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Implementing farmers' rights relating to seeds

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**SOUTH
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Paper
March 2017

75

IMPLEMENTING FARMERS' RIGHTS RELATING TO SEEDS

Carlos M. Correa



RESEARCH PAPERS

75

IMPLEMENTING FARMERS' RIGHTS RELATING TO SEEDS

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SOUTH CENTRE

MARCH 2017

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I. INTRODUCTION

The enhancement of the Multilateral System established by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) is a clear priority now for its Contracting Parties. While discussions on the subject are ongoing, developing countries, farmers' and other civil society organizations continue to express their disappointment regarding the slow pace and the obstacles found in the implementation of Farmers' Rights, as recognized in that treaty.¹

The acceptance and delineation of the concept of Farmers' Rights in the ITPGRFA were among the most contentious issues in the seven years of negotiations leading to the adoption of the Treaty. The adopted text has set out a general umbrella to promote a range of policies relevant to farmers' use and conservation of plant genetic resources for food and agriculture.² Although it has not provided a precise definition of such rights, it has created a platform for initiatives to improve farmers' participation in decision making and to support their activities as both producers and breeders.

The concept of Farmers' Rights recognized the role of farmers as custodians of biodiversity and helped to draw attention to the need to preserve practices that are essential for a sustainable agriculture. This paper examines one particular aspect of such rights, perhaps the most controversial. It deals with the component of farmers' rights referred to the use, exchange and sale of farm-saved seeds. Although, as discussed below, that concept was initially introduced –in 1989– with the aim of balancing the rights of farmers as breeders and of commercial plant breeders, a specific reference to the rights relating to seeds was only introduced upon the conclusion of the ITPGRFA in 2001.

The first section briefly considers the international processes that led to the recognition of rights relating to the use of seeds as part of the concept of Farmers' Rights. This is followed by a discussion of the various categories of rights encompassed by that concept, and by an analysis of a number legal obstacles that hinder the implementation of such rights.

¹ See Andersen, R. and Winge, T. (with contributions from Batta Torheim, B.), *Global Consultations on Farmers' Rights in 2010*, 2011, The Fridtjof Nansen Institute, available from <http://www.farmersrights.org/pdf/FNI%20Report%201-2011%20Farmers%20Rights.pdf>; Report of the Global Consultation on Farmers' Rights, Bali, 27-30 September 2016, available at [...].

² Charles Lawson, "Implementing Farmers' Rights: Finding Meaning and Purpose for the *International Treaty on Plant Genetic Resources for Food and Agriculture* Commitments?" 5 July 2015, p. 32. Available from <http://dx.doi.org/10.2139/ssrn.2626668>.

II. EVOLUTION OF THE CONCEPT

The concept of Farmers' Rights obtained international recognition for the first time in 1989 in the context of the International Undertaking on Plant Genetic Resources (IUPGR), originally adopted by the FAO Conference in 1983. The Undertaking, a non-binding instrument, proclaimed the public goods nature of plant genetic resources for food and agriculture. The States that signed up the Undertaking agreed to provide other parties adhering to the Undertaking "free access" to the plant genetic resources within their territory.³

The negotiation of the IUPGR generated some tensions,⁴ notably between developed and developing countries, regarding the consistency of the principle of 'free access' with the protection of breeders' rights, as enshrined in the International Union for the Protection of New Varieties of Plant (UPOV). The American Seed Trade Association, for instance stated that the International Undertaking "strikes at the heart of free enterprise and intellectual property rights."⁵

At the time of the adoption of the IUPGR and of the subsequent FAO resolutions clarifying it; with the exception of South Africa, all the UPOV members were developed countries. Very few developing countries granted protection to plant varieties. The discrepancies generated by the IUPGR were explicitly noted in FAO Resolution 4/89:

Some countries have not adhered to the Undertaking and others have adhered with reservation because of possible conflict of certain provisions of the Undertaking with their international obligations and existing national regulations

These tensions were addressed by an "Agreed Interpretation" adopted through FAO Resolution 4/89, which clarified that "Plant Breeders' Rights, as provided for under UPOV... are not incompatible with the International Undertaking" (Article 1). The reference to this category of intellectual property rights – which were established in response to the demands of commercial breeders⁶ – raised the issue of what rights should be recognized to the benefit of farmers who domesticated wild plants and added value to them for agricultural use through repeated selection over the centuries.⁷ The recognition of the legitimacy of plant breeders' rights only, would have created an unbalanced treatment with regard to farmers, who have

³ The principle of "free access" in this context, however, did not necessarily mean "free of charge", as clarified by Article 5(a) of FAO Resolution 4/89.

⁴ See, e.g., FAO, *The State of the World's Plant Genetic Resources for Food and Agriculture*, 1998, Rome, p. 271; Muriel Lightbourne, 'The FAO Multilateral System for Plant Genetic Resources for Food and Agriculture: Better than Bilateralism?', *Washington University Journal of Law & Policy*, vol. 30, (2009), p. 465. Available from http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1114&context=law_journal_law_policy.

⁵ Quoted in Shawn N. Sullivan, "Plant Genetic Resources and the Law. Past, Present, and Future", *Plant Physiology*, (May 2004); 135(1): 10-15. Available from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC429328/>.

⁶ See, e.g. Carlos Correa (with contributions from Sangeeta Shashikant and Francois Meienberg), *Plant Variety Protection in Developing Countries. A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, (Alfter, Germany, APBEBES, Berne Declaration, TWN, SEARICE, Utviklingfondet, 2015). Available from <http://www.apbebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>.

⁷ See, e.g., José Esquinas-Alcázar, "Protecting Crop Genetic Diversity for Food Security: Political, Ethical and Technical Challenges", *Nature Reviews Genetics*, vol. 6, (2005), pp. 946-947.

traditionally not only produced food but also undertook breeding activities essential for food security.

In order to address that possible asymmetry, the concept of “Farmers’ Rights” was introduced by FAO Resolution 4/89,⁸ unanimously approved by more than 160 countries. The main purpose of incorporating this concept was hence to provide a counterbalance to intellectual property rights.⁹

The concept was originally formulated by FAO Resolution 4/89 in very general terms. It relied on the idea that “the best way to implement the concept of Farmers’ Rights was to ensure the conservation, management and use of plant genetic resources, for the benefit of present and future generations of farmers, particularly through the support of the International Fund for Plant Genetic Resources, which had already been established by FAO”.¹⁰ The idea that that Farmers’ Rights will be implemented through an international fund on plant genetic resources “which will support plant genetic conservation and utilization programmes, particularly, but not exclusively, in the developing countries” was later reaffirmed by FAO Resolution 3/91.¹¹

While in accordance with FAO Resolution 4/89, the adequate conservation, management and use of plant genetic resources would constitute, by itself, the “best way” of realizing Farmers’ Rights, FAO Resolution 5/89 –specifically dealing with such rights– incorporated new elements relating to their nature and content.¹²

FAO Resolution 5/89 declared that those rights “are vested in the International Community, as trustee for present and future generations of farmers”. There are different possible interpretations of the concept of “international community”, which has been quite controversial under international law,¹³ as it is unclear whether that community may be deemed a subject in its own right and how to identify its members and characterize its ways of action; for some, the concept is essentially sociological or a mere discursive expression.¹⁴ In turn, the idea of the international community being a “trustee” –a common law concept– may imply that it holds such rights for the benefit of the farmers and that it has a position of responsibility towards them.

In accordance with the referred Resolution, the international community is recognized as a trustee “for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking”. This wording suggests that the “rights” of farmers may be

⁸ See Annex 1.

⁹ FAO, “Revision of the International Undertaking. Issues for Consideration in Stage II: Access to Plant Genetic Resources, and Farmers’ Rights”, CPGR-Ex1/94/5, 1994, Rome, available from <http://www.fao.org/publications/card/en/c/274728d0-bc68-4736-8c1d-723780927065/>.

¹⁰ This Fund, however, never operated effectively.

¹¹ See Annex 1.

¹² Ibid.

¹³ See, e.g., Warbrick, S., & Tierney, C. (2006), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law*, (London, British Institute of International and Comparative, 2006).

¹⁴ Mor Mitrani, “In Search of an International Community: Between Historical, Legal and Political Ontologies”, available from http://www.lse.ac.uk/collections/law/sociological/Mitrani_The%20Internatioanl%20Community_Apr14.pdf.

characterized as commitments¹⁵ of the international community to provide support to traditional farmers' activities, rather than "rights" *stricto sensu* that may be exercised by farmers or their communities.

The purposes of such commitments are further specified in FAO Resolution 5/89. Farmers Rights aim to:

- (a) ensure that the need for conservation is globally recognized and that sufficient funds for these purposes will be available;
- (b) assist farmers and farming communities, in all regions of the world, but especially in the areas of origin/diversity of plant genetic resources,
- (c) allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods.

The Resolution referred to indicates what **objectives** should be achieved rather than what **measures** should be taken. This formulation, hence, leaves a wide space for the adoption of different instruments to ensure **conservation** of plant genetic resources, **assistance** to farmers and their **participation in the benefits** generated by plant improvement. While the purpose of the "assistance" to be provided to farmers is not spelled out, the context of the above quoted text suggests that its aim would be to support "the continuation" of farmers' contributions. How the participation in benefits derived from the improved use of plant genetic resources could be operationalized is undefined. It is unclear whether such benefits would just arise from the use of plant varieties improved "through plant breeding and other scientific methods", or whether they should materialize in a different form.

While the concept of Farmers' Rights was known when the negotiation of the Convention on Biological Diversity took place, the Convention did not make any reference to it. However, Resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity recognized the need to seek solutions to two outstanding matters concerning plant genetic resources, one of which was "the question of farmers' rights".¹⁶

The treatment to be conferred to Farmers' Rights became one of the most contentious issues in the negotiations of the ITPGRFA. While, as noted, the IUPGR vested such rights – and the responsibility to realize them – in the "International Community", the ITPGRFA stipulated that "the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments" (article 9.2).

This difference in the approach of the ITPGRFA with respect to the IUPGR represents an important conceptual shift since, in accordance with the ITPGRFA, national governments,

¹⁵ Of a non-binding nature, given that the IUPGR was adopted through a FAO Resolution that did not create States' legally enforceable obligations. The United States and a number of other developed countries initially refused to sign the Undertaking even despite its non-binding character (Sullivan, op. cit).

¹⁶ See, e.g. Regine Andersen, *The History of Farmers' Rights: A Guide to Central Documents and Literature*, (The Fridtjof Nansen Institute, 2005), p. 16. Available from http://www.planttreaty.org/sites/default/files/history_farmers_rights.pdf.

rather than the international community, are responsible for the implementation of Farmers' Rights. This difference reflected the resistance of developed countries to accept an international responsibility in this field in a legally binding instrument. Japan, the USA, Canada, Australia and New Zealand were unwilling to discuss the Farmers' Rights issue at all; the USA, in particular, struggled to delay an agreement and to water down any outcome of the negotiation on this issue.¹⁷

Nevertheless, the Preamble of the ITPGRFA indicates that the "promotion" of Farmers' Rights needs to take place at both the "national and international levels" (see Box 1). In fact the Governing Body of the ITPGRFA has taken some action to promote Farmers' Rights,¹⁸ and based on the outcomes of the Farmers' Rights Global Consultation that took place on 27-30 September 2016, in Bali, Indonesia it will be requested to take further steps with that objective.¹⁹

Box 1

Farmers Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture

Preamble

.....

Affirming 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, is the basis of Farmers' Rights;

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, as well as the promotion of Farmers' Rights at national and international levels;

....

Article 9 – Farmers' Rights

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.

9.2 The Contracting Parties agree that the responsibility for realizing 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

¹⁷ See Svanhild-Isabelle Batta Bjørnstad, *Breakthrough for "the South"? An Analysis of the Recognition of Farmers' Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture*, FNI Report 13/2004. Lysaker, FNI, 2004, available from <https://www.fni.no/publications/breakthrough-for-the-south-an-analysis-of-the-recognition-of-farmers-rights-in-the-international-treaty-on-plant-genetic-resources-for-food-and-agriculture-article743-290.html>, p. 74.

¹⁸ See the Governing Body' Resolutions 2/2007, 6/2009, 6/2011 and 8/2013; see also Resolution 5/2015, Implementation of article 9, farmers' rights. Available from http://www.planttreaty.org/sites/default/files/RES5_Farmers_rights.pdf.

¹⁹ See the Report of the Global Consultation on Farmers Rights, Bali, 27-30 September 2016, available at [...].

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 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.

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.

Unlike the IUPRG (which focused on targets), the ITPGRFA refers to a non-exhaustive set of **measures** that governments should take “to protect and promote Farmers' Rights” (article 9.2). While the ITPGRFA is a legally binding instrument, the wording of article 9.2 leaves governments with a wide discretion to adopt and define the scope and content of such measures. The provision indicates that such measures “should” (rather than “shall”) be taken subject to various conditions: “in accordance with their needs and priorities”, “as appropriate”, and “subject to its national legislation”. Although, given this wording, it might be practically impossible to claim non-compliance with article 9.2, it has been noted that:

Two other articles of the International Treaty contain provisions related to the realization of Farmers' Rights – and both of these are legally binding. The first (Section 13.3) provides for farmers who contribute to maintaining plant genetic resources for food and agriculture to receive benefits arising from the Multilateral System of Access and Benefit Sharing established under the Treaty. The latter (Section 18.5) ensures that funding priority will be given to the implementation of agreed plans and programmes for farmers in developing countries who conserve and sustainably utilize plant genetic resources for food and agriculture...

The wording of article 9.3 of the ITPGRFA –an outcome of a difficult compromise– is particularly problematic in terms of effective implementation and compliance. It has observed that:

Whereas plant breeders' rights and biotech-industry patents are defined and enforced at international level through UPOV and all WTO Members must ensure some protection of plant varieties under Article 27.3(b) of the TRIPS Agreement, Farmers' Rights are only recognized in principle, and in vague terms, in the ITPGRFA.²⁰

²⁰ Olivier De Schutter, “Seed Policies and the Right to Food: Enhancing Agrobiodiversity, Encouraging Innovation”, Background document to the report (A/64/170) presented by prof Olivier De Schutter, Special Rapporteur on the right to food, at the 64th session of the UN General Assembly, October 2009. Available from <http://www.srfood.org/en/seeds>.

It is quite obvious that nothing in article 9 could be read as limiting “any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material”, because there is no reference there to such acts nor to constraints they might (directly or indirectly) be subject to. It would have been quite different to say that “nothing in national laws” would limit such rights, but this was of course unacceptable for countries determined to preserve the full scope of the legal powers conferred under breeders’ rights, particularly as articulated under the UPOV Convention.

The limitations of the ITPGRFA in spelling out the scope and content of Farmers’ Rights are self-evident. However, the specific reference to the rights relating to saving, using, exchanging and selling seeds/propagating material represents a significant step forward in relation to the IUPGR, which was silent in this regard. Without ignoring the importance of the other categories of rights enumerated in the treaty, the rights relating to seeds/propagating material constitute a fundamental pillar of Farmers’ Rights. In the absence of the recognition of the former, the latter would be essentially limited to the conservation of plant genetic resources for food and agriculture.

III. CATEGORIES OF FARMERS' RIGHTS

The Preamble of the ITPGRFA identifies three categories of Farmers' Rights:

- (1) to save, use, exchange and sell farm-saved seed and other propagating material.
- (2) to participate in decision-making regarding the use of plant genetic resources for food and agriculture, and
- (3) to participate in the fair and equitable sharing of the benefits arising from the use of such resources.

Article 9.2(a) adds a fourth category of rights:

'[the] protection of traditional knowledge relevant to plant genetic resources for food and agriculture'.

The non-exhaustive nature of the enumeration contained in article 9 means that other rights may be conferred and promoted. It also means that the implementation of different aspects of Farmers Rights may also be addressed outside the framework of the ITPGRFA. Thus, several aspects of such rights have been considered in the context of the realization of human rights.²¹

Both the Preamble and article 9.3 of the ITPGRFA refer to the rights that farmers have in relation to seeds and other propagating material.²² They thus recognize the importance –not only for farmers but for food security– of the ancestral practices of saving seeds for further use or exchange, or even for sale to other farmers.²³ The practical implementation of these rights, however, has been hindered by intellectual property laws, seed laws and other regulations, such as plant health regulations, as discussed below.

The right to participate in decision-making processes by relevant stakeholders is well-established within the human rights framework.²⁴ While article 9.2(c) alludes to the right to participate in making decisions, at the **national level**, Farmers Rights may be deemed as

²¹ See, e.g., Olivier de Schutter, op. cit; The draft of the United Nations declaration on the rights of peasants and other people working in rural areas includes provisions that, while not referring to "Farmers' Rights" address several aspects thereof. See, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/WG.15/4/2. See also The Berne Declaration, *Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines*, 2014, available from <https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/seeds/owning-seeds-accessing-food/>.

²² Plant (asexual) propagation can be made by root, stem and leaf cutting, by layering and marcotting, budding and grafting. See, e.g., Ben G. Bareja, "What is Plant Propagation, Sexual and Asexual Propagation Methods Distinguished" 2010. Available from <http://www.cropsreview.com/plant-propagation.html>.

²³ See, e.g., Evanson Chege Kamau and Gerd Winter (editors), *Common Pools of Genetic Resources: Equity and Innovation in International* (Oxon, Routledge, 2013).

²⁴ Chee Yoke Ling and Barbara Adams, "Farmers' Right to Participate in Decision-making – Implementing Article 9.2 (c) of the International Treaty on Plant Genetic Resources for Food and Agriculture", Working Paper, (APBEBES, Public Eye, The Development Fund, Searice and Third World Network, 2016), p. 4. Available from http://www.apbrebes.org/files/seeds/files/PE_farmers%20right_9-16_def-high.pdf?pk_campaign=part.

including participation in regional and international processes which often result in agreements with far-reaching impacts for farmers. However, the right to participate in decision-making – at the national, regional and international level – is encumbered by several factors, including the lack of governments' political will to accord farmers a treatment equal to that given to the seeds' industry.²⁵

The right to participate in the fair and equitable sharing of the benefits arising from the use of such resources is not qualified (as it was the case in FAO Resolution 5/89) by a reference to the means ('through plant breeding and other scientific methods'). The Treaty is in harmony with the CBD²⁶ and, hence, the reference to "benefits" needs to be understood in the context of the benefit sharing regime established by that Convention. However, benefit sharing has been addressed under the ITPGRFA on a **multilateral** basis. Unlike the bilateral model created by the CBD, the ITPGRFA provides for benefit sharing through "the Multilateral System of Access and Benefit Sharing established under the Treaty" (article 13.3). This does not exclude, however, the possibility of providing for the sharing of benefits that may directly accrue to farmers and farmer communities, such as in situations where farmers' varieties are commercialized by third parties.²⁷

The protection of traditional knowledge, including that relevant to plant genetic resources for food and agriculture, has been discussed albeit without a specific reference to Farmers' Rights, in the framework of the CBD²⁸ and of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO).²⁹ Some countries have adopted specific legislation on the subject,³⁰ while others have enacted laws that more generally cover traditional knowledge, including expressions of culture. This is still an area where, despite national, regional³¹ and international efforts, appropriate solutions still need to be found. The IGC process, in particular, has become particularly frustrating due to persistent divergences within the WIPO membership.³²

²⁵ Ibid.

²⁶ ITPGRFA Article 1.1: 'The objectives of this Treaty are the 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, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security'.

²⁷ See proposals in this regard in Carlos Correa, 2015, op. cit.

²⁸ See <https://www.cbd.int/traditional/>.

²⁹ See, e.g., South Centre, IP Negotiations Monitor, No. 19, 2016, available from https://www.southcentre.int/wp-content/uploads/2016/11/IPMonitor19_EN.pdf.

See also the United Nations Declaration on the Rights of Indigenous Peoples, available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>.

²⁹ See <https://www.cbd.int/traditional/>.

³⁰ An example is Law 27811 of Peru (2002) for protection of Indigenous Peoples' collective knowledge associated with biodiversity.

³¹ See, e.g., ARIPO, "Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions", 2010. Available from http://www.wipo.int/edocs/trtdocs/en/ap010/trt_ap010.pdf.

³² See, e.g., Catherine Saez, "WIPO Traditional Knowledge: Text Passes Committee Approval, Goes to Next Session" *IP-Watch* (September 2016). Available from <https://www.ip-watch.org/2016/09/23/wipo-traditional-knowledge-text-passes-committee-approval-goes-to-next-session/>.

IV. FARMERS' RIGHTS RELATING TO SEEDS

Rights relating to seeds and other propagating materials are among the most important, and controversial, components of Farmers' Rights. Despite the importance of farmers as a source of seeds,³³ the right to save, use, exchange and sell farm-saved seeds has been growingly limited by different pieces of legislation and international treaties.

Plant Variety Protection

Although some elements of the right to save, use, exchange and sell seeds have traditionally been regarded as part of what is known as the "farmers' privilege" under plant variety legislation, the evolution of the UPOV Convention³⁴ and of national and regional laws³⁵ that follow its model, has been towards the narrowing down of the space left to farmers to dispose of the farm-saved seeds.

Under UPOV 1978 the breeder's right does not extend to acts that farmers may perform in order to save, use and exchange seeds. This means that, except with regard to the right to **sell** farm-saved seeds, UPOV 1978 does not prevent the realization of the Farmers' Rights concerning seeds/propagating material as enumerated in the ITPGRFA.

The situation is quite different under article 15(2) of UPOV 1991, which provides for an "optional exception", subject to several conditions ('within reasonable limits' and safeguarding 'the legitimate interests of the breeder') and limitations: farmers may only use "for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings".

There are several problems with this exception, as formulated in UPOV 1991. First, it may or may not be introduced under national laws. Given its optional character,³⁶ governments may just deny the Farmers' Rights in this area in general or for certain crops, or subject them to additional conditions, for instance, payment to the breeder in case farmers plant farm-saved seed. The obligation to safeguard "the legitimate interests of the breeder" has been interpreted as requiring further remuneration to the breeder, despite the fact that the farmers materially own the seeds and that they have invested their own capital and labour to obtain them, in a context of risk and uncertainty characteristic of any agricultural activity.³⁷

³³ In some developing countries, up to 90% of seeds are supplied by the 'informal' seed sector, that is, by farmers themselves. See Shawn McGuire and Louise Sperling, "Seed systems smallholder farmers use", *Food Security*, volume 8, Issue 1 (February 2016), pp. 179-195. Available from DOI 10.1007/s12571-015-0528-8.

³⁴ See Sangeeta Shashikant and François Meienberg, *International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9 on Farmers' Rights, and Relevant Instruments of UPOV and WIPO* (TWN/ The Berne Declaration, 2015), p. 2. Available from https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2015_BD_Saatgut_EN_9-15_def.pdf.

³⁵ See, e.g. the Arusha Protocol for the Protection of New Varieties of Plants adopted in the framework of ARIPO in July 2015.

³⁶ This is a major difference with the 'breeder's exception' which is mandatory (article Article 15(1)(iii), UPOV 1991).

³⁷ See, e.g., Sivakumar, Mannava V.K., and Motha, Raymond P. (editors), *Managing Weather and Climate Risks in Agriculture* (Springer, 2007).

The UPOV bodies have in fact suggested a restrictive interpretation of the scope of the optional exception, which could be limited to certain crops only (see Box 2). In addition, in accordance to the UPOV *Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention*:

[f]or those crops where the optional exception is introduced, a requirement to provide remuneration to breeders might be considered as a means of safeguarding the legitimate interests of the breeders (para. 2.2.7).³⁸

Second, if allowed, the exception only permits the use of the saved seed in the farmer's holding where it was obtained. This limitation prevents not only the sale but also the **exchange** of seeds among farmers whether neighbours or participants in informal networks. A recent study has confirmed, however, the importance of seed exchanges through farmers' networks for a sustainable agriculture:

Farmer seed networks make a vital contribution to agriculture because they are an effective means of moving seed not only farmer-to-farmer, but also from nature, local markets, national seed agencies, research stations, agro-dealers, and agribusiness to farmers throughout the countryside.³⁹

Box 2

The Farmers' Privilege under UPOV 1991

UPOV Explanatory Note on exceptions to breeders' rights

13. When considering the way in which the optional exception might be implemented, the Diplomatic Conference of 1991... developed the following recommendation:

“The Diplomatic Conference recommends that the provisions laid down in Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, should not be read so as to be intended to open the possibility of extending the practice commonly called ‘farmer’s privilege,’ to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned.”

14. The Diplomatic Conference recommendation indicates that the optional exception was aimed at those crops where, for the member of the Union concerned, there was a common practice of farmers saving harvested material for further propagation.⁴⁰

³⁸ UPOV, *Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention*, adopted by the Council at its forty-ninth ordinary session on October 29, 2015, available at http://www.upov.int/edocs/infdocs/en/upov_inf_6.pdf.

³⁹ Oliver T. Coomes et al. “Farmer seed networks make a limited contribution to agriculture? Four common misconceptions”, *Food Policy*, vol. 56 (October 2015), p. 47. Available from http://ac.els-cdn.com/S030691921500086X/1-s2.0-S030691921500086X-main.pdf?_tid=e98e6918-1477-11e7-824e-00000aab0f26&acdnat=1490789271_7e4c2c132ce07b8f00cfab0b23790a20..

⁴⁰ UPOV, ‘Explanatory Notes on Exceptions to the Breeder’s Right Under the 1991 Act of the UPOV Convention’ <http://www.upov.int/explanatory_notes/en/>, paras. 13 and 14. It is to be noted, however, that the Diplomatic Conference refused to include this qualification in the text of the Convention itself.

UPOV's Guidance on Article 15(2)

2.1.5 '...the optional exception may be considered to relate to selected crops where the product of the harvest is used for propagating purposes, for example small-grained cereals where the harvested grain can equally be used as seed i.e. propagating material. Taken together with the recommendation relating to Article 15(2) of the Diplomatic Conference of 1991 ..., the wording also indicates that it may be considered 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 (para).'⁴¹

Third, the ITPGRFA does not derogate any rights and obligations contained in other international treaties. Its Preamble states:

Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements;

Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements.

This means that even if the ITGRFA contained a clearly mandatory wording in relation to Farmers' Rights, it would not have been read as allowing a Contracting Party to ignore other international obligations, for instance, under UPOV 1991.

However, countries that are not bound to comply with or that do not follow the UPOV 1991 model may provide for Farmers' Rights relating to seeds with a broad scope. Thus, in countries that still adhere to UPOV 1978 (such as Argentina, Brazil, China), the use and exchange by farmers of farm-saved seeds is legal, since those acts are outside the scope of the breeder's rights.

Moreover, the policy space is even broader in countries that have adopted *sui generis* regimes of plant variety protection that do not follow the UPOV Convention (whether the 1978 or 1991 Acts), particularly with regard to the right to sell farm-saved seed. Thus, in the case of India, article 39(1)(iv) of the Protection of Plant Variety and Farmers' Right Act, 2001 (PPVFR Act) stipulates that:

...a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act:

Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.

⁴¹ UPOV, Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention, op. cit.

Explanation. For the purposes of clause (iv), branded seed means any seed put in a package or any other container and labelled in a manner indicating that such seed is of a variety protected under this Act.

The OAU *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (2000)⁴², also included among the “Farmers’ Rights” the right to “save, use, exchange and sell farm-saved seed/propagating material of farmers’ varieties” (article 26(1)(d), subject to the limitation that “the farmer shall not sell farm-saved seed/propagating material of a breeders’ protected variety in the seed industry on a commercial scale” (article 26(2)).

Patents

Plant materials are patentable in many countries, including in some cases plant varieties as such. A patent on a single component incorporated in a plant (for instance a promoter or transit peptide in a gene construct) may allow the patent owner to prevent the use and commercialization of any plant or seed containing the patented component, including planting farm-saved seed in the same exploitation where the seed was obtained.

Patent laws generally do not include provisions equivalent to the farmers’ privilege but they may actually do so. A provision of this type would be compatible with article 30 of the TRIPS Agreement, to the extent that it would be limited, it would not conflict with a normal exploitation of the patent and would not unreasonably prejudice the legitimate interests of the patent owner, taking account the legitimate interests of farmers.⁴³

In fact, an exception of this kind was introduced in 1998, after the TRIPS Agreement entered into force for developed countries, through article 11.1 of the European Directive on the Legal Protection of Biotechnological Inventions (Directive 98/44/EC).⁴⁴ The exception is subject to the same conditions and limitations applicable under the European Community Regulation (EC) No. 2100/94 on plant variety rights.

The Swiss patent law, as amended in 2008, also introduced an exception mirroring the farmers’ privilege:

Article 35a 1: Farmers who have acquired plant reproduction material placed on the market by the proprietor of the patent or with his consent may reproduce, on their own agricultural holding, the product of the harvest from the cultivation of this material on the said holding.⁴⁵

⁴² Available from <http://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf>.

⁴³ See article 30 of the TRIPS Agreement, available from https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm.

⁴⁴ Article 11.1 stipulates: ‘By way of derogation from Articles 8 and 9, the sale or other form of commercialisation of plant propagating material to a farmer by the holder of the patent or with his consent for agricultural use implies authorisation for the farmer to use the product of his harvest for propagation or multiplication by him on his own farm, the extent and conditions of this derogation corresponding to those under Article 14 of Regulation (EC) No. 2100/94 (available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994R2100:EN:HTML>).

⁴⁵ Unofficial translation. See <https://www.admin.ch/opc/fr/classified-compilation/19540108/201701010000/232.14.pdf>.

This type of exception is rather unusual in patent laws, notably in developing countries. This may reflect the fact that in most of those countries plant varieties are not patentable subject matter.⁴⁶ However, elements used for the genetic modification of plants may be patentable in countries where the commercialization of genetically modified plants is allowed,⁴⁷ thereby conferring on the patent owner the legal power to prevent the use and commercialization of a plant variety that incorporates any of such elements. Such legal power may also encompass the right to prevent the use, exchange and sale of farm-saved seed, even if the use is made in the exploitation where the seeds were obtained.⁴⁸

Seed Regulations

The implementation of Farmers' Rights relating to seeds –in particular the rights to exchange and sell– may be affected by a number of regulations concerning the distribution and marketing of seeds, even in cases where certain acts are not prohibited under intellectual property laws.

Laws regulating the marketing of seeds ('seed laws') in many countries, such as those adopting mandatory catalogues, provide that seeds are allowed to enter the market only if they fulfil the criteria of distinctiveness, uniformity, and stability (DUS). Since farmers' varieties are not in most cases stable and uniform, the application of those criteria may prevent farmers from legally selling and exchanging their seeds,⁴⁹ even if they are more suitable and affordable than seeds produced by the seed industry. The mandatory certification of seeds discriminates against seeds produced by farmers, who may be subject to civil or criminal sanctions in case of violation of the law.⁵⁰ This may include cases where seeds are exchanged, since marketing may encompass "free exchange, bartering, the transfer of seeds within networks or even just giving seeds as gifts".⁵¹ In some countries, however, the laws explicitly apply only to seed that is packed and certified (they basically protect the seed label), thereby leaving the farmers' seed supplies unregulated.⁵²

⁴⁶ See, e.g., WIPO, *Information Provided by WIPO Member States Concerning Practices Related to the Protection of Biotechnological Inventions*, WIPO/GRTKF/IC/1/6, 2001, Geneva, available from http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_6_corr.pdf.

⁴⁷ It has been reported that thirty eight (38) countries worldwide have officially banned the cultivation of genetically modified crops and only 28 actually grow such crops. See "GM Crops Now Banned in 38 Countries Worldwide", *Sustainable Pulse Research*, (October 22, 2015), available from <http://sustainablepulse.com/2015/10/22/gm-crops-now-banned-in-36-countries-worldwide-sustainable-pulse-research/#.WNyxhG-GMdV>.

⁴⁸ See Carlos Correa, *Patent Protection for Plants: Legal Options for Developing Countries*, Research Paper 55, (Geneva, South Centre, October 2014). Available from https://www.southcentre.int/wp-content/uploads/2014/11/RP55_Patent-Protection-for-Plants_EN.pdf.

⁴⁹ Some countries have introduced certain flexibility in the application of the uniformity requirement. For instance, in the European Union marketing of the so called 'conservation varieties' is allowed, but this possibility is 'strictly limited to old and locally used varieties, and does not seem to open the door for significant improvements of such materials through, for example, participatory breeding' (para. 3.4.2) (Niels Louwaars, Philippe Le Coent and Tom Osborn, *Seed Systems and Plant Genetic Resources for Food and Agriculture*, available from http://www.fao.org/fileadmin/templates/agphome/documents/PGR/SoW2/tbs_Seed_Systems_081209.pdf).

⁵⁰ See La Via Campesina/GRAIN, *Seed laws that criminalize farmers. Resistance and fightback*, (March, 2015). Available from <https://viacampesina.org/en/images/stories/pdf/2015-Seed%20laws%20booklet%20EN.pdf>. Seed laws also typically require that the plant variety presents a 'value for cultivation and use', usually referring to its yield (p. 10).

⁵¹ Ibid.

⁵² Niels Louwaars, Philippe Le Coent and Tom Osborn, op. cit. (para. 3.4.3).

Plant health regulations are important to prevent or control pests and diseases that can seriously damage crops, particularly through restrictions on the importation, movement among different locations and keeping of certain plants. However, these regulations may be enforced in some cases in ways that prevent risk-free small-scale exchanges –including through traditional seed fairs– of seeds among farmers who may not be able to comply with the requirements imposed by such regulations.

The obstacles that national laws and regulations may create for the implementation of Farmers' Rights were acknowledged by the Governing Body of the ITPGRFA in its third session held in Tunis, on 1-5 June 2009. The Governing Body invited:

...each Contracting Party to consider reviewing and, if necessary, adjusting its national measures affecting the realization of Farmers' Rights as set out in Article 9 of the International Treaty, to protect and promote Farmers' Rights (para. 1).⁵³

This review, however, has not been conducted in most countries: “very few countries have explicit exemptions for farmers' seed systems, which makes marketing of local variety and landrace seeds technically illegal”.⁵⁴

⁵³ Resolution 6/2009 Implementation of Article 9, Farmers' Rights, available from <http://www.planttreaty.org/sites/default/files/gb3repe.pdf>.

⁵⁴ Niels Louwaars, Philippe Le Coent and Tom Osborn, op. cit. (para. 3.4.3).

V. CONCLUSIONS

The adoption of the concept of Farmers' Rights in the context of the IUPGR fostered international action on the ways to recognize and reward farmers' ancestral contributions, not only to the current benefit of such farmers, but in order to ensure the continuity of activities that are crucial for a sustainable agriculture and food security. While initially the concept was essentially defined through the objectives it intended to achieve, its incorporation into the ITPGRFA meant, on the one hand, that some of the measures that could be taken for its realization were spelled out and, on the other, that a right relating to the use of seeds –not explicit in the IUPGR– was specifically mentioned.

The ITPGRFA recognizes the right relating to seeds as a component of Farmers' Rights in a preambular paragraph and in the text of the Treaty with a non-binding formulation (despite the legally binding nature of the treaty as such). Such a formulation is unable to derogate international obligations that the contracting parties may have under other binding international treaties, such as UPOV 1991. While this is the current legal situation, the ITPGRFA indicates the direction in which the national and international law should evolve in order to ensure the effective recognition of farmers' contributions to a sustainable agriculture and food security.

To this end, a revision of national laws should be conducted, where needed, to ensure their compatibility with the realization of Farmers' Rights. As discussed above, *sui generis* regimes for the protection of plant varieties may be designed that allow for the full realization of Farmers' Rights, including the rights relating to seeds. Likewise, a revision of UPOV 1991 seems necessary to align it with the objectives of the ITPGRFA. The possibility of allowing current or new UPOV members to shift to or join UPOV 1978, respectively, should also be considered, as it would promote regimes of plant variety protection more compatible with the implementation of Farmers' Rights.

ANNEX I

Resolution 4/89

AGREED INTERPRETATION OF THE INTERNATIONAL UNDERTAKING

THE CONFERENCE,

Recognizing that:

plant genetic resources are a common heritage of mankind to be preserved, and to be freely available for use, for the benefit of present and future generations,

Further *recognizing that:*

(a) the International Undertaking on Plant Genetic Resources constitutes a formal framework aimed at ensuring conservation, use and availability of plant genetic resources,

(b) some countries have not adhered to the Undertaking and others have adhered with reservation because of possible conflict of certain provisions of the Undertaking with their international obligations and existing national regulations,

(c) these reservations and constraints may be overcome through an agreed interpretation of the Undertaking which recognizes Plant Breeders' Rights and Farmers' Rights,

Endorses the agreed interpretation set forth hereinafter which is intended to lay the basis for an equitable and therefore solid and lasting, global system and thereby to facilitate the withdrawal of reservations which countries have made with regard to the International Undertaking, and to secure the adherence of others:

AGREED INTERPRETATION

1. Plant Breeders' Rights as provided for under UPOV (International Union for the Protection of New Varieties of Plant) are not incompatible with the International Undertaking;

2. a state may impose only such minimum restriction on the free exchange of materials covered by Article 2.1 (a) of the International Undertaking as are necessary for it to conform to its national and international obligations;

3. states adhering to the Undertaking recognize the enormous contribution that farmers of all regions have made to the conservation and development of plant genetic resources, which constitute the basis of plant production throughout the world, and which form the basis for the concept of Farmers' Rights;

4. the adhering states consider that the best way to implement the concept of Farmers' Rights is to ensure the conservation, management and use of plant genetic resources, for the benefit of present and future generations of farmers. This could be achieved through appropriate means, monitored by the Commission on Plant Genetic Resources, including in particular the International Fund for Plant Genetic Resources, already established by FAO. To reflect the responsibility of those countries which have benefitted most from the use of germplasm, the Fund would benefit from being supplemented by further contributions from adhering governments, on a basis to be agreed upon, in order to ensure for the Fund a sound and recurring basis. The International Fund should be used to support plant genetic conservation, management and utilization programmes,, particularly within developing countries, and those which are important sources of plant genetic material. Special priority should be placed on intensified educational programmes for biotechnology specialists, and strengthening the capabilities of developing countries in genetic resource conservation and management, as well as the improvement of plant breeding and seed production.

5. It is understood that:

(a) the term "free access" does not mean free of charge, and

(b) the benefits to be derived under the International Undertaking are part of a reciprocal system, and should be limited to countries adhering to the International Undertaking.

(Adopted 29 November 1989)

FAO Resolution 5/89 on Farmers' Rights

The Conference,
Recognizing that:

(a) Plant genetic resources are a common heritage of mankind to be preserved, and to be freely available for use, for the benefit of present and future generations,

(b) full advantage can be derived from plant genetic resources through an effective programme of plant breeding, and that, while most such resources, in the form of wild plants and old landraces, are to be found in developing countries, training and facilities for plant survey and identification, and plant breeding, are insufficient, or even not available in many of those countries,

(c) plant genetic resources are indispensable for the genetic improvement of cultivated plants, but have been insufficiently explored, and in danger of erosion and loss,

Considering that:

(a) In the history of mankind, unnumbered generations of farmers have conserved, improved and made available plant genetic resources,

(b) the majority of these plant genetic resources come from developing countries, the contribution of whose farmers has not been sufficiently recognized or rewarded,

(c) the farmers, especially those in developing countries, should benefit fully from the improved and increased use of the natural resources they have preserved.

(d) there is a need to continue the conservation (*in situ* and *ex situ*), development and use of the plant genetic resources in all countries, and to strengthen the capabilities of developing countries in these areas.

Endorses the concept of Farmers' Rights (Farmers' Rights mean rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking) in order to:

- (a) ensure that the need for conservation is globally recognized and that sufficient funds for these purposes will be available;
- (b) assist farmers and farming communities, in all regions of the world, but especially in the areas of origin/diversity of plant genetic resources,
- (c) allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods.

(Adopted on 29 November 1989)

Resolution 3/91

ANNEX 3 TO THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

THE CONFERENCE,

Recognizing that:

- the concept of mankind's heritage, as applied in the International Undertaking on Plant Genetic Resources, is subject to the sovereignty of the states over their plant genetic resources,
- the availability of plant genetic resources and the information, technologies and funds necessary to conserve and utilize them, are complementary and of equal importance,
- all nations can be contributors and beneficiaries of plant genetic resources, information, technologies and funds,
- conditions of access to plant genetic resources need further clarification;

Considering that:

- the best way to guarantee the maintenance of plant genetic resources is to ensure their effective and beneficial utilization in all countries,
- the farmers of the world have, over the millennia, domesticated, conserved, nurtured, improved and made available plant genetic resources, and continue to do so today,

- advanced technologies and local rural technologies are both important and complementary in the conservation and utilization of plant genetic resources,
- in situ and ex situ conservation are important and complementary strategies for maintaining genetic diversity;

Endorses the following points:

1. that nations have sovereign rights over their plant genetic resources ;
2. that breeders' lines and farmers breeding material should only be available at the discretion of their developers during the period of development;
3. that Farmers' Rights will be implemented through an international fund on plant genetic resources which will support plant genetic conservation and utilization programmes, particularly, but not exclusively, in the developing countries;
4. that the effective conservation and sustainable utilization of plant genetic resources is a pressing and permanent need, and therefore the resources for the international fund as well as for other funding mechanisms should be substantial, sustainable and based on the principles of equity and transparency;
5. that through the Commission on Plant Genetic Resources, the donors of genetic resources, funds and technology will determine and oversee the policies, programmes and priorities of the fund and other funding mechanisms, with the advice of the appropriate bodies.

(Adopted 25 November 1991)

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