



CFS Open Ended Working Group on principles for responsible agricultural investments which enhance food security and nutrition

**Consultancy output 3:**

**Annotated list of international binding agreements that may have implications for the formulation of the rai principles**

30 January 2013

## Table of Contents

Introduction .....	3
1. WTO Agreements.....	5
2. ILO Conventions on Labour Rights .....	7
3. Convention on Biological Diversity (CBD).....	7
4. Cartagena Protocol on Biosafety.....	10
5. Nagoya Protocol on Access and Benefit-Sharing .....	11
6. International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) .....	11
7. UN Framework Convention on Climate Change .....	13
8. UN Convention to Combat Desertification (UNCCD) .....	14
9. Human Rights Treaties.....	15
10. International instruments on the rights of indigenous peoples .....	16
11. International instruments on chemicals, and particularly pesticides .....	18

## Introduction

With the growth in world population and changes in income levels and life-styles, world demand for food is set to increase steadily. More investment in agriculture is vital particularly for developing countries. At the same time, the upward trend in food prices in recent years has made agriculture an attractive sector for investment. As agricultural investments take place in developing countries, the need has emerged for globally agreed guidelines or principles to ensure investments in agriculture support sustainable development and are carried out in a responsible manner that does not impact negatively on people, their livelihoods and natural resources.

The 37<sup>th</sup> Session of the Committee on World Food Security (CFS) in October 2011, decided to support “an inclusive consultation process within CFS for the development and the broader ownership of principles for responsible agricultural investment that enhance food security and nutrition”. This consultation process should take into account existing frameworks, such as the *principles for responsible agricultural investment that respects rights, livelihoods and resources* (PRAI) developed by FAO, IFAD, UNCTAD and the World Bank and the *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) endorsed by the CFS in May 2012. The CFS established an Open-ended Working Group (OEWG rai) to prepare terms of reference for the inclusive consultation process to develop and ensure broad ownership of principles for responsible agricultural investment that enhance food security and nutrition (rai).

The 39<sup>th</sup> Session of the CFS in October 2012 approved the terms of reference prepared by the OEWG rai. for the consultation process, with a view to submitting the rai principles for endorsement by the CFS at its 41<sup>st</sup> session in October 2014. According to the terms of reference, the principles will be intended for all stakeholders that are involved in, benefit from or are affected by agricultural investment. They will be non-binding: they will be interpreted and applied consistently with existing obligations under international and national law, and with due regard to voluntary commitments under regional and international instruments. They will apply to all types of investment (foreign and domestic; public and private; small, medium or large-scale) in agricultural value chains and food systems, including by, for and with smallholder producers and including investments in agricultural research, extension and technology transfer.

### Purpose of the document

This document is the third outcome of a consultancy supporting the inclusive consultation process on rai. It offers a succinct discussion of the relevance of existing international binding agreements that are not directly related to investments but may have implications for the formulation of the rai principles.

This document covers international treaties that were identified by the terms of reference of the consultancy as relevant to the rai (WTO Agreements, ILO Conventions, International Treaty on Plant Genetic Resources for Food and Agriculture), as well as other treaties that appear related to the subject matter that may be covered by the rai, namely: environmental sustainability in the agricultural sector (Convention on Biological Diversity and its Protocols, UN Framework Convention on Climate Change; UN Convention to Combat Desertification; and conventions on pesticides), which also include provisions on technology transfer and research; and human rights issues (international treaties on human rights and on the rights of indigenous peoples).

### Summary of findings

This document concludes that the formulation of the rai principles could draw upon these international binding agreements so that the rai principles can contribute to the implementation of governments' obligations under several international agreements, such as the ILO Conventions on labour rights, several multilateral environmental agreements (Convention on Biological Diversity and its Protocols, UN Framework Convention on Climate Change, International Treaty on Plant Genetic Resources for Food and Agriculture, UN Convention to Combat Desertification, and international conventions on chemicals). **The development of the rai principles, therefore, provides an opportunity to contribute to the implementation of these treaties, in some instances going into more details than existing international instruments on responsible investment** (identified and analysed in consultancy outputs 1-2), such as on:

- Invasive alien species
- Biosafety
- Plant genetic resources for food and agriculture
- Pesticides

- Technology transfer.

On the other hand, certain international treaties may have implications for the future *implementation* of the rai principles by governments. This is the case of the **Agreements of the World Trade Organization**, which may limit the room for maneuver of governments in determining the ways in which they decide to implement the rai principles.

Finally, in supporting agricultural research and technology transfer, governments should also respect the objectives established by, and support the implementation of, international obligations and mechanisms related to **access and benefit-sharing** under the CBD, ITPGR and, when it comes into force, the Nagoya Protocol on Access and Benefit-Sharing.

# 1. WTO Agreements

Among the World Trade Organization (WTO) Agreements, those relevant to the development of the rai principles are: the 1994 General Agreement on Tariffs and Trade (GATT); the Agreement on Trade-Related Investment Measures (TRIMs); the Agreement on Agriculture and the General Agreement on Trade in Services (GATS). While these agreements do not impact on the development of the rai, possible implications of these agreements may rather concern the future *implementation* of the rai principles by governments in relation to: liberalization of food imports and exports; agricultural subsidies, including domestic support measures in favour of agricultural producers; and liberalization of services incidental to agriculture.

It should be preliminary noted that the WTO Agreements do not prevent WTO Members from taking measures to support responsible investment in the agricultural sector, as long as certain conditions are observed. It should also be noted that in addition to commitments under the WTO, many states may have specific obligations arising from bilateral or regional treaties relating to trade liberalization and investment protection.

## Liberalization of food imports and exports

The GATT generally seeks to liberalize trade in all types of goods, including agricultural products. It includes basic commitments on non-discrimination, prohibiting discrimination between products from different countries<sup>1</sup> and discrimination between domestic products and imported products.<sup>2</sup>

The GATT also includes a prohibition on quantitative restrictions on imports or exports, whether made effective through quotas, licences, or other measures.<sup>3</sup> The TRIMs Agreement likewise prohibits the imposition of conditions on the authorization of an investment that, inter alia, “restrict the exportation for sale for export by an enterprise of products, whether specific in terms of particular products, in terms of volume or value of products, or in terms of a proportion or value of its local production.”<sup>4</sup> This prohibition applies both to measures imposed by WTO Members on investors, or voluntary undertakings made by investors that are enforceable in law.<sup>5</sup> This provision would therefore potentially limit the ability of WTO Members to adopt measures requiring individual investors to restrict their exports of agricultural products in order to promote food security.

These general restrictions are, however, subject to a number of exceptions. In particular, it is worth noting that WTO Members are **permitted to impose “export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of food stuffs or other products essential to the exporting contracting party.”**<sup>6</sup> This has been interpreted as including measures adopted to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage,<sup>7</sup> but the permission is **only available for measures applied for a limited time in order to bridge a passing need.**<sup>8</sup> It also noted that the provision only applied in situations where there was a critical shortage, which meant more than a mere short supply. For agricultural goods, developed country Members or developing country Members that are net-food exporters of the specific foodstuff concerned must also:

- (a) give due consideration to the effects of such prohibition or restriction on importing WTO Members’ food security;
- (b) before instituting an export prohibition or restriction, give notice in writing, as far in advance as practicable, to the WTO Committee on Agriculture comprising such information as the nature and the duration of such measure, and consult, upon request, with any other WTO Member having

---

<sup>1</sup> GATT, Article I. This is known as most-favoured nation treatment.

<sup>2</sup> GATT, Article III. This is known as national treatment.

<sup>3</sup> GATT Article XI.

<sup>4</sup> TRIMs Agreement, Annex, para. 2(c).

<sup>5</sup> See discussion of this point in *Canada – Administration of the Foreign Investment Review Act*, Report of the GATT Panel adopted on 7 February 1984, at para 5.4.

<sup>6</sup> TRIMs Agreement Article 3, read in conjunction with GATT Article XI(2)(a).

<sup>7</sup> *China – Measures Related to the Exportation of Various Materials*, Report of the Appellate Body, Document WT/DS394/DS395/DS398/AB/R, circulated on 30 January 2012, adopted by the Dispute Settlement Body on 22 February 2012, at para. 327.

<sup>8</sup> *China – Measures Related to the Exportation of Various Materials*, at para. 323.

a substantial interest as an importer with respect to any matter related to the measure in question, including providing necessary information if so requested by other WTO Members.<sup>9</sup>

Alternatively, WTO Members are also permitted to adopt measures “essential to the acquisition or distribution of products in general or local short supply.”<sup>10</sup> This would appear to be a broader exception, although it has never been interpreted by WTO dispute settlement organs and so it is unclear what precise conditions may be attached to it.

### **Domestic support measures in favour of agricultural producers**

WTO Agreements may affect the type and scale of assistance that can be offered by WTO Members to encourage investors in agriculture. Some WTO Members have undertaken specific domestic support reduction commitments in their individual schedules based upon general criteria found in the Agreement on Agriculture.<sup>11</sup> These commitments target domestic support measures that have a direct effect on production and trade, whilst allowing other domestic support measures. WTO Members have recognized that their commitments in this context could have a negative impact on least-developed and net food-importing countries and they have agreed to monitor the effect of the implementation of the Agreement of Agriculture in this regard.<sup>12</sup>

This is also an issue on which negotiations are on-going within the framework of the 2001 Doha Declaration. In that context, the WTO Members committed themselves to “comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.”<sup>13</sup> At the same time, it was agreed that non-trade concerns, such as food security, would be taken into account in the negotiations.<sup>14</sup>

### **Liberalization of services incidental to agriculture**

The objective of the GATS is to achieve progressive liberalization in trade in services on a mutually advantageous basis. The Agreement covers trade in services through four distinct modes, including by a service supplier of one Member through commercial presence in the territory of another Member.<sup>15</sup> Services sectors that are relevant for the rai include **services incidental to agriculture, wholesale trade services, distribution services, and retailing services.**

Obligations under the GATS fall into two broad categories. Part II of the Agreement sets out general obligations and disciplines that apply to all WTO Members, unless there is a specific exception. Perhaps the most important obligation in this Part is the requirement to “accord immediate and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and services suppliers of any other country.”<sup>16</sup> The so-called Most-Favoured Nation principle therefore applies to all services and service suppliers in all Member States, unless a particular exception applies.

In contrast, commitments relating to national treatment and to market access only apply to Members if they have undertaken specific commitments in their service schedules. Thus, the **obligations of WTO Members will vary from state to state.**

Even if Members have undertaken commitments, they are not prevented from regulating a service sector, provided they do not violate their specific commitments and provided that such regulations are “administered in a reasonable, objective and impartial manner.”<sup>17</sup>

---

<sup>9</sup> Article 12 of the Agreement on Agriculture.

<sup>10</sup> GATT, Article XX(j).

<sup>11</sup> Agreement on Agriculture, Article 6.

<sup>12</sup> Decision on Measures concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Countries.

<sup>13</sup> Doha Declaration, para. 13.

<sup>14</sup> Ibid. See also the Decision adopted by the General Council on 1 August 2004, Document WT/L/579, Annex A; Hong Kong Ministerial Declaration of 18 December 2005, Document WT/MIN(05)/DEC, paras. 4-10.

<sup>15</sup> GATS, Article I(2).

<sup>16</sup> GATS, Article II(1).

<sup>17</sup> GATS, Article VI(1).

Although the WTO does not directly regulate investment, WTO rules potentially impose a number of conditions on the use of trade-related measures in the context of agricultural investment. These conditions should be taken into account by States when they implement the rai principles.

Perhaps the most important rule in this context is that WTO Members wishing to restrict their exports of agricultural products in order to promote food security can only do so if they can satisfy the requirements of the WTO Agreements, in particular the GATT and the TRIMs Agreement.

## 2. ILO Conventions on Labour Rights

The International Labour Organization (ILO) has already undertaken significant work to clarify the duty of states and the responsibility of investors with regard to workers' rights, based on its **Conventions on: Freedom of Association and Collective Bargaining (ILO Conventions 87 and 98); Elimination of Forced and Compulsory Labour (ILO Conventions 29 and 105); Elimination of Discrimination in Respect of Employment and Occupation (ILO Conventions 100 and 111); and Abolition of Child Labour (ILO Conventions 138 and 182)**. These conventions are considered so fundamental that ILO Members are expected to comply with them regardless of whether they have ratified them or not. This understanding has also been distilled in the ILO Declaration on Multinational Companies (discussed in outcomes 1-2 of this consultancy). In addition, there is a significant convergence across other international standards on responsible investment as to the protection of labour rights. Therefore, as long as the proposed rai principles follow similar lines, they will contribute to the implementation of core ILO conventions on labour rights.

In addition, **ILO Convention No. 122 concerning Employment Policy** is relevant for the rai. The Convention counts 106 parties. According to this convention, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment,<sup>18</sup> and representatives of employers and workers, shall be consulted concerning employment policies, with a view to taking fully into account their experience and views and securing their full co-operation in formulating and enlisting support for such policies.<sup>19</sup> As discussed in outcome 2 of this consultancy, only certain international standards related to responsible investment reflect this Convention.

Finally, it should be noted that **ILO Convention no. 110** focuses on **plantations workers**: it covers the recruitment and engagement of migrant workers and affords protection to plantation workers in respect of employment contracts, wages, working time, medical care, maternity protection, employment accident compensation, freedom of association, labour inspection, and housing. While very relevant for the rai, the Convention has only attracted very limited State support: it only counts 12 ratifications.<sup>20</sup>

**By taking into account the existing convergence of international standards for responsible investment related to labour rights (freedom of association and collective bargaining, forced labour, elimination of discrimination, and child labour), the formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, relevant clauses of key ILO Conventions on workers' rights.**

## 3. Convention on Biological Diversity (CBD)

The Convention on Biological Diversity aims to the conservation and sustainable use of biodiversity. It also aims to ensure benefit-sharing from the use of genetic resources, including by appropriate access to genetic resources and technology transfer, taking into account all rights over these resources and technologies, and by appropriate funding.<sup>21</sup> It has proved a useful reference for several international instruments on responsible investment, most notably the IFC Performance Standards, both in relation to the sustainable use of living resources and to the respect of the rights of indigenous peoples and local communities. The CBD also provides a basis for technology transfer and scientific and technical

<sup>18</sup> ILO Convention No. 122, Article 1.

<sup>19</sup> ILO Convention No. 122, Article 3.

<sup>20</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312255](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:312255).

<sup>21</sup> CBD Article 1.

cooperation. Decisions adopted by CBD parties provide useful references for the rai, notably the programme of work on agricultural biodiversity<sup>22</sup> and decisions on biofuels.

### Sustainable use of living resources

The CBD includes several obligations related to the sustainable use of living resources, the implementation of which may be supported by the rai principles. It calls upon governments to pursue biodiversity conservation and sustainable use by adopting specific strategies, plans and programmes, as well as by incorporating relevant concerns into other plans, programmes and policies.<sup>23</sup> Thus, governments should ensure the integration of biodiversity concerns in their investment plans, programmes and policies

In addition, the CBD calls upon governments to ensure the **rehabilitation and restoration** of degraded ecosystems and the promotion of the recovery of threatened species,<sup>24</sup> the control of the risks associated with the use and release of **living modified organisms** (see section 4 below),<sup>25</sup> and the prevention of the introduction of, control or eradication of **alien species** that threaten ecosystems, habitats or species.<sup>26</sup> All these obligations can, among other things, be implemented in the context of agricultural investment. Furthermore, governments in regulating and controlling agricultural investment are to endeavour to create the conditions needed for compatibility between present uses and biodiversity conservation and sustainable use;<sup>27</sup> identify and control all potential sources of adverse impacts on biodiversity, and carry out **environmental impact assessments** of projects likely to have “significant adverse effects” on biological diversity,<sup>28</sup> and build **incentives** for conservation and sustainable use efforts.<sup>29</sup>

On the basis of the CBD programme of work on agricultural biodiversity, governments are called upon to identify **adaptive management** practices that promote the positive effects and mitigate the negative impacts of agriculture on biodiversity, and enhance productivity and the capacity to sustain livelihoods, by expanding knowledge, understanding and awareness of the goods and services provided by agricultural biodiversity.

### Respect of the rights of indigenous peoples and local communities

The CBD also incorporates several obligations that are relevant to the protection of the rights of indigenous peoples and local communities, including in the context of the proposed rai principles:

- encouraging **cooperation** between national authorities and indigenous communities and the private sector in developing methods for the sustainable use of biodiversity;<sup>30</sup>
- protecting and encouraging the **customary use** of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;<sup>31</sup>
- supporting **local populations** to develop and implement **remedial action** in degraded areas where biological diversity has been reduced;<sup>32</sup> and
- promoting the respect, preservation and maintenance of **traditional knowledge** and practices relevant for the conservation and sustainable use of biological diversity,<sup>33</sup> including to ensure communities’ prior informed consent<sup>34</sup> and involvement when such knowledge is applied, as well as the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In addition, the CBD programme of work on agricultural biodiversity calls upon governments to strengthen the capacities of farmers, indigenous and local communities and other stakeholders to manage agricultural biodiversity sustainably so as to increase their benefits.

In this regard, CBD parties have developed the concept of **benefit-sharing** as: i) a reward for the use of traditional knowledge; ii) an integral component of the full involvement of indigenous peoples and local communities in the conservation and sustainable use of biodiversity; and iii) as compensation to communities for negative impacts of conservation and sustainable use activities at the local level. In the

---

<sup>22</sup> CBD Decision V/5.

<sup>23</sup> CBD Article 6.

<sup>24</sup> CBD Article 8(f).

<sup>25</sup> CBD Articles 8(g) and 19.

<sup>26</sup> CBD Article 8(h).

<sup>27</sup> CBD Article 8(i).

<sup>28</sup> CBD article 14.

<sup>29</sup> ITPGR article 11.

<sup>30</sup> CBD article 10(e).

<sup>31</sup> CBD Article 10(c).

<sup>32</sup> CBD Article 10.

<sup>33</sup> CBD Article 8(j).

<sup>34</sup> CBD Article 8(j), although the explicit reference to prior informed consent can be found in CBD Decision V/16, Annex on the work programme on the implementation of Art. 8(j), general principle 5.



CBD decisions, this concept is based on the expectation that the State (and other non-State actors, in the absence of, or in addition to, relevant State measures) adopt a bottom-up approach to building a true partnership with communities for the conservation and sustainable use of biodiversity by proactively providing for a combination of economic and non-economic benefits. To this end, several CBD decisions, such as the work programme on forest biodiversity,<sup>35</sup> the Akwé: Kon Guidelines and the Addis Ababa Principles and Guidelines, have also spelt out a series of procedural steps: the use of environmental and socio-cultural **impact assessments**, the integration of traditional knowledge and community concerns in **management plans**, the **legal recognition** and active support of community-based management arrangements, the setting-up of benefit-sharing mechanisms when **revenue** generated through conservation and sustainable use activities is accrued by the State or outside investors, the provision of **livelihood-based mitigation and compensatory measures**, the use of other incentives such as payments for ecosystem services, as well as the re-investment of benefits in the protection of traditional knowledge and traditional sustainable practices. These developments may provide specific ideas for the incorporation of benefit-sharing in the rai principles.

## Technology transfer

The Convention on Biological Diversity contains several provisions on technology transfer. First, it calls upon parties to undertake to provide access for and transfer to other parties of technologies that are relevant for the conservation and sustainable use of biodiversity or make use of genetic resources and do not cause significant damage to the environment. This is to be provided to developing countries under fair and most favourable terms, but must recognise and be consistent with the effective and adequate protection of intellectual property rights.<sup>36</sup> Second, parties are to take measures so that parties that provided genetic resources receive access to and transfer of technology which makes use of these genetic resources on mutually agreed terms, including technology protected by intellectual property rights.<sup>37</sup> Third, the CBD calls for the development of methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, as well as for the promotion of cooperation in the training of personnel and exchange of experts.<sup>38</sup> Fourth, the CBD requires its parties to adopt measures to provide for the effective participation in biotechnological research of other parties that provide genetic resources for such research; and to promote and advance priority access on a fair and equitable basis to the results and benefits arising from biotechnology based upon genetic resources provided by other parties, on mutually agreed terms. (On access to genetic resources, see also sections 5-6 below).

The CBD programme of work on technology transfer and technological and scientific cooperation<sup>39</sup> provides concrete guidance on activities needed and a framework for partnership and collaboration on four key elements, including: the conduct of technology assessments, the strengthening of information systems, the establishment of enabling environments for technology transfer and capacity building. The proposed rai principles may contribute to the realization of these provisions.

## Biofuels

According to the CBD Conference of the Parties, biofuel production and use should be sustainable in relation to biological diversity, in order to promote the positive—and minimize the negative—impacts of biofuel production and use on biodiversity and on the livelihoods of local and indigenous communities. To this end, CBD parties are called upon to ensure the full and effective participation of indigenous and local communities in the implementation of activities relevant to the sustainable production and use of biofuels. With particular regard to the need to adopt appropriate policy frameworks to ensure the sustainability of biofuel production and use, the COP identified a series of international standards developed by the CBD in the context of precautionary and ecosystem-based approaches that CBD parties and other governments should take into account,<sup>40</sup> namely:

- the Addis Ababa Principles and Guidelines on Sustainable Use;
- the work programme on protected areas;<sup>41</sup>
- the work programme on traditional knowledge;<sup>42</sup>
- the Akwé: Kon Voluntary Guidelines;
- the Global Strategy for Plant Conservation;<sup>43</sup>
- guiding principles on alien invasive species;<sup>44</sup>

---

<sup>35</sup> CBD Decision VI/22.

<sup>36</sup> CBD Article 16(1-2).

<sup>37</sup> CBD Article 16(3).

<sup>38</sup> CBD Article 18(4).

<sup>39</sup> CBD Decision VII/29.

<sup>40</sup> CBD Decision IX/2.

<sup>41</sup> CBD Decision VII/28.

<sup>42</sup> CBD Decision V/16.

<sup>43</sup> CBD Decision VI/9.

- the application of sustainable forest management and best agricultural practices in relation to biodiversity;
- national biodiversity strategies and action plans; and
- relevant guidance developed under the Cartagena Protocol on Biosafety.

These guidelines were extended by COP 9 to the production and use of biomass for energy, in particular large-scale or industrial production and use, with a view to avoiding or minimizing negative impacts on forest biodiversity and on indigenous and local communities.<sup>45</sup>

The COP more recently called on parties to put in place policies, supportive measures, environmentally sound technologies, and impact assessments to minimize negative impacts on “biodiversity-related socio-economic conditions that could be impacted on by biofuel production and use.” This notion includes both **food and energy security** issues, and also “the consideration of **land tenure and resource rights, including water, where relevant for the CBD implementation, and in particular the implications for indigenous and local communities**”. It also called upon parties to assess and address direct and indirect land-use and water-use changes affecting areas of high value for biodiversity and areas of cultural, religious, and heritage interest and indigenous and local communities. The COP further urged parties and others to ensure that the sustainable agricultural practices, and food and energy security of indigenous and local communities are addressed and respected, subject to national legislation, taking into account communities’ customary laws where applicable.<sup>46</sup>

In conclusion, while several key obligations under the CBD are well reflected in and have significantly contributed to international guidelines on responsible investment (most notably, with regard to environmental and socio-cultural impact assessments and benefit-sharing), there are other key provisions for the agricultural sector that are not equally represented in existing international guidelines, such as on invasive alien species, access to genetic resources, and living modified organisms (on the latter two, see sections 4-6 below).

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, the above-discussed obligations under the CBD, in particular in relation to socio-cultural and environmental impact assessments and benefit-sharing, as well as on invasive alien species, access to genetic resources and living modified organisms.**

## 4. Cartagena Protocol on Biosafety

The Cartagena Protocol on Biosafety under the CBD was adopted with a view to establishing a system to regulate the transboundary movements of living modified organisms resulting from modern biotechnology that may have adverse effects on biodiversity, taking also into account risks to human health, and aiming to ensure their safe handling, transport and use. The Protocol establishes a system of advanced informed agreement between parties prior to the transboundary movement of living modified organisms. It also subjects to a less rigorous regulatory regime living modified organisms intended for use as food, feed or for processing, whereby a party may decide to ban or limit imports under its domestic legal framework consistently with the objectives of the Protocol.

The Protocol includes a general obligation for parties to ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.<sup>47</sup>

As almost no international instrument on responsible investment addresses living modified organisms (with the exception of the Fairtrade standards: see consultancy output 2), the proposed rai principles could acknowledge the Biosafety Protocol’s provisions and contribute to their implementation.

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, relevant clauses of the Biosafety Protocol.**

<sup>44</sup> CBD Decision VI/23.

<sup>45</sup> CBD Decision IX/2, para. 2(b).

<sup>46</sup> CBD Decision X/37.

<sup>47</sup> Biosafety Protocol, Article 2(2).

## 5. Nagoya Protocol on Access and Benefit-Sharing

While the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization is not yet in force, CBD parties have committed to ensure its entry into force by 2015.<sup>48</sup> Its provisions could be usefully taken into account in as much as the rai principles supports the “recognition of the special interests and needs of smallholder producers with respect to research, development and technology transfer.”

The Protocol requires parties to establish national measures that provide whether and how access to genetic resources and associated traditional knowledge for the purposes of research and development is subject to prior informed consent and benefit-sharing, including in certain instances the prior informed consent of and benefit-sharing with indigenous peoples and local communities. The details are to a significant extent left to national implementing measures so they will vary from one country to another. Consequently, the rai principles should reflect the flexibility required at national level to implement the Nagoya Protocol. At the same time, the rai principles should support the Protocol’s objective with regard to fair and equitable benefit-sharing, including by appropriate access to genetic resources and transfer of relevant technologies, and the protection of the rights of indigenous peoples and local communities with respect to their traditional knowledge and to the genetic resources ‘held by’ these communities.

In addition, the Protocol makes explicit reference to the **need for parties to consider the importance of genetic resources for food and agriculture and their special role for food security**.<sup>49</sup> In that regard, it can be noted that the provisions of the International Treaty on Plant Genetic Resources for Food and Agriculture, as a specialized ABS instrument, will prevail over those of the Nagoya Protocol in respect of plant genetic resources covered by the Treaty’s Multilateral System and accessed for the purpose of research, breeding and training for food and agriculture (see section below).

At present no international standard on responsible investment addresses questions related to access to genetic resources and associated traditional knowledge and related benefit-sharing, so the rai principles could support the Nagoya Protocol’s objectives and contribute to their implementation.

**The formulation of the rai principles may draw upon, and thereby contribute to relevant clauses of the implementation of, the Nagoya Protocol, by supporting the Protocol’s objectives, in particular the protection of the rights of indigenous peoples and local communities under the Protocol.**

## 6. International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR)

While the ITPGR does not specifically address investment, it contains several provisions the implementation of which may be supported by the rai principles. These obligations concern both sustainable use and conservation of plant genetic resources for food and agriculture, as well as the rights of farmers. In addition, the Treaty contains provisions on non-monetary benefit-sharing under its Multilateral System of access and benefit-sharing which address exchange of information, and access to and transfer of technology.

### Conservation and sustainable use

The ITPGR provides that governments take several measures for the conservation and sustainable use of plant genetic resources for food and agriculture, that are relevant to the rai to the extent to which they will address the impact of agricultural investment on the environment, food security and improved sustainable agricultural productivity. These obligations include promoting in situ conservation of wild crop relatives and wild plants for food production, by supporting, inter alia, the efforts of indigenous and local communities;<sup>50</sup> and taking steps to minimize or, if possible, to eliminate threats to plant genetic resources for food and agriculture.<sup>51</sup>

In addition, parties to the ITPGR are to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture, such as:

<sup>48</sup> Target 16, CBD Decision X/1.

<sup>49</sup> Nagoya Protocol, Article 8.

<sup>50</sup> ITPGR Art. 5(1)(d).

<sup>51</sup> ITPGR Art. 5(2).

- pursuing fair agricultural policies that promote as appropriate the development and maintenance of diverse farming systems that enhance the sustainable use of agricultural biodiversity and other natural resources;
- Strengthening research that enhances and conserves biodiversity and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests;
- Promoting plant breeding efforts which, with the participation of farmers, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas;
- Promoting as appropriate the expanded use of local and locally adapted crops, varieties and underutilized species; and
- Supporting 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.<sup>52</sup>

### **Farmers' rights**

The ITPGR also includes obligations related to the protection and promotion of farmers' rights. The ITPGR calls upon parties to promote or support farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and agriculture.<sup>53</sup> The implementation of agreed plans and programmes for farmers in developing countries who conserve and sustainably utilize plant genetic resources for food and agriculture is also specifically prioritized in the context of the Treaty's funding strategy.<sup>54</sup> Finally, the ITPGR calls upon parties to take measures to protect and promote farmers' rights to their traditional knowledge relevant to plant genetic resources for food and agriculture, to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture, and to participate in decision-making at the national level on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.<sup>55</sup> In its latest resolution, the ITPGR Governing Body invited parties to consider reviewing and, if necessary, adjusting national measures affecting the realization of farmers' rights, in order to protect and promote such rights.<sup>56</sup> Farmers' rights to save, use, exchange and sell farm-saved seed and propagating material remain an issue to be regulated at the national level at the discretion of national governments.<sup>57</sup>

While farmers' rights may be reflected to a great extent in the existing international standards for responsible investment related to the holders of human and tenure rights or to local communities, it may still be useful to spell out the special situations of farmers in an instrument that deals specifically with agricultural investment, such as the *rai* principles with respect to the progressive realization of the right to food and protection of vulnerable segments of the population.

### **Research and technology transfer**

The ITPGR established a Multilateral System, which combines facilitating access to specific genetic resources with collecting benefits from users, in the form of a standard payment to a trust fund, and then allocating them to particular activities designed to promote not only the conservation and sustainable use of biodiversity, but also the livelihoods of rural communities and indigenous peoples through projects selected and awarded by the Treaty's Governing Body. This Multilateral System of access and fair and equitable benefit-sharing,<sup>58</sup> which refers to a specified list of plant genetic resources,<sup>59</sup> aims to facilitate access to, and exchange of, those plant genetic resources that are considered to be vital for agricultural research and food security, and to institutionalize the sharing of benefits arising from their use. Its provision on benefit-sharing<sup>60</sup> recognizes that monetary and non-monetary benefits accruing from the Multilateral System will be shared fairly and equitably through a number of inter-State mechanisms, under the guidance of the Treaty's Governing Body, and include the exchange of information, access to and transfer of technology, capacity building, and the sharing of the benefits arising from commercialization.

To ensure the integrity of the system, the ITPGR calls upon parties to ensure that a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates the material accessed from the Multilateral System shall pay to the Mechanism an equitable share of the

<sup>52</sup> ITPGR Article 6.

<sup>53</sup> ITPGR Article 5(1)(c).

<sup>54</sup> ITPGR Article 18(5).

<sup>55</sup> ITPGR Article 9(2).

<sup>56</sup> Resolution on farmers' rights, third session of the ITPGR Governing Body, 4 June 2009.

<sup>57</sup> ITPGR Article 9(3). Also the 1991 UPOV Convention, which extended the scope of breeders' rights, provided that parties may, in their national legislation, allow the reuse by farmers of farm-saved seed that is protected by plant breeders' rights on their own holdings (Article 15(2)).

<sup>58</sup> ITPGR Articles 10-13.

<sup>59</sup> ITPGR Annex I.

<sup>60</sup> ITPGR Article 13.

benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such a payment.<sup>61</sup>

With respect to non-monetary benefit-sharing, the ITPGR provides for exchange of information, access to and transfer of technology, and capacity building. On exchange of information, parties are expected to make available, among others, results of technical, scientific and socio-economic research regarding plant genetic resources in the Multilateral System. On technology transfer, the ITPGR calls upon parties to undertake to provide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System, and in particular through the establishment and maintenance of and participation in crop-based thematic groups on utilization of plant genetic resources for food and agriculture, partnerships in research and development and in commercial joint ventures relating to the material received, human resources development and effective access to research facilities.<sup>62</sup> When developing countries are concerned, technology transfer should be provided or facilitated under fair and most favourable terms, in particular in the case of technologies for use in conservation and technologies for the benefit of farmers in developing countries. With regard to capacity building, parties should prioritize, among other issues, carrying out scientific research preferably and where possible, in developing countries, in cooperation with institutions of such countries. It does not seem that existing international guidelines on responsible investment pay specific attention to these issues, so the rai principles could have the value added of contributing to implement the Treaty.

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, the above-discussed obligations under the ITPGR, in particular the respect of farmers' rights and the promotion of technology transfer.**

## 7. UN Framework Convention on Climate Change

The UNFCCC aims to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system within a timeframe sufficient to **allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened** and to enable economic development to proceed in a sustainable manner.<sup>63</sup>

The UNFCCC includes general obligations (applicable to developed and developing countries in light of the common but differentiated responsibility principle) that appear relevant for rai, such as:

- Promoting the development, application and diffusion, including transfer, of **technologies, practices and processes that control, reduce or prevent anthropogenic emissions** of greenhouse gases, including in the agriculture and forest sectors;<sup>64</sup>
- Promoting sustainable management, and the conservation and enhancement of sinks and reservoirs of all greenhouse gases, including **biomass, forests and terrestrial ecosystems**;<sup>65</sup> and
- Developing appropriate and integrated **adaptation plans for agriculture** and for the rehabilitation of areas affected by drought and desertification.<sup>66</sup>

The inclusion of climate change concerns in international standards on responsible investment is a relatively recent but increasingly significant phenomenon (see, for instance, the 2011 review of the OECD Guidelines for Multinational Enterprises and of the IFC Performance Standards). Along these lines, the implementation of the above-mentioned provisions of the UNFCCC may be supported by the rai principles.

<sup>61</sup> ITPGR Article 13(2)(ii). This provision was operationalized through the clauses of the standard material transfer agreement (SMTA), adopted by the Treaty's Governing Body as the standardized contract to be used in all transactions involving material included in the Multilateral System. Adopted by Governing Body Resolution 2/2006 (16 June 2006), the SMTA includes provisions on a fixed percentage of 1.1% that a user shall pay when a product is commercialized, yet not available without restriction to others for further research and breeding; and a discounted percentage of 0.5% as part of an alternative payments scheme, which entails making payments at a discounted rate on all products belonging to one of the crops under Annex I of the treaty, irrespective of whether they are available without restriction and whether the product has been developed from material originating from the multilateral system or from other sources.

<sup>62</sup> ITPGR Article 13(2)(b).

<sup>63</sup> UNFCCC Article 12.

<sup>64</sup> UNFCCC Article 4(1)(c).

<sup>65</sup> UNFCCC Article 4(1)(d).

<sup>66</sup> UNFCCC Article 4(1)(e).

**The formulation of the proposed rai principles could draw upon and thereby contribute to the implementation of, the above-listed obligations under the UNFCCC.**

## **8. UN Convention to Combat Desertification (UNCCD)**

The UNCCD aims at combatting desertification and mitigate the effects of drought, through improved productivity of land, and rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at community level.<sup>67</sup> While it does not address investment, the implementation of several of its obligations can be supported by the rai principles, in particular with reference to: measures to prevent desertification and drought; involvement of local communities; research and technology transfer.

### **Prevention of desertification**

Under the UNCCD, parties are to adopt an integrated approach addressing the physical, biological and socio-economic aspects of the process of desertification and drought, and integrate strategies for poverty eradication into efforts to combat desertification and mitigate the effects of drought.<sup>68</sup> In the development of national action programmes, it calls upon parties to give particular attention to the implementation of **preventive measures** for lands that are not yet degraded or which are only slightly degraded, **establishment of food security systems**, including storage and marketing facilities particularly in rural areas, and development of sustainable irrigation programmes for both crops and livestock, measures to promote **alternative livelihoods and sustainable agricultural practices**.<sup>69</sup>

### **Involvement of local communities and the protection of traditional knowledge**

The Convention calls upon parties to ensure the decisions on the design and implementation of programmes to combat desertification are taken with the participation of populations and local communities, and develop partnership among all levels of government, communities, NGOs and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use.<sup>70</sup>

The UNCCD also calls upon parties to protect, integrate and enhance traditional and local knowledge ensuring subject to national legislation that knowledge will directly benefit on an equitable basis and on mutually agreed terms from any commercial utilization of it or from any technological development derived from that knowledge, and promote the conduct of joint research programmes for the development of improved, affordable and accessible technologies for sustainable development through effective participation of local communities.<sup>71</sup>

### **Research and technology transfer**

Parties are to undertake to promote technical and scientific cooperation in the fields of combating desertification and mitigating the effects of drought through appropriate institutions, contribute to increased knowledge of processes leading to desertification with a view to achieving improved productivity and sustainable use of resources, and respond to specific needs of local populations.<sup>72</sup>

As to technology transfer, the UNCCD expects parties to undertake to promote, facilitate and/or finance technology transfer, by facilitating access by developing countries on favorable terms to technologies most suitable to practical application for specific needs of local populations, taking into account the need to protect intellectual property rights.<sup>73</sup>

Only few international instruments on responsible investment address issues related to soil degradation, so the rai principles could add value by contributing to the implementation of the UNCCD.

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, the above-listed obligations under the UNCCD.**

<sup>67</sup> UNCCD, Article 2.

<sup>68</sup> UNCCD, Article 4.

<sup>69</sup> UNCCD Article 10(2)(c).

<sup>70</sup> UNCCD, Article 3.

<sup>71</sup> UNCCD Article 17.

<sup>72</sup> UNCCD Article 17.

<sup>73</sup> UNCCD Article 18(1).

## 9. Human Rights Treaties

International obligations related to human rights have clear implications for the good governance of natural resources, including agricultural investments. As the UN Framework on Business and Human Rights has clarified, States have an obligation to protect, and private companies responsibility to respect, human rights. The key global human rights agreements are the International Covenant on Economic, Social and Cultural Rights,<sup>74</sup> the International Covenant on Civil and Political Rights<sup>75</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>76</sup>

The following rights that are relevant for the rai are recognised by the **International Covenant on Economic, Social and Cultural Rights**:

- right of self-determination, by virtue of which peoples freely determine their political status and freely pursue their economic, social and cultural development; and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. This right is particularly relevant for the rai as agricultural investment should in no case lead to a situation where a people be deprived of its own means of subsistence;<sup>77</sup>
- right to non-discrimination for men and women to the enjoyment of all economic, social and cultural rights,<sup>78</sup> and right to non-discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;<sup>79</sup>
- the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions;<sup>80</sup>
- the right to work, which includes the right of everyone to the opportunity to gain a living by work which a person freely chooses or accepts, which is to be safeguarded by States through technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual;<sup>81</sup>
- right to decent conditions of work, including: remuneration which provides all workers, as a minimum, with: fair wages and equal remuneration for work of equal value without distinction of any kind; a decent living for themselves and their families; safe and healthy working conditions; equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays;<sup>82</sup>
- right to form trade unions and join the trade union of one's choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests;<sup>83</sup>
- fundamental right of everyone to be free from hunger, which is to be safeguarded by States through specific programmes that are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;<sup>84</sup> and
- right to the highest attainable standard of health, which is to be safeguarded by States through: the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention,

<sup>74</sup> General Assembly Resolution 2200A (XXI), 16 December 1966 (ICESCR).

<sup>75</sup> General Assembly resolution 2200A (XXI), 16 December 1966 (ICCPR).

<sup>76</sup> General Assembly resolution 45/158 of 18 December 1990.

<sup>77</sup> ICESCR Article 1(1-2).

<sup>78</sup> ICESCR Article 3.

<sup>79</sup> ICESCR Article 2(2).

<sup>80</sup> ICESCR Article 11(1).

<sup>81</sup> ICESCR Article 6.

<sup>82</sup> ICESCR Article 7.

<sup>83</sup> ICESCR Article 8.

<sup>84</sup> ICESCR Article 11(2).

treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.<sup>85</sup>

The relevant rights recognized by the **International Covenant on Civil and Political Rights** comprise: the right to life;<sup>86</sup> the right to self-determination;<sup>87</sup> the prohibition of slavery, slave-trade in all their forms and servitude,<sup>88</sup> the right to non-discrimination;<sup>89</sup> the right to physical security;<sup>90</sup> right to information;<sup>91</sup> and the right to take part in the conduct of public affairs, directly or through freely chosen representatives.<sup>92</sup>

According to both **Covenants**, in no case may a people be deprived of its own means of subsistence,<sup>93</sup> and the right to culture<sup>94</sup> implies that acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on the opportunity to participate in the decision-making process and on whether a minority will continue to benefit from its traditional economy.

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** recognizes, *inter alia*, the right to be free from slavery, servitude or forced labour;<sup>95</sup> right of access to information;<sup>96</sup> right to property;<sup>97</sup> and the right to enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration.<sup>98</sup>

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, the above-listed obligations under global human rights treaties.**

## 10. International instruments on the rights of indigenous peoples

International standards and obligations related to the rights of indigenous peoples have clear implications for the good governance of natural resources, including agricultural activities that are connected to the lands or waters traditionally occupied by local and indigenous communities, to their livelihoods and to their traditional, religious or cultural practices. ILO Convention No. 169 is the only legally binding agreement specifically dealing with the rights of indigenous peoples, but has very limited participation (only 22 ratifications).

The **ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries** includes several obligations the implementation of which can be supported by the rai principles, including:

- consulting indigenous peoples, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;<sup>99</sup>
- establishing means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in bodies responsible for policies and programmes;<sup>100</sup>
- to this end, ensuring that consultations be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures;<sup>101</sup>
- designing projects for the development of the areas indigenous peoples inhabit, so as to promote improvements of the conditions of life and work and levels of health and education of indigenous

---

<sup>85</sup> ICESCR Article 12.

<sup>86</sup> ICCPR Article 6.

<sup>87</sup> ICCPR Article 1.

<sup>88</sup> ICCPR Article 8.

<sup>89</sup> ICCPR Articles 3 and 26.

<sup>90</sup> ICCPR Article 11.

<sup>91</sup> ICCPR Article 19(2).

<sup>92</sup> ICCPR Article 25.

<sup>93</sup> Article 1 in both Covenants.

<sup>94</sup> ICESCR, Article 15; ICCPR Article 27.

<sup>95</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 11.

<sup>96</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 13(2).

<sup>97</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 15.

<sup>98</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 25.

<sup>99</sup> ILO Convention No. 169, Article 6(1)(a).

<sup>100</sup> ILO Convention No. 169, Article 6(1)(b).

<sup>101</sup> ILO Convention No. 169, Article 6(2).



- peoples concerned, with their participation and co-operation;<sup>102</sup>
- ensuring that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on these peoples of planned activities. The results of these studies must be considered as fundamental criteria for the implementation of such activities;<sup>103</sup>
- obtaining indigenous peoples' free and informed consent if their relocation from the land they occupy is considered necessary, and provide full compensation for any resulting loss or injury.<sup>104</sup>

Although formally non-binding, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has received universal endorsement and can provide useful guidance for the elaboration of the rai principles. According to the Declaration,<sup>105</sup> governments should:

- respect the right of indigenous peoples' participation in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions;<sup>106</sup>
- consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them;<sup>107</sup>
- respect the right of indigenous peoples to own, use, develop and control the lands, territories and resources that they have traditionally owned, occupied or otherwise acquired, as well as providing a process for redress where lands have been taken, occupied or used without consent;<sup>108</sup>
- take affirmative steps to give legal recognition and protection to these lands, territories and resources, being mindful of the customs and traditions of the indigenous peoples in order to tailor the legal recognition and protection to ensure it is consistent with indigenous peoples' use of and relationship with the land and resources;<sup>109</sup>
- establish a fair process to recognize and adjudicate the rights of indigenous peoples relating to their lands, territories and resources, which takes into account the relevant indigenous peoples' laws, traditions and customs, and land tenure systems;<sup>110</sup>
- establish assistance programmes for indigenous peoples to exercise their right to the conservation and protection of the environment and the productive capacity of their lands and resources, and to take effective measures to ensure that hazardous materials are not stored or disposed of on indigenous peoples' lands or territories without their free, prior informed consent;<sup>111</sup>
- consult and cooperate with indigenous peoples to obtain their free, prior informed consent before approving any project that would affect their lands, territories or other resources, and provide mechanisms through which indigenous peoples will receive redress for any such activities and to mitigate an adverse impacts of projects;<sup>112</sup>
- obtain the free, prior informed consent of indigenous peoples concerned and agreement on just and fair compensation before forcibly removing them from their lands, possibly providing the option of return.<sup>113</sup>

For the purposes of the rai principles, it should be noted that the UN Special Rapporteur on the Rights of Indigenous Peoples (James Anaya) noted that **private companies engaging or promoting activities affecting indigenous peoples should themselves "as a matter of company policy" endeavour to conform their behaviour at all times to relevant international norms concerning the rights of indigenous peoples, including those norms related to consultation.** To this end, he recommended that companies identify, fully incorporate and make operative the norms concerning the rights of indigenous peoples within every aspect of their work carried out within or in close proximity to indigenous lands. In addition, as part of their due diligence, companies should avoid endorsing or contributing to any act or omission on the part of the State amounting to a failure to adequately consult with the affected indigenous community before proceeding with a project. The Special Rapporteur furthermore recommended that States develop specific mechanisms to closely monitor company behaviour to ensure full respect for indigenous peoples' right and that required consultations are fully and adequately employed.

<sup>102</sup> ILO Convention No. 169, Article 7(2).

<sup>103</sup> ILO Convention No. 169, Article 7(3).

<sup>104</sup> ILO Convention No. 169, Article 16.

<sup>105</sup> General Assembly Resolution 61/295, 13 September 2007 (UNDRIP).

<sup>106</sup> UNDRIP Article 18.

<sup>107</sup> UNDRIP Article 19.

<sup>108</sup> UNDRIP Articles 26 and 28.

<sup>109</sup> UNDRIP Article 16.

<sup>110</sup> UNDRIP Article 27.

<sup>111</sup> UNDRIP Article 29.

<sup>112</sup> UNDRIP Article 32.

<sup>113</sup> UNDRIP Article 10.

Anaya emphasised that social and environmental impact studies should be conducted on behalf of companies by independent experts under the supervision of the State, specifically referring in this respect to guidance on cultural, social and environmental assessments adopted under the Convention on Biological Diversity (CBD) - the Akwé: Kon Guidelines. As a result of these assessments, companies are expected to take all possible technically feasible solutions to mitigate likely negative impacts on the environment and social, economic, cultural and spiritual life of indigenous peoples. Where adverse impacts cannot be avoided, Anaya indicated that indigenous peoples are entitled to just and fair redress.

Anaya also devoted significant attention to the question of **benefit-sharing**, emphasising that in addition to entitlement to compensation, indigenous peoples have a right to share in the benefits arising from business activities taking place on their traditional lands or in relation to their traditionally used natural resources. Accordingly, he argued that due diligence would imply that companies set up specific benefit-sharing mechanisms, based on international standards, genuinely strengthening the capacity of indigenous peoples to establish and follow up on their development priorities and supporting communities' own decision-making mechanisms.<sup>114</sup>

Anaya also clarified that **free prior informed consent** does not provide indigenous peoples with a veto power when the State acts legitimately and faithfully in the public interest, but rather "establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned." He also added that such consensus-driven consultation processes should not only address measures to mitigate or compensate for adverse impacts of projects, but also explore and arrive at means of equitable benefit-sharing in a spirit of true partnership.<sup>115</sup>

While the rights of indigenous peoples are often referred to in the international instruments on responsible investment, there is inconsistency in the standards used to ensure protection of their rights. The rai principles could therefore contribute to clearly support the implementation of relevant obligations and international commitments.

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, the above-commented international obligations and commitments on the rights of indigenous and local communities.**

## 11. International instruments on chemicals, and particularly pesticides

Several international agreements concern chemicals and may be relevant to the rai in as much as they concern the use, storage and disposal of pesticides in the context of agricultural investment. The rai principles may therefore support the implementation of relevant obligations of the Stockholm Convention on Persistent Organic Pollutants (POPs), the Basel Convention on the Transboundary Movement of Hazardous Wastes, and the ILO Conventions No. 184 (on Safety and Health in Agriculture) and No. 170 (Concerning Safety in the Use of Chemicals at Work).

Parties to the **POPs Convention** need to prohibit the production and use of chemicals listed under Annex A of the Convention, and to restrict the production and use of chemicals listed under Annex B. Both Annexes include pesticides. Materials containing pesticides or resulting from pesticides listed under POPs Convention fall under the **Basel Convention's** definition of hazardous waste once they reach the end stages of their life cycle and were bound for disposal. The Basel Convention is also relevant for other pesticides in addition to POPs, namely 'wastes from the production, formulation and use of biocides and phytopharmaceuticals, including waste pesticides and herbicides which are off-specification, outdated, or unfit for their originally intended use'.<sup>116</sup> Parties to the Basel Convention are bound by a requirement for environmentally sound management of these substances, by ensuring the availability of adequate disposal facilities, and a prohibition of transboundary movement without prior informed consent.<sup>117</sup> In addition, the Basel Convention is based on the principles of prevention and minimization of waste, and parties are to adopt measures to ensure that persons involved in the management of hazardous wastes take steps necessary to prevent pollution and to minimize the consequences of pollution for human health and the environment.<sup>118</sup>

<sup>114</sup> UN Doc. A/HRC/15/37.

<sup>115</sup> UN Doc A/HRC/12/34.

<sup>116</sup> Basel Convention, Annex VIII, item A4030.

<sup>117</sup> Basel Convention, Article 4.

<sup>118</sup> Basel Convention Article 4(2).

The **ILO Convention on Safety and Health in Agriculture No. 184** addresses all aspects of health and safety for chemicals used in agriculture. While very relevant for the rai, the Convention has only received limited State support (it counts only 15 ratifications). It covers agricultural workers working for a wage, whether permanent, temporary or seasonal, that are not usually protected by national legislation on workers' health and safety. It recognized the following rights to workers in agriculture:

- to be informed and consulted on safety and health matters including risks from new technologies;
- to participate in the application and review of safety and health measures and, in accordance with national law and practice, to select safety and health representatives and representatives in safety and health committees; and
- to remove themselves from danger resulting from their work activity when they have reasonable justification to believe there is an imminent and serious risk to their safety and health and so inform their supervisor immediately. They shall not be placed at any disadvantage as a result of these actions.<sup>119</sup>

**ILO Convention Concerning Safety in the Use of Chemicals at Work No. 170** covers all hazardous chemicals used in all kinds of economic activities to protect workers from harmful effects of chemicals at the workplace (handling, storage, transport, disposal and treatment of waste chemicals and release of chemicals resulting from work activities and maintenance, repair and cleaning of chemical equipment and containers). This Convention has also received limited State support: it counts 17 ratifications.

Questions related to pesticides are only occasionally addressed by international instruments on responsible investment, so the rai principles could have value added by contributing to the implementation of relevant international agreements.

**The formulation of the proposed rai principles could draw upon, and thus contribute to the implementation of, the above-commented international obligations related to pesticides.**

---

<sup>119</sup> ILO Convention No. 184, Article 8.