to provide proper compensation for farmers in germplasm resource regions^[9].

3.2 Expanding scope of objects To go with the development trend of international new plant variety protection, and to make full preparation for joining the 1991 Act, China should expand objects of farmers' privilege from propagated materials to harvested materials and processed products of propagated materials of protected varieties, especially, it is required to intro-

duce the system of "dependent derived variety".

The 1991 Act firstly incorporated substantive derived varieties into scope of plant variety protection, which is favorable for strengthening interest protection of original breeders, raising higher requirement for original breeding innovation ability, but also limits the study of exemption^[10]. The variety right protection is a major motive force of breeding industrial development. Therefore, introduction of "dependent derived variety" system can effectively encourage original breeding and diversified breeding, realize balanced interest pattern of new technical conditions, and promote the development of breeding industry, particularly the development of personal breeding^[11].

3.3 Enriching contents of rights In the first place, it is required to expand contents of variety protection, and add the stipulation of any import and export activities for commercial purpose without permission in act of tort. Adding import activities is to prevent exclusive right of variety right owners from any substantive harm due to the same variety of propagated materials imported from foreign countries; adding export activities is not only helpful to protecting China's plant genetic resources, but also helpful to effectively preventing variety right owners from irreparable damage due to regional intellectual property protection and independence of protection. In the second place, it is proposed to add the suspension of release by customs authorities. In the third place, it is required to extend term of protection of new plant varieties. Finally, it is required to make clear definition of commercial purpose.

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