



Food and Agriculture
Organization of the
United Nations



The International Treaty
ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

**Views, Experiences and Best Practices as an example of possible options for the
national implementation of Article 9 of the International Treaty Submitted by
Contracting Parties and Relevant Organizations**

Note by the Secretary

This document presents the views, experiences and best practices on the implementation of Farmers' Rights, as set up in Article 9 of the International Treaty submitted jointly by APREBES, The Development Fund, Public Eye, and Third World Network on 01 July 2018.

The submission is presented in the form and language in which it was received.

**Joint Submission of the Association for Plant Breeding for the Benefit of Society
(APBREBES), Development Fund, Public Eye, Third World Network**
30th June 2018

Introduction

This submission is being made in response to Notification by the International Treaty Secretariat dated 7th May 2018 (Ref: NCP GB8-05 Farmers' Rights) which invited Contracting Parties and all relevant stakeholders, including farmers' organizations, to submit views, experiences and best practices as an example of possible options for the national implementation of Article 9 of the International Treaty, as appropriate and subject to national legislation in preparation for the Ad Hoc Technical Expert Group on Farmers' Rights (AHTEG).

In this submission we would like to highlight 3 papers, which provide experiences and concrete options for the national implementation of Article 9 of the International Treaty. We believe the content of these papers will provide useful information for AHTEG's deliberations.

We would welcome the opportunity to present on these papers for the AHTEG and would be happy to respond to any further queries or requests for information. Contact: Sangeeta Shashikant at sangeeta@twnetwork.org

Submission

1. International Contradictions on Farmers' Rights: The Interrelations between the International Treaty, its Article 9 on Farmers' Rights and Relevant Instruments of UPOV (Annex 1) Author: Sangeeta Shashikant

Article 27.3(b) of the WTO-TRIPS Agreement requires WTO Members (except for LDCs) to provide for protection of plant varieties but it also allows WTO Members complete freedom to determine the modalities of such protection. However despite this policy space, often there is enormous pressure on developing country governments, many of who are Parties to the International Treaty, to adopt the 1991 Act of UPOV as the basis for their plant variety protection (PVP) systems.

The abovementioned paper attached as Annex 1 elaborates on the conflicts between the requirements of UPOV especially its 1991 Act and implementation of Article 9 of the International Treaty. It presents actual experiences of countries that have been asked to drop provisions implementing Farmers Rights from their PVP bills or legislations, for they are considered to be non-compliant with the requirements of UPOV especially its 1991 Act. In addition, the paper also highlights alternative non-UPOV PVP systems implemented by several developing countries, that further implementation of Article 9 of the ITPGRFA.

Several countries (e.g. India, Malaysia, Thailand) have opted to depart significantly from the one-size fits all model of UPOV 1991 and adopt innovative national PVP legislation that balance the different interests (public interests, commercial breeders and farmers), as well as advances the key requirements and objectives of the International Treaty, the Convention on Biological Diversity (CBD) and its Nagoya Protocol on access and benefit sharing (Nagoya Protocol).

For example Section 39(1)(iv) of India's Protection of Plant Varieties and Farmers' Rights Act 2001 includes the following exception: "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."

Similarly the PVP legislations of Philippines as well as Malaysia have provisions safeguarding the right of small farmers to freely save, use, exchange, share or sell their farm-saved seeds/propagating material of protected variety.

Malaysia and India's PVP laws include mechanisms (e.g. obligation to disclose the source of the variety) to prevent misappropriation of local genetic resources including farmer varieties and to facilitate fair and equitable benefit sharing.

This shows it is entirely possible to put in place a *sui generis* PVP legislation that advances implementation of Article 9.

2. Plant Variety Protection in Developing Countries A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 (Annex 2) *Authors: Carlos M. Correa with contributions from Sangeeta Shashikant and Francois Meienberg.* Available in English, Spanish and French at <http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>

This paper is a tool to assist developing countries in designing a *sui generis* plant variety protection (PVP) system that is consistent with the WTO requirements, is suitable for the seed and agricultural systems that prevail in developing countries, and promotes achievement of the objectives of the CBD, Nagoya Protocol and the International Treaty especially its Article 9.

Chapter 1 of this paper examines the origins of plant protection through intellectual property rights and UPOV. Chapter 2 elaborates on the requirements of the TRIPS Agreement and the flexibilities available to WTO members as well as the context and provisions of other international instruments relevant to plant genetic resources including the International Treaty

Chapter 3 discusses the key features of UPOV 1991 and its implications for developing countries. It also especially highlights *sui generis* PVP models implemented in developing countries especially in Malaysia, Thailand and India that *inter alia* furthers national implementation of Article 9 of the International Treaty.

Importantly Chapter 4 proposes model provisions for key features that are essential to designing a *sui generis* PVP regime and which may be adapted to national circumstances, taking into account requirements of Article 9 of the International Treaty and best practices nationally.

In brief, the chapter proposes *inter alia* protecting new and traditional farmer varieties through remuneration right (not exclusive rights) that is, the proposed regime would not restrict commercial exploitation of the propagating materials of these varieties; however, it will require payment of remuneration (to individual farmers, farming communities etc) when such exploitation takes place. Thus, the regime essentially aims at preventing the misappropriation of varieties developed or evolved by farmers and farmers' communities as well as of other heterogeneous varieties developed by breeders, including in public research institutions.

Importantly, in recognition of the crucial role that small farmers play in the production of food in developing countries, the proposed sui generis regime exempts them from any obligation in connection with the categories of plant varieties mentioned, thereby fully safeguarding the right of small-scale farmers to freely save, use, exchange and sell seeds/propagating material. Other exceptions, consistent with the concept of Farmers' Rights, are also contemplated for other farmers.

The proposed sui generis regime also suggests the establishment of a Seed Fund which will collect remuneration from the commercial exploitation of traditional farmers' varieties and a benefit-sharing contribution when a new uniform plant variety is registered. Income from the Seed Fund will be used to support the conservation and sustainable use of plant genetic resources, particularly on-farm conservation and community seed banks, as well as to implement benefit sharing for relevant farmers and farming communities.

The proposed model provision also stipulates an obligation to disclose information on the source of a plant variety for which protection is sought as well as to provide evidence that the material used for breeding has been lawfully obtained. This will further implementation of Article 9.2(b) of the International Treaty. It further recognizes farmers' right to participate in decision-making as required by Article 9.2(c) of the International Treaty.

Chapter 5 addresses the obstacles that developing countries may face in designing sui generis PVP legislation and recommendations for actions to be taken when developing a PVP law. This chapter takes into account the requirements of Article 9 of the International Treaty as it elaborates on the importance of an inclusive process in developing a sui generis PVP system.

3. Farmers' Right to Participate in Decision-making – implementing Article 9.2 (c) of the International Treaty on Plant Genetic Resources for Food and Agriculture (Annex 3). *Authors: Chee Yoke Ling, Barbara Adams, with contributions from Sangeeta Shashikant and Laurent Gaberell.*

Available in English, French and Spanish at
<http://www.apbrebes.org/news/farmers%20%99-right-participate-decision-making-%20%93-implementing-article-92-c-international-treaty>

Article 9.2(c) applies to all types of decision-making processes (e.g. administrative, legislative) and outcomes (e.g. policies, legislations, regulations, budgets, strategies etc.). It also applies to a wide range of subject matter given the broad scope of "conservation and sustainable use of PGRFA," including the formulation of seed laws related to plant variety protection, seed certification and marketing. It is relevant to all roles of farmers related to conservation and sustainable use of PGRFA and given the importance of Farmers' Rights in this regard the right to participate is intrinsic for matters related to Article 9 itself, including the implementation of Article 9.2(c).

This paper clearly shows that the participation required goes beyond mere consultation. Article 9.2(c) applies to national level decision-making, which would include participation in sub-national processes i.e. at the local and community level. However, this paper also demonstrates that increasingly regional and international developments and processes impact decision-making at the national level, and these in turn, can adversely affect Farmers' Rights and implementation of the Treaty. Since regional and international decision-making affects national decision-making with implications for Farmers' Rights, it is only logical that the right to participate should also apply to decision-making processes at the regional and international levels.

Chapter 1 of the paper discusses the context and scope of Article 9.2(c), and its importance for the realization of the bundle of integrated Farmers' Rights. Using country and stakeholder submissions to the International Treaty as well as examples and experiences at the national,

regional and international levels, Chapters 2 and 3 review the status of farmers' participation in decision-making processes, identifying some of the key issues and challenges that arise with respect to Article 9.2(c) implementation. The evidence also illustrates how implementation or non- implementation of participation rights can respectively promote or hinder the realization of Farmers' Rights.

The right to participate in decision-making processes is a well-established right within the human rights framework. Specific provisions in relevant human right instruments, and interpretations and understandings of those provisions, can inform on elements that are essential for the effective implementation of Article 9.2(c). Some human rights instruments have mechanisms that may be utilized to assert Farmers' Rights to participate in decision-making processes. In addition to human rights instruments, there are good practices within the UN system with regard to participation. Examples include the Committee on World Food Security, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention) and the Convention on Biological Diversity (CBD).

Chapter 4 highlights some existing principles, norms and standards expressed in the existing human rights framework, and good practices as well as mechanisms that may be considered for enhancing implementation of Article 9.2(c).

Learning from the challenges as well as drawing from the norms, principles, good practices and mechanisms that exist within the UN system, especially within the human rights framework, this paper discusses some of the key elements that are essential for the effective operationalization of farmers' right to participate in decision-making. Chapter 5 discusses elements that are essential for effective and meaningful implementation of Article 9.2(c), and provides some recommendations.

In a nutshell, the right to participate should include the following elements:

- It should have a solid legal basis and be enforceable by law.
- It should be supported by inclusive, independent, impartial, transparent and non-discriminatory processes and mechanisms, designed to engage farmers, including from the community level, allowing sufficient time and opportunity for meaningful consultation and to provide feedback and proposals.
- Special attention should be paid to the participation of disadvantaged groups, in particular small-scale farmers in view of their importance in conservation and sustainable food systems.
- Consultation at each phase of legislative drafting and policy making, to voice opinions and criticism, and to submit proposals. This means that comments and inputs need to be taken into account in making decisions.
- A long-term and genuine commitment on the part of the relevant authorities to engage in processes of intensive dialogue regarding the development of policies, programmes and measures.
- Prompt access to full and up-to-date information over process (e.g. the timeline and phases of a decision-making process, how and to whom to submit comments and/or proposals), and substance (the actual content of the instruments, documents, the evidence etc.) is imperative.
- Freedom of association, capacity building and financial support.
- Opportunity and ability to seek a review of a decision and redress/remedies if such decision results in adverse effects on the individual or group concerned, thereby violating their rights.

The key recommendations of this paper are below.

Recommendations for Governments

- **Establish a legally enforceable farmers' right of participation in decision-making processes.** Such a legal right should be supported by mechanisms building on and coherent with human rights and other principles for participatory mechanisms and processes, as elaborated in chapters 4 and 5 of the paper. It is also important that the modalities for engagement and participation build on the good practices of the UN system and not regress with respect to either current formal or informal practices.
- **Participation of farmers must be ensured in decision-making on seed policies and laws at the national, regional and international levels,** based *inter alia* on the good practices, principles and elements discussed in chapters 4 and 5 of the paper, in light of the impact of seed policies and laws especially pertaining to intellectual property (plant variety protection and patents) and seed certification and marketing, and on Farmers' Rights. Seed policies and laws that have been formulated without, or with limited, involvement of farmers, especially small-scale farmers, should be urgently reviewed with the participation of farmers.
- **Governments should recognise the specific role and importance of the “unfiltered voice” of farmers and their organisations/self-organised mechanisms of representation and especially adequate representation of small-scale farmers in implementing Article 9.2(c).**

Recommendations at the Treaty Level

- Gather data and information on national, regional and international rules and practices that provide for participation of farmers in decision-making in connection with PGRFA, and document and assess their impact on realising Farmers' Rights, including progress, obstacles and challenges.
- Develop “guidance” for the effective implementation of Article 9.2(c) with the full and effective participation of farmers' representatives and public interest civil society organisations. Such guidance should build on good practices, principles and elements discussed in chapters 4 and 5.
- Establish an ombudsman facility under the Treaty and open a window for addressing gaps/obstacles in implementation of Farmers' Rights, including farmers' right to participate in decision-making.
- Reporting on implementation of the Treaty by every Contracting Party required by the Treaty's compliance mechanism should specifically require the Contracting Party to provide information on measures taken to implement Farmers' Rights, including farmers' right to participate in decision-making. These country implementation reports should be presented regularly and be publicly available. Farmers' representatives should also be given an opportunity to present their perspectives on implementation of Farmers' Rights in relation to their countries, including regional and international activities and instruments that involve their countries.
- Conduct an assessment of farmers' participation in Treaty- related meetings, processes and initiatives in consultation with farmers' representatives and public interest civil society organisations, with the intent to institutionalise and strengthen farmers' participation in such processes and initiatives.
- Ensure adequate, predictable and timely funding to implement the right to participate in the work of the Governing Body, including its inter-sessional work and relevant consultations and meetings that may be held. A wide range of Contracting Parties, with developed countries taking the lead, should finance a multi-donor trust fund to be administered by FAO/the Treaty (bearing in mind that the Governing Body resolutions of 2013 and 2015 made explicit linkages with FAO more broadly, specifically mentioning CFS).

- Recognise and draw on farmers' expertise. Representatives of farmers' organisations should be adequately represented and involved in any meeting, consultation, panel of experts, working group or equivalent body convened by the Secretariat as mandated by Contracting Parties. In ensuring this, the Secretariat should recognise and respect farmers' autonomy to self-organise and select their own representatives, and should provide the necessary financial support for the participation.
- Enhance and support (e.g., by ensuring financial support) capacity-building of farmers (especially of small-scale farmers) by farmer groups and public interest civil society organisations in respect of their rights, including the right to participate in decision-making processes; developments that may undermine Farmers' Rights; and the importance of active farmers' engagement in such relevant national, regional and international processes.

Recommendations for Regional and International Organisations and Processes

- Regional and international organisations and processes should respect Farmers' Rights and ensure that their instruments and activities do not affect the policy space to realise Farmers' Rights, consequently contradicting or undermining the objectives and provisions of the Treaty.
- In line with the above, regional and international organisations and processes should recognise, legally establish and institutionalise farmers' right of participation in their decision-making processes and activities. Such a right should be supported by mechanisms building on the good practices of the UN system for participatory mechanisms and processes as well as principles and elements elaborated in chapters 4 and 5 of the paper.

ANNEX 1

INTERNATIONAL CONTRADICTIONS ON FARMERS' RIGHTS: The Interrelations between the International Treaty, its Article 9 on Farmers' Rights and Relevant Instruments of UPOV

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This paper is based on the submission of Third World Network and Berne Declaration (now Public Eye) to the International Treaty on the subject of interrelations which was published in October 2015 and is available at

http://www.twn.my/title2/intellectual_property/info.service/2015/ip151003/457628655560ccf2b0eb85.pdf

A. INTRODUCTION

Article 9.1 of the International Treaty acknowledges the “enormous contributions” that the local and indigenous communities and farmers “have made and will continue to make” not only in the conservation but also the “development of plant genetic resources” which constitute the foundation for food and agriculture globally.

Existing literature provides irrefutable evidence of the contribution of farmers particularly smallholder farmers and their important role in the development of plant genetic resources for food and agriculture (PGRFA) as well as food security.¹

Article 9.2 of the International Treaty places the responsibility of realizing Farmers’ Rights with national governments, adding that each Contracting Party 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 PGRFA;
- (b) the right to equitably participate in sharing benefits arising from the utilization of PGRFA; and
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA.

The use of “including” in Article 9.2 means that the list of what is considered to be Farmers’ Rights is non-exhaustive or open.

Article 9.3 of the International Treaty states: “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”.

The importance of the abovementioned elements and in particular farmers’ right to save, use, exchange and sell farm-saved seed/propagating material is reinforced by the Preamble of the

¹ See FAO factsheet, “Smallholders and family farmers” at http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/Factsheet_SMALLHOLDERS.pdf; IFAD & UNEP (2013) “Smallholders, food security and the environment”, available at http://www.ifad.org/climate/resources/smallholders_report.pdf

International Treaty which states:

“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 level*”.

Farmers’ Rights is a core component of the International Treaty and as such its full implementation is a pre-requisite to achieving the objectives of the International Treaty. **However, there is much concern that the instruments and/or activities of UPOV are not supportive of Farmers’ Rights, and even undermine those rights, thereby hindering full realization of those rights.**

This paper highlights some of the conflicts between the instruments/activities of UPOV and implementation of Farmers’ Rights.

B. ARTICLE 27.3(b) OF THE WTO-TRIPS AGREEMENT & SUI GENERIS PVP LEGISLATION

Article 27.3(b) of the WTO-TRIPS Agreement requires WTO Members to provide for protection of plant varieties. However it also allows WTO Members complete freedom to determine the modalities of such protection. Important to note is that the Article 27.3(b) obligation does not apply to WTO members which are least developed countries (LDCs), as they enjoy a transitional period until July 1, 2021, during which period they need not implement the TRIPS standards.² This transition period may be extended upon request.³

The only condition established by Article 27.3(b) is to provide “effective *sui generis* protection”. “*Sui generis*” means “unique”, “of its own kind”, thus WTO Members have broad policy space to define how the protection is conferred. UPOV Convention is not mentioned in this provision. Hence, WTO Members may opt for *sui generis* protection that is not UPOV-compliant.

UPOV Conventions especially its 1991 Act is generally considered to be an inappropriate legal framework for developing countries as it was conceived for the agricultural systems and modalities of seed production prevailing in the US and European countries. In fact, developing countries were conspicuously absent in the process of creating the UPOV Conventions.⁴

Therefore several countries (e.g. India, Malaysia, Thailand, Ethiopia) have opted to depart significantly from the one-size fits all model of UPOV 1991 and adopt innovative national PVP legislation that balance the different interests (public interests, commercial breeders and smallholder farmers), as well as advances the key requirements and objectives of the International Treaty, the Convention on Biological Diversity (CBD) and its Nagoya Protocol on access and benefit sharing (Nagoya Protocol).

For example Section 39(1)(iv) of India’s Protection of Plant Varieties and Farmers’ Rights Act 2001 states: “a farmer shall be deemed to be entitled to save, use, sow, resow, exchange,

² See Decision of the WTO TRIPS Council adopted on 11 June 2013 (IP/C/64) at https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/7_1_ipc64_e.pdf

³ Article 66.1 of the TRIPS Agreement.

⁴ The 1991 Act was negotiated by only 20 UPOV member countries, out of which only one (South Africa) was a developing country, 17 developing countries participated as observers See Carlos M. Correa et al. (2015), « Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 », APBREBES, available at <http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>

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.”

This shows it is entirely possible to put in place a *sui generis* PVP legislation that advances implementation of Article 9. However as shown below, there are significant pressures on Parties to the International Treaty to adopt the UPOV 1991 model and forgo Farmers’ Rights.

C. CONFLICTS BETWEEN UPOV AND IMPLEMENTATION OF FARMERS’ RIGHTS

C.1. Farmers’ right to save, use, exchange and sell farm-saved seed and other propagating material

This right is fundamental to the realization and promotion of Farmers’ Rights, at the national and international level.

There are major differences between the UPOV Acts of 1978 and 1991 and the implications for farmers’ right to save, use, exchange and sell farm-saved seeds/propagating materials are discussed below.

UPOV 1978

Article 5 of UPOV 1978 provides for breeders’ rights but this is limited to “production for purposes of commercial marketing, the offering for sale and the marketing of the reproductive or vegetative propagating material, as such, of the variety”. As such it is generally accepted that farmers using the protected varieties have the freedom to save and exchange farm-saved seed/propagating material. However “commercial marketing” and “offering for sale” of the propagating material of protected variety needs the authorization of the right holder. In contrast to UPOV 1991 (discussed below), UPOV 1978 offered greater leeway to implement Farmers’ Rights. It is worth noting that though UPOV 1978 provided more flexibility, there are still limitations to implementation of Farmers’ Rights.

In any case the ratification of UPOV 1978 is no longer possible. New members joining UPOV have to be in line with UPOV 1991. UPOV members that have already ratified the 1978 Act do not have any obligation to ratify the Act of 1991. Several members of UPOV (Norway, China, Brazil, etc,) have decided to remain with UPOV 1978 and to not ratify UPOV 1991.

UPOV 1991

UPOV 1991 greatly expands the scope of breeders’ rights and severely limits Farmers’ Rights.

Article 14 of UPOV 1991 expands breeders’ rights to “producing, conditioning, offering for sale, selling or other marketing, exporting, importing or stocking” in relation to the propagating material, as well as harvested material obtained through unauthorized use of propagating material.

An optional exception to breeders’ right is provided under Article 15(2) of UPOV 1991 which states: “[...] within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, [...] permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety.”

UPOV's Guidance on Article 15.2 advocates the following interpretation: “The Diplomatic Conference recommendation indicates that the optional exception was aimed at those crops where, [...] *there was a common practice of farmers saving harvested material for further propagation*. [...] The wording ‘product of the harvest’ indicates that 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* [...] Examples of factors which might be used to establish reasonable limits and to safeguard the legitimate interests of the breeder are the size of the farmer’s holding, the area of crop concerned grown by the farmer, or the value of the harvested crop. Thus, ‘*small farmers’ with small holdings (or small areas of crop) might be permitted to use farm-saved seed to a different extent and with a different level of remuneration to breeders than ‘large farmers’*’. [...] For 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.*” (emphasis added)⁵

In sum, this optional exception (also often referred to as “farmers’ privilege”) allows farmers to save seed and replant on their own holdings only certain crops and subject to certain conditions (e.g. payment of remuneration to the right holder). This limited (optional) exception would not allow national laws to permit smallholder farmers to freely exchange or sell farm-saved seed/propagating material (e.g. small amounts or for rural trade).

Another relevant exception is Article 15(1)(i) which states breeders’ rights shall not extend to “acts done privately *and* for non-commercial purposes”.

UPOV’s guidance and interpretation of the scope of the exception is extremely restrictive and narrow. It states: “[...] acts which are *both* of a private nature *and* for non-commercial purposes are covered by the exception. Thus, *non-private acts, even where for non-commercial purposes, may be outside the scope* of the exception ...” (emphasis added)

“Furthermore, [...] private acts which are undertaken for commercial purposes do not fall within the exception. Thus, a farmer saving his own seed of a variety on his own holding might be considered to be engaged in a private act, but could be considered not to be covered by the exception if the said saving of seed is for commercial purposes. The wording [...] suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden (i.e. *no material of the variety being provided to others*), since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop *to be consumed entirely by that farmer and the dependents of the farmer living on that holding*, may be considered to fall within the meaning of acts done privately and for non-commercial purposes..”(emphasis added)⁶

The exception as elaborated above would not cover exchange of seeds among farmers as UPOV’s Guidance explicitly mentions “exclusive use in his own garden (i.e. no material of the variety being provided to others)” and consumption entirely by people “on that holding”. Even the multiplication of the protected variety to produce food crops to be consumed by a neighbour (not living on the holding) is not seen as falling within the scope of the exception. The interpretation applied by UPOV does not address the needs and realities of especially smallholder farmers who, in their daily lives, do exchange seeds/propagating material and sell them at the local market.⁷

⁵ “Guidance for the Preparation of Laws based on the 1991 Act of the UPOV Convention” (UPOV/INF/6/4), p. 68-69 available at http://www.upov.int/edocs/infdocs/en/upov_inf_6.pdf

⁶ See supra, note 5

⁷ McGuire, S.J., and Sperling, L. (2016). Seed systems smallholder farmers use Food Security, 8(1), pp. 179–195

Most revealing of the conflict between UPOV 1991 and Article 9 of the International Treaty is UPOV's response to Farmers' Rights provisions enacted by Parties to the International Treaty.

For example, in examining the conformity of Malaysia's national PVP legislation with UPOV 1991 UPOV stated that “the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act” and on that basis recommended deletion of Section 31(1)(e) of Malaysia's Protection of New Plant Varieties Act 2004 which contained the following exception: “any exchange of reasonable amounts of propagating materials among small farmers.”⁸

In the case of the Philippines, UPOV found the farmer's exception in Section 43(d) of the PVP legislation to be incompatible with the 1991 Act. Section 43(d) states:

“The Certificate of Plant Variety Protection shall not extend to: ... d) The traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act, except when a sale is for the purpose of reproduction under a commercial marketing agreement. The Board shall determine the condition under which this exception shall apply, taking into consideration the nature of the plant cultivated, grown or sown. This provision shall also extend to the exchange and sale of seeds among and between said small farmers: Provided, That the small farmers may exchange or sell seeds for reproduction and replanting in their own land.”

In its comments UPOV notes *inter alia* “if ‘exchange, share or sell (*sic*) of their farm produce of a variety protected under this Act’ is for the purpose of reproduction, those acts would constitute infringements to the breeder's right [...] The exchange and sale of seeds among and between said small farmers [...] would constitute an infringement to the breeder's right.”⁹ UPOV called for the Section to be amended, meaning deletion of provisions that safeguards Farmers' Right.

In response to increasing criticisms over the adverse implications of UPOV's provisions for Farmers' Rights, in October 2014, the UPOV Council adopted a list of Frequently Asked Questions which states that “within the scope of the breeder's right exceptions [...], UPOV Contracting Parties have the flexibility to consider, where the legitimate interests of the breeders are not significantly affected, in the occasional case of propagating material of protected varieties, allowing subsistence farmers to exchange this against other vital goods within the local community.”

This has been criticized for being “legally incorrect and deliberately misleading” as UPOV's response is not supported by the text and interpretation of Article 15 and practices of UPOV which have consistently rejected provisions in PVP legislation that allow exchange of seeds/propagating material.¹⁰ Moreover, how is a farmer to know when the breeders' rights are not affected and exchange is allowed.

In any case, only “occasional exchange” is allowed, meaning that exchange of seeds/propagating material as a regular component of farming practices is still not recognized by UPOV.¹¹

⁸ UPOV doc. C(Extr.)/ 22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.

⁹ UPOV doc. C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf

¹⁰ See APBREBES Report on the UPOV Autumn Session 2014, Newsletter Issue #11, available at www.apbrebes.org/files/seeds/files/newsletter11%202018nov2014short.pdf

¹¹ Carlos M. Correa et al. (2015), « Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 », APBREBES, available at <http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>

It is important to note that as recently as 2016, UPOV advised the Myanmar government to remove provisions safeguarding farmers' rights from its national PVP legislation. Myanmar's existing PVP legislation adopted in 2016, allows use of the protected variety for cultivation for non-commercial purposes and exchange of varieties among farmers. However, Myanmar has been advised by UPOV to drop these provisions implementing Farmers' Rights from its new draft PVP legislation.¹²

In summary:

The discussion shows that UPOV especially its 1991 Act is NOT conducive for the implementation of the farmers' right to freely use, save, exchange and sell seed/propagating material.

In contrast, countries that are NOT members of UPOV, are better placed to realize Farmers' Rights, as they may implement a *sui generis* regime (e.g. as in India, Malaysia, Philippines) that allows farmers especially smallholder farmers to freely save, use, exchange and sell seeds/propagating material.

The effects of restrictions on farmers' right can be quite devastating. A human rights impact assessment of UPOV that examined the potential impact of UPOV in the Philippines, Peru and Kenya concludes: “*UPOV 91 restrictions on the use, exchange and sale of farm-saved PVP seeds will make it harder for resource-poor farmers to access improved seeds.* This could *negatively impact on the functioning of the informal seed system*, as the beneficial inter-linkages between the formal and informal seed systems will be cut off. Moreover, *selling seeds is an important source of income for many farmers*. From a human rights perspective, restrictions on the use, exchange and sale of protected seeds could *adversely affect the right to food*, as seeds might become either more costly or harder to access. *They could also affect the right to food, as well as other human rights*, by reducing the amount of household income which is available for food, healthcare or education”¹³

C.2 Protection of traditional knowledge relevant to PGRFA (Article 9.2(a))

Traditional knowledge is the basis of local innovation, *in situ* seed conservation, and essential for food security and creation of agrobiodiversity.¹⁴ It is applied by farmers in the selection, preservation and storing of seed and is also the basis of the informal seed system, which is crucial to achieve food security in many developing countries.¹⁵ However the wealth of farmers' practices goes largely unnoticed and unacknowledged by UPOV.

There is no provision recognizing that breeders have (over generations) been sourcing and continue to source their genetic material from farming communities. In addition, UPOV does not have mechanisms to deal with misappropriation of plant genetic resources and associated traditional knowledge or to facilitate benefit-sharing (see below).

Moreover, UPOV's restrictions on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and preservation. They would also gradually lose their ability to make informed decisions about what to grow and on which type of land, how to respond to pest infestation, or how to adapt

¹² See <http://www.apbrebes.org/news/apbrebes-report-upov-2017-autumn-session>

¹³ “Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines,” October 2014. Available at www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed - Accessing_Food_report_def.pdf

¹⁴ IAASTD (International Assessment of Agricultural Knowledge, Science and Technology for Development). 2009. Synthesis Report – A Synthesis of the Global and Sub-Global IAASTD Reports (edited by B. McIntyre).

¹⁵ Joseph Wekundah (2012) 'Why Informal Seed Sector is important in Food Security', African Technology Policy Studies Network

their seed system to changing climatic conditions.¹⁶ The process of “deskilling” of farmers – which is already underway with the decline of local agrobiodiversity – could become more acute with restrictions on use of seeds introduced through UPOV 91-style laws.¹⁷

In summary:

UPOV does not protect traditional knowledge. Its system is crafted to further the interests of commercial breeders and its restrictions on saving, exchanging and selling protected seeds has detrimental effects on traditional knowledge.

C.3 The right to equitably participate in sharing benefits arising from the utilization of PGRFA (Article 9.2(b))

Disclosure of origin and evidence of compliance with access and benefit sharing requirements in intellectual property applications is widely seen as a crucial tool to prevent misappropriation of genetic resources and associated traditional knowledge and to facilitate implementation of prior informed consent and fair and equitable benefit sharing arising from the utilization of such resources and knowledge.

There are numerous documented cases of misappropriation.¹⁸ For example Hammond found that Seminis (a subsidiary of Monsanto) planted farmers’ carrot seeds from Turkey, and through a simple process of selection – mainly selecting plants that were slow to bolt and which had a desirable root shape and shade of purple (associated with health benefits) – emerged with a new carrot variety over which it has obtained PVP protection in the United States and Europe.¹⁹

Disclosure requirements have been incorporated into intellectual property legislation in many countries, and have been advocated by many different countries in international forums such as the WTO, the CBD and the World Intellectual Property Organization (WIPO). A PVP application is an important checkpoint to monitor and enhance transparency with regard to utilization of genetic resources and associated traditional knowledge, and compliance with access and benefit-sharing rules.²⁰

An example of a disclosure obligation in PVP legislation is provided by Section 12 of Malaysia’s national PVP legislation, which stipulates that an application must:

- “... (e) contain information relating to the source of the genetic material or the immediate parental lines of the plant variety;
- (f) be accompanied with the prior written consent of the authority representing the local community or the indigenous people in cases where the plant variety is developed from traditional varieties;
- (g) be supported by documents relating to the compliance of any law regulating access to genetic or biological resources.”

Another example is Article 18(1) of India’s PVP and Farmers’ Rights Act, which stipulates that an application for registration must:

- “... (e) contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has

¹⁶ See *supra*, note 13

¹⁷ See *supra*, note 13

¹⁸ McGown, J., (2006). “Out of Africa: Mysteries of Access and Benefit Sharing”, Edmonds Institute, available at <http://bit.ly/1uSCXHa>; Hammond, E., (2013). “Biopiracy Watch: A compilation of some recent cases”, Vol. 1. Third World Network, Penang.

¹⁹ Hammond, E., (2014). “Biopiracy of Turkey’s purple carrot”, Third World Network, available at http://www.twn.my/title2/intellectual_property/info.service/2014/ip140212.htm

²⁰ See *supra* note 11

been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety; (h) contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired.”

However, the UPOV Convention has been interpreted as preventing Contracting Parties from establishing a disclosure obligation as a condition for registration of a plant variety.²¹

In applying this approach, UPOV has deemed inconsistent with its regime legislation proposed by some Members of the International Treaty, such as Malaysia, India and required removal of disclosure obligations (with regard to origin, prior informed consent and compliance with access and benefit-sharing legislation) before allowing accession to the Union. Peru deleted from its draft legislation a disclosure-of-origin obligation in anticipation of UPOV’s opposition.²²

In summary:

UPOV has taken the position that disclosure requirements are incompatible with its provisions, which in turn limits countries’ ability to effectively implement Article 9.2(b) of the International Treaty. Further UPOV lacks mechanisms to prevent misappropriation and facilitate benefit-sharing arising from the utilization of plant genetic resource developed by farmers.

In contrast, developing countries opting for *sui generis* PVP legislation (e.g. Malaysia and India) are able to put in place appropriate mechanisms including a disclosure requirement to implement fair and equitable benefit sharing and safeguard against misappropriation.

C.4 The recognition of 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 (Article 9.1)

The word “farmer” does not appear in UPOV 1978, while in UPOV 1991, “farmer” is only mentioned in Article 15.2 with regard to the limited farm-saved seed exception. There is nothing in the Acts, which could be interpreted as recognition of the contribution farmers, local and indigenous communities have made and continue to make with regard to PGRFA. Such recognition or consideration of Farmers’ Rights is similarly lacking with regard to decisions taken during UPOV sessions as well as the activities of the UPOV Secretariat.

Instead UPOV’s instruments and activities are heavily tilted in favour of commercial breeders, to the detriment of Farmers’ Rights and interests. For example, farmers’ varieties in most cases cannot be protected as they often cannot meet the uniformity or stability criteria.

Another inequality, which could be observed, is regarding essentially derived varieties (EDVs). UPOV 1991 extends breeders’ rights to varieties essentially derived from the protected variety. This means that if a farmer makes a small derogation from a protected variety (e.g. by selection), the farmer would need authorization from the breeder (of the protected variety) to commercialize the newly bred variety (as it would be considered an EDV). The given rationale for EDVs is to prevent claims for plant breeder rights (PBRs) on newly bred varieties, which are essentially similar to the initial protected variety.

²¹ See supra note 5, pp. 33-34.

²² See supra note 11

However, if a public or private commercial breeder uses a variety bred by farmers (not protected by PBRs) to breed a new plant variety, the breeder may obtain PBRs but the farmer has no rights. As noted above, UPOV refuses to allow the introduction of a disclosure of origin requirement and any mechanism to prevent misappropriation and facilitate benefit sharing arising from the utilization of plant genetic resource developed by farmers.

In addition, as discussed above, UPOV undermines the exercise of farmers' right to freely use, save, exchange and sell seeds/propagating material, which facilitates farmer experimentation and breeding that has underpinned their contribution to the conservation and development of PGRFA.

In summary:

UPOV's instruments and activities fail to give due recognition to the contribution of local, indigenous communities and farmers, or acknowledge their continuing important role in the development of plant genetic resources. Its instruments (especially UPOV 1991), while safeguarding the interests of commercial breeders are detrimental to the interests of farmers, including local and indigenous communities.

C.5 The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA (Article 9.2 (c))

In 2009, then UN Special Rapporteur on the Right to Food recommended that governments put in place "mechanisms" for the active participation of farmers in decisions related to PGRFA "particularly in the design of legislation covering [...] the protection of plant varieties so as to strike the right balance between the development of commercial and farmers' seed systems"²³

In this context, a major concern is that UPOV's technical assistance is focused on the promotion of UPOV 1991. It does not require the beneficiary country to put in place mechanisms for farmers' participation in the formulation of national PVP laws. In fact, UPOV is known to support processes that are not participatory or inclusive of farmers or their representatives.

For example, UPOV provided extensive technical assistance to the African Regional Intellectual Property Organization (ARIPO) in the development of a regional PVP Protocol (Arusha Protocol). At least 13 ARIPO members are categorized by the UN as Least Developed Countries. This regional process had significant implications nationally, as it is about adopting a centralized system for the grant and administration of PVP modelled on UPOV 1991. Farmer organizations and civil society groups raised numerous concerns over the appropriateness of such a legal framework for the ARIPO region given the views and interests of smallholder farmers that make up 80% of the agricultural system in the ARIPO region have not been taken into account. Concern was also raised over the flawed, non-participatory and non-transparent process by which the Protocol was being developed.

In January 2016, the Alliance for Food Sovereignty Africa (AFSA) wrote a letter to all UPOV Members expressing "outrage at the deliberate exclusion of smallholder farmers and civil society in key meetings negotiating a PVP Arusha Protocol [...] despite their numerous requests".²⁴

²³ UN General Assembly Document (A/64/170), "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation" available at http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf

²⁴ See <http://afsafrica.org/open-letter-to-members-of-the-international-union-for-the-protection-of-new-varieties-of-plants-upov-2/>

The letter asserts the Arusha Protocol has major implications on Farmers' Rights at the national level for the ARIPO members that are also members of the International Treaty. "And yet no effort was made to operationalize Article 9.2(c) of ITPGRFA, which is about Farmers' Rights to participate in decision-making on matters."²⁵

"Even worse is that international organizations such as UPOV and WIPO have intentionally enabled the non-fulfilment of Article 9.2(c) of the ITPGRFA and the undermining of Farmers' Rights as these organizations have supported this flawed and illegitimate ARIPO process."²⁶

In Summary:

UPOV facilitates national and regional processes where farmers' right to participate in making decisions is ignored.

C.6 Pressure to Give Up Farmers' Rights

As highlighted above, the WTO TRIPS Agreement gives countries full freedom to put in place PVP systems that are suitable for their own agricultural systems, and several countries have done so.

However at the same time it cannot be ignored that there is enormous pressure on developing country governments, many of whom are Parties to the International Treaty, to adopt the UPOV 1991 model for the protection of plant varieties. In particular developed countries negotiating bilateral and regional North-South free trade agreements (FTAs) make it a requirement for developing countries to adopt the UPOV 1991 model and/or become a party to the 1991 Act²⁷. In fact, many developing countries that have ratified UPOV 1991 have done so to comply with obligations imposed in FTAs with the USA or the European Union.

This pressure is accompanied by one-sided (and in some cases even inaccurate or misleading) information about the benefits of the UPOV system. Usually no information is provided on alternative *sui generis* PVP systems, the importance of the informal seed sector and Farmers' Rights.

Countries joining UPOV 1991 have very little room to manoeuvre, as they have to present their legislation to the UPOV Council for assessment of conformity with the 1991 Act.²⁸ To assess conformity, the UPOV Secretariat scrutinises a country's legislation, rejecting any clause that in its view is inconsistent with its understanding of the 1991 Act. Only if the decision is positive (in conformity) can the said country become a Member of UPOV 1991.

This has been illustrated above in the case of Malaysia and the Philippines, whereby UPOV called for the deletion of provisions implementing Farmers' Rights on the basis that they were inconsistent with the 1991 Act.

In summary:

The incoherence and conflicts in the international legal system is hindering Parties to the International Treaty from implementing all elements of Farmers' Rights.

D. CONCLUSION

²⁵ ibid

²⁶ ibid

²⁷ GRAIN (2016), Trade agreements privatising biodiversity, available at <https://www.grain.org/attachments/3734/download>

²⁸ Article 34(3) of the 1991 Act.

Based on the above discussion, it is apparent that in contrast to UPOV, alternative non-UPOV *sui generis* PVP systems offers Parties to the International Treaty full freedom to put in place mechanisms to implement all aspects of Farmers' Rights.

It is important to note that many independent expert reports have actually recommended that developing countries do not join the UPOV system²⁹ as it offers a rigid model inappropriate for developing countries where farmer managed seed systems (informal seed systems) and the practices of freely saving, using, exchanging and selling seeds are prevalent.

Parties to the International Treaty should learn from the experiences of countries that are implementing non-UPOV *sui generis* systems, and design PVP systems that are more suited to their national agricultural systems and realities. Towards this end several tools have been developed.³⁰

²⁹ For example, The UPOV Convention, Farmers' Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks" published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development" (June 2015) available at <https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>; UNDP (2008) "Towards a Balanced Sui Generis Plant Variety Regime", available at <http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/toward-a-balanced-sui-generis-plant-variety-regime.html>; See also supra note 23.

³⁰ Carlos M. Correa et al. (2015), see supra note 12 ; UNDP 2008, ibid and Chee Yoke Ling et al. (2016), Farmers' Right to Participate in Decision-making – implementing Article 9.2 (c) of the International Treaty on Plant Genetic Resources for Food and Agriculture, APBREBES, available at http://www.apbrebes.org/files/seeds/files/PE_farmers%20right_9-16_def-high.pdf?pk_campaign=part

Plant Variety Protection in Developing Countries

A Tool for
Designing a
Sui Generis
Plant Variety
Protection
System:
An Alternative
to UPOV 1991

Carlos M. Correa

with contributions from
Sangeeta Shashikant and
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CONTENTS

Executive Summary	ix
Introduction	1
1 The Origins of Plant Variety Protection and UPOV	5
1.1 The introduction of plant variety protection in the USA	5
1.2 The development of a <i>sui generis</i> regime in Europe	8
1.3 Adoption and evolution of UPOV: towards broader and enhanced protection of breeders' rights	10
1.4 Conclusions	11
2 The International Legal Context for the Protection of Plant Varieties	15
2.1 The protection of plant varieties under the TRIPS Agreement: flexibilities regarding the model of protection under Article 27.3(b)	15
2.2 Pending review of Article 27.3(b)	17
2.3 Relevance of the CBD and the Nagoya Protocol and their relationship with the TRIPS Agreement	18
2.4 International Treaty on Plant Genetic Resources for Food and Agriculture	22
2.5 UPOV accession rules: a rigid modelling of national laws	24
2.6 Conclusions	25
3 Concerns About the Impact of UPOV 1991 in Developing Countries	27
3.1 Impact of UPOV in developing countries	27
3.2 Standards established by UPOV	29
3.3 Pressures to join UPOV: obligations in free trade and economic partnership agreements	40
3.4 <i>Sui generis</i> models implemented in developing countries	41
3.5 Conclusions	45
4 An Alternative Model: Proposals for a <i>Sui Generis</i> Regime	47
4.1 Categories of protected varieties	49
4.2 Requirements for protection	51
4.3 Scope of protection	54
4.4 Exclusions from protection	55
4.5 Registration	56
4.6 Opposition	58
4.7 Rights conferred	59
4.8 Benefit-sharing contribution	61
4.9 Acts not covered by conferred rights and exceptions	62
4.10 Farmers' Rights	64
4.11 Compulsory licences	65
4.12 Variety denomination	66
4.13 Duration	66
4.14 Parallel importation	67
4.15 Infringement	67
4.16 Nullity and revocation	68
5 The Process of Adoption of a <i>Sui Generis</i> Regime	71
5.1 Unused policy space	71
5.2 Arguments for adopting the UPOV model	71
5.3 Developing a <i>sui generis</i> regime: an inclusive process	77
Annex: Bibliography on the Impacts of Plant Variety Protection	81

LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific (Group of States)
AIPH	International Association of Horticultural Producers
AIPPI	Association Internationale pour la Protection de la Propriété Intellectuelle
APBREBES	Association for Plant Breeding for the Benefit of Society
ASSINSEL	International Association of Plant Breeders for the Protection of Plant Varieties
ASTA	American Seed Trade Association
CAFTA	US-Central America Free Trade Agreement
CBD	Convention on Biological Diversity
CPVO	Community Plant Variety Office (EU)
DUS	distinctness, uniformity and stability
EDV	essentially derived variety
EFTA	European Free Trade Association
FAO	(UN) Food and Agriculture Organization
FDI	foreign direct investment
FTA	free trade agreement
GRs	genetic resources
IFAD	International Fund for Agricultural Development
IGC	(WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP	intellectual property
IPRs	intellectual property rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LDC	least developed country
MAS	marker-assisted selection
NDUS	novelty, distinctness, uniformity and stability
NGO	non-governmental organization
OAPI	African Intellectual Property Organization
PBAK	Plant Breeders' Association of Kenya
PBRs	plant breeders' rights
PGRFA	plant genetic resources for food and agriculture
PIC	prior informed consent
PPVFR	Protection of Plant Varieties and Farmers' Rights (Act) (India)
PVP	plant variety protection
PVPA	Plant Variety Protection Act (USA)
PVR	plant variety rights
SPVA	Seeds and Plant Varieties Act (Kenya)
STAK	Seed Trader Association of Kenya
TCEs	traditional cultural expressions
TK	traditional knowledge
TRIPS	(Agreement on) Trade-Related Aspects of Intellectual Property Rights
UNEP	United Nations Environment Programme
UPOV	International Union for the Protection of New Varieties of Plants
UPOV 1991	1991 Act of the International Convention for the Protection of New Varieties of Plants
USDA	United States Department of Agriculture
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

ABOUT THIS WORKING PAPER

THIS working paper is a tool to assist developing countries in designing a *sui generis* plant variety protection (PVP) system that is consistent with the requirements of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), is suitable for the seed and agricultural systems that prevail in developing countries, and promotes achievement of the objectives of the Convention on Biological Diversity (CBD), the Nagoya Protocol on Access and Benefit Sharing (Nagoya Protocol) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). This tool could also support civil society and farmer organizations engaged in seed policy work and advocating for an appropriate *sui generis* system.

WTO member states (with the exception of least developed countries) are required to make available some form of intellectual property protection for plant varieties. However, they have the flexibility to design a '*sui generis*' (unique) system for such protection. There is extensive literature on the inappropriateness of the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 1991) for developing countries where farmer-managed seed systems (also commonly known as the informal seed sector) and the practices of saving, using, exchanging and selling seeds are prevalent. UPOV 1991 requirements also undermine implementation of the CBD, Nagoya Protocol and the ITPGRFA.

Thus the rationale for this tool is to present an alternative to UPOV 1991 taking into account the realities and conditions as well as alternative *sui generis* PVP systems that exist in some developing countries.

It has been observed by the publishing organizations of this working paper that governments intending to legislate on PVP often receive assistance from UPOV and are unaware of the significant concerns with regard to UPOV 1991, the flexibilities provided under the TRIPS Agreement, obligations under other international treaties such as the CBD, Nagoya Protocol and the ITPGRFA and the possible legal options available to them. In short, these governments are constrained by limited expertise, institutional capacity and experience in designing regimes appropriate to the conditions prevailing in their countries. Hence, this tool is an attempt to fill that knowledge gap, and to enable developing-country governments to explore alternative legal options for developing a relevant PVP system and to take an informed decision.

Chapter 1 of this paper examines the origins of plant protection through intellectual property rights and UPOV. Chapter 2 elaborates on the requirements of the TRIPS Agreement and the flexibilities available to WTO members as well as the context and provisions of other international instruments (currently the CBD, Nagoya Protocol and the ITPGRFA) relevant to plant genetic resources. Chapter 3 discusses the key features of UPOV 1991 and its implications for developing countries.

Chapter 4 proposes model provisions for key features that are essential to designing a *sui generis* PVP regime and which may be adapted to national circumstances. Chapter 5 addresses the obstacles that developing countries may face in designing *sui generis* PVP legislation, arguments against and in favour of non-UPOV-type *sui generis* regimes, and recommendations for actions to be taken when developing a PVP law.

This working paper is the outcome of a project undertaken by the Association for Plant Breeding for the Benefit of Society (APBREBES). An advisory group was formed to assist in the development of the paper. The advisory group consists of: Bram de Jonge (Wageningen University), François Meienberg (Berne Declaration), Gurdial Singh Nijar (University of Malaya), Mariam Mayet (African Centre for Biodiversity), Normita Ignacio (SEARICE), Sangeeta Shashikant (Third World Network) and Susanne Gura (APBREBES).

This working paper is the result of:

- a review of existing literature on PVP systems and UPOV and other relevant instruments (CBD, Nagoya Protocol and ITPGRFA) as well as PVP legislations in operation in various countries particularly developing countries

- advisory group meetings to discuss the conceptualization and drafts of the working paper. Meetings were held on: March 28-29, 2014 in Cape Town; August 26-28, 2014 in Zurich; and February 16-17, 2015 in Frankfurt.
- consultations with Bert Visser (Director, Centre for Genetic Resources, Netherlands) and others to obtain feedback on a draft of the working paper, particularly the model provisions presented in Chapter 4
- comments provided by members of the advisory group on the various drafts of the working paper
- comments received from Lim Li Ching, Third World Network; Guy Kastler, La Via Campesina (European Coordination); Teshome Hunduma, Norwegian Development Fund; Lim Eng Siang, Malaysian representative at the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing; Edward Hammond, Prickly Research; and Dr. Yiching Song, Center for Chinese Agricultural Policy, Chinese Academy of Sciences.

APBREBES welcomes feedback and comments on this document. These can be forwarded to:
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EXECUTIVE SUMMARY

PRIVATE nurseries and breeders from the United States pioneered the legislative movement towards the creation of exclusive rights over plant varieties. They were able to obtain, without the participation of farmers and consumers, the enactment of special legal regimes of plant variety protection (PVP). In Europe, commercial breeders' initiatives led to the adoption of the International Convention for the Protection of New Varieties of Plants (UPOV), conceived for the agricultural systems and the modalities of seed production prevailing in those countries. Developing countries were conspicuously absent in the process of creation and strengthening, through UPOV as revised in 1991 (UPOV 1991), of this international regime.

As a matter of principle, countries should be able to choose whether or not to provide intellectual property protection to plant varieties as well as what form of intellectual property protection they confer, depending on the characteristics of their agriculture and seed supply systems. Improvements in plant genetic resources for food and agriculture have taken place over the centuries without such protection. The costs generated by such protection may exceed potential benefits, particularly if farmers are prevented from pursuing their traditional practices of saving, using, exchanging and selling seeds/propagating material.

World Trade Organization (WTO) member states bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) need to provide some form of intellectual property protection for plant varieties. This obligation is crafted in such a manner that significant flexibility exists to design the legal regime for such protection. Importantly, least developed countries (LDCs), even if members of the WTO, enjoy full policy space to not provide any intellectual property protection for plant varieties.

Some countries have opted for joining UPOV 1991 in order to comply with the obligation created by the TRIPS Agreement; many of these countries have done so in response to pressures from developed countries or obligations imposed in free trade agreements (FTAs). However, UPOV 1991 – which significantly expanded and strengthened plant breeders' rights – offers a rigid model inappropriate for developing countries. It ignores the characteristics of the seed supply systems in those countries, where farmers produce a large part of the seeds/propagating material used, and suppresses farmers' traditional practices of saving, exchanging and selling plant materials. In developing countries access to seeds/propagating material is heavily dependent on practices of saving and exchanging seeds/propagating material. Selling of seeds/propagating material is an important source of income for farmers and their families. These activities are crucial to preserving a diversified supply of seeds, adapted to local conditions and a changing environment. UPOV 1991 also does not include measures to prevent the misappropriation of farmers' varieties by commercial firms. In addition, the implementation of UPOV may narrow down the genetic diversity in the fields.

Countries, even those that are WTO members, are not obliged to join UPOV nor to otherwise apply the standards set out by the UPOV Convention. For the purpose of conforming to the commitments made under the TRIPS Agreement, they can implement other *sui generis* options which are more suitable to their needs and supportive of small-scale farmers – who account for the largest part of food production and employment in many developing countries – and of national policies on agricultural development and food security.

While UPOV provides a model of protection focused on breeders' commercial interests, the Convention on Biological Diversity (CBD) and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, as well as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), include elements reflecting other interests, notably the conservation of biodiversity, the sustainable use of genetic resources, and the fair and equitable sharing of the benefits arising from their exploitation. Since PVP legislation concerns exploitation of plant genetic

resources, a *sui generis* regime on plant varieties should be designed in a manner that is supportive of and coherent with the objectives and elements of these international instruments.

Developing countries are often exposed to arguments about the potential benefits of joining UPOV 1991. In addition to the mentioned pressures and obligations under FTAs, these countries have been constrained by limited expertise, institutional capacity and experience in designing regimes adequate to their realities. However, based on an inclusive process of continual engagement with relevant stakeholders, including farmers, parliamentarians and government agencies, such regimes can be developed and implemented.

This working paper offers a tool to design an alternative to a UPOV-type regime of PVP, one that is suitable to the seed supply and agricultural systems prevailing in developing countries. The proposed *sui generis* regime is articulated on the basis of three categories of plant varieties: (i) ‘new uniform plant varieties’; (ii) ‘new farmer and other heterogeneous varieties’; and (iii) ‘traditional farmers’ varieties’.

In the proposed model provisions, *new uniform plant varieties* are subject to a regime close to UPOV 1978, whereunder the NDUS (novelty, distinctness, uniformity and stability) requirements for the granting of breeders’ rights are applicable and on registration, breeders obtain an exclusive right. This means commercial use of the propagating material of the new uniform plant variety would require prior authorization of the right holder, subject to certain exceptions.

New farmer and other heterogeneous varieties should also be registered but different requirements would apply (novelty, distinctness and identifiability). Right holders would have a remuneration right only (not ‘exclusive rights’), that is, the proposed regime would not restrict commercial exploitation of the propagating materials of these varieties; however, it will require payment of remuneration (to individual farmers, farming communities or breeders that registered that variety) when such exploitation takes place. Thus, the regime essentially aims at preventing the misappropriation of varieties developed or evolved by farmers and farmers’ communities, as well as of other heterogeneous varieties developed by breeders, including in public research institutions.

Commercial exploitation of the propagating material of *traditional farmers’ varieties* would also give rise to a right to remuneration, but payable to a Seed Fund. The only requirement for this right to arise would be ‘identifiability’ of a variety; registration would not be needed.

Importantly, in recognition of the crucial role that small farmers play in the production of food in developing countries, the proposed *sui generis* regime exempts them from any obligation in connection with the categories of plant varieties mentioned, thereby fully safeguarding the right of small-scale farmers to freely save, use, exchange and sell seeds/propagating material. Other exceptions, consistent with the concept of Farmers’ Rights, are also contemplated for other farmers.

The proposed *sui generis* regime also suggests the establishment of a Seed Fund which will collect remuneration from the commercial exploitation of traditional farmers’ varieties and a benefit-sharing contribution when a new uniform plant variety is registered. Income from the Seed Fund will be used to support the conservation and sustainable use of plant genetic resources, particularly on-farm conservation and community seed banks, as well as to implement benefit sharing for relevant farmers and farming communities.

The proposed *sui generis* regime is an attempt to, *inter alia*, attain a right balance between breeders’ rights and those of farmers and the society at large; ensure that farmers’ varieties and those developed by public research and breeding institutions are not misappropriated; allow breeders to recoup their investments in the development of new varieties; expand the use of new varieties suitable to the conditions in the country, taking into account particularly the needs of small-scale farmers; support national policies of conservation and sustainable use of plant biodiversity for food and agriculture, as well as compliance with obligations under the CBD, the Nagoya Protocol and the ITPGRFA; preserve associated traditional knowledge and ensure the permanent adaptation of seeds to the evolution of agricultural ecosystems and food security; and respect, protect and fulfil human rights obligations.

INTRODUCTION

PLANT varieties were developed over centuries through the exchange of seeds and the sharing of knowledge among farmers. Even today this is the model of innovation and diffusion in agriculture that prevails in most developing countries. It is based on principles of common ownership, within a given community, and free access to materials and knowledge. However, with the development of commercial plant varieties by seed companies, a new model of production and diffusion, based on intellectual property rights, has emerged. As a result of the obligations imposed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Trade Organization (WTO) member countries have now become bound to provide for some form of intellectual property protection on plant varieties.

Intellectual property generally confers *exclusive* rights. This means that the right holder can exclude others from using the protected subject matter. If close substitutes to the protected products and processes are not available, a monopoly can be exercised during the term of protection. While originally such rights were created for mechanical inventions and works of authorship, they gradually extended to other areas, including living matter. Private commercial breeders started initiatives to establish intellectual property rights in the field of plants at the end of the 19th century, which eventually led, some decades thereafter, to the adoption of specific (*sui generis*) legislation in the USA and some European countries relating to plant varieties.

The creation of exclusive rights in relation to plant breeding was justified by the need to provide incentives for the development of better plant varieties. The assumption was that the generation of new varieties would increase and a diversified pool of seeds/propagating material would be available to farmers. The appropriation of plant varieties under 'plant variety protection' (PVP) brought about, however, a drastic change to the model of creation and diffusion of plant varieties based on the sharing and exchange of seeds among farmers, along which lines the development of agriculture and food production had proceeded over centuries.

With the application of modern biotechnology and the development of genetically modified plants, the model of appropriation of plant materials further deepened. Many countries – again in response to private sector demands – extended patent protection to plants (and, in some cases, plant varieties themselves). The combination of PVP and patents allowed a few biotechnology-based companies to monopolize a growing share of the seed market, while focusing on a narrow pool of genetic diversity. By the end of 2012, the global commercial seed market was estimated to be worth \$44 billion. On the global level, nine commercial seed companies controlled close to 61% (with three companies controlling 45%) of the market, in contrast to 17% (three companies controlling 10%) in 1996.¹ In addition, seed sales offer corporations the opportunity to capture revenue deriving from complementary sales of chemical products.

Seeds' ability to self-reproduce and the ensuing farmers' ability to save and re-plant seeds, including their exchange, are essential to a sustainable agriculture and food security. They constitute the very essence of 'Farmers' Rights' as recognized in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). However, these characteristics are dysfunctional to the interests of commercial seed suppliers, who may increase their income (and recoup their purported investment in developing new varieties) if the natural process of seeds' reproduction is blocked or subject to payment obligations. These suppliers protect their commercial interests through technical processes like the production of hybrids – which do not breed true – and/or through the implementation of restrictive modalities of intellectual property rights.

¹ Based on 'The EU seed and plant material market in perspective: a focus on companies and market shares, 2013', as quoted in 'Semeuses agricoles – Monopole privé sur un bien public' published by the Berne Declaration and ProSpecieRara, 2014.

This paper provides a tool with a set of model provisions regarding the protection of plant varieties that, while complying with the TRIPS Agreement – in the case of the countries that are currently subject to its obligations – may allow developing countries to design a system of intellectual property that protects Farmers’ Rights and is functional to the conditions of local supply systems and national policies *inter alia* regarding agriculture and food security.

A basic reason for the elaboration of this tool is that the UPOV Convention, as revised in 1991, that establishes the International Union for the Protection of New Varieties of Plants (hereinafter ‘UPOV 1991’) has emerged as the dominant model of PVP and is applied in a growing number of developing countries, often under political pressures or as a condition to obtain trade concessions. The model of protection enshrined by UPOV 1991, as discussed below, prioritizes commercial breeders’ interests over those of farmers, especially small and medium landholders who contribute the major part of the agriculture and food production in most developing countries.

The purpose of this paper is not to elaborate or provide evidence on the impact of UPOV or other PVP regimes in developing countries.² It is, rather, based on the premise that a UPOV-type PVP system, especially if framed in accordance with UPOV 1991, may negatively affect farmers’ ancestral practices of freely saving, exchanging and selling seeds/propagating material, contribute to the loss of biodiversity, lead to a growing concentration in seed supply, and ultimately endanger livelihoods and food security.

Some developing countries (e.g., India, Malaysia, Thailand) have developed *sui generis* PVP systems that respond to their own realities, but their rules and operations are not sufficiently known. There seems to be a knowledge gap concerning the design of a true alternative to UPOV 1991. This tool aims at contributing to filling the legal vacuum created by the lack of existing legal models compatible with the farming systems prevailing in most developing countries.

The elaboration of this tool has been based on several premises, namely that:

- UPOV 1991 is NOT the only option available to countries introducing or reforming PVP legislation;
- it is possible to design other regimes of PVP that are more flexible and better adapted to the agricultural profile of developing countries, particularly to the needs of small-scale farmers, consistent with policies of conservation, sustainable use of plant biodiversity and food security;
- such a regime would be compatible with the TRIPS Agreement, a matter of concern for countries currently bound by this Agreement;
- there is a need to balance breeders’ rights and those of farmers and the society at large, supporting the formal seed system as well the informal seed sector³ which is led by smallholder farmers, with the goal of realizing the right to food and society’s welfare;
- there is a need to preserve traditional farming practices of saving, exchanging and selling seeds/propagating material, having in view the importance of ensuring the livelihood of farming communities, the continuous adaptation of seeds/propagating material to the evolution of agricultural ecosystems, and food security;
- there is a need to ensure that developments made by farmers as well as public research institutions are not misappropriated;
- there are legal models that may be applied to implement benefit sharing in the case of use of materials conserved and developed by farmers;

² On this subject see, e.g., 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 at https://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-Accessing_Food_report_def.pdf.

³ The need to support the informal seed system in addition to the formal seed system has been recognized in the Voluntary Guide for National Seed Policy Formulation, which was endorsed by the Fifteenth Regular Session of the Commission on Genetic Resources for Food and Agriculture in January 2015. See <http://www.fao.org/3/amm546e.pdf>

- there is a need to facilitate or increase diffusion of new varieties suitable to the conditions in the country concerned, taking into account particularly the situation and needs of small-scale farmers;
- national PVP regimes should respect, protect and fulfil human rights obligations, including the rights of indigenous communities;
- a PVP regime should be supportive of and not counter the objectives and the obligations under the Convention on Biological Diversity (CBD), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, and the ITPGRFA.

The model provisions presented in this tool (see Chapter 4), if adopted, would create a legal regime in relation to plant varieties that is different from those modelled under UPOV. The protection sought is broader in scope than that accorded under UPOV-type laws, but the rights conferred are more limited. The proposed *sui generis* regime is articulated on the basis of three categories of plant varieties for which different requirements and rights are provided.

New uniform plant varieties would be subject to a regime close to UPOV 1978, whereby to be protected the varieties would need to be ‘novel, distinct, uniform and stable’ and on registration the right holder obtains an exclusive right. Hence commercial use of the propagating material of the new uniform plant variety would require prior authorization by the right holder, subject to certain exceptions.

New farmer and other heterogeneous varieties would not be required to satisfy the criteria of uniformity and stability. For these varieties to be registered, different requirements would apply (novelty, distinctness and identifiability). Right holders would enjoy a remuneration right (not ‘exclusive rights’), which means the commercial exploitation of the propagating material of these varieties would not be restricted but only subjected to payment of remuneration (to individual farmers, farming communities or breeders that registered that variety).

The commercial exploitation of the propagating material of *traditional farmers’ varieties* would also give rise to remuneration, but payable to a Seed Fund. To be protected, the variety has to be ‘identifiable’, although registration would not be needed.

In the case of the latter two categories of varieties, the aim is to prevent misappropriation; the protection would be based on the principle of benefit sharing and could be characterized as ‘defensive’.

Importantly, the proposed *sui generis* regime exempts small-scale farmers from any obligation in connection with any of the proposed categories of plant varieties. The model provisions preserve the right of small-scale farmers (to be defined nationally) to freely save, use, exchange and sell seeds/propagating material. Other exceptions, consistent with the concept of Farmers’ Rights, are also contemplated for other farmers.

The model provisions also suggest the establishment of a Seed Fund which will collect remuneration from the commercial exploitation of traditional farmers’ varieties and a benefit-sharing contribution when a new uniform plant variety is registered. Income from the Seed Fund will be used to support the conservation and sustainable use of plant genetic resources, particularly on-farm conservation and community seed banks, and payments of remuneration/benefit sharing to relevant farmers and farming communities.

The recognition of the abovementioned three categories of varieties aims at creating a system that avoids a dichotomization between breeding and farming, which would also allow countries to implement their obligations under international treaties relating to genetic resources and particularly to realize Farmers’ Rights. In recognition of the crucial role that small farmers play in the production of food in developing countries, the proposed *sui generis* regime would exempt them from UPOV-type restrictions on saving, use, exchange and sale of seeds/propagating material.

CHAPTER 1

The Origins of Plant Variety Protection and UPOV

THIS chapter examines the origins of plant protection through intellectual property rights in the USA and Europe and the role of private nurseries and breeders in pursuing the adoption of legislation in this area. It notes the discussions held on the modalities of protection and the origins of UPOV, inspired by legislation adopted in a few European countries. This chapter looks at the main drivers behind the introduction of legal protection of plant varieties and what objectives they pursued. It also shows that such protection originated in developed countries to address the particular conditions of breeding and commercialization of plant varieties in those countries. Such conditions are very different from those prevailing in developing countries where agriculture is strongly dependent on small-scale farmers, the practices of saving, exchanging and selling seeds/propagating material and the plant varieties they conserve and improve.

The chapter further discusses the evolution of the UPOV Convention, as well as the changes in its membership after the adoption of the TRIPS Agreement with the incorporation of a larger number of developing countries.

The introduction of plant variety protection in the USA

At the end of the 19th century, a dynamic crop seed market emerged in the USA, notably as a result of on-farm experimentation, selection and discovery.⁴ In parallel, the activities of nurseries specializing in fruits and flowers expanded significantly. While they benefited from the identifiability of their products and the possibility of offering visibly differentiated, standardized products, they faced the challenge of competitors that easily engaged in ‘copying’ and flooded the market with competing products.⁵

Several associations⁶ were formed at the national, sectoral and regional levels to protect the interests of breeders and nurseries, develop standards, and lobby the government (especially against the ‘free seeds program’, which was implemented in the USA until 1924).⁷

Historical studies on the development of US plant variety protection reveal that the establishment of intellectual property protection for plants was, to a great extent, the result of lobbying by a nursery, Stark Brothers, a leading company in the US market at the beginning of the 20th century. Significantly, this company was not involved in actual breeding:

Stark’s business was based on varieties, not breeding. It depended on the ability to purchase new, desirable varieties as they arose, and to mass-market them. It did not depend on Stark’s breeding new varieties – varieties it could not legally or practically keep out of the hands of eager and often unscrupulous competitors.⁸

⁴ See Cary Fowler, ‘The Plant Patent Act of 1930: A sociological history of its creation’ <http://ipmall.info/hosted_resources/lipa/PlantPatent_Act/82JPatTrademarkOffSocy621.pdf>, 624.

⁵ *Id.*, 627.

⁶ For instance, the American Association of Nurserymen, founded in the 1870s, and the American Seed Trade Association (ASTA), established in 1883.

⁷ Fowler, *op. cit.*, 628, 632. Under the ‘free seeds program’, the US Department of Agriculture (USDA) distributed to farmers millions of packages of seed annually for free.

⁸ *Id.*, 630.

Stark Brothers had attempted to avoid the propagation by third parties of the varieties they commercialized through contractual means, but this method proved to be ineffective.⁹ A draft bill to create rights over plant varieties was first introduced in 1906 as an amendment to the patent law but it failed to obtain congressional support.¹⁰ Stark Brothers and breeders' and nurseries' associations made several attempts in the following years to promote legislation on plant varieties, while addressing other issues of concern to them such as the new seed legislation adopted in various US states.¹¹ Despite the fact that nursery companies were mainly relying on farmers' selection and fortuitous discovery of chance mutations and not actually breeding varieties, the proponents of new legislation were slowly able to expand the idea, eventually with the support of Edison (famous for his work on the lightbulb),¹² that they merited the same protection as inventors. The basic message was that

[i]nventors who create new values, and creative breeders who add to the transmitting efficiency of plants and animals, are alike in that they too often do not secure for themselves a reasonable remuneration. It is to the interest of the manufacturer, the grower of pedigreed seeds or pedigreed animals, and the general public that a liberal share of the new values go to the inventor and to the creative breeder.¹³

In a clever move to address concerns among US lawmakers regarding the monopolization of food, Stark Brothers suggested limiting new legislation to asexually reproduced plants¹⁴ and excluding tubers, such as potatoes.¹⁵ It was proposed, in fact, to only cover fruits and some flowers, so as not to deprive farmers of the right to use the products of their field as seed or to sell them as food.¹⁶ As noted in a study on US plant variety legislation,

... the introduction of the asexual/sexual distinction in US plant intellectual property law was as much a matter of political expediency as it was a matter of biology... [t]he nursery operators persuaded seed companies to drop efforts to secure patent legislation expressly encompassing seed-grown plants. Political considerations suggested that plant breeders should 'get established the principle that Congress recognized the rights of the plant breeder' by lobbying for the limited protection afforded by the plant patent legislation.¹⁷

However, the proponents of protection (correctly) speculated that the protection of asexually reproduced varieties would smoothly lead over time to the acceptance of legislation for the protection of sexually reproduced varieties.¹⁸

⁹ Id., 630.

¹⁰ A previous attempt was made to amend the trademark law to allow the registration of names for new varieties of plants. See, e.g., Mark D. Janis and Jay Kesan, 'US Plant Variety Protection: Sound and Fury ...?' (2002), University of Illinois Working Paper No. LE03-002 <http://papers.ssrn.com/s013/papers.cfm?abstract_id=384140>, 731.

¹¹ Fowler, op. cit., 633.

¹² Id., 637, 642, 643.

¹³ Hays, *Distributing Valuable New Varieties and Breeds*, Proceedings of the First Meeting of the American Breeders' Association held in St. Louis, Mo., at 62 (American Breeders' Association 1905), quoted in Fowler, op. cit., 634, fn. 63.

¹⁴ In asexual reproduction there is only one parent and no exchange of genetic information. As a result, the offspring are clones of the parent. Sexual reproduction requires two parents; it produces offspring that resemble their parents, but are not identical to them. Any plant obtained from seeds has been sexually reproduced.

¹⁵ Fowler, op. cit., 635.

¹⁶ Id.

¹⁷ See, e.g., Janis and Kesan, op. cit., 736.

¹⁸ See, e.g., Janis and Kesan, op. cit., 737.

As a result of these efforts, in 1930 a special title of ‘plant patents’ was finally introduced into US law by the Plant Patent Act, which allowed for the patenting of asexually reproduced cultivars (except tubers). The first plant patent was granted for a climbing or trailing rose.¹⁹ The Act recognized exclusive rights²⁰ in relation to cultivated sports, mutants, hybrids and newly found seedlings, while excluding plants reproduced from seeds and tubers (the Irish potato and the Jerusalem artichoke) because they are ‘propagated by the same part of the plant that is sold as food’.²¹

Deliberately, the protection conferred by the Plant Patent Act of 1930 extended to discoveries, thereby supporting the activities of the main proponents of the law, ‘as long as the discovery was not of a completely wild plant or one growing in wild, uncultivated circumstances’.²²

While the protection conferred by the Plant Patent Act is characterized as a ‘patent’, the law introduced substantial modifications to the requirements for obtaining ordinary (‘utility’) patents, that is, the patents that may be granted in relation to inventions in the mechanical, chemical and other technological fields. The requirement of ‘distinctness’ essentially replaced the requirements of utility and non-obviousness applied to utility patents.²³ The Act also eliminated the standard of sufficient written description of the invention to enable a person skilled in the art to reproduce it.²⁴

The intellectual property protection of plant varieties was complemented in the USA by the enactment of the Plant Variety Protection Act of 1970 (PVPA),²⁵ which introduced UPOV-type protection.²⁶ The PVPA extends protection only to sexually reproduced and tuber propagated plants (Section 42). Interestingly, until 1995, under this Act farmers were allowed to save an unlimited quantity of seed and to sell up to half the crop produced from a protected variety. The situation changed after a US Supreme Court decision interpreted that a farmer could only save the amount of seed of a protected variety necessary to plant on their own farms.²⁷ A 1994 amendment to the PVPA subjected the sale of protected seed to the breeder’s right.

¹⁹ See <http://inventors.about.com/od/weirdmuseums/ig/Inventive-Thinking/First-Plant-Patent.htm>.

²⁰ 35 U.S. Code § 163: ‘In the case of a plant patent, the grant shall include the right to exclude others from asexually reproducing the plant, and from using, offering for sale, or selling the plant so reproduced, or any of its parts, throughout the United States, or from importing the plant so reproduced, or any parts thereof, into the United States.’ Infringement of these rights occurs by the asexual reproduction of a patented plant or by selling or using a plant so reproduced (the taking of plant material or cuttings is sufficient to find infringement). See *Yoder Brothers, Inc. v. California-Florida Plant Corp. et al.* (537 F.2d 1347, 193 U.S.P.Q. 264, 1976-2 Trade Cases 61,047) <<http://openjurist.org/537/f2d/1347/yoder-brothers-inc-v-california-florida-plant-corporation-california-florida-plant-corporation>>.

²¹ US Patent and Trademark Office, ‘Introduction: The Act, Scope, Type of Plants Covered [R-11.2013]’ <<http://www.uspto.gov/web/offices/pac/mpep/s1601.html>>. Bulbs, corms, stolons and rhizomes have been deemed to be outside the tuber exception and, hence, protectable under the Act.

²² Fowler, op. cit., 641. In *Yoder Brothers, Inc. v. California-Florida Plant Corp. et al.*, the court held that ‘the whole key to the invention of a new plant is the discovery of new traits plus the foresight and appreciation to take the step of asexual reproduction’ (para. 171).

²³ The law did not define the concept of ‘distinct’. The report of a Senate Committee noted in this regard that ‘in order for a new variety to be distinct it must have characteristics clearly distinguishable from those of existing varieties’.

²⁴ 35 U.S. Code § 162: ‘No plant patent shall be declared invalid for noncompliance with section 112 if the description is as complete as is reasonably possible.’

²⁵ 7 U.S.C. §§ 2321-2582.

²⁶ The influence of the private sector in shaping this law was also paramount. The PVPA exempted from PVP protection ‘the seeds, plants, or transplants of okra, celery, peppers, tomatoes, carrots, and cucumbers’ ‘for reasons apparently related to the interests of the Campbell’s Soup Company, not to any logical delineation of the variety concept’ (Mark D. Janis and Stephen Smith, ‘Technological Change and the Design of Plant Variety Protection Regimes’ (2013), *Chicago-Kent Law Review*, 82(3), 15, fn. 61).

²⁷ *Asgrow Seed Company, Petitioner v. Denny Winterboer and Becky Winterboer, Dba Deebees*, January 18, 1995, available at <https://www.law.cornell.edu/supct/html/92-2038.ZO.html>.

Despite earlier failures to extend by legislative act utility patents to plant varieties,²⁸ such extension became a reality after the Supreme Court affirmed in *re Chakrabarty*²⁹ the patentability of living materials.³⁰

As a result, plant varieties may be protected in the USA through three different regimes:

- the PVPA, under which UPOV-type protection applies to sexually reproduced plants, tuber propagated plants and F1 hybrids;³¹
- utility patents, including for genetically engineered plants and plant components (e.g., genes and cells);
- plant patents (a special type of patent) in the case of asexually reproduced plants.

Despite the adoption of the PVPA and the possibility of obtaining utility patents over plant varieties, the system instituted by the Plant Patent Act of 1930 for asexually reproduced plants has continued to be widely used. Between January 1, 1989 and December 31, 2013, 17,591 plant patents were granted, 43% of which were filed by US applicants.³²

1.2 The development of a *sui generis* regime in Europe

The growth of the seed trade at the end of the 19th century in several European countries gave impetus to early demands for intellectual property protection in relation to seeds. Article 1(3) of the Paris Convention for the Protection of Industrial Property (hereinafter ‘the Paris Convention’)³³ opened up the possibility of ‘industrial property’ protection for plant genetic materials and agricultural products.³⁴ The establishment of the International Bureau of the Union for the Protection of Industrial Property in 1883 ‘provided an incentive for plant breeders to establish their claims for IPP [intellectual property protection] on new plant varieties’.³⁵ The Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI), created in 1897, became a forum for the discussion of initiatives to provide ‘industrial property’ protection in the realm of plants.³⁶

Like in the USA, various attempts were made to extend patent protection to plant varieties in Europe since the beginning of the 20th century. This possibility, however, raised concerns among breeders and law professionals, given the incremental type of innovation that characterizes plant breeding and the difficulty in meeting the patentability standards, as well as fears regarding possible distortions of the patent system.³⁷

²⁸ The possibility of extending utility patent protection to plant varieties had been rejected in the 1960s by the US Congress. Janis and Kesan note that in 1966 ‘the President’s Commission on the Patent System recommended deleting from the patent statute all provisions relating to plants and providing “another form of protection,” on the grounds that the Commission “does not consider the patent system the proper vehicle for the protection of [plant] subject matter, regardless of whether the plants reproduce sexually or asexually”’ (Janis and Kesan, *op. cit.*, 737).

²⁹ 447 U.S. 303, 309, 206 U.S.P.Q. 193 (1980).

³⁰ The first patent covering plants or segments thereof was issued by the US Patent and Trademark Office in *Ex parte Hibberd*, 227 U.S.P.Q. 443 (Bd. Pat. App. 1985). The patent covered genetically engineered maize with high levels of tryptophan. Thereafter, a large number of patents were granted in the area of plants, including plant varieties as such.

³¹ F1 hybrids are the first generation of offsprings of distinctly different parental lines.

³² See US Patent and Trademark Office, ‘Plant Patents’ (2013), January 1, 1989–December 31 <<http://www.uspto.gov/web/offices/ac/ido/oeip/taf/plant.pdf>>.

³³ This Convention deals with patents, trademarks, designs and other modalities of intellectual property rights.

³⁴ Article 1(3): ‘Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.’

³⁵ Biswajit Dhar, ‘Sui Generis Systems for Plant Variety Protection. Options under TRIPS’ (2002) <<http://www.qiap.ca/documents/SGcol1.pdf>>.

³⁶ AIPPI membership has included lawyers, patent attorneys and trademark agents as well as judges, scientists and engineers; currently, corporations can also be members. See <https://www.aippi.org/?sel=aims>.

³⁷ AIPPI opposed the patenting of plant varieties ‘on the grounds that doing so would stretch basic patent law concepts like inventiveness to the point of undermining the credibility of the patent system’ (G. Dutfield, *Intellectual Property Rights and the Life Science Industries*, Ashgate, 2003, 186).

In the USA, as noted above, the efforts of commercial nurseries and breeders focused on an amendment to the patent law, and culminated in fact in an adaptation of that law to the special characteristics of plant breeding. In Europe, the approach was somewhat different as it increasingly pointed towards a special regime of protection for plant varieties. Thus, the Congrès Pomologique de France suggested, in 1911, the need for such special protection.³⁸ This view gradually became prevalent among European commercial breeders; it underpinned the position of the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), which was established in Amsterdam in 1938.

Early attempts to introduce some form of specific PVP were made in Germany (1895) and France (1922).³⁹ In 1930 there was an unsuccessful attempt in Germany to require the breeders' authorization for marketing protected seed and the derived seed for the first two generations (three in the case of potato) for 20 years (with a possible extension to 30 years).⁴⁰ The first piece of PVP legislation was introduced in the Netherlands in 1942, followed by Germany in 1953.⁴¹ The design of this legislation was influenced by concepts developed in the context of seed regulations, i.e., legislation enacted to ensure the identification and quality of seeds. Although motivated by other concerns, the basic requirements of seed regulations (distinctness, homogeneity, stability) provided an alternative model to the standards generally imposed by patent laws. In turn, the national PVP laws inspired further initiatives aiming at the establishment of a *sui generis* international regime on the matter.

In June 1956, the Semmering Congress of ASSINSEL stressed the need for an international conference to adopt an international system for the protection of new plant varieties.⁴² It was in response to this call and to ASSINSEL's lobbying that, in February 1957, the French government decided to invite European countries that were deemed to share France's concerns on this issue,⁴³ to a diplomatic conference in Paris for the negotiation of an international instrument on plant variety protection.⁴⁴ The Final Act of the conference, adopted in May 1957, contained some of the elements of the future international regime on the matter as would be enshrined in the UPOV Convention. In particular, the Paris conference concluded that plant variety protection should be granted when a variety was distinct from preexisting varieties and sufficiently uniform and stable in its essential characteristics.⁴⁵ The Final Act defined the rights of the breeder and acknowledged the principle of the independence of protection.

While an important step towards the establishment of an international system of PVP was taken in the Paris conference, the Lisbon Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property held in 1958 discussed the possible grant of patents in relation to plant varieties. However, no amendment to the Convention was adopted. The general view at the Lisbon conference was that a 'special law' was needed to protect new plant varieties.⁴⁶

³⁸ See Michael Blakeney, 'Plant Variety Protection, International Agricultural Research, and Exchange of Germplasm: Legal Aspects of *Sui Generis* and Patent Regimes', Chapter No. 4.7, in *MIHR-PIPRA IP Handbook of Best Practices* <<http://www.iphandbook.org/handbook/ch04/p07/>>.

³⁹ See André Heitz, 'The History of Plant Variety Protection', in UPOV, *The First Twenty-five Years of the International Convention for the Protection of New Varieties of Plants* (1987).

⁴⁰ *Id.*

⁴¹ See Geertrui Van Overwalle, 'Patent Protection for Plants: A Comparison of American and European Approaches' (1999), *IDEA – The Journal of Law and Technology*, 39(2), 161. The German law of 1953 set an important precedent by exempting breeding activity from liability. See, e.g., Janis and Kesan, *op. cit.*, 739.

⁴² Blakeney, *op. cit.*

⁴³ West Germany, Austria, Italy, Belgium, Spain and the Netherlands. Denmark, Norway and Switzerland participated as observers. See Dutfield, *op. cit.*, 186.

⁴⁴ Blakeney, *op. cit.*

⁴⁵ Dutfield, *op. cit.*, 186-187.

⁴⁶ See Dhar, *op. cit.*, 4.

At the second session of the conference for the negotiation of an international instrument on plant variety protection, held in Paris in late 1961, the International Convention for the Protection of New Varieties of Plants, establishing the Union pour la Protection des Obtentions Végétales (UPOV), was adopted. Significantly, the Convention introduced an exception for the use of a protected plant variety for further breeding, a possibility that may be excluded under patent law.

1.3 Adoption and evolution of UPOV: towards broader and enhanced protection of breeders' rights

The UPOV Convention adopted in 1961 set binding minimum standards of PVP. It was revised in 1972, 1978 and 1991. While the first two revisions did not substantially alter the system of protection, the 1991 revision brought about significant changes (further discussed in Chapter 3). It expanded and strengthened the rights conferred to breeders while limiting the rights of farmers to save, use and exchange seeds.

Accession to the Union created by the UPOV Convention has been made conditional upon the acceding country's capacity to give effect, under its domestic law, to the provisions of the Convention.⁴⁷ This means, as discussed in Chapter 2, that a country wanting to join UPOV must have its PVP law reviewed and approved by the UPOV Council.⁴⁸

While the aim of the proponents of the UPOV Convention was to extend the new model of protection internationally, the process was, however, extremely slow. In the 1960s only three European countries introduced breeders' rights laws; eight did so in the 1970s. As mentioned, the USA also passed a Plant Variety Protection Act in 1970 which introduced UPOV-type PVP. Thereafter, plants could be protected in that country through both the Plant Patent Act of 1930 and PVP under the 1970 Act, a possibility that was, as a matter of principle, excluded under the UPOV Convention 1961 (Article 2(1)) at that time. This temporarily prevented the USA – despite its having been the first country to introduce intellectual property rights in agriculture – from acceding to UPOV.⁴⁹

Generally developing countries did not consider adopting any PVP system, including a UPOV-type regime, until the 1990s, reflecting the perception that such a model of protection was not suitable to the conditions under which agricultural activities took place in those countries. In fact, PVP not only originated in European countries but remained as a form of protection predominantly applied in developed countries for more than 30 years after the signature of the UPOV Convention in 1961.

The membership of the UPOV Convention was historically small. It was negotiated and adopted by six countries from Western Europe. Within the first 17 years of its life, until the revision of the Convention conducted in 1978,⁵⁰ it had only attracted the accession of 12 states.⁵¹ The 1991 revision of the Convention was negotiated by only 20 UPOV member countries, out of which only one (South Africa) was a developing

⁴⁷ Article 30(2) of the 1991 Act of UPOV: 'It shall be understood, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organization must be in a position, under its laws, to give effect to the provisions of this Convention.'

⁴⁸ Article 34(3) of the 1991 Act of UPOV: 'Any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.'

⁴⁹ The ban on the accumulation of protections was lifted by the UPOV revision of 1978 (Article 37) for countries that already practised it, and it was repealed altogether by the UPOV revision in 1991.

⁵⁰ Article 27(1) provided that '[t]his Convention shall be reviewed periodically with a view to the introduction of amendments designed to improve the working of the Union'.

⁵¹ See Blakeney, *op. cit.*, 402.

country; 17 developing countries participated as observers.⁵² The low participation of developing countries in setting the UPOV regime is in sharp contrast to the negotiations leading to the adoption of the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture (see Chapter 2), in which developing countries played a key role.

A turning point in UPOV membership occurred after the adoption of the TRIPS Agreement in 1994: 45 out of the 72 current members, plus the European Union and the African Intellectual Property Organization (better known under the acronym OAPI for its French name, Organisation Africaine de la Propriété Intellectuelle),⁵³ were incorporated after 1995. UPOV currently has 72 members, still a much lower number than the membership of the Paris Convention and other conventions administered by the World Intellectual Property Organization (WIPO), but significantly higher than 20 years ago.

After the entry into force of UPOV 1991 (April 24, 1998), countries seeking to accede to UPOV had no option but to sign up to the 1991 version of the Convention,⁵⁴ which, as examined in Chapter 3, expands the breeder's right and is more limitative of farmers' practices than the 1978 version. However, most developing countries that joined the 1978 Act have chosen to remain bound by that Act. The developing countries that shifted from UPOV 1978 to UPOV 1991 in most cases were required to do so to comply with obligations imposed in free trade agreements entered into with the USA or the European Union (see Chapter 3) or the European Free Trade Association.

It is also worth mentioning that many developing countries that provide intellectual property protection for plant varieties are not members of UPOV but have established alternative *sui generis* systems (see Chapter 3), while others have not established any form of such protection.

As discussed in Chapter 2, the TRIPS Agreement made the protection of 'plant varieties' mandatory. The UPOV system appeared to many countries as a ready-to-use legal framework for PVP to comply with the TRIPS obligations. In addition, the implementation of a UPOV-based regime could be undertaken with technical support from the UPOV Secretariat. These factors probably heavily influenced the choice by some developing countries to opt for a UPOV-based regime, despite the possibility allowed by the TRIPS Agreement to develop *sui generis* regimes better adapted to the characteristics of each country's agricultural production and compatible with farmers' traditional practices. Moreover, in many cases, the adoption of a UPOV-style system and the accession to UPOV was not the result of a thorough assessment of the benefits and costs of such a system, nor of its perceived advantages over other possible *sui generis* options, but rather the result of unilateral pressures or straightforward obligations imposed in free trade agreements (see Chapter 3).

1.4 Conclusions

Private nurseries and breeders from a few developed countries pioneered the legislative movement towards the creation of exclusive rights over plant varieties. As breeding became a business activity in its own right, commercial breeders started to demand some form of exclusive rights over the new plant varieties they discovered or developed. The creation of such rights, however, was not just 'the simple unfolding of legal logic, an inevitable response to a major scientific advance. Nor can it be easily understood as the institutionalization of custom or as a simple expression of public opinion'.⁵⁵ It was rather the triumph of a group of business organizations that were able to articulate their interests through legislative processes, without the participation of other relevant stakeholders, notably farmers and consumers. The legal regimes so created became inexpugnable fortresses for the protection of the interests of those who had the means and capacity to influence lawmaking.

⁵² See UPOV, Record of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Plant Varieties, Geneva, 1991, 535-543.

⁵³ OAPI joined UPOV as a member in 2014.

⁵⁴ See Article 37(3), 'Closing of the 1978 Act', of UPOV 1991.

⁵⁵ Fowler, *op. cit.*, 622.

Interestingly, the process of adoption of the 1930 US Plant Patent Act showed the society's resistance to creating exclusive rights over plants for the production of food, and the search for a legal regime adapted to the characteristics of plant breeding.

The UPOV regime was conceived for the agricultural systems and modalities of seed production prevailing in the USA and European countries. Developing countries were conspicuously absent in the process of creation and strengthening (through UPOV 1991) of that regime. It should not be surprising, therefore, to find that many developing countries have not adopted legislation for plant variety protection, or that they did so only when such protection was required by the TRIPS Agreement, in some cases with legislation that falls outside the UPOV model. As discussed in Chapters 3 and 5, this model, particularly as shaped under UPOV 1991, is inappropriate for developing countries where farmer-managed seed systems, generation and supply prevail.

This paper attempts to offer an alternative to a UPOV-type regime of PVP, one that is better adapted to the seed supply and agricultural systems prevailing in developing countries (see Chapter 4). It also discusses how *sui generis* legislation may be designed with the participation and taking into account the interests and views of all relevant stakeholders, including small farmers (see Chapter 5).

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CHAPTER 2

The International Legal Context for the Protection of Plant Varieties

THIS chapter elaborates on the scope of the obligation to protect plant varieties imposed by Article 27.3(b) of the TRIPS Agreement⁵⁶ and the flexibilities allowed by this provision. It also briefly refers to the failed review of the article, and to the unfinished discussions in the WTO on the relationship between the TRIPS Agreement and the Convention on Biological Diversity.

The chapter then introduces other international instruments (CBD, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization,⁵⁷ ITPGRFA) relating to genetic resources, and highlights elements in those instruments that are relevant for the design of legal regimes for plant varieties. Reference is also made to the ongoing negotiations on genetic resources and traditional knowledge in the World Intellectual Property Organization.

Finally, the chapter examines how the UPOV accession rules (which, as noted in Chapter 1, make accession conditional upon the full compatibility of the national law with the Convention) limit the policy space available to contracting parties. The chapter also explores the limited available flexibilities under UPOV, especially UPOV 1991. The rigidity of the UPOV model will be contrasted with the room for manoeuvre offered by other *sui generis* options.

2.1 The protection of plant varieties under the TRIPS Agreement: flexibilities regarding the model of protection under Article 27.3(b)

Countries that are not members of the WTO nor of UPOV may decide whether or not to establish plant variety protection and, if they do so, have full freedom to determine the scope and other characteristics of such protection. The situation is different for WTO members, which are bound under the TRIPS Agreement by a general⁵⁸ obligation to protect plant varieties. However, this obligation does not apply to WTO members which are least developed countries (LDCs), as they enjoy a transitional period until July 1, 2021, during which period they need not implement the TRIPS standards. This transitional period can be extended.⁵⁹

⁵⁶ This article reads: ‘Members may also exclude from patentability:

...

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. *However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement*’ (emphasis added).

⁵⁷ Hereinafter ‘the Nagoya Protocol’.

⁵⁸ Unlike in the case of patents, trademarks and other titles covered by the TRIPS Agreement, the Agreement does not specify the scope, rights conferred, duration or other features of the protection to be granted to plant varieties.

⁵⁹ See http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm. LDCs have the right, in accordance with Article 66.1 of the TRIPS Agreement, to be granted further extensions of the transitional period (‘the Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period’).

Article 27.3(b) of the TRIPS Agreement authorizes WTO members to exclude from patentability, *inter alia*, ‘plants’. However, members must provide protection for ‘plant varieties’ either by patents or by ‘an effective *sui generis* system or by any combination thereof’. This means that, while WTO members may deny the grant of patents for a plant, for instance, a genetically modified plant,⁶⁰ they have to provide for patents or other intellectual property rights in relation to a ‘plant variety’, that is, a *grouping of plants* that share some essential characteristics.

Article 27.3(b) of the TRIPS Agreement provides

a much needed ‘safe space’ for governments to harmonize conflicting norms and policies – a space that is lacking in other areas of the TRIPS [sic] Agreement... Nothing in TRIPS requires states to adopt the exclusive rights approach, nor does it indicate which exclusive rights must be granted to new varieties.⁶¹

As a result,

countries have considerable latitude and space to be legally imaginative as they implement this obligation, which makes it ripe for forum-shopping for norms that might ameliorate some of the adverse implications of introducing IP [intellectual property] in plant varieties.⁶²

Since the TRIPS Agreement does not specify the concept of ‘plant varieties’, WTO members can adopt a narrow or broad definition of the concept, depending on each particular country’s conditions and the objectives pursued. This is an important *flexibility* built into the Agreement.

Thus, a WTO member *may* decide to limit protection to plant varieties defined – as is the case under UPOV – on the basis of uniformity and stability, or to extend it, based on equity or other grounds, to plant groupings that are relatively heterogeneous and not stable, such as farmers’ varieties. The only condition for introducing such broader protection is that it should not be inconsistent with other provisions of the TRIPS Agreement.⁶³ Members may also limit protection to a set of species or genera as well as differentiate the level of protection conferred to different categories of varieties by granting, for instance, stronger rights in the case of narrowly defined varieties, as compared to those granted in respect of more heterogeneous populations.⁶⁴

The distinction between what is mandatory and what is not required under the TRIPS Agreement is important, since no member may be subject to complaints under the dispute settlement procedures of the WTO (which may eventually lead to trade sanctions) in relation to protections that are not binding under the Agreement.

While all WTO member countries are bound to protect plant varieties, a second and important flexibility is that they can choose the *modality and level of protection*. The scope for such a choice is broad, since the only condition established by Article 27.3(b) is to provide ‘effective *sui generis*’ protection. The UPOV Convention is not mentioned in this provision. Hence, members may adopt UPOV-style legislation, but may equally opt for other forms of *sui generis* protection that are not UPOV-compliant.

⁶⁰ Logically interpreted, the authorized exclusion from patentability is applicable to plants’ parts and components as well, since patenting the latter may be equivalent to patenting the plant as such. The owner of a patent on a component (e.g., a transit peptide in a genetic construct that provides resistance to herbicides) could prevent commercial acts relating to any plant that contains the patented subject matter and thereby nullify, in practice, the exclusion relating to patents for plants. See, e.g., Carlos Correa, *TRIPS-Related Patent Flexibilities and Food Security. Options For Developing Countries* (ICTSD-QUNO 2012).

⁶¹ Laurence Helfer, ‘Intellectual Property in Plant Varieties: International Legal Regimes and Policy Options for National Governments’ (2004), FAO Legislative Study 85 <<ftp://ftp.fao.org/docrep/fao/007/y5714e/y5714e00.pdf>>, 39 and 58.

⁶² Dwijen Rangnekar, ‘Geneva Rhetoric, National Reality: The Political Economy of Introducing Plant Breeders’ Rights in Kenya’ (2013), *New Political Economy* <<http://dx.doi.org/10.1080/13563467.2013.796445>>, 2.

⁶³ See Article 1.1 of the TRIPS Agreement.

⁶⁴ See, e.g., Dan Leskien and Michael Flitner, ‘Intellectual Property Rights and Plant Genetic Resources: Options for a *Sui Generis* System’, *Issues in Genetic Resources*, No. 6, June 1997, 54.

‘Sui generis’ means ‘unique’, ‘of its own kind’,⁶⁵ a concept that indicates that WTO members have broad policy space to define how the protection is conferred, as further explored in Chapter 4.

‘Effective’ means ‘successful in producing a desired or intended result’.⁶⁶ This may be interpreted as requiring that the substantive norms and the enforcement mechanisms are such that the intended objectives of the protection are achieved. Those objectives may encompass not only the level of profits or revenues of the right holder, but the public interests pursued with the adoption of the protection, such as safeguarding food security and promoting a sustainable agriculture. Notably, the objective of the TRIPS Agreement is to ‘contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare, and to a balance of rights and obligations’.⁶⁷

One view expressed is that, in order to be ‘effective’, a *sui generis* system of protection should possess the same basic characteristics as those that generally apply in relation to the protection of property rights, whether real, tangible or intangible: the nature of the subject matter must be identified clearly enough to enable a distinction to be drawn between what falls within and what is beyond the scope of the law; who is entitled to obtain property rights must be established; the circumstances in which the rights exist and the limitations apply must be spelt out; the period during which the rights are in force and the circumstances, if any, under which the rights expire early or under which they can be extended must be specified; and the legal action available to the right holder to enforce its rights along with the remedies available must be indicated, unless these are provided for in other laws such as a code of civil procedure.⁶⁸

As noted by many developing countries in the debates on the review of Article 27.3(b) of the TRIPS Agreement, this Agreement ‘does not specify criteria by which to judge whether a *sui generis* system is effective and therefore this should be left to Members to decide’.⁶⁹

Article 27.3(b) refers to the possible protection of plant varieties by patents or by a combination of patents and a *sui generis* system. However, neither patents alone nor in combination with a *sui generis* system are advisable methods of protecting plant varieties. Although in some countries (e.g., the USA, Australia, Japan) a plant variety may be patentable as such, there is no obligation to follow this approach. The inventive step/non-obviousness standard generally applied under patent law is unsuitable to plant varieties. Moreover, the broad exclusive rights granted by patents may be exercised to prevent farmers from saving and reusing seeds, as well as to deter further research and breeding on protected materials. In fact, plant varieties are not patentable in Europe and in many other countries.⁷⁰

2.2 Pending review of Article 27.3(b)

Article 27.3(b) is the only provision in the entire TRIPS Agreement that was subjected to an early review – four years after the entry into force of the agreement that created the World Trade Organization (i.e., 1999). This short period to conduct a review – even shorter than the transitional period contemplated for developing countries and economies in transition in Article 65 of the TRIPS Agreement – suggests how difficult it was for the parties negotiating the Agreement to reach a satisfactory compromise on issues relating to the patentability of living matter.

⁶⁵ See <http://www.oxforddictionaries.com/definition/english/sui-generis>.

⁶⁶ See <http://www.oxforddictionaries.com/definition/english/effective>.

⁶⁷ See Article 7 of the TRIPS Agreement.

⁶⁸ See WTO, ‘Review of the Provisions of Article 27.3(b). Summary of Issues Raised and Points Made’, Note by the Secretariat, IP/C/W/369/Rev.1, March 9, 2006, 16.

⁶⁹ *Id.*, 17.

⁷⁰ See, e.g., WIPO, ‘Exclusions from Patentability and Exceptions and Limitations to Patentees’ Rights’, study coordinated by Lionel Bently, SCP/15/3 Annex <http://www.wipo.int/edocs/mdocs/scp/en/scp_16/scp_16_inf_2.pdf>, 78.

In introducing the review clause, developed countries had possibly expected that an early revision of Article 27.3(b) could lead to the establishment of the UPOV Convention as the standard to be complied with by all WTO members with regard to plant varieties.⁷¹

The process of review was formally initiated in 1999. Some developing countries regarded the mandated review as an opportunity to amend the provision and limit the obligations established therein. The African Group of countries was particularly active in the debates at the WTO's Council for TRIPS on this issue. It sought the harmonization of Article 27.3(b) with the Convention on Biological Diversity and the exclusion of patents on plants, animals, micro-organisms, their parts and natural processes.⁷²

In the context of such review, the African Group held, with respect to the protection of plant varieties, that the review should ensure that a balance is struck between the interests of the community as a whole and protecting Farmers' Rights and traditional knowledge and ensuring the preservation of biological diversity.⁷³ It suggested a confirmation that under Article 27.3(b) members had the freedom to determine and adopt regimes appropriate to their conditions,⁷⁴ and that a footnote be inserted after the sentence on plant variety protection in Article 27.3(b), stating that any *sui generis* law for plant variety protection can provide for: (i) the protection of innovations of indigenous and local farming communities in developing countries; (ii) the continuation of traditional farming practices including the right to save and exchange seeds, and sell farmers' harvest; and (iii) the prevention of anti-competitive rights or practices which threaten the food sovereignty of developing countries, as is permitted by Article 31 of the TRIPS Agreement.⁷⁵ Other developing countries, such as India, Thailand, Malaysia, Brazil and Venezuela, expressed similar concerns.⁷⁶

However, by exploiting the ambiguity of the term 'review', developed countries opted for a defensive stand, suggesting that the mandated 'review' was only meant to consider the *implementation* of the provision, not its revision or amendment. Negotiations on this issue have been stalled since then.

2.3 Relevance of the CBD and the Nagoya Protocol and their relationship with the TRIPS Agreement

The adoption of the CBD in May 1992 at the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity represented a major step towards the establishment of international rules for the conservation of biological diversity and the sustainable use of its components. The principles of the CBD, particularly in relation to benefit sharing, provide a model that may be applied in the context of *sui generis* legislation covering farmers' plant varieties. Such legislation may reward farmers' contributions without introducing monopolistic rights, thereby promoting the diffusion of varieties adapted to local conditions, as further discussed in Chapter 4.

⁷¹ During the review process, the European Communities suggested that a reference could be made to the UPOV Convention in Article 27.3(b). See WTO document IP/C/W/369/Rev.1, 16.

⁷² See, generally, Tshimanga Kongolo, *African Contributions in Shaping the Worldwide Intellectual Property System* (Ashgate 2013). More recently, Bolivia has also proposed to amend Article 27.3(b) to prohibit the patenting of all life forms, protect innovations of indigenous and local farming communities and their farming practices, prevent anti-competitive practices, protect the rights of indigenous communities and prevent any intellectual property rights claims over their traditional knowledge. See WTO documents IP/C/W/545, February 2010 and IP/C/W/554, March 2011.

⁷³ Submission by the African Group, IP/C/W/404.

⁷⁴ See the submission by the African Group, IP/C/W/404, 2.

⁷⁵ See the submission by Kenya on behalf of the African Group, IP/C/W/163. See also WTO, 'Review of the Provisions of Article 27.3(b). Summary of Issues Raised and Points Made', Note by the Secretariat, IP/C/W/369/Rev.1, March 9, 2006, 15-16.

⁷⁶ See WTO, 'Review of the Provisions of Article 27.3(b). Summary of Issues Raised and Points Made', Note by the Secretariat, IP/C/W/369/Rev.1, March 9, 2006, available at http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/4_ipcw369rev1_e.pdf.

The CBD entered into force on December 29, 1993; it currently has 194 Parties.⁷⁷ It aims at ensuring the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (Article 1). Importantly, the CBD introduced the requirement of prior informed consent (Article 15.5) and the fair and equitable sharing of benefits arising from the ‘commercial and other utilization’ of genetic resources, based on terms mutually agreed between the recipient and the country supplying the resources (Articles 15.4 and 15.7). The CBD thus operationalized the concept of sovereign rights over genetic resources recognized in its Article 3.

During the negotiations on the CBD, a controversial issue was the possible impact of intellectual property rights on the implementation of the Convention. The compromise text adopted in Article 16.5⁷⁸ reveals the tension between the negotiating parties’ positions on the role that intellectual property rights may play in this context. While many (particularly developing countries) feared that such rights could undermine or impede the implementation of the CBD, others (mainly developed countries) thought that such rights could support the realization of the Convention’s objectives. The adopted provision only establishes an obligation to cooperate and spells out the objective of the cooperation – ‘to ensure that such rights are supportive of and do not run counter’ to the CBD objectives.

The general framework for access and benefit sharing established by the CBD provided the basis for the adoption by many developing countries of specific legislation on the matter.⁷⁹

Given the obstacles faced in the implementation of the CBD principles in the two decades following its adoption, and in order to provide greater legal certainty and transparency for both providers and users of genetic resources in complying with the benefit-sharing obligations,⁸⁰ developing countries promoted the negotiation of a supplementary international instrument. In October 2010, the tenth meeting of the Conference of the Parties (COP 10) to the CBD adopted the Nagoya Protocol, which clarifies such obligations not only in relation to genetic resources but also in respect of the ‘derivatives’ resulting from the genetic expression or metabolism of biological or genetic resources.⁸¹

While the TRIPS Agreement allows for or requires (as is the case regarding microorganisms and plant varieties) the protection of genetic materials, it does not contain any provisions to ensure that patent applicants have obtained prior informed consent (PIC) from the countries of origin of the genetic resources and complied with national regimes on access and benefit sharing. A possible incompatibility between the TRIPS Agreement and the CBD raised significant concerns among developing countries.

As a result, the Council for TRIPS was mandated by paragraphs 12 and 19 of the WTO’s Doha Ministerial Declaration, and by paragraph 39 of the Hong Kong Ministerial Declaration to work on this issue. Like in the case of the review of Article 27.3(b), the process has been unproductive. For developed countries there is no possible clash between the two treaties, and no further action would be needed.

⁷⁷ See <http://www.cbd.int/information/parties.shtml>.

⁷⁸ ‘The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.’

⁷⁹ See, e.g., Jorge Cabrera Medaglia, Frederic Perron-Welch and Olivier Rukundo, ‘Overview of National and Regional Measures on Access to Genetic Resources and Benefit-Sharing: Challenges and Opportunities in Implementing the Nagoya Protocol’ (2011), CISDL <<http://www.cisdl.org>>.

⁸⁰ See Secretariat of the Convention on Biological Diversity, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization. Text and Annex* (2011), 1.

⁸¹ See, e.g., Gurdial Singh Nijar, ‘The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries’ (2011), Research Paper 36, South Centre, available at http://www.southcentre.int/wp-content/uploads/2013/08/Ev_130201_GNjar1.pdf.

Developing countries, on their part, have focused their efforts on establishing an obligation to disclose the origin of genetic resources and associated traditional knowledge claimed in patent applications.⁸² The first proposals on the subject were made in the context of the review of Article 27.3(b). However, the proposals shifted later to the consideration of possible amendments to Article 29 of the TRIPS Agreement, which deals with the general disclosure obligation imposed on patent applicants. Several submissions outlined the purposes and possible scope of a disclosure obligation relating to patent claims on genetic resources.⁸³ A group of developing countries, supported by the African, Caribbean and Pacific Group of States (ACP Group) and the Least Developed Countries (LDC) Group, made a proposal for a new Article 29bis.⁸⁴ After the adoption of the Nagoya Protocol, a new submission was made⁸⁵ that reflects some of the elements of the Protocol, such as the concept of an ‘Internationally Recognized Certificate of Compliance’.⁸⁶

In addition, proposals regarding a disclosure obligation in all intellectual property applications, including for PVP, have been submitted by a number of developing countries to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).⁸⁷ This Committee is undertaking text-based negotiations with the objective of reaching agreement on one or more international legal instruments that should ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs).⁸⁸ Discussions at the IGC have been conducted for more than 10 years. The USA and other developed countries maintain the same negative position as in the WTO regarding a possible disclosure obligation.

The case of the ‘Turkey carrot’ shows how misappropriation can take place in the context of PVP.⁸⁹ While carrots are generally associated with the colour orange, this was the outcome of ‘work by Dutch plant breeders who, in the 16th and 17th centuries, bred carrots in that colour in order to indulge their royalty, giving rise to the wide adoption of orange varieties as being the customary colour for carrots’.⁹⁰ Monsanto’s subsidiary Seminis ‘went to a part of the world where coloured carrots never stopped being cultivated – in this case, southern Turkey – and purchased some farmers’ seed. After a simple process of selection, the company called this carrot its own, and has obtained plant variety rights (PVR) over it in both the United States (US PVPA Certificate 200400327) and Europe (European Union CPVO Certificate 20050779’.⁹¹

⁸² Countries that provide for such obligation include the Andean Community countries, Brazil, China, Costa Rica, Denmark, India, Kyrgyzstan, Norway, the Philippines, South Africa, Switzerland, Thailand and Vietnam. See David Vivas-Eugui, ‘Bridging the Gap on Intellectual Property and Genetic Resources in WIPO’s Intergovernmental Committee (IGC)’ (2012), Issue Paper No. 34, ICTSD, Geneva, 31.

⁸³ See, e.g., ‘Elements of the obligation to disclose the source and country of origin of biological resources and/or traditional knowledge used in an invention’, submission from Brazil, India, Pakistan, Peru, Thailand and Venezuela, IP/C/W/429 of September 21, 2004.

⁸⁴ Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania, ‘The Outstanding Implementation Issue on the Relationship between the TRIPS Agreement and the Convention on Biological Diversity’ IP/C/W/474, Add.1, Add.2, Add.3, Add.4, Add.5, Add.6, Add.7, Add.8 and Add.9 Revision (also circulated as WT/GC/W/564/Rev.2 and TN/C/W/41/Rev.2), July 5, 2006.

⁸⁵ TN/C/W/59, April 2011. Brazil, China, Colombia, Ecuador, India, Indonesia, African Group, ACP Group, Peru and Thailand.

⁸⁶ This is a permit or equivalent document issued by a national authority as evidence of prior informed consent and mutually agreed terms, and made available to the Access and Benefit-sharing Clearing-House established by Article 14 of the Nagoya Protocol.

⁸⁷ See, e.g., http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_20/wipo_grtkf_ic_20_6.pdf; http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_46/wo_ga_46_6.pdf. See also http://www.twn.my/title2/intellectual_property/info.service/2014/ip140205.htm and http://www.twn.my/title2/intellectual_property/info.service/2014/ip140208.htm.

⁸⁸ See <http://www.wipo.int/tk/en/igc/>.

⁸⁹ Edward Hammond, ‘Biopiracy of Turkey’s purple carrot’, TWN, February 24, 2014, available at <http://www.twinside.org.sg/title2/biotk/2014/btk140208.htm>.

⁹⁰ Id.

⁹¹ Id.

An example of a disclosure obligation in the context of PVP legislation is provided by Article 18(1) of the Indian Protection of Plant Varieties and Farmers' Rights Act 2001 which stipulates that an application for registration must

- (e) contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety;
- ...
- (h) contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired.⁹²

However, the UPOV Convention has been interpreted as preventing contracting parties from establishing a disclosure obligation as a condition for registration of a plant variety. According to UPOV 1991, the grant of the breeder's right shall not be subject to conditions other than compliance with the requirements of novelty, distinctness, uniformity and stability (NDUS), provided that the variety is designated by a denomination and that the required fees have been paid (Article 5). Further, PVP shall not be annulled or cancelled for reasons other than those indicated in Articles 21 and 22 of the Convention (UPOV 1991).⁹³

The UPOV Council has stated in this regard that

The breeder is usually required, in a technical questionnaire that accompanies his application for protection, to provide information concerning the breeding history and genetic origin of the variety. UPOV encourages information on the origin of the plant material, used in the breeding of the variety, to be provided where this facilitates the examination mentioned above, but could not accept this as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability and a suitable denomination and does not allow any further or different conditions for protection. Indeed, in certain cases, for technical reasons, applicants may find it difficult, or impossible, to identify the exact geographic origin of all the material used for breeding purposes...

With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, ... UPOV Convention requires that the breeder's right should not be subject to any further or different conditions than the ones required to obtain protection.⁹⁴

In applying this approach, UPOV has deemed inconsistent with its regime legislation proposed by some developing countries, such as Malaysia,⁹⁵ and required removal of disclosure obligations (with regard to origin, prior informed consent and compliance with access and benefit-sharing legislation) before allowing

⁹² See also, e.g., Article 200 of Egypt's Law 82 of 2002 (Law on the Protection of Intellectual Property).

⁹³ It has been argued, however, that '...article 5 expressly stipulates that plant breeders' rights shall be subject to each country's formalities. Consequently, it is legally possible to establish disclosure of origin as a formal but non-substantive requirement. If this requirement is not met, the application will not be processed' (Jorge Cabrera Medaglia, 'The Disclosure of Origin Requirement in Central America. Legal Texts, Practical Experience and Implementation Challenges', ICTSD <<http://www.ictsd.org/downloads/2011/12/the-disclosure-of-origin-requirement-in-central-america.pdf>>, 5).

⁹⁴ UPOV, 'Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention', UPOV/INF/6/3, October 24, 2013, 33. This document suggests that a disclosure obligation could be introduced in legislation separate from PVP, such as on 'seed quality or other marketing related regulations' (p. 75). See also 'International Harmonization Is Essential for Effective Plant Variety Protection, Trade and Transfer of Technology', UPOV Position, based on an intervention in the Council for TRIPS, on September 19, 2002 <http://www.upov.int/export/sites/upov/about/en/pdf/international_harmonization.pdf>, para. 9.

⁹⁵ See http://www.upov.org/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.

accession to the Union. Peru deleted from its draft legislation a disclosure-of-origin obligation in anticipation of UPOV's opposition.⁹⁶

A PVP application is an important checkpoint to monitor and enhance transparency with regard to utilization of genetic resources and compliance with access and benefit-sharing rules. UPOV's restrictive position on this subject undermines the implementation of the CBD and the Nagoya Protocol as well as the efforts made by developing countries to curb misappropriation of genetic resources.⁹⁷

It is important to note that while developing countries are seeking to make disclosure of origin mandatory for patent applications through an amendment to the TRIPS Agreement, it is clear that such an amendment is not necessary for any WTO member to introduce this obligation in its national law. In fact, many WTO members (including developed countries) have done so. The same applies in relation to PVP. Following the guidance and statements by UPOV, however, it is clear that a disclosure obligation in a PVP law is considered inconsistent with the UPOV regime.

As a result, several developing countries have opted for *sui generis* PVP legislation outside UPOV that supports implementation of the CBD provisions, in particular through the inclusion of a disclosure requirement to implement fair and equitable benefit sharing and safeguard against biopiracy.

2.4 International Treaty on Plant Genetic Resources for Food and Agriculture

The CBD applies to all genetic resources, including plants. Given the special characteristics of plant genetic resources for food and agriculture (PGRFA), Resolution 3 of the abovementioned Nairobi Conference recognized the need

to seek solutions to outstanding matters concerning plant genetic resources within the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture, in particular:

- (a) Access to ex-situ collections not acquired in accordance with this Convention; and
- (b) The question of farmers' rights.⁹⁸

This Resolution provided the basis for negotiations, conducted under the auspices of the United Nations Food and Agriculture Organization (FAO), to lay down international rules applicable to access, sustainable use and benefit sharing specifically relating to PGRFA. The International Treaty on Plant Genetic Resources for Food and Agriculture, adopted in 2001, is a specialized regime that applies to *all* PGRFA. It created a 'Multilateral System' to ensure facilitated access (for research, breeding and training for food and agriculture only)⁹⁹ in relation to a global pool of 64 crops – which account for 80% of the food derived from plants¹⁰⁰ – identified on the basis of interdependence and their importance to food security. Benefit sharing in respect of these PGRFA has to be provided on a multilateral basis. Negotiation of an ad hoc bilateral agreement between the supplying country and recipients is not required as transfers of materials are done through a Standard Material Transfer Agreement, a mandatory contractual agreement agreed upon by the Contracting Parties. However, disappointingly the Multilateral System has thus far been unable to generate sufficient resources to operationalize the mandatory fair and equitable benefit sharing arising from the utilization of resources accessed through the system. The need to review the benefit-sharing mechanism has already been acknowledged by the Governing Body of the ITPGRFA in 2011. Discussions on the review are currently underway.

⁹⁶ See 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 at https://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf, 42.

⁹⁷ See 'Civil Society Concerned with ARIPO's Draft Regional Policy and Legal Framework for Plant Variety Protection', available at <http://www.tinyurl.com/a4v5gte>.

⁹⁸ Resolution 3, para. 4 <<https://www.cbd.int/doc/handbook/cbd-hb-09-en.pdf>>.

⁹⁹ Other uses of PGRFA as well as the exchange of PGRFA not listed in the Annex to the ITPGRFA are subject to the CBD.

¹⁰⁰ See <http://www.planttreaty.org/content/overview>.

None of the international instruments referred to in this chapter (CBD, Nagoya Protocol, ITPGRFA) were intended to specifically deal with the protection of plant varieties through intellectual property rights. However, they contain a number of provisions that are relevant in designing a legal regime for such protection.

Article 6 of the ITPGRFA requires Contracting Parties, *inter alia*, to ‘develop and maintain appropriate policy and legal measures that promote the sustainable use’ of PGRFA, including promoting the development and maintenance of ‘diverse farming systems’, promoting plant breeding efforts with the participation of farmers, particularly in developing countries, to ‘strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions’, broadening the genetic base of crops, promoting ‘the expanded use of local and locally adapted crops, varieties and underutilized species’, as well as maximizing ‘intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties’.

Article 12.3(d) of the ITPGRFA prevents the recipients of PGRFA within the Multilateral System from claiming

any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System.

In addition, the ITPGRFA is the first international binding instrument to recognize Farmers’ Rights, taking into account

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 (Article 9.1).

While the implementation of Farmers’ Rights is left to national laws and regulations, the treaty indicates some of the elements of such rights (Article 9.2):

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

Importantly, the Preamble of the ITPGRFA affirms 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.

In this regard, the treaty further clarifies that

[n]othing in this Article [9] 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 (Article 9.3).

Governments may adopt different measures to integrate the commitments made under the ITPGRFA into national laws relating to plant varieties. Some of the objectives spelt out in Articles 6 and 9 of the ITPGRFA may be achieved through the adoption of legal regimes that recognize the importance of farmers’ varieties, and provide appropriate mechanisms to prevent the misappropriation of farmers’ varieties and for benefit sharing and which safeguard farmers’ right to save, use, exchange and, in some circumstances, sell seeds/propagating materials.

These elements are ostensibly absent in UPOV-type legislation but can be adequately considered in *sui generis* regimes (see Chapter 4). There is no conceptual or legal obstacle to including such elements in a regime dealing with PVP, as illustrated by the *sui generis* regimes of some countries mentioned in Chapter 3. On the contrary, a PVP regime adapted to the conditions of developing countries may be based on a differentiated approach taking into account the needs of the formal seed sector, on the one hand, and the needs of farmer-managed systems – often called ‘informal’ seed supply systems – on the other, including remedies against the misappropriation of farmers’ varieties. From a systemic perspective, and for practical reasons as well, it is important to coherently legislate on the whole spectrum of issues relating to plant varieties, whether produced by commercial breeders or farmers, and to clearly define the relations between different right holders. Fragmentation of the legislation may create uncertainty and thereby discourage plant breeding and the diffusion of the best-adapted plant varieties.

2.5 UPOV accession rules: a rigid modelling of national laws

As noted in Chapter 1, accession to the Union created by the UPOV Convention is conditional upon the acceding country’s capacity to give effect, under its domestic law, to the provisions of the Convention (Article 30(3)). This means that the national laws of a country must be fully consistent with the Convention’s provisions before the country can be accepted as a new contracting party. Thus, according to Article 34(3) of UPOV 1991:

Any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the [UPOV] Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.

The UPOV Council has conducted this task over the years through a detailed examination of the legislation of would-be acceding countries, thereby strongly influencing the legal regime applicable to PVP. Countries that deviate from the rigid model established by the Convention are not allowed to join. For instance:

Prior to UPOV accession, Kenya had a requirement that ‘agroecological value must surpass in one or more characteristics that of existing varieties according to results obtained in official tests’. UPOV (1996) observed this ‘a departure from the principles of the UPOV Convention. The Convention does not consider that the value of a variety should be taken into account for the purposes of protection’ (para. 16). Consequently, Kenya deleted this prior to accession.¹⁰¹

Another notable case is that of India. On May 31, 2002, the Indian Cabinet approved the government’s decision to seek accession under the terms of UPOV’s 1978 Act.¹⁰² This meant that India had to submit its Protection of Plant Varieties and Farmers’ Rights (PPVFR) Act 2001 for review by the UPOV Council. The Act, however, contains elements deemed incompatible with the Convention (even with the most flexible UPOV 1978 version).¹⁰³ As a result, India’s petition would not be accepted unless the country decides to dilute provisions related to Farmers’ Rights:

...neither of the two UPOV conventions contain effective farmer’s rights. What the UPOV conventions provide are narrow rights for the farmers, which can be described as farmer’s privilege. Hence, if India were to become a member of UPOV, then it will not be able to maintain a strong farmer rights regime, which the PPVFR Act contains.¹⁰⁴

¹⁰¹ Rangnekar, *op. cit.*, 12.

¹⁰² See <http://www.grain.org/article/entries/1944-india-decides-to-join-upov>.

¹⁰³ The consultative committee of UPOV that examined India’s application conducted a preliminary examination of India’s legislation in October 2002. It raised a number of questions which were not made public. See Prabhash Ranjan, ‘Recent Developments in India’s Plant Variety Protection, Seed Regulation and Linkages with UPOV’s Proposed Membership’ (2009), *Journal of World Intellectual Property*, 12(3), 219-243. Available at SSRN: <<http://ssrn.com/abstract=1696522>>.

¹⁰⁴ *Id.*,12.

In the case of Malaysia, the UPOV Council dismissed several elements of the proposed PVP legislation, such as allowing for criteria different to NDUS for certain categories of plant varieties and exchanges of seeds among small farmers, defining ‘public interest’, and establishing a benefit-sharing obligation and the mandatory deposit of samples.¹⁰⁵

2.6 Conclusions

As a matter of principle, countries should be able to choose whether or not to provide intellectual property protection to plant varieties as well as what form of protection they confer, depending on the characteristics of their agriculture and seed supply systems. Improvements in PGRFA have taken place over the centuries without such protection and, arguably, its costs may exceed potential benefits if farmers are prevented from pursuing their traditional practices.

However, WTO members bound by the TRIPS Agreement, with the exception of LDCs, need to provide some form of protection for plant varieties.¹⁰⁶ This obligation is crafted in such a manner that significant flexibility exists to design the legal regime for such protection. Some countries, as discussed in Chapter 1, have opted for joining UPOV in order to comply with the obligation. UPOV 1991, however, offers a rigid model inappropriate for developing countries. Other *sui generis* options better adapted to the conditions of particular countries can be devised while respecting the commitments made under the TRIPS Agreement.

The UPOV system provides a model of protection focused on breeders’ commercial interests. The CBD, the Nagoya Protocol and the ITPGRFA include elements reflecting other interests, notably the conservation of biodiversity, the sustainable use of genetic resources, and the fair and equitable sharing of the benefits arising from their exploitation. Some of these objectives and elements may be incorporated in a *sui generis* regime on plant varieties. The principle of benefit sharing under the CBD/Nagoya Protocol may be used as a model for certain categories of plant varieties, while the concept of Farmers’ Rights as contained in the ITPGRFA (omitted in the UPOV regime) may provide the basis for recognition of the contributions made by farmers in conserving and improving plant genetic resources. These issues are further elaborated on in Chapter 4.

¹⁰⁵ See http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf. See also the UPOV Council’s comments regarding the Philippines’ draft law in http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf.

¹⁰⁶ As mentioned, LDCs are exempted until July 2021 from compliance with the TRIPS Agreement, including in relation to plant varieties. On request, the term of this exemption may be extended.

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CHAPTER 3

Concerns About the Impact of UPOV 1991 in Developing Countries

THIS chapter spells out the conditions established by UPOV 1991 that may affect the implementation of a regime of plant variety protection suitable to farmers and farmers' communities in developing countries. It deals in some detail with the main provisions in UPOV 1991 taking into account, for the purposes of comparison, the more flexible model established by UPOV 1978.

The obligation to join the UPOV Convention imposed in free trade agreements (FTAs) and economic partnership agreements is briefly examined, as are other forms of pressures exerted on developing countries to implement PVP in accordance with the Convention.

Finally, the chapter describes the main aspects of the legislation in force in India,¹⁰⁷ Malaysia¹⁰⁸ and Thailand¹⁰⁹ where full-fledged *sui generis* regimes for plant varieties have been adopted. These regimes include, in particular, protections for categories of varieties (e.g., farmers' varieties) that are not covered under the UPOV model.

3.1 Impact of UPOV in developing countries

As noted in Chapter 1, the UPOV regime was designed with the farming systems of the developed countries in mind. There are significant differences between such systems and those prevailing in most developing countries. While in developed countries farmers heavily depend on seed supplies from commercial breeders, in most developing countries farmer-managed systems, based on farm-saved seeds and the exchange and sale of seeds among farmers, are predominant and crucial to guarantee access to affordable seed for resource-poor farmer-producers, as well as to protect them from the uncertainties (in price, availability and quantity) of commercial seed supply.¹¹⁰

A main concern regarding the impact of UPOV is the extent to which it may affect the reliance of farmers on farmer-managed systems.¹¹¹ A study commissioned by the World Bank that examined the situation in five developing countries (Colombia, Kenya, Uganda, India and China) concluded in this regard that

[f]armers' seed systems are the main source of seed and new varieties for most crops in the case study countries. IPRs [intellectual property rights] may reduce the effectiveness of these systems by limiting the saving, exchanging and selling of farmer-produced seed of protected varieties.¹¹²

¹⁰⁷ Plant Varieties and Farmers' Rights Act (PPVFR Act) 2001 <<http://www.wipo.int/wipolex/en/details.jsp?id=2401>>.

¹⁰⁸ Protection of New Plant Varieties Act 2004 <http://www.wipo.int/wipolex/en/text.jsp?file_id=128880>.

¹⁰⁹ Plant Variety Protection Act 1999 <<http://www.wipo.int/wipolex/en/details.jsp?id=3816>>.

¹¹⁰ See Berne Declaration, *Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and the Philippines*, available at http://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf.

¹¹¹ See, e.g., Olivier De Schutter, UN Special Rapporteur on the right to food, 'Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation', report (A/64/170) presented at the 64th session of the UN General Assembly, October 21, 2009.

¹¹² N.P. Louwaars, R. Tripp, D. Eaton, V. Henson-Apollonio, R. Hu, M. Mendoza, F. Muhhuku, S. Pal and J. Wekundah, 'Impacts of Strengthened Intellectual Property Rights Regimes on the Plant Breeding Industry in Developing Countries. A Synthesis of Five Case Studies' (2005), Wageningen UR, available at http://www.iprsonline.org/resources/docs/LouwaarsCGN_Plants_05.pdf.

The extent to which breeders' rights and, more generally, intellectual property rights actually promote innovation, even in developed countries, is a source of much contention.¹¹³ The low threshold established by the NDUS requirements under UPOV 1991 'virtually guarantees that PVP systems can play no more than a meager role in the improvement of plant varieties'.¹¹⁴ Moreover, it was found that a dynamic system of seed supply may develop in the absence of IPRs. The World Bank-commissioned study mentioned above found that

[b]y far the most dynamic private seed sector in the sample (India) has grown and diversified without benefit of any IPRs but in the context of quite liberal seed laws and in many cases through the use of hybrids as a means of appropriation.¹¹⁵

It should also be borne in mind that, as recognized in Article 9 of the ITPGRFA, farmers have contributed over the centuries to improving plant varieties and to creating a vast agrobiodiversity in the absence of any intellectual property protection.

UPOV tends to favour commercial breeders to the detriment of farmers, who are not protected against the misappropriation of their varieties nor compensated when such varieties are used by breeders as breeding material. Moreover, UPOV-based protection may serve foreign rather than local breeders. For instance, in Kenya it was found that

PVP rights seem to have been predominantly applied for by the foreign-owned commercial exporters of flowers and vegetables to underpin commercialisation and exporting ... but [appear] to play little part in stimulating local research. The system has not appeared to be very relevant to the direct concerns of Kenya's poor farmers and the crops they grow.¹¹⁶

In addition, by its very design, UPOV favours genetic uniformity in crop varieties, which can have drastic effects on biodiversity.¹¹⁷ Although it is often argued that the implementation of a UPOV 1991 model does not affect the functioning of farmer-managed systems, such a model may have a number of distortive effects:

- It may limit farmers' capacity to access seeds through informal channels.
- It prohibits the sale by farmers of seeds/propagating material obtained by planting a protected plant variety, thereby depriving them of what may be an important source of income and limiting the diffusion of seeds in farmer-managed systems.
- The more dependent farmers are on the formal sector, the greater the risk to which they expose themselves (instability of household budget).
- UPOV weakens states' capacities to comply with other legal obligations, such as the CBD and obligations regarding Farmers' Rights (as discussed in Chapter 2).¹¹⁸

¹¹³ See, e.g., Carlos Correa, 'Innovation and Technology Transfer of Environmentally Sound Technologies: The Need to Engage in a Substantive Debate' (2013), *Review of European, Comparative and International Environmental Law (RECIEL)*, 22(1), 54-61.

¹¹⁴ Mark D. Janis and Stephen Smith, 'Technological Change and the Design of Plant Variety Protection Regimes' (2013) *Chicago-Kent Law Review*, 82(3), 33.

¹¹⁵ Louwaars et al., op. cit., 3.

¹¹⁶ Report of the UK Commission on Intellectual Property Rights, 2002.

¹¹⁷ See, e.g., De Schutter, op. cit.

¹¹⁸ See Berne Declaration, op. cit.

3.2 Standards established by UPOV

o One size fits all

As noted in Chapter 2, the UPOV Convention, particularly its 1991 version, creates a rigid model for PVP. Although it contains some minimum standards (e.g., period of protection) and facultative clauses (e.g., growing or testing a variety for the grant of the breeder's right; farmers' exemption to save seeds; extension of protection to harvested materials; cancellation of a breeder's right), most provisions in the Convention spell out the specific standards to be adopted by contracting parties. Some differences may and do exist in the national laws of parties, but the Convention requires compliance with a set of detailed rules (e.g., conditions of protection, scope of breeder's rights, exceptions, etc.) that leave little or no room for diversity in implementing them.¹¹⁹ Hence, the Convention creates a legal regime with a high degree of harmonization across contracting parties and very little flexibility to adapt to local conditions, especially in developing countries.

In addition, unlike other international agreements on intellectual property,¹²⁰ the UPOV Convention does not allow for any reservations. According to Article 35(1), '[s]ubject to paragraph (2), no reservations to this Convention are permitted.' The only permissible reservation was crafted to allow the USA to maintain the system of its Plant Patent Act of 1930 for asexually reproduced plants.¹²¹

o Genera/species subject to protection

UPOV 1978 provides a flexible standard relating to the scope of botanical genera and species to be protected. It does not obligate contracting parties to extend protection to all genera and species. It only requires contracting parties 'to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species' (Article 4(2)). Article 2(2) also allows contracting parties to limit the application of the Convention 'within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use'. Contracting parties are only bound to initially apply the Convention to at least five genera or species,¹²² and progressively extend it within eight years to at least 24 genera or species in all (Article 4(3)(b)). Additionally, UPOV 1978 provides for the possible extension by the UPOV Council of the term for introducing PVP 'in order to take account of special difficulties encountered by that State in the fulfilment' of its obligations (Article 4(5)).¹²³

UPOV 1991 eliminated these flexibilities. Although transitional periods were stipulated for prior and future member states (5 and 10 years, respectively), there is an obligation to grant protection to 'all genera and species' (Article 3(1)(ii) and 3(2)(ii)).

It is important to preserve the possibility of restricting PVP to a limited number of genera and species. It does not make sense to develop administrative guidelines and procedures in relation to crops that are of no commercial interest in a particular country. Moreover, countries that introduce PVP for the first time should

¹¹⁹ One exception is Article 13, which refers to 'measures' that 'shall have the effect' of providing for provisional protection of the breeder's right.

¹²⁰ See, e.g., the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the Paris Convention for the Protection of Industrial Property.

¹²¹ Article 35(2): '[Possible exception] (a) Notwithstanding the provisions of Article 3(1), any State which, at the time of becoming party to this Convention, is a party to the Act of 1978 and which, as far as varieties reproduced asexually are concerned, provides for protection by an industrial property title other than a breeder's right shall have the right to continue to do so without applying this Convention to those varieties.'

¹²² Under UPOV 1961 member states were required to protect at least five of 13 genera listed in an Annex to the Convention.

¹²³ Further, the Council could, 'in order to take account of special economic or ecological conditions prevailing' in a state intending to ratify, accept, approve or accede to UPOV 1978, decide to reduce the minimum numbers of genera/species requiring protection or to extend the periods to do so (Article 4(4)).

be able to concentrate their efforts around those crops that are relevant for their economies, taking into account, as provided for in Article 4(4) of UPOV 1978, the ‘special economic or ecological conditions’ prevailing in the country.¹²⁴

o Essentially derived varieties

The provision on essentially derived varieties (EDVs) – a concept introduced by UPOV 1991¹²⁵ – has become one of the UPOV Convention’s most problematic provisions for interpretation and application by administrative authorities and judges.¹²⁶ Article 14(5)(c) defines EDVs as varieties that ‘may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering’.

A variety that is deemed to be an EDV cannot be commercialized without the authorization of the right holder of the initial variety (from which the EDV was derived). This means that, although a protected variety can be used by a third party to obtain a new EDV (as allowed under the ‘compulsory’ breeder’s exemption provided for under the UPOV Convention),¹²⁷ the EDV will fall under the exclusive rights of the right holder of the initial variety (provided that this is not in itself an EDV).

The introduction of the concept of an EDV approximates PVP to patent law, as long as the latter requires a certain level of inventive step to justify the grant of a patent.¹²⁸ The concept addresses concerns about trivial improvements on protected varieties:

...the distinctness criterion can usually be easily fulfilled due to minimal distances and, moreover, in many instances the development of something distinct to fulfil the uniformity and stability requirement may not go beyond the average ability of persons skilled in the art of breeding... This is emphasized by the fact that Art. 1 of the UPOV Convention defines, in No. IV, a breeder as being not only the person who has created but also somebody who has discovered and developed a variety. Thus, even spontaneous mutation of a protected variety may be open for protection in favor of its finder.¹²⁹

¹²⁴ As discussed in Chapter 4, the TRIPS Agreement does not specifically address the coverage of protection for plant varieties. It can be interpreted as allowing members to reasonably determine a number of genera and species that would be eligible for PVP.

¹²⁵ Under Article 14(5) of UPOV 1991, a variety shall be deemed to be essentially derived from an initial variety when it:

- (i) is predominantly derived from such initial variety, or from a variety that itself is predominantly derived from such initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of such initial variety;
- (ii) is clearly distinguishable from such initial variety; and
- (iii) conforms (except for the differences which result from the act of derivation) to such initial variety in the expression of the essential characteristics that result from the genotype or combination of genotype of such initial variety.

¹²⁶ See, e.g., Mia Buma, ‘Essentially derived varieties and the perspective of growers’ <http://www.upov.int/edocs/mdocs/.../upov_sem_ge_13_ppt_8.pdf>.

¹²⁷ See Article 15(1)(iii) of UPOV 1991.

¹²⁸ As discussed extensively in the literature on patent law, however, many patent offices apply a lax inventive-step standard that leads to the grant of patents on minor, trivial developments. See, e.g., A. Jaffe and J. Lerner, *Innovation and Its Discontents: How Our Broken Patent System Is Endangering Innovation and Progress, and What to Do About It* (Princeton University Press 2004).

¹²⁹ Gert Würtenberger, ‘Legal perspectives on Essentially Derived Varieties’, *Revista Eletrônica do IBPI*, No. 8 <<http://ibpibrasil.org/ojs/index.php/Revel/article/download/73/71>>.

Determining when a variety is an EDV is complex.¹³⁰ Although significant efforts have been made by the UPOV members, the UPOV Secretariat and multinational seed companies¹³¹ to clarify and make the concept operative,¹³² divergent approaches and uncertainties¹³³ remain in determining EDVs.¹³⁴

However problematic the concept of EDVs and its implementation is, any country wanting to accede to UPOV 1991 must incorporate it into its national law. Notably, the application of the EDV rules may reduce competition between breeders, as they risk the possibility of being prevented from commercializing a new variety if it is found to be an EDV. The International Association of Horticultural Producers (AIPH), an international organization dedicated to promoting horticultural producers, holds this view. AIPH has questioned the whole basis of EDVs, arguing that it reduces healthy competition between breeders, as it makes it difficult for new varieties to enter the market and gives existing breeders a market monopoly.¹³⁵ It is of the opinion that ‘distinctiveness’ is a sufficient criterion for granting breeder’s rights, adding that EDVs also do not promote ‘innovation and product renewal which was the basis for progress in ornamental sector’.¹³⁶

The application of the concept of EDVs may be highly problematic in developing countries not only because of the practical difficulties in establishing when a variety qualifies as an EDV. EDVs introduce limitations that threaten the informal seed sector¹³⁷ as farmers may no longer be able to freely use protected varieties for further breeding because in certain circumstances (e.g., breeding through selection, mutants), authorization of the right holder to exploit the newly bred variety will be needed. This may adversely impact the ability of farmers to adapt protected varieties to local conditions, thus enhancing farmers’ vulnerability and threatening food security.¹³⁸

It also introduces a double standard since it only applies to *protected* varieties used as an initial source of derivation, while in cases where a farmer’s variety is used to develop a new variety which is essentially derived, the breeder can obtain an independent title and is not subject to any limitation on commercialization of ‘his’ new variety.¹³⁹

¹³⁰ See, e.g., Orlando di Ponti, ‘Intellectual Property in Seed Business. Towards a New Upov Act?’, Wageningen 10, 17, 18 November 2011 (PPt presentation).

¹³¹ See <http://www.worldseed.org/isf/edv.html>.

¹³² See the UPOV ‘explanatory notes’ and other materials on the subject in <http://www.upov.int/tools/en/gsearch.html?cx=016458537594905406506%3Asa0ovkspdwx&cof=FORID%3A11&q=essentially+derived+varieties>.

¹³³ See APBREBES Report on the UPOV Seminar on Essential Derived Varieties, 22nd October 2013 in Geneva, available at http://www.apbrebes.org/files/seeds/APBREBES%20rep%20EDV%20Sem%202022%20Oct%202013_0.pdf. See also UPOV Seminar Report on EDVs available at http://www.upov.int/edocs/pubdocs/en/upov_pub_358.pdf.

¹³⁴ According to one view, a revision of the EDV provision based on 20 years of practical experience may be necessary, for instance, by requiring DNA information of an initial variety in order to determine the existence of an EDV (di Ponti, op. cit.).

¹³⁵ See presentation on ‘Essentially derived varieties and the perspective of growers’ at the UPOV Seminar on Essentially Derived Varieties, October 22, 2013, by Mia Buma, International Association of Horticultural Producers (AIPH), available at http://www.upov.int/edocs/mdocs/.../upov_sem_ge_13_ppt_8.pdf.

¹³⁶ See APBREBES Report on the UPOV Seminar on Essential Derived Varieties, 22nd October 2013 in Geneva, available at http://www.apbrebes.org/files/seeds/APBREBES%20rep%20EDV%20Sem%202022%20Oct%202013_0.pdf.

¹³⁷ Normita G. Ignacio, Joy Angelica Santos-Doctor and Rosette Ferrer, ‘Essentially derived varieties and the perspective of farmer-breeders’, contribution to the UPOV Seminar on Essentially Derived Varieties, October 22, 2013, available at <http://www.apbrebes.org/files/seeds/Essentially%20derived%20varieties%20and%20the%20perspective%20of%20farmer.pdf>.

¹³⁸ Id.

¹³⁹ Id.

o Requirements for protection: NDUS

Since its inception in 1961, the UPOV system has been based on a set of specific criteria for the grant of breeders' rights, whose adoption was strongly influenced by seed certification and marketing legislation. These criteria are: novelty, distinctness, uniformity and stability (see Table 1).

Table 1. Requirements for the grant of the breeder's right as defined in UPOV 1991

<i>Novelty:</i> The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety within one year in the territory of the Contracting Party or within four years (six years in the case of trees or of vines) in another country (Article 6).
<i>Distinctness:</i> The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application (Article 7).
<i>Uniformity:</i> The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics (Article 8).
<i>Stability:</i> The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

As noted in Chapter 2, the grant of the breeder's right under the UPOV Convention shall not be subject to different or additional conditions (Article 5(2)). In this respect, the TRIPS Agreement is more flexible than the UPOV Convention, as it does not specify what criteria are to be applied to grant PVP.¹⁴⁰

The application of the novelty requirement would generally exclude from protection farmers' varieties.¹⁴¹ A *sui generis* regime, as discussed in Chapter 4, may lift this requirement in order to grant certain rights to farmers over their varieties. For instance, the Indian Protection of Plant Varieties and Farmers' Rights Act of 2001 applies to: (1) new plant varieties; (2) extant (domestic and existing) varieties; and (3) farmers' varieties.¹⁴² Under the PPVFR Act, 'farmers' varieties' are a subset of 'extant varieties'.¹⁴³

Distinctness is judged against the plant varieties that are a matter of common knowledge. UPOV 1978 spells out various factors that may be considered for that purpose (such as 'cultivation or marketing already in

¹⁴⁰ Such flexibility also exists under the TRIPS Agreement in relation to patents. The Agreement allows WTO members to apply different concepts, whether inventive step or non-obviousness, industrial applicability or utility (see the footnote to Article 27.1 of the TRIPS Agreement). In addition, it does not define the patentability requirements, thereby leaving significant policy space for their interpretation and application at the national level. See, e.g., Carlos Correa, 'Guidelines for the examination of pharmaceutical patents: developing a public health perspective' (2006), Working Paper, WHO, ICTSD and UNCTAD <<http://www.ictsd.org>>.

¹⁴¹ The situations where the concept of 'disposed of' does not apply are narrowly defined in the UPOV context; they would not include, for instance, farmers' exchanges of seeds. See UPOV, 'Explanatory Notes on Novelty under the UPOV Convention', UPOV/EXN/NOV, 2009, para. 6.

¹⁴² See <http://agricoop.nic.in/seeds/farmersact2001.htm>.

¹⁴³ According to Article 2(j) of the PPVFR Act, 'extant variety' means a variety available in India which is:
(i) notified under section 5 of the Seeds Act, 1966 (54 of 1966);
(ii) farmers' variety;
(iii) a variety about which there is common knowledge; or
(iv) any other variety which is in the public domain.

progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication'). UPOV 1991 does not mention such possible factors, thereby leaving room for UPOV members to determine the scope of the common knowledge. However, unlike UPOV 1978, UPOV 1991 restricts the possibility of considering as part of that knowledge a variety in the process of obtaining breeder's right protection or of being entered into an official register of varieties, since the variety will only become part of the common knowledge if a breeder's right is finally granted or the variety registered (Article 7, UPOV 1991).

According to Article 6(1)(c) of UPOV 1978, a variety is deemed to be 'uniform' if it is 'sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation'. Article 8 of UPOV 1991 considers that a variety is uniform if, 'subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics'. Uniformity is assessed by 'the number of obviously different plants – "off-types" – that occur'¹⁴⁴ in a plant grouping, taking into account the features of their propagation.

The rationale for this requirement has been highly contested, as its current interpretation under the UPOV rules cannot be justified by agronomic reasons, and it creates incentives to narrow down agricultural genetic diversity.¹⁴⁵ By doing so it puts at risk the sustainability and resilience of agriculture, particularly in a context of climate change.¹⁴⁶

The stability requirement is closely linked to uniformity; it means, in practice, 'continuous uniformity'.¹⁴⁷ The stability standard reinforces the trend towards uniformity and the erosion of the genetic base and genetic diversity. It is dictated by certain market demands, rather than by agronomic needs.

The application of the requirements of uniformity and stability excludes from protection varieties such as landraces or farmers' varieties that are more heterogeneous and variable, which are crucial for food security especially in risk-prone areas.¹⁴⁸ A *sui generis* regime of PVP may fully recognize the importance of heterogeneity and adaptability of plant varieties to changing conditions; it does not need to rely (totally or partially) on the UPOV standards. Such a regime may – as proposed in Chapter 4 – admit the application of some of these standards for commercially bred varieties, while providing a legal framework which also deals with farmers' varieties.¹⁴⁹

o Rights conferred

One of the outstanding differences between UPOV 1978 and UPOV 1991 lies in the set of exclusive rights that national laws *must* grant to the breeder (see Table 2). UPOV 1991 dramatically expanded such rights, which are comparable to those granted under a patent. Notably, under UPOV 1978, saving, re-use and farmers' exchange of seeds for non-commercial purposes are not expressly restricted and as such generally accepted as permitted. However, under UPOV 1991, these acts are subject to the breeder's right. Although these acts may be legitimately conducted if they fall under an exception introduced, under certain conditions, at the national level (as discussed in the next sub-section), the principle has been reversed: what was *outside* the scope of the breeder's rights under UPOV 1978 is now subject to them unless eventually exempted.

¹⁴⁴ See UPOV, 'General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants', TG/1/3, 2002, available at http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf, 19.

¹⁴⁵ See, e.g., Leskien and Flitner, *op. cit.*, 52.

¹⁴⁶ See, e.g., La Via Campesina, 'The Bali Seed Declaration' (2011), available at <http://climateandcapitalism.com/2011/03/20/la-via-campesina-the-bali-seed-declaration/>.

¹⁴⁷ See, e.g., Leskien and Flitner, *op. cit.*, 52.

¹⁴⁸ *Id.*, 51.

¹⁴⁹ It is worth noting that the European Commission is considering the adoption of certain derogations to the current legislation to allow the marketing of 'heterogeneous material', that is, of populations of plants that are not uniform and stable.

UPOV-type protection is, like other components of the intellectual property system, based on the grant of exclusivity, that is, of a legal monopoly on the protected subject matter. Although such exclusivity is often justified by the need to provide an incentive for innovation (by allowing the right holder to recover research expenditures and to make a profit on his investment), as mentioned above innovation in plant breeding can flourish in the absence of IPRs. Moreover, establishing IPRs protection for plants is not a magic tool that would instantly and automatically lead to increased plant breeding. Many other factors should be in place for this to happen, including public support for developing improved varieties adapted to local conditions. In addition, whatever the effects of IPRs on innovation may be in a particular context, such rights limit the *diffusion* of the protected varieties; therefore, innovation does not necessarily benefit farmers, especially small farmers.

As indicated in Table 2, the set of rights conferred are much broader under UPOV 1991 than under UPOV 1978. In particular, conditioning and stocking have been added in order to enhance the breeders' ability to enforce their basic rights (production and marketing of propagating material). Exclusive rights to export and import are also specifically spelt out in UPOV 1991.

Table 2. Scope of the breeder's right under UPOV 1978 and UPOV 1991

UPOV 1978 (Article 5) ¹⁵⁰	UPOV 1991 (Article 14)
<p>‘(1) The effect of the right granted to the breeder is that his prior authorization shall be required for</p> <ul style="list-style-type: none"> – the production for purposes of commercial marketing – the offering for sale – the marketing <p>of the reproductive or vegetative propagating material, as such, of the variety. Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.</p> <p>‘(2) The authorization given by the breeder may be made subject to such conditions as he may specify.’</p>	<p>(1)(a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:</p> <ul style="list-style-type: none"> (i) production or reproduction (multiplication), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing, (vii) stocking for any of the purposes mentioned in (i) to (vi), above. <p>(b) The breeder may make his authorization subject to conditions and limitations.</p> <p>(2) subject to Articles 15 and 16, acts referred to in items (1)(a)(i) to (vii) in respect of harvested material, including entire plants and parts of plants;</p> <p>(3) [Optional] subject to Articles 15 and 16, the acts referred to in items (1)(a)(i) to (vii) in respect of products made directly from harvested material of the protected variety;</p> <p>(4) [Optional] subject to Articles 15 and 16, acts other than those referred to in items (1)(a)(i) to (vii);</p> <p>(5) paragraphs (1) to (4) shall also apply in relation to varieties which are essentially derived from the protected variety; varieties which are not clearly distinguishable in the protected variety and varieties whose production requires the repeated use of the protected variety.</p>

¹⁵⁰ A similar provision is contained in Article 5 of UPOV 1961.

UPOV 1978 contained a facultative provision (Article 5(4)) allowing contracting parties ‘to grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed product’. UPOV 1978, hence, does not require contracting parties to extend the exclusive rights to harvested material or other marketed products, with the exception of ornamental plants that are used for commercial propagating purposes (Article 5(1)).¹⁵¹

Under UPOV 1991 the exclusive rights have been expanded so as to cover *harvested material*, including entire plants and parts of plants, ‘unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material’ (Article 14(2)). Additionally, contracting parties may further extend such rights to products (e.g., soya flour, sunflower oil) made directly from harvested material of a protected variety if such an opportunity did not exist (Article 14(3)). Any other act may also be subject to exclusive rights by decision of a contracting party (Article 14(4)). Notably, this broad permission to further expand the scope of exclusiveness is not subject to a test of consistency with other provisions of the Convention.¹⁵²

Article 14(5) of UPOV 1991 also extended the scope of the breeder’s rights to essentially derived varieties and certain other varieties, thereby covering under such rights: (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety; (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety; and (iii) varieties whose production requires the repeated use of the protected variety.

These reforms introduced by UPOV 1991 accentuated the bias of the UPOV model towards commercial breeders’ interests. The needs and interests of farmers, particularly in developing countries, received little or no consideration.

o Exceptions

As noted above, UPOV 1991 has subjected to the breeder’s right acts that were outside the scope of UPOV 1978. This is particularly the case with the acts of saving, using, exchanging and selling farm-saved seed/propagating material, which are key elements of the concept of Farmers’ Rights.¹⁵³ Article 15(2) of UPOV 1991 provides for an ‘optional exception’, subject to certain conditions (‘within reasonable limits’ and safeguarding ‘the legitimate interests of the breeder’), that may be incorporated into national laws to allow farmers to use ‘for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings,’ a protected variety.

The importance of providing for the right of saving farmers’ own seeds cannot be overstated. In some African countries, for instance, farm-saved seeds account for about 80% or more of farmers’ total seed requirements.¹⁵⁴ The limited (optional) exception allowed by UPOV 1991 would not allow national laws to permit small-scale farmers ‘to freely exchange or sell farm-saved seed/propagating material even if the breeders’ interests are not affected (e.g. small amounts or for rural trade)’.¹⁵⁵

¹⁵¹ See, e.g., Helfer, *op. cit.*, 24.

¹⁵² In contrast, Article 1.1 of the TRIPS Agreement allows WTO members to grant broader rights than those required under the Agreement, but ‘provided that such protection does not contravene the provisions of this Agreement’. This requirement may prevent WTO members from expanding certain rights recognized under the Agreement. See, e.g., Henning Grosse Ruse-Khan and Annette Kur, ‘Enough Is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection’ (2008), Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01 <<http://ssrn.com/abstract=1326429> or doi:10.2139/ssrn.1326429>.

¹⁵³ See Article 9 of the ITPGRFA, discussed in Chapter 2.

¹⁵⁴ See, e.g., Philippe Cullet, ‘Plant Variety Protection in Africa: Towards Compliance with the TRIPS Agreement’ (2001), *Journal of African Law*, 45(1), 97, 106.

¹⁵⁵ ‘Open Letter to Members of the International Convention for the Protection of New Varieties of Plants (UPOV)’, TWN Info Service on Intellectual Property Issues (Apr14/09), April 10, 2014, available at http://www.twnside.org.sg/title2/intellectual_property/info.service/2014/ip140409.htm.

In addition, the practice of saving seeds may be completely banned, limited to certain crops and/or subjected to payment of royalties to the breeder. Further, farmers may be required to provide information to breeders on the use of farm-saved seed.¹⁵⁶

A UPOV Explanatory Note on exceptions to breeders' rights recalls that the UPOV Diplomatic Conference of 1991 recommended that the provisions laid down in Article 15(2) of UPOV 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.¹⁵⁷

UPOV's Guidance on Article 15(2) states that '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.'

If this recommendation and interpretation is followed, the 'farmer's privilege' would not be admissible for many genera/species, or its application could be questioned on the basis of different interpretations of what 'common practice' means.

UPOV 1991 retained what is known as 'the breeder's exemption', that is, the possibility of using a protected variety 'for the purpose of breeding other varieties' (Article 15(1)(iii)). This is a 'compulsory' exception, of key importance in allowing for the continuous improvement of plant varieties by third parties without the authorization of the right holder of the original variety. In fact, this exception is indispensable, as plant breeding is of an incremental nature and cannot proceed without relying on existing materials.

The breeder's exemption in UPOV 1991 is, however, limited in comparison to UPOV 1978. UPOV 1978 allows the use of the protected variety as an initial source of variation for the purpose of creating other varieties and marketing of such varieties. The authorization of the right holder is only required in cases where repeated use of the protected variety is 'necessary' for the commercial production of the newly bred variety.

In contrast, the breeder's exemption under UPOV 1991 requires the authorization of the right holder of the protected variety for purposes of commercialization in the following cases: the newly bred variety is an EDV (discussed above), or its production requires the repeated use of the protected variety or the newly bred variety is not clearly distinguishable from the protected variety.

UPOV 1991 introduced two other 'compulsory exceptions' in relation to:

- (i) acts done privately and for non-commercial purposes,
- (ii) acts done for experimental purposes (Article 15(1)(i) and (ii)).

The exception regarding 'acts done privately and for non-commercial purposes' had been introduced by the US PVPA in 1970 and is common under patent laws. The experimental exception is also provided for, with

¹⁵⁶ In Germany, for instance, seed companies sent letters to farmers demanding a full inventory for each year of what seed they are growing, in order to determine the royalty on farm-saved seed that the companies should collect. In Case C-182/01 – Saatgut-Treuhandverwaltungsgesellschaft (March 11, 2004) (<http://curia.europa.eu/juris/liste.jsf?num=C-182/01>), the European Court of Justice decided, however, that the plaintiff did not have the authority to ask for information about the use of protected seed without evidence that the plant was being used by the farmer.

¹⁵⁷ 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.

different formulations, in most patent laws.¹⁵⁸ The incorporation of these exceptions into UPOV 1991 follows the notable expansion of the scope of the breeder's right as compared to UPOV 1978. According to the abovementioned UPOV Explanatory Note:¹⁵⁹

The wording of Article 15(1)(i) indicates that acts which are *both* of a private nature *and* for non-commercial purposes are covered by the exception. Thus, non-private acts, even where for non-commercial purposes, may be outside the scope of the exception ...

The wording of Article 15(1)(i) suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden (i.e. no material of the variety being provided to others), since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example 'subsistence farming', where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder's right, and farmers who conduct these kinds of activities freely benefit from the availability of protected new varieties.¹⁶⁰

A key issue not specifically addressed by the above Explanatory Note is whether this exception would allow farmers to exchange saved seed among themselves. However, a likely reading would be that exchange is not allowed as the Note explicitly mentions 'exclusive use in his own garden (i.e. no material of the variety being provided to others)' and consumption entirely by people 'on that holding'. Assessment of the draft legislation of Malaysia¹⁶¹ and the Philippines¹⁶² by UPOV has shown that the exchange of seeds among farmers would not be permissible in the context of UPOV 1991.¹⁶³

¹⁵⁸ See, e.g., Carlos Correa, 'International Dimension of the Research Exception' (2005), SIPPI Project, AAAS <<http://sippi.aaas.org/intlexemptionpaper.shtml>>.

¹⁵⁹ It is worth noting that UPOV contracting parties can make their own interpretations of the Convention, in accordance with the Vienna Convention on the Law of Treaties, in implementing their obligations. The UPOV Council has not been given the competence to issue authoritative interpretations of the UPOV Convention (in the case of the WTO, for the sake of comparison, such interpretations can only be made by the WTO Ministerial Conference with the vote of a three-fourths majority of the members (Article IX.2 of the Agreement Establishing the WTO <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>)). Having said that, it has been observed that when reviewing PVP legislation of countries wishing to become contracting parties, the UPOV Council seems to expect rather strict compliance with the 1991 Act and the interpretation in the Explanatory Notes adopted by the UPOV Council (as explained in Chapter 2). It is also worth noting that the Explanatory Notes, though not binding, may have persuasive effect on the legislative, executive and judicial authorities of countries when these countries implement plant breeders' rights based on UPOV 1991.

¹⁶⁰ 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. 5 and 7.

¹⁶¹ In examining the conformity of the Malaysian national PVP legislation with UPOV 1991 (UPOV document C(Extr.)/22/2), the Secretariat expressly stated that 'the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act' and on that basis recommended deletion of Section 31(1)(e) of the Malaysian Protection of New Plant Varieties Act which contained the following exception: 'any exchange of reasonable amounts of propagating materials among small farmers'. See UPOV document C(Extr.)/22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.

¹⁶² In the case of the Philippines, UPOV found the farmer's exception in Section 43(d) of the PVP legislation to be incompatible with the 1991 Act. Section 43(d) states: 'The Certificate of Plant Variety Protection shall not extend to:... d)The traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act, except when a sale is for the purpose of reproduction under a commercial marketing agreement. The Board shall determine the condition under which this exception shall apply, taking into consideration the nature of the plant cultivated, grown or sown. This provision shall also extend to the exchange and sale of seeds among and between said small farmers: Provided, That the small farmers may exchange or sell seeds for reproduction and replanting in their own land.' UPOV in its comments notes *inter alia* that 'The exchange and sale of seeds among and between the said small farmers in their own land, as provided in the third sentence of Section 43(d) of the Law, go beyond the exception of Article 15(2) of 1991 Act', and calls for the Section to be amended. See UPOV document C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf.

¹⁶³ See http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf and http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf.

As UPOV 1991 limits the ability of farmers to freely save and exchange seed, its suitability for developing countries is questionable. In a letter issued on September 20, 2012, the Dutch Minister for Agriculture and Foreign Trade stated that ‘UPOV 1991 cannot be applied to all developing countries but that a different approach is desired’, adding that the Netherlands would ‘urge for greater scope for the private and non-commercial use exemption in UPOV 1991 than is currently the case. This will allow small farmers that use protected varieties to trade their surpluses on the market and exchange seed among themselves’.¹⁶⁴

In response to increasing criticisms over the adverse implications of UPOV’s provisions for Farmers’ Rights, in October 2014, the UPOV Council adopted a list of ‘Frequently Asked Questions’ which states that ‘within the scope of the breeder’s right exceptions provided under the UPOV Conventions, UPOV Contracting Parties have the flexibility to consider, where the legitimate interests of the breeders are not significantly affected, in the occasional case of propagating material of protected varieties, allowing subsistence farmers to exchange this against other vital goods within the local community’.

This response of UPOV has been criticized by the Association for Plant Breeding for the Benefit of Society (APBREBES) as being ‘legally incorrect and deliberately misleading’. APBREBES has also argued that UPOV’s response is not supported by the interpretation of Article 15 that has been applicable thus far or by the practices of UPOV, which has consistently rejected national draft PVP legislation that allows exchange of seeds/propagating material.¹⁶⁵

In any case, UPOV’s response would only allow for ‘occasional’ exchange. This is an indication that UPOV continues to fail to recognize that exchange of seeds/propagating material is a *regular* component of farming practices in developing countries.

Following UPOV’s interpretation of the exceptions, any sale of seeds/propagating material obtained by planting protected varieties would not be allowed. Selling seeds/propagating material is an important source of income for many farmers and its prohibition could adversely impact livelihoods and access to basic necessities such as food, healthcare or education.¹⁶⁶

Countries not bound by UPOV 1991 may, however, apply a *sui generis* regime that allows farmers to freely save, use, exchange and sell seeds/propagating material, as discussed in Chapter 4.

o Restrictions on the exercise of the breeder’s right

Article 9 of UPOV 1978 and Article 17 of UPOV 1991 include provisions on ‘restrictions on the exercise’ of the breeder’s right. Such restrictions can only be determined on the basis of ‘public interest’. They may be implemented through an authorization given to a third party to reproduce and commercialize a protected variety. While such an authorization is comparable to a compulsory licence as permitted under Article 31 of the TRIPS Agreement in relation to patents, only one condition needs to be complied with: equitable remuneration has to be paid to the right holder. In the case of UPOV 1978, the remuneration was only due in cases of ‘widespread distribution of the variety’. Under UPOV 1991, it will be more broadly applicable to any situation where the restriction ‘has the effect of authorizing a third party to perform any act for which the breeder’s authorization is required’ (Article 17(2)).

¹⁶⁴ See <http://www.apbrebes.org/news/dutch-minister-supports-differentiated-approach-pvp>. The indicated Dutch approach does not seem to be supported by the majority of the UPOV Council.

¹⁶⁵ See APBREBES Report on the UPOV Autumn Session, Newsletter Issue #11, November 18, 2014, available at <http://www.apbrebes.org/files/seeds/files/newsletter11%20nov2014short.pdf>.

¹⁶⁶ Berne Declaration, *Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and the Philippines*, available at http://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf.

The concept of ‘public interest’ is sufficiently broad for national authorities to decide when a restriction needs to be applied and a compulsory licence granted. For instance, in the case of the US PVPA, insufficiency of supply or unreasonable prices may trigger a compulsory licence:

The Secretary may declare a protected variety open to use on a basis of equitable remuneration to the owner, not less than a reasonable royalty, when the Secretary determines that such declaration is necessary in order to insure an adequate supply of fiber, food, or feed in this country and that the owner is unwilling or unable to supply the public needs for the variety at a price which may reasonably be deemed fair. Such declaration may be, with or without limitation, with or without designation of what the remuneration is to be; and shall be subject to review as under section 71 or 72 (any finding that the price is not reasonable being reviewable), and shall remain in effect not more than two years. In the event litigation is required to collect such remuneration, a higher rate may be allowed by the court. (7 U.S.C. 2404)¹⁶⁷

However, as noted above, the UPOV Council has taken a rigid approach regarding the right of UPOV members to define ‘public interest’, as shown by the deliberations on the draft legislation submitted by Malaysia.¹⁶⁸

o **Duration**

Under UPOV 1978, the *minimum* period of protection is 15 years. For vines, forest trees, fruit trees and ornamental trees, it is 18 years (Article 8). UPOV 1991 extended these periods to 20 years and 25 years, respectively (Article 19).

While plant breeding is time-consuming, the application of marker-assisted selection (MAS) and other tools may help to reduce the period of time necessary to develop a new, distinct, uniform and stable variety. Biotechnology ‘has considerably shortened the time to 7-10 years for new crop varieties to be brought to the market’.¹⁶⁹ This would be the case particularly when a transgenic variety is developed containing only one or few transgenes, like for insect tolerance or herbicide resistance. In the light of these developments, a long term of protection does not seem justified and may block rather than promote innovation in plant varieties. This is particularly the case when an extension beyond the mandatory UPOV terms has been introduced, as done by some laws (e.g., European Union, Kenya).

o **Nullity and cancellation**

In both UPOV 1978 and UPOV 1991, nullity must be declared when the requirements to obtain protection have not been met. UPOV 1991 expanded the grounds for nullification to include cases where ‘the breeder’s right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled’ (Article 21(1)(iii)).

UPOV 1978 provides for the automatic forfeiture of the breeder’s right when the right holder is no longer capable of providing the competent authority with reproductive or propagating material of the protected variety. The right may also be forfeited if, after being requested to do so, the right holder fails to provide reproductive or propagating material or information to the competent authority, or to pay the required fees.

¹⁶⁷ Section 44, ‘Public Interest in Wide Usage’ <<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3002796>>.

¹⁶⁸ Section 36 of the Malaysian PVP legislation contains several grounds on which a compulsory licence could be issued. The grounds include where an excessive proportion of the registered plant variety offered for sale is being imported (Section 36(1)(b)). On examination of the legislation, UPOV called for Section 36 to be revised ‘in order to only cover cases of public interest’ (which is what is mentioned in Article 17 of UPOV 1991). UPOV declared Section 36(1)(b) to be inconsistent with UPOV 1991, although the latter does not explicitly disallow such a provision. See document C(Extr.)/22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.

¹⁶⁹ See International Service for the Acquisition of Agri-biotech Applications (ISAAA), *Pocket K No. 19. Molecular Breeding and Marker-Assisted Selection* <<http://www.isaaa.org/resources/publications/pocketk/19/default.asp>>.

UPOV 1991 eliminated the automatic forfeiture referred to. It provides for the possibility of deciding on the ‘cancellation’ of the breeder’s right only after a request for the material has been made to the breeder.

Importantly, under both UPOV 1978 and UPOV 1991, contracting parties are not allowed to introduce other grounds for nullity or forfeiture/cancellation. Under alternative *sui generis* PVP systems (discussed in Chapter 4), countries would be free to include other grounds critical to safeguarding national interests, such as where the protected variety is not commercialized in a sufficient quantity to meet the demand or where the right holder is engaged in anti-competitive practices.

3.3 Pressures to join UPOV: obligations in free trade and economic partnership agreements

International harmonization of the rights conferred to breeders has often been presented as the optimal solution that satisfies both local and global interests. However, it is only by designing the applicable legislation in a manner consistent with the needs and conditions of each country that those interests can be best served. An inappropriate legislative approach in relation to such rights may decrease access to seeds and agricultural output, reduce biodiversity in the fields, and negatively affect food security as well as the realization of the human right to food.¹⁷⁰

The sovereign right that countries should be able to exercise in an area of such vital importance as agriculture and food production has been constrained or bluntly ignored by developed countries in free trade agreements and economic partnerships involving developing countries.

Thus, the US FTAs have required accession of the partner countries to UPOV 1978 or 1991,¹⁷¹ or specifically to UPOV 1991.¹⁷² Examples of the latter case include the US FTAs with Bangladesh, Singapore, Chile and South Korea and the US-Central America Free Trade Agreement (CAFTA). On their part, the European Free Trade Association (EFTA)¹⁷³ and the European Union (EU) have also required accession to UPOV, or specifically to UPOV 1991, in free trade agreements and economic partnerships they entered into.¹⁷⁴ Interestingly, the EU agreement with Algeria provided that the latter had to accede to and implement UPOV 1991 within five years of its entry into force, but accession could be replaced by implementation of an effective *sui generis* system if both parties agreed.¹⁷⁵

¹⁷⁰ See, e.g., De Schutter, *op. cit.*

¹⁷¹ For instance, Article 1701.2 of the North American Free Trade Agreement (NAFTA) required a party that had not yet acceded (the only party in this situation was Mexico) ‘to make every effort’ to accede to either UPOV 1978 or 1991.

¹⁷² Chile, Peru, Morocco, Jordan and Singapore, for instance, were required to join UPOV 1991 under the FTAs they entered into. It should be noted that no instrument of accession to UPOV 1978 could be submitted after December 31, 1995 for developing countries and December 31, 1993 for other countries. UPOV 1991 hence became the only option under the UPOV system for new members after those dates.

¹⁷³ E.g., agreements entered into with Jordan, Morocco, Lebanon and Tunisia.

¹⁷⁴ However, while in the Cotonou Agreement (partnership agreement between the members of the African, Caribbean and Pacific Group of States, on the one side, and the European Community and its member states, on the other side, signed in Cotonou on June 23, 2000) ‘the Parties recognize the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights’ (Article 46.1) including for plant varieties (Article 46.5), there is no obligation to join UPOV.

¹⁷⁵ See Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, on the one side, and the People’s Democratic Republic of Algeria, on the other side – Annexes 1 to 6 and Protocols Nos. 1 to 7, Council of the European Union, Brussels, April 12, 2002, 6786/02 ADD1 AL1, Annex 6, Article 3. Nevertheless, Algeria is listed among the countries that have been in contact with the UPOV Secretariat ‘for assistance in the development of laws based on the UPOV Convention’ <<http://www.upov.int/export/sites/upov/members/en/pdf/status.pdf>>.

Pressures to adopt UPOV as *the* model for the protection of plant varieties have also been exerted in other contexts outside trade negotiations,¹⁷⁶ where developing countries may not obtain, in exchange for accepting high standards of intellectual property protection, concessions in other areas.¹⁷⁷

The case of Kenya, which joined UPOV 1991 in 1999, is instructive:

The largely ‘foreign’-owned floriculture and horticulture sectors have consistently lobbied for PBRs [plant breeders’ rights]… The Seed Trader Association of Kenya (STAK), established in 1982, simultaneously acts as a conduit for international links, through its membership of the International Seed Federation, and a local/regional base for socialising IPRs, as it is the headquarters of the African Seed Trade Association. STAK has an active secretariat, busy in organising and hosting national and regional conferences with key transnational actors (e.g. UPOV) and lobbying domestic legislation. In 1993, a STAK conference co-hosted with UPOV saw the formation of the Plant Breeders’ Association of Kenya (PBAK). PBAK gave lobbying for enacting PBR provisions of SPVA [Seeds and Plant Varieties Act] a collective voice… while also channeling expertise to shape the architecture of law.¹⁷⁸

Pressures on developing-country governments to adopt the UPOV regime and introduce UPOV 1991 rules at the national level have met with significant domestic resistance, as exemplified by the case of Chile. The Chilean government was unable to overcome farmers’, indigenous communities’ and other stakeholders’ resistance to the adoption of a bill implementing UPOV 1991, and was forced to withdraw it from the Congress in March 2014, more than 10 years after the commitment to join UPOV 1991 was made in the FTA signed with the USA.¹⁷⁹ In Colombia, the Constitutional Court declared unconstitutional a 2012 law approving the country’s accession to UPOV 1991. The high court considered that the law violated the rights of indigenous groups and Afro-Colombians who were not consulted by the Congress prior to enacting the law.¹⁸⁰ In September 2014, the Congress of Guatemala repealed plant variety legislation that would have allowed the country to accede to UPOV 1991 as required by CAFTA. The passing of the legislation had sparked massive protests, leading to the Constitutional Court suspending the law.¹⁸¹

3.4 Sui generis models implemented in developing countries

This chapter has examined the shortcomings of the UPOV Conventions, notably UPOV 1991, in addressing the needs of developing countries, where the supply of seeds/propagating material is largely dependent on the practice of saving, exchanging and selling seeds/propagating material and on plant varieties developed or adapted by farmers. UPOV-type PVP, which focuses on new plant varieties compliant with the NDUS requirements (as discussed above), was conceived to cover varieties produced by the commercial breeding sector and research institutions. However, several countries have designed (or are in the process of doing so) *sui generis* regimes that take better account of the characteristics of seeds/propagating material supply in developing countries. They cover not only varieties obtained as a result of formal breeding programmes, but also those improved or held by farmers and farmers’ communities, which generally do not comply with one or more of the NDUS requirements.

¹⁷⁶ Including ‘ideational pressures’ and those exerted by the UPOV Secretariat itself. See C. Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009), 186.

¹⁷⁷ The benefits expected from these concessions, however, often do not materialize for the developing-country parties. See, e.g., Martin Khor, ‘Need to assess costs, benefits of FTAs’ (2011), TWN <<http://www.twnside.org.sg/title2/gtrends/gtrends365.htm>>; Kevin Gallagher and Timothy Wise, ‘Nafta’s unhappy anniversary’ (2009), January 1 <<http://www.theguardian.com/commentisfree/cifamerica/2009/jan/01/nafta-anniversary-us-mexico-trade>>.

¹⁷⁸ Rangnekar, *op. cit.*, 14.

¹⁷⁹ See <http://newamericamedia.org/trending/2014/03/chile-derails-monsanto-law-that-would-privatize-seeds.php>.

¹⁸⁰ See Shawn Sullivan, ‘Colombian Court Strikes Down Law Approving 1991 Plant Variety Protection Convention’, December 10, 2012 <<http://sullivanlaw.net/colombian-court-strikes-law-approving-1991-plant-variety-protection-convention/>>.

¹⁸¹ See, e.g., <http://www.apbrebes.org/news?page=1>. See also GRAIN, ‘Trade deals criminalise farmers’ seeds’, November 2014, available at <http://www.grain.org/article/entries/5070-trade-deals-criminalise-farmers-seeds>.

The legislations of India, Malaysia and Thailand provide interesting examples of such regimes. Although this section focuses on these countries, it is worth noting that in many other countries (e.g., Zimbabwe, Ethiopia, Zambia) PVP legislation contains some elements of a *sui generis* regime (even if several of these countries generally follow the UPOV model) such as a disclosure obligation, recognition of Farmers' Rights, and limitations to the breeder's right based on various public interest considerations.

Eligible subject matter

The categories of plant varieties covered by the three *sui generis* regimes examined here (India, Malaysia and Thailand) vary significantly (see Table 3).

The Indian Protection of Plant Varieties and Farmers' Rights Act applies to (1) new plant varieties; and (2) extant varieties, which include (i) varieties already notified under Section 5 of the Seeds Act, 1966; (ii) farmers' varieties; (iii) varieties about which there is common knowledge; and (iv) any other variety which is in the public domain (Article 2(j)). Farmers' varieties are thus a subset of 'extant varieties' which includes varieties that have 'been traditionally cultivated and evolved by the farmers in their fields' and those that are a 'wild relative or land race of a variety about which the farmers possess the common knowledge' (Article 2(l)).

In Malaysia, the Protection of New Plant Varieties Act 2004 covers both new commercial and 'traditional' varieties. The latter are varieties of crops conserved by farmers to which they add value 'through the selection and identification of their useful properties' (Article 2).

The Thai Plant Variety Protection Act (PVP Act) applies to new and local varieties as well as to local domestic and wild varieties defined as follows:

- a 'local domestic plant variety' means 'a plant variety which exists only in a particular locality within the Kingdom and has never been registered as a new plant variety and which is registered as a local domestic plant variety under this Act';
- a 'wild plant variety' means 'a plant variety which currently exists or used to exist in the natural habitat and has not been commonly cultivated'; and
- a 'general domestic plant variety' means 'a plant variety originating or existing in the country and commonly exploited and shall include a plant variety which is not a new plant variety, a local domestic plant variety or a wild plant variety' (Section 3).

Table 3. Protected varieties under *sui generis* legislation

India	Malaysia	Thailand
(1) New plant varieties; (2) extant (domestic and existing) varieties; and (3) farmers' varieties	Commercial and 'traditional' varieties	New and local varieties; local domestic and wild varieties

Requirements for protection

Two of the *sui generis* regimes considered here (India, Thailand) are 'hybrids' in the sense that they incorporate the UPOV-type NDUS requirements while, in addition, either excluding the application of one or more of them or introducing a different requirement for certain categories of varieties. The Malaysian *sui generis* regime introduces the most significant departure from the NDUS standards in a PVP system in force.

The Indian PPVFR Act requires NDUS for the protection of new plant varieties while, as suggested by the definition mentioned above, it excludes novelty – but not the distinctness, uniformity and stability (DUS) requirements – in the case of 'extant varieties' (Article 15(2)). The exclusion of the novelty requirement

drastically expands the scope of varieties that may be protected. In fact, the overwhelming majority (around 85%) of varieties registered with the PPVFR Authority belong to this category.¹⁸²

Section 14(2) of the Malaysian Protection of New Plant Varieties Act 2004 provides that plant varieties bred or discovered and developed by a farmer, local community or indigenous people are protectable if they are ‘new, distinct and identifiable’. Novelty is not destroyed if ‘the propagating or harvested material of the plant variety has not been sold or otherwise disposed of on a commercial basis by or with the consent of the breeder’ (Section 14(3)(a)).¹⁸³ Uniformity and stability are not required to obtain protection. The applicable requirements, as defined, permit the protection of existing varieties insofar as they are *identifiable*¹⁸⁴ and have not been previously commercialized.

The Thai PVP Act does apply the DUS requirements to define a ‘plant variety’ (Article 2). While local domestic plant varieties do not need to comply with the novelty requirement, a modified distinctness criterion applies. Section 12(2) of the Act requires that distinctness be ‘related to the feature beneficial to the cultivation, consumption, pharmacy, production or transformation, including the distinctness from the following plant varieties: (a) plant varieties already registered and protected, whether in or outside the Kingdom, prior to the date of filing the application; (b) plant varieties in respect of which application for registration has been made in the Kingdom and which will subsequently have been registered.’

There is a growing body of empirical information that would allow conclusions to be drawn on the way in which the sui generis systems considered here operate, and particularly their impact on both commercial breeders and farmers.¹⁸⁵ To measure the impact of PVP legislation, it is insufficient to simply rely on the number of applications or rights granted¹⁸⁶ as this would only hint at the extent to which the legislation is being used and by whom. An assessment of the impact of PVP legislation should go beyond this, and preferably include an analysis of the effects of the implemented regimes, *inter alia*, on plant breeding, biodiversity, food security and the realization of the rights accorded to farmers.

Categories of varieties and conferred rights

The examined sui generis regimes for PVP have introduced various categories of plant varieties, as noted above, and, in some cases, confer different sets of rights to the respective breeders.¹⁸⁷

Under the Indian PPVFR Act, the right holder of a ‘certificate of registration’ enjoys an exclusive right ‘to produce, sell, market, distribute, import or export the variety’. In the case of an extant variety, the same rights are conferred but, ‘unless a breeder or his successor establishes his right’, the central or the state government ‘shall be deemed to be the owner of such right’ (Article 28(1)). In other words, this legislation does not distinguish *what* rights can be exercised in respect of different categories of plant varieties but *who* is entitled to do so.

¹⁸² Sujith Koonan, ‘India’s sui generis system of plant variety protection’ (2014), QUNO, available at <http://www.quno.org/resource/2014/1/developing-country-sui-generis-options-plant-variety-protection>, 3.

¹⁸³ While the wording of UPOV 1991 ‘otherwise disposed of to others’ does not refer to commercial acts (as is the case in UPOV 1978), the UPOV ‘Explanatory Notes on Novelty under the UPOV Convention’ seem to consider both standards equivalent. See UPOV, ‘Explanatory Notes on Novelty under the UPOV Convention’ (2009), UPOV/EXN/NOV/11, available at http://www.upov.int/edocs/expndocs/en/upov_exn_nov.pdf, 7.

¹⁸⁴ Under Section 14(3)(e), ‘a plant variety is identifiable if—(i) it can be distinguished from any other plant grouping by the expression of one characteristic and that characteristic is identifiable within individual plants or within and across a group of plants; and (ii) such characteristics can be identified by any person skilled in the relevant art’.

¹⁸⁵ See various country reports submitted to the Seventh East Asia Plant Variety Protection Forum Meeting held in Vientiane, Lao PDR, 2014, available at http://eapvp.org/report/laos/20140916_113330.html.

¹⁸⁶ See Berne Declaration, ‘UPOV report on the impact of plant variety protection – A critique’, available at http://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_Critique_UPOV_report_final.pdf.

¹⁸⁷ Under UPOV 1978, only one single category of protectable varieties was identified and, hence, the same set of rights applied to all varieties. UPOV 1991 introduced the concept of ‘essentially derived varieties’ and differentiated the rights that may be exercised in their respect.

The potential effects of such a broad assignment of exclusive rights may be mitigated by the state's abstention from exercising them and by the fact that Article 39(1)(iv) of the PPVFR Act provides for an exception to the exclusive rights which allows farmers to save, use, sow, re-sow, exchange, share and even sell farm produce, including the seed of a variety protected under the Act, provided that the seed is not branded.

The PPVFR Act also stipulates that

a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund:... Provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act (Article 39(1)(iii)).

Accordingly, the 'recognition and reward' is not triggered by the conservation, development or commercialization of a plant variety, but by the fact that it has served as a 'donor' of genes for a variety which is registered.

In addition, Indian nationals and organizations can claim 'benefit sharing' in case a variety is sought to be registered by a third party, when 'genetic material of the claimant'¹⁸⁸ has been used in the development of said variety, taking into account 'the commercial utility and demand in the market of the variety relating to which the benefit sharing has been claimed' (Article 28(5)(a) and (b)).

In Malaysia, right holders of protected varieties can exercise exclusive rights (defined along the lines of Article 14 of UPOV 1991) which extend to

any propagating material of the registered plant variety, harvested material of the registered plant variety and the entire or any part of a plant variety where the propagating material of that plant variety is obtained through unauthorized means from the registered plant variety (Article 30(2)).

While the breeder's exception is provided for under the Malaysian law, it does not apply in cases of EDVs (in line with UPOV 1991). Exceptions relating to saving and exchanging seeds are provided for the benefit of 'small farmers'.¹⁸⁹

In Thailand, the PVP Act differentiates the protection that is accorded to various categories of plant varieties eligible for protection:

- New plant varieties are protected through exclusive rights in a way similar to UPOV 1991, but subject to a broader set of exceptions.¹⁹⁰
- A comparable set of rights applies to 'local domestic plant varieties', subject also to some exceptions.¹⁹¹ In addition, 'a person who collects, procures or gathers a local domestic plant variety or any part thereof for the purposes of variety development, education, experiment or research for commercial interest shall make a profit-sharing agreement in relation to the profits derived from the use of such local domestic plant variety' (Article 48).

¹⁸⁸ It is unclear how this type of ownership is to be established in the absence of a certificate of registration.

¹⁸⁹ 'Small farmer' is, according to Article 2, 'a farmer whose farming operations do not exceed the size of holding as prescribed by the Minister'. This has been determined to be a holding <0.2 ha (Gazette – October 20, 2008).

¹⁹⁰ See, e.g., Pawarit Lertdhamtewe, 'Thailand's sui generis system of plant variety protection' (2014), QUNO, available at <http://www.quno.org/resource/2014/1/developing-country-sui-generis-options-plant-variety-protection>, 3.

¹⁹¹ Article 47: 'When registration has been made for the protection of a local domestic plant variety of any locality, that locality shall have the exclusive right to develop, study, conduct an experiment or research in, produce, sell, export or distribute by any means the propagating material thereof...'

- General domestic and wild varieties are not eligible for exclusive rights but subject to a benefit-sharing mechanism only. Permission by the government is required in order to access these varieties for variety development, education, research or commercial purposes:

A person who collects, procures or gathers general domestic plant varieties, wild plant varieties or any part of such plant varieties for the purposes of variety development, education, experiment or research for commercial interest shall obtain permission from the competent official and make a profit-sharing agreement under which the income accruing therefrom shall be remitted to the Plant Varieties Protection Fund (Article 52).

The Thai PVP Act hence relies quite heavily on benefit-sharing mechanisms rather than on exclusive rights. Thailand ‘has sought to provide other forms of incentives to breeders of domestic and farmers’ varieties (i.e., it is closer to a liability regime than a property rights regime)’.¹⁹²

3.5 Conclusions

The 1991 revision to the UPOV Convention significantly expanded and strengthened plant breeders’ rights. UPOV 1991 provides a platform for harmonizing PVP on the basis of standards that essentially respond to conditions prevailing in developed countries. Moreover, it does not contain any limitation to the further expansion of the scope of exclusive rights.

The UPOV Convention’s ‘one size fits all’ model ignores the agricultural profiles and the characteristics of the seed supply systems in developing countries, particularly the needs of small-scale farmers regarding access to good-quality yet affordable plant materials. The implementation of the Convention may, in particular, narrow down genetic diversity in the fields and suppress farmers’ traditional practices of saving and exchanging plant materials. These activities are crucial to preserving a diversified supply of seeds adapted to local conditions and a changing environment.

As discussed in Chapter 2, countries, even those that are WTO members, are not obliged to join UPOV nor to otherwise apply the standards set out by the UPOV Convention. They can implement – as examined in Chapter 4 – *sui generis* options more suitable to their needs, supportive of small-scale farmers – who account for the largest part of food production and employment in many developing countries – and consistent with their policies on agricultural development and food security.

¹⁹² D. Robinson, *Exploring Components and Elements of Sui Generis Systems for Plant Variety Protection and Traditional Knowledge in Asia* (International Centre for Trade and Sustainable Development 2007), 19.

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CHAPTER 4

An Alternative Model: Proposals for a Sui Generis Regime

MODEL provisions for a sui generis regime are presented and explained in this chapter. In drafting such provisions, a thorough analysis has been conducted of PVP legislations – particularly the sui generis regimes described in Chapter 3 and the legislations of other developing countries (such as the Philippines,¹⁹³ Egypt,¹⁹⁴ Zambia,¹⁹⁵ Indonesia¹⁹⁶ and Ethiopia¹⁹⁷) which include some sui generis elements, especially with regard to the rights conferred to farmers – that depart from the UPOV model.

The objective here is not to draw up a full-fledged model law but to provide some of the key elements that a sui generis regime may contain. The model provisions primarily deal with substantive issues that are essential to designing a sui generis regime and are accompanied by short explanatory notes. For purposes of completeness, some provisions that are standard in PVP legislation are included. Some procedural aspects are also considered, but the model provisions do not address issues concerning legal standing, provisional injunctions, damages in case of infringement and other issues concerning the exercise of rights. All these issues need to be treated in the context of the national law, consistent with the relevant law principles, legal traditions and practices including, where applicable, customary law.

The model provisions are mainly aimed at countries that are bound to comply with the TRIPS Agreement's obligation regarding the protection of plant varieties. LDCs can, as mentioned above, delay the introduction of PVP until the end of the transitional period and any subsequent renewals thereof. There are, in fact, good reasons – as suggested by the wording of Article 66.1 of the TRIPS Agreement¹⁹⁸ – for these countries to rely on free access to plant materials and technologies until they cease to be an LDC.

Governments and other stakeholders intending to rely on the proposed model provisions would need to adapt them to the particular circumstances and needs of their respective countries. Importantly, a sui generis regime on PVP – like any other component of a national intellectual property system – should not be designed and implemented in isolation, but as an integral part of national policies such as those relating to agricultural and rural development, protection of indigenous and local communities' knowledge, commercialization of seeds, food security, poverty alleviation and protection of the environment.

The objectives of PVP regimes may vary in different countries. They may include, for instance, complying with the TRIPS requirements in a manner that is supportive of other international legal obligations (e.g., CBD, ITPGRFA), balancing the interests of commercial breeders and farmers, 'encouraging biodiversity', promoting access to plant genetic resources on fair and equitable terms, recognizing Farmers' Rights and protecting the traditional knowledge of indigenous communities.¹⁹⁹

¹⁹³ Plant Variety Protection Act of 2002; Republic Act 9168.

¹⁹⁴ Law No. 82 of 2002, Book Four.

¹⁹⁵ Plant Breeder's Rights Act 2007.

¹⁹⁶ Law No. 29 of 2000 on Plant Variety Protection.

¹⁹⁷ Proclamation No. 481/2006, A Proclamation to provide for Plant Breeders' Right.

¹⁹⁸ 'In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement...'

¹⁹⁹ Helfer, *op. cit.*, 71.

The model provisions presented here have been developed with a number of objectives in view, such as the need to ensure:

- a right balance between breeders' rights and those of farmers and the society at large;
- the recognition and implementation of Farmers' Rights and that the PVP regime supports both the formal seed system as well as the informal seed sector,²⁰⁰ particularly smallholder farmers;
- that developments made by public research and breeding institutions as well as farmers are not misappropriated;
- that breeders recoup their investments in the development of new varieties without undermining Farmers' Rights, societal welfare and the environment;
- the facilitated or increased diffusion of new varieties suitable to the conditions in the country, taking into particular account the situation and needs of small-scale farmers;
- that national PVP regimes are adapted to the agricultural profile of the respective countries, and that they are consistent with and supportive of policies on conservation and sustainable use of plant biodiversity for food and agriculture;
- the preservation of traditional knowledge associated with genetic resources and the traditional farming practices of saving, using, exchanging and selling seeds/propagating material, having in view the importance of ensuring the livelihood of farming communities, the continuous adaptation of seeds/propagating material to the evolution of agricultural ecosystems, and food security;
- that the national PVP regimes respect, protect and fulfil states' obligations regarding the right to food,²⁰¹ the right to enjoy the benefits of scientific progress and its application,²⁰² and the rights of indigenous peoples;
- that such regimes are supportive of and do not counter the objectives and the obligations under the CBD, the Nagoya Protocol and the ITPGRFA.

The proposed *sui generis* regime is articulated on the basis of three categories of plant varieties: (i) new uniform plant varieties; (ii) new farmer and other heterogeneous varieties; and (iii) traditional farmers' varieties.

New uniform plant varieties are covered by a regime that approximates UPOV 1978, whereunder the NDUS requirements are applicable and breeders may obtain an exclusive right upon registration. This means that once protection is granted, and subject to some exceptions, the commercial use of the propagating material of the new uniform plant variety would require prior authorization by the right holder.

New farmer and other heterogeneous varieties should also be registered but different requirements would apply (novelty, distinctness and identifiability). Right holders would have a remuneration right only (not 'exclusive rights'), that is, the proposed regime would not restrict the commercial exploitation of the propagating materials of those varieties; however, it will require payment of remuneration (to individual farmers, farming communities or breeders that registered that variety) when such exploitation takes place. Thus, the regime essentially aims at preventing the free misappropriation of varieties developed or evolved by farmers and farmers' communities, as well as of other heterogeneous varieties developed by breeders, including in public research institutions.

With regard to the last category of varieties, *traditional farmers' varieties*, a remuneration right is also proposed in case of commercial exploitation of the propagating material of traditional varieties, but the remuneration would be payable to a Seed Fund. The only requirement for protection to be granted is the 'identifiability' of a variety, and registration would not be needed.

²⁰⁰ As mentioned above, the need to support the informal seed system in addition to the formal seed system has been recognized in the Voluntary Guide for National Seed Policy Formulation, which was endorsed by the Fifteenth Regular Session of the Commission on Genetic Resources for Food and Agriculture in January 2015. See <http://www.fao.org/3/a-mm546e.pdf>.

²⁰¹ See Article 11.1 and 11.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

²⁰² See Article 15.1(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Importantly, in recognition of the crucial role that small farmers play in the production of food in developing countries, the proposed *sui generis* regime exempts them from any obligation in connection with the categories of plant varieties mentioned, thereby fully safeguarding the right of small-scale farmers to save, use, exchange and sell seeds/propagating material. Other exceptions consistent with the concept of Farmers' Rights are also contemplated for other farmers.

The proposed *sui generis* regime also suggests the establishment of a Seed Fund which will collect remuneration from the commercial exploitation of traditional farmers' varieties and a benefit-sharing contribution when a new uniform plant variety is registered. Income from the Seed Fund will be used to support the conservation and sustainable use of plant genetic resources, particularly on-farm conservation and community seed banks, as well as to implement benefit sharing to relevant farmers and farming communities.

The recognition of these three categories of varieties is an attempt to create an equitable system that overcomes the dichotomization between breeding and farming inherent to the UPOV model. It would also allow countries to establish a system that is consistent with and supports the implementation of the CBD and the ITPGRFA.

Before entering into the analysis of possible provisions to implement the system described above, it is important to stress that no intellectual property regime is a magic tool that will *per se* promote investment or innovation in plant breeding and bring about food security. Any such regime is strongly dependent on the context where it applies and cannot substitute for measures that governments need to adopt to support plant breeding. Public investment in breeding, including the dynamic management of cultivated biodiversity and participatory breeding, is and will continue to be a necessity regardless of the adoption of any PVP regime. It would be absolutely wrong to believe that by merely enacting and enforcing a PVP regime, the state has ensured an optimal level of private and public investment in breeding and as such may cease or reduce the required public support, in particular, to address the needs of poor farmers.

MODEL PROVISIONS

4.1 Categories of protected varieties

This law applies to:

- (a) *New uniform plant varieties* developed by a breeder or group of breeders;
- (b) *New farmer and other heterogeneous varieties*. These consist of
 - (i) *New farmers' varieties* cultivated and bred by a farmer or a community of farmers in the fields;
 - (ii) *Other heterogeneous varieties* developed by other breeder or group of breeders;
- (c) *Traditional farmers' varieties* which have been traditionally cultivated and evolved by the farmers in the fields, or which are a wild relative or landrace of a variety which is of common knowledge to farmers.

While a PVP regime may be limited to protection of varieties that comply with the NDUS requirements, it may be expanded so as to cover other, non-uniform varieties, including those cultivated and developed by farmers. There are different reasons that may justify this extended protection, such as:

- 1) bringing equity into the relations between farmers and commercial breeders through the recognition of breeding undertaken by farmers/communities;
- 2) promoting plant genetic diversity through the conservation and sustainable use of farmers' varieties by raising 'the profile of that knowledge and encourag[ing] respect for it both inside and outside the knowledge holding communities'²⁰³ and by providing a remuneration right/benefit sharing. This is also a way of facilitating implementation of Articles 6 and 9 of the ITPGRFA;

²⁰³ Crucible Group II, *Seeding Solutions, Volume 2: Options for National Laws Governing Control over Genetic Resources and Biological Innovations* (2001), International Development Research Centre, 68-69.

- 3) curbing the misappropriation, without benefit sharing, of varieties bred by farmers and farmers' communities;
- 4) encouraging the diffusion of varieties bred by farmers/communities;
- 5) addressing the farmers' need to have access to varieties better adapted to climate and environmental changes;
- 6) promoting biodiversity in the fields through the recognition of a set of (non-exclusive) rights in relation to heterogeneous varieties developed by commercial breeders and research institutions;
- 7) ensuring that plant genetic resources from various sources, including private breeding, are free for further breeding without restriction.

Accordingly, the proposed *sui generis* regime would cover three different categories of varieties, the protection of which would generate different sets of rights.

New uniform plant varieties would cover new uniform varieties developed by breeders, private companies and other entities (e.g., agricultural research institutions) with the intent of commercializing them via licensing or multiplication and sale. As indicated below, the proposed *sui generis* regime would apply the NDUS requirements to these varieties, despite the shortcomings noted in Chapter 3 in respect of the UPOV-type requirements of protection (NDUS). The reason is that the negative impact that the uniformity and stability requirements may have on genetic diversity could be neutralized, at least to some extent, by the recognition and promotion of heterogeneous varieties, including farmers' varieties.

The proposed model provisions do not refer to the concept of 'essentially derived varieties'. As noted in Chapter 3, this concept is problematic and, although it may contribute to avoiding 'cosmetic' breeding, its application may be particularly cumbersome in developing countries.

The purpose of the category of *new farmer and other heterogeneous varieties* is to capture varieties that do not meet all the NDUS requirements but are, however, new, distinct and identifiable, as discussed below.

This category extends to new farmers' varieties that are heterogeneous and developed by farmers as part of their agricultural practices. This is to recognize the role of farmers as breeders. However, the protection conferred would essentially be 'defensive', in the sense that it would aim at avoiding the misappropriation by commercial breeders of new farmers' varieties and operationalizing a system of compensation to the farmer or community of farmers in cases where the new farmers' varieties are multiplied for commercial purposes.

This category also includes other varieties that are non-uniform, the aim being to contribute to the conservation and promotion of biodiversity, which, as mentioned, is undermined by the requirement of uniformity applied under PVP laws that follow the UPOV model. The rights conferred would be the same as those granted in relation to new farmers' varieties, that is, the regime would not create exclusive rights but a remuneration right. This may allow, *inter alia*, generation of a monetary income in cases where non-uniform varieties released by public research institutions are commercialized by third parties.

The category of *traditional farmers' varieties* would include farmers' varieties that are of common knowledge to farmers.²⁰⁴ The purpose of recognizing this category is also defensive: to ensure fair and equitable benefit sharing where the propagating material of a traditional farmers' variety is commercialized by a third party. The traditional farmers' varieties need not be new but should be identifiable. This category includes new farmers' varieties whose term of protection has expired.

It is important to note that the adoption of a legal regime to protect farmers' varieties will not achieve its intended objectives if other complementary measures are not adopted and effectively implemented by governments. Such measures may include a wide range of both indirect and direct policies, such as state

²⁰⁴ This concept is based on Article 2(l) of the Indian PPVFR Act.

programmes for the acquisition of stocks of foodstuff with the purpose of both supporting low-income producers and feeding the poor,²⁰⁵ and assistance to farmers²⁰⁶ in asserting their rights, particularly in cases of misappropriation. Non-governmental organizations (NGOs) have a crucial role in providing this assistance, as in many countries they would be well placed to work with and support farmers in exercising their rights.

4.2 Requirements for protection

- (1) In order to obtain protection under this law
 - (a) *New uniform varieties* must be (i) new, (ii) distinct, (iii) uniform and (iv) stable.
 - (b) *New farmer and other heterogeneous varieties* must be (i) new, (ii) distinct and (iii) identifiable.
 - (c) *Traditional farmers' varieties* must be identifiable.
- (2) A variety shall be deemed to be new if, at the date of filing of the application for registration, the propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder(s) or farmer(s), for purposes of exploitation of the variety:
 - (a) in the territory of [country] earlier than one year before the filing date of the application, and
 - (b) in other countries earlier than four years or, in the case of trees or of vines, earlier than six years before the filing date of the application.²⁰⁷
- (3) A variety shall be deemed to be distinct if it is clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. Common knowledge may be established *inter alia* by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description.²⁰⁸
- (4) A variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.²⁰⁹
- (5) A variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.²¹⁰
- (6) A plant variety shall be deemed to be identifiable if—
 - (i) it can be distinguished from any other plant grouping by the expression of one characteristic and that characteristic is traceable within individual plants or within and across a group of plants; and
 - (ii) such characteristic can be identified by any person skilled in the relevant art.²¹¹

²⁰⁵ The implications of implementing these programmes under the WTO Agreement on Agriculture were one of the controversial issues discussed at the 2013 Bali WTO Ministerial Conference, which adopted an ‘interim’ solution on the subject. See, e.g., Carlos Correa, ‘Subsidies and food security in WTO: a permanent solution is still pending’ (2014), South Centre.

²⁰⁶ See, e.g., Article 41 of the Indian PPVFR Act.

²⁰⁷ Based on Article 6 of UPOV 1991.

²⁰⁸ See Article 6(a) of UPOV 1978.

²⁰⁹ See Article 8 of UPOV 1991.

²¹⁰ See Article 9 of UPOV 1991.

²¹¹ See Article 14(3)(e) of the Malaysian Protection of New Plant Varieties Act 2004.

As mentioned, a *sui generis* regime may adopt the NDUS requirements or a different set of them. It may also apply different requirements to different categories of varieties, as proposed in this model provision.

a) New uniform varieties

New uniform varieties would be subject to the NDUS requirements.

The *novelty* requirement has become a generally accepted standard for PVP. Under this provision, commercialization or other disposal of a variety (even without commercial intent) would destroy novelty. The proposed model provision exempts ‘traditional farmers’ varieties’ from compliance with this requirement, as this category is suggested to cover extant (existing) varieties which may have been cultivated and conserved by farmers for periods longer than those admissible under the standard of novelty as defined.

The requirement of *distinctness*, first introduced by the US Plant Patent Act of 1930,²¹² aims to ensure that a variety receives protection when it may be distinguished from the varieties that are in the ‘common knowledge’. The distinction may be based, e.g., on quantitative differences (for instance, plant or seed size), colour, yield or disease resistance. Some PVP laws only require the presence of one or more characteristics that clearly distinguish the variety, without qualifying how significant the differences should be, thereby applying a low threshold for protection. In line with UPOV1961/1978 and the legislation that implemented it, that requirement may be qualified by the *importance* of the characteristics that make a new variety distinct from those which are of common knowledge. If this approach were followed, the registration of a new variety may be made conditional upon the description of at least one major trait or property that distinguishes it from those in the common knowledge, thereby promoting a certain level of innovation in plant breeding and excluding from protection varieties that incorporate merely ‘cosmetic’ changes to existing varieties.

Distinctness is normally assessed on the basis of phenotypic characteristics, but nothing excludes the use of genotypic indicators. One problem to be addressed, however, is that

distinctness assessments are becoming even more subtle as reference collections become larger and as marketplace pressures drive breeders towards incorporating very similar traits in phenotypically similar plants that may be genotypically quite different.²¹³

Commercial varieties are bred with the deliberate aim of obtaining a high degree of *uniformity* in order to respond to certain market demands and/or to comply with the seed certification or PVP requirements.

Stability, which is a key condition under the UPOV regime, means that the plant variety obtained in the course of various cycles of planting continues to produce plants with the same characteristics obtainable with the original propagating material. Generally, when uniformity is established, the stability requirement is deemed to be met as well.²¹⁴ Like in the case of uniformity, stability may be measured differently according to the adopted criteria. A certain level of variability may be allowed (or required) on the population level, for instance by testing the presence of some important traits (e.g., yield) through several generations.²¹⁵

b) New farmer and other heterogeneous varieties

The NDUS requirements are unsuitable to farmer and other heterogeneous varieties. The main reason is that farmers’ breeding practices generally do not aim at ensuring uniformity and stability. Farmers’ varieties normally involve a diversity of genotypes, and are less uniform and stable than commercial varieties. Small-scale farmers normally do not seek to increase uniformity through selection, as this would pose a high risk;

²¹² Janis and Kesan, *op. cit.*, 741.

²¹³ See Janis and Smith, *op. cit.*, 27.

²¹⁴ *Id.*

²¹⁵ *Id.*

variations within one single farmer's variety may be important for responding to particular growing conditions, biological or abiotic stresses.²¹⁶

Farmers' practices are crucial for the conservation of diversity in the fields. This is essential for a sustainable and resilient agriculture and for food security, particularly given the challenges of adapting to climate change. As a result of the different objectives of commercial and farmers' breeding, the outcomes of the latter fall outside the UPOV type of protection, which focuses instead on responding to certain market demands.

The proposed model provision suggests the application of the requirements of novelty and distinctness to new farmer and other heterogeneous varieties, as defined above, but replacing the uniformity and stability requirements with 'identifiability'.

The concept of *identifiability* can be understood as requiring that each generation of a plant variety be identifiable as the same distinct plant variety, without necessarily being uniform in all of its characteristics.²¹⁷ It has been adopted by the Malaysian *sui generis* regime in relation to a plant variety that 'is bred, or discovered and developed by a farmer, local community or indigenous people' (Section 14(2)); and compliance with the 'identifiability' requirement would require demonstrating that there is a group of plants that perform in a certain way.²¹⁸

The adoption of the identifiability requirement (along with novelty and distinctness) was one of the options recommended by the Crucible Group²¹⁹ to overcome the problem posed by the lack of uniformity of farmers' varieties. The Group noted that

[t]his element replaces the relatively strict requirements of uniformity and stability with the looser condition of 'distinctness and identifiability' (DI) ... [D]espite not satisfying the UPOV standards, the criterion of identifiability may well satisfy TRIPs [sic] Article 27.3(b), which includes no obligation on WTO member countries to follow the UPOV model or to become members of UPOV.²²⁰

The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (OAU Model Law)²²¹ also proposed to grant protection to 'a variety with specific attributes identified by a community' (Article 25(2)).

The same requirements for protection would apply in relation to breeders' varieties developed without having uniformity/stability as a target. 'Other heterogeneous varieties' share the characteristic of non-uniformity with new farmers' varieties. The current UPOV model excludes such heterogeneous varieties from protection. The *sui generis* regime proposed here is, in this sense, more encompassing than the UPOV-type regimes, as it aims at promoting biodiversity in the fields.

²¹⁶ See, e.g., R. Salazar, N. Louwaars and B. Visser, 'Protecting Farmers' New Varieties: New Approaches to Rights on Collective Innovations in Plant Genetic Resources' (2007), *World Development*, 35(9), 1523. See also Prabhash Ranjan, 'Recent Developments in India's Plant Variety Protection, Seed Regulation and Linkages with UPOV's Proposed Membership' (2009), *Journal of World Intellectual Property*, 12(3), 219-243. Available at SSRN: <<http://ssrn.com/abstract=1696522>>.

²¹⁷ See Leskien and Flitner, op. cit., 53.

²¹⁸ Personal communication from Lim Li Ching of June 2, 2014 based on an interview with staff of the Malaysian PVP office (on file with the author).

²¹⁹ The Crucible Group was an interdisciplinary gathering of experts who included grassroots organizations working with small-scale or subsistence farmers, trade diplomats, agricultural research scientists, science managers, intellectual property specialists, and agricultural policy analysts from both developed and developing countries. The Group met for the first time in 1993 to examine questions of genetic resources control and management. See, e.g., *Seeding Solutions: the Crucible projects* (2000), IDRC, available at <http://idl-bnc.idrc.ca/dspace/bitstream/10625/29938/1/117465.pdf>.

²²⁰ Crucible Group II, op. cit., 148.

²²¹ African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources <<http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf>>.

c) Traditional farmers' varieties

The requirement of identifiability would also be applicable in relation to traditional farmers' varieties, which are not new. It would be impossible to apply the criterion of distinctness, since such varieties are in use and part of the common knowledge.

Since it is often difficult or impossible to establish the community that developed a traditional variety, the regime proposed here suggests the creation of a Seed Fund to collect remuneration in cases of commercial use of such varieties.

In addition to the income that could be generated by collecting this remuneration, it is proposed that a mandatory contribution to the Seed Fund be made whenever a new uniform variety is registered. Income from the Seed Fund may be used to make benefit-sharing payments where a new farmers' variety or traditional farmers' variety as defined by this law has been used as a donor of traits/genes in the development of the registered new uniform plant variety (see the section on 'Benefit-sharing contribution' below).

4.3 Scope of protection

- (1) The protection conferred under this law to new uniform plant varieties shall be granted to at least five genera or species, within one year of its entry into force, 10 within three years, 18 within six years and 24 within eight years. The protection may be limited to varieties with a particular manner of reproduction or multiplication, or certain end-use within a particular genus or species. The competent authority may, taking account of special economic or ecological conditions or of special difficulties in granting protection, decide to reduce the minimum numbers or to extend the periods referred to in this paragraph, or to do both.²²²
- (2) A new uniform plant variety, or new farmer and other heterogeneous variety that has merely been discovered is not protectable.
- (3) The rights conferred under this law in relation to new farmer and other heterogeneous varieties and traditional farmers' varieties shall apply to all genera or species.

Paragraph (1) of this provision draws from Article 2(2) and Article 4(3), (4) and (5) of UPOV 1978. As noted in Chapter 3, UPOV 1978 is flexible in relation to the scope of the protected varieties, aiming at a *progressive* extension of the protection, but with limited obligations on contracting parties, including the possibility to reduce the scope of protection where special economic, ecological conditions or difficulties prevail. However, countries could opt for a narrower scope of protection than that suggested above.

One possibility offered by the proposed provision – admitted also by UPOV 1978 – is to limit the varieties protected *within* a certain genus or species, thereby allowing for a differentiation in treatment, for instance, based on whether the end-use of the variety is food or non-food.

One important question is whether limitation of the protection to a certain number of plant varieties would be, in the case of countries subject to the TRIPS Agreement, compatible with the obligation set out by Article 27.3(b) of the Agreement. While the absence of a specific reference to this issue may be interpreted as indicating that protection for all plant varieties is required by the Agreement,²²³ it is common practice for national PVP laws to limit protection to a list of genera and species.²²⁴ No member has been challenged under the WTO rules on this ground. In India, for instance, the government is bound to notify through the

²²² Based on Articles 4 and 2(2) of UPOV 1978.

²²³ See, e.g., Helfer, *op. cit.*, 56.

²²⁴ See, e.g., UPOV, 'List of the Taxa Protected by the Members of the Union' (2013), C/47/6, document prepared by the Office of the Union.

Official Gazette the genera or species for the purpose of registration of varieties (other than extant varieties and farmers' varieties) and may delete any genera or species in the public interest.²²⁵ Notably, UPOV 1978, which is in force in many countries (and was in force in even more countries when the TRIPS Agreement was adopted), does not require protection for all genera/species.

In the debates around the review of Article 27.3(b) different views were expressed on this issue:

In regard to the subject-matter that should be protected, the view has been expressed that such subject matter should be clearly defined and for a *sui generis* system to be considered effective, protection should apply to all plant varieties throughout the plant kingdom. It has been pointed out that, unlike the English and French versions of the text of the TRIPS Agreement, the Spanish version, which is as authentic as the English and French versions, makes it clear that all plant varieties are to be protected. In response, the point has been made that Article 27.3(b) only speaks of a *sui generis* system without providing specific details as to the plant varieties that should be protected. Further, it has been pointed out that some existing *sui generis* systems, such as in the UPOV, which appear to be considered effective models given their long-standing use, do not require protection of the entire plant kingdom.²²⁶

The opinions reflected above point to a major divergence between developed²²⁷ and developing countries²²⁸ on this issue. However, the UPOV 1978 regime as well as the states' practices seem to support the possibility of limiting protection of new uniform varieties to certain genera/species. This would also be in line with the rationale of PVP, which only makes sense in a particular country for certain crops. As stated in a report produced by the UPOV Secretariat:

In an effective system of PVP the development of new varieties of plants will be encouraged where there is commercial viability, but in cases where there is no existing, or potential, commercial market for varieties, the presence of a PVP system should not be expected to encourage the development of new varieties.²²⁹

Further, the law can make it clear – as proposed in paragraph (2) – that merely discovered varieties, such as mutants, are not protectable. There is no sound justification for granting PVP over materials that are simply found, and on which no further breeding or only a simple development (homogenization and stabilization of a variety) has taken place.

Finally, paragraph (3) clarifies that in the case of varieties that are non-uniform (for the category of new farmer and other heterogeneous varieties as well as traditional farmers' varieties), the coverage includes all genera/species. The reason for this differentiation in treatment is that the protection for such varieties is essentially defensive, that is, its purpose is to prevent misappropriation. The granted protection would be based on a remuneration right only; no exclusive rights could be exercised in respect of such varieties.

4.4 Exclusions from protection

The protection of a variety under this law shall be refused in cases where the prevention of the commercial exploitation of such variety is necessary to protect the public order or public morality or human, animal and plant life and health or to avoid a serious prejudice to the farming system or the environment,²³⁰ including when a variety may have harmful effects on biodiversity or food security.

²²⁵ See Article 29(2) and (4) of the PPVFR Act.

²²⁶ WTO, 'Review of the Provisions of Article 27.3(b). Summary of Issues Raised and Points Made', Note by the Secretariat, IP/C/W/369/Rev.1, March 9, 2006, 17.

²²⁷ See European Communities, IP/C/W/383, para. 77.

²²⁸ See the submissions by Uruguay, IP/C/M/28, para. 132; Peru, IP/C/M/32, para. 128; India, IP/C/M/29, para. 162; and Thailand, IP/C/M/25, para. 78.

²²⁹ UPOV, 'UPOV Report on the Impact of Plant Variety Protection' (2005), 11, available at http://www.upov.int/export/sites/upov/about/en/pdf/353_upov_report.pdf.

²³⁰ See Article 27.2 of the TRIPS Agreement and Article 29 of the Indian PPVFR Act.

A *sui generis* regime may provide for certain exclusions from the scope of protection. Several countries have similar exclusions in their *sui generis* legislation (e.g., Zambia,²³¹ India,²³² Zimbabwe,²³³ Indonesia²³⁴).

Such exclusions may be important to protect farming systems or the environment, for instance, when the diffusion of a particular variety (which would be otherwise protectable) would have detrimental effects. One example is provided by Article 29(3) of the Indian PPVFR Act (concerning ‘Exclusion of certain varieties’) in relation to the so-called ‘genetic use restriction technology’ or ‘terminator gene’ which prevents germination of saved seeds.²³⁵

The model provision spells out various reasons that may be invoked by the competent authority to refuse the registration of a plant variety. Although seed laws (that is, the laws that regulate the production and commercialization of seeds) may contain similar prohibitions, the coherence of the legal system will be enhanced if the competent authority is empowered to refuse the grant of PVP rights in the first place.

4.5 Registration

- (1) In order to obtain the protection established by this law, the new uniform plant variety, the new farmer and other heterogeneous variety must be registered [in accordance with the applicable regulations].
- (2) An application for registration of a variety shall include:
 - (a) the pedigree information and associated passport data, as available to the applicant, on the lines from which the variety has been derived, along with all such information available to the applicant relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety;²³⁶
 - (b) evidence, as required by the competent authority, that the genetic material or parental material used for breeding, evolving or developing the variety has been lawfully acquired²³⁷ and that, where appropriate, the applicant has complied with prior informed consent and benefit-sharing requirements;
 - (c) samples, as determined by the regulations, of the variety. The samples will be conserved by [the competent authority] during the term of protection and thereafter. Upon request, any interested party may at any time obtain access to the deposited samples.
- (3) The information and evidence submitted to comply with paragraphs (2)(a) and (b) shall be made publicly accessible by the competent authority.
- (4) An application shall not be processed if the required information and samples are not supplied.

²³¹ Section 29(7) of the Zambian Plant Breeder’s Rights Act 2007.

²³² Article 29 of the Indian PPVFR Act.

²³³ Section 10(d) of the Zimbabwean Plant Breeders Rights Act, Chapter 18:16.

²³⁴ See also Article 4 of the Indonesian Plant Variety Protection law No. 29 of 2000: ‘Varieties that cannot be given Plant Variety Protection are those that are used for purposes which conflict with prevailing laws, social order, ethics/morality, religious norms, health and the conservation of the environment.’

²³⁵ In 2000, the fifth meeting of the Conference of the Parties (COP 5) to the CBD recommended a *de facto* moratorium on field-testing and commercial sale of terminator seeds; the moratorium was reaffirmed and the language strengthened in March 2006 at COP 8.

²³⁶ See Article 18(1)(e) of the Indian PPVFR Act.

²³⁷ The proposed model provision is also aimed at covering cases where materials have been obtained from the wild, and not only where they have been acquired from a farmer, community or an institution different from the applicant.

The protection conferred to new uniform varieties, new farmer and other heterogeneous varieties is made contingent on the registration of the variety, in accordance with regulations that should be enacted to that effect, taking into account the particular institutional setting and procedures applicable in each country. Although farmers may find it difficult to comply with registration procedures, it does not seem viable to establish remuneration rights for specific farmers or farming communities (as proposed below) in the absence of a registration system. The same logic applies to requiring registration of new heterogeneous varieties. Such a registration system may also provide some legal certainty to third parties regarding their obligations. The role of NGOs in assisting the farmers to register their varieties and assert their rights may be crucial for the operation of a retributive system. Governments should adopt simple and affordable procedures,²³⁸ and assist farmers in complying with them. For example, India charges no fees for the registration of farmers' varieties.²³⁹

Registration is not suggested with regard to traditional farmers' varieties as it would be impracticable to require the registration of all such varieties. In any case, NGO and governmental support will be indispensable to realizing rights in relation to traditional farmers' varieties.

Sui generis regimes may include obligations on applicants or right holders that are not required under UPOV-type laws. Although the disclosure obligation (see Chapter 2) has mainly been discussed in the context of patent law, PVP laws should equally implement it,²⁴⁰ *mutatis mutandis*, to monitor and enhance transparency with regard to utilization of plant genetic resources and if misappropriation of genetic resources is to be dealt with or avoided.

Thus, in India, a breeder or other person making an application for registration of any variety must disclose the passport data of the parental lines from which the variety is derived, the contribution of any farmer/ community in developing the variety (Article 18(1)(e) of the PPVFR Act) as well as information regarding the use of genetic material conserved by any tribal or rural families in the breeding or development of such a variety (Article 40(1)).²⁴¹ In Malaysia, applications for the registration of a new variety need to provide information relating to the source of the genetic material, and should be 'accompanied with the prior written consent of the authority representing the local community or the indigenous people in cases where the plant variety is developed from traditional varieties', and need to be 'supported by documents relating to the compliance of any law regulating access to genetic or biological resources' (Section 12(1)(e), (f), (g) of the Protection of New Plant Varieties Act). The Thai PVP Act makes the registration of a variety conditional upon the disclosure of the origin of either the new plant variety or the genetic materials used in the breeding of that variety (Section 19(3)). In Egypt, the breeder is obliged to disclose the genetic resource from which the new plant variety has been derived; prove that it was obtained lawfully consistent with the Egyptian law; and disclose traditional knowledge and experience belonging to local communities upon which the breeder relied to derive the new plant variety.²⁴²

The proposed model provision stipulates an obligation to disclose information on the source of a plant variety for which protection is sought as well as to provide evidence that the material used for breeding has been lawfully obtained. Where appropriate, this would require the applicant to show that the prior informed consent of the traditional farmers/communities who have developed/conserved the materials has been obtained and evidence of compliance with benefit-sharing requirements. The disclosure-of-origin obligation would facilitate identification of farmers and farming communities that should be entitled to benefit-sharing payments by the Seed Fund (see section below on 'Benefit-sharing contribution').

²³⁸ For instance, no legal assistance or representation should be required for submitting an application.

²³⁹ See http://plantauthority.gov.in/pdf/FAQ_New.pdf.

²⁴⁰ As noted in Chapter 2, this requirement has been deemed incompatible with the UPOV Convention.

²⁴¹ The Indian PPVFR Act requires information about the origin of the variety including geographical source and farmer/village/community/institution/organization (PPVFR Regulations, Form 1, Part 10(b)).

²⁴² See Mohamed Salem Abou El Farag Balat, 'Intellectual Property Rights and Plant Varieties Protection in Egypt: The New Sui Generis Regime, Public Interest and the TRIPs Agreement' (2006), *Journal of International Biotechnology Law*, 3(3) <<http://www.degruyter.com/view/j/jibl.2006.3.issue-3/jibl.2006.015/jibl.2006.015.xml>>, 121.

Plant varieties, even if subject to specific rights under a *sui generis* regime, constitute the pool on which breeders and farmers rely in order to improve yields, adapt to changing conditions or attain other targets. Thus the model provision requires the submission, with the application, of samples of the variety and their conservation by the competent authority even after the protection has expired, so as to ensure their continuous availability for multiplication or further research and breeding.

The information and samples submitted with an application for registration should be publicly available, as proposed in the model provision above.²⁴³

It is important to note that the public availability of information and samples through the operation of seed certification and marketing laws is no substitute for a similar solution under PVP regimes, since varieties registered under the latter may not have been submitted for marketing approval under the applicable seeds legislation. In addition, the information required by seed certification and marketing laws may not include elements required under the PVP legislation, for instance, in relation to the source of the variety and traditional knowledge relied upon by the applicant. Moreover, the reception of PVP applications by the competent authority is an important checkpoint for purposes of verifying compliance with the CBD and the Nagoya Protocol.

4.6 Opposition

- (1) Applications for registration of new uniform varieties, new farmer and other heterogeneous varieties shall be published in accordance with the regulations. Any person may, before a decision to grant protection has been made by the authority, file an opposition to such grant on one or any combination of the following grounds:
 - (a) that the person opposing the application is entitled to the breeder's right as against the applicant;
 - (b) that the application does not comply with the requirements of this law;
 - (c) that the variety for which an application has been filed is excluded from protection; or
 - (d) that the commercialization of the variety will be contrary to the public interest.²⁴⁴
- (2) An opposition may also be filed, on the grounds provided for in paragraph (1), within 12 months from the date of publication of the grant of protection to a new uniform variety or a new farmer and other heterogeneous variety.
- (3) The person opposing the application or the grant of protection will have the right to submit evidence, be informed of the arguments presented by the applicant or the right holder in response to the opposition, and be heard by the competent authority before a decision on the opposition is made.

The proposed provision incorporates pre-grant (paragraph (1)) and post-grant (paragraph (2)) oppositions. Pre- and post-grant oppositions may provide the competent authority with important information to make the right decisions regarding the protection of new plant varieties. This may avoid the grant of unwarranted rights and the need for third parties to litigate in courts for a long time and at a high cost. Until a conferred right is revoked, it is presumed to be valid and may block legitimate competition. Therefore, rather than correcting wrong decisions, the best policy is to ensure the highest possible quality of examination of filed applications. The right to submit an opposition would be open to any person, including individual farmers or farmers' organizations, non-governmental organizations, research institutions and government agencies.

²⁴³ In this regard, recent attempts to introduce confidentiality in PVP regimes in relation to information and samples submitted to the competent authorities are a matter of concern. See, e.g., Article 15(2) of the draft ARIPO Legal Framework for the Protection of New Varieties of Plants; UPOV, 'Matters Raised by the International Seed Federation (ISF)', document prepared by the Office of the Union, CAJ/69/10, February 27, 2014, available at http://www.upov.int/edocs/mdocs/upov/en/caj_69/caj_69_10.pdf.

²⁴⁴ See Article 21(3) of the Indian PPVFR Act.

4.7 Rights conferred

The following rights shall be conferred under this law:

(1) *New uniform plant varieties*

The following acts shall require the authorization of the right holder in respect of the propagating material of a uniform plant variety that has been registered in accordance with the established procedures:

- (i) the production for purposes of commercial marketing;
- (ii) the offering for sale;
- (iii) the marketing.²⁴⁵

(2) *New farmer and other heterogeneous varieties*

- (a) Any person shall be free to undertake the acts referred to in paragraph (1)(i)-(iii) in respect of propagating material of a registered new farmer and other heterogeneous variety, provided that remuneration shall be paid to the farmer, farmers' community or breeder who has registered the variety in the case of marketing of such material.
- (b) The remuneration stipulated in this article shall be a percentage of the net sales price or other remuneration, such as licensing fees, resulting from the commercial exploitation of the propagating material. The applicable percentage shall be determined by the competent authority taking into account the relevant genera/species and nature of use in accordance with the regulations.
- (c) Where the registered variety is a new farmer variety as defined by this law the rights may be exercised by individual farmers or the communities where such varieties have been developed and evolved, provided that where the variety was developed within a community the rights can only be exercised by the community. Members of the community that has registered a new farmer variety shall be exempted from payment of the established remuneration.

(3) *Traditional farmers' varieties*

- (a) Where a third party undertakes acts referred to in paragraph (1)(iii) in respect of propagating material of a traditional farmer variety, remuneration shall be paid to the Seed Fund established by this law.
- (b) The remuneration shall be determined in accordance with paragraph (2)(b) above, subject to the exceptions determined by the regulations, such as with regard to farming communities and persons carrying out activities with the primary aim of promoting the revival and/or use of traditional farmer varieties.
- (c) The income of the Seed Fund shall be utilized to support the conservation and sustainable use of plant genetic resources, particularly on-farm conservation and community seed banks.
- (d) Notwithstanding paragraphs (a) and (b), where it is identified that the traditional farmer variety is from a particular community or communities, the Seed Fund will take all reasonable measures to provide for the remuneration received to be equitably distributed within such community or communities.
- (e) Payment of the required remuneration shall not be conditional upon the registration of the traditional farmer variety.
- (f) Without prejudice to the right of farmers or farmers' communities to seek payment of the remuneration established in paragraph (a), the Seed Fund shall be competent to request payment of the remuneration, including through administrative or judicial proceedings.

²⁴⁵ Based on Article 5 of UPOV 1978.

A *sui generis* regime of PVP can differentiate the rights granted according to the category of plant varieties protected and the policy objectives pursued. As noted in Chapter 3, the *sui generis* legislations of several countries introduce some distinctions in this regard, by providing for exclusive rights and other forms of remuneration or benefit sharing depending on the characteristics of the variety involved.

The proposed model provision limits the grant of exclusive rights to those cases where the NDUS requirements are met, that is, where a new uniform plant variety (as defined above) has been registered. In these cases, a set of exclusive rights as provided for under Article 5 of UPOV 1978 are suggested. This means that to undertake acts mentioned in paragraph (1), prior authorization of the right holder would be required. An alternative to the suggested model provision is to introduce a distinction between food and non-food crops (e.g., export crops like flowers), for instance, by providing a set of more comprehensive rights for the latter (based on UPOV 1991). However, this option may run against the difficulty of determining which set of rights would be applicable in cases of dual-use crops (e.g., sugar cane that may be processed for food or ethanol production).

In the case of the category of new farmer and other heterogeneous varieties that are protected under the standard of identifiability (as a replacement for uniformity and stability), it seems logical to provide for less extensive rights²⁴⁶ in order not to prevent the diffusion of such varieties, while ensuring recognition and remuneration in case of commercialization by third parties.

The proposed model provision (paragraph (2)) suggests the adoption of a remuneration right. This means that in the case of registered new farmer and other heterogeneous varieties the commercial exploitation of the propagating material of such varieties would not require the prior authorization of the right holder. However, remuneration would need to be paid by third parties (with some exceptions – addressed below) commercially exploiting them. Given the diverging circumstances that may arise, the determination of the amount of remuneration is left to the competent authority. Such amount may vary in accordance with the genera/species, with the importance for food security of the new plant variety and with the nature of use (e.g., purpose of use (profit-based or otherwise), whether intended for local or foreign markets etc.).

Paragraph (2)(c) of the proposed model provision clarifies that the rights attached to new farmers' varieties (as defined above under the section dealing with 'Categories of protected varieties') may be claimed by individual farmers or the communities where such varieties have been developed and evolved. However, where a variety is developed in a community context (which is often the case), the rights provided for should be exercised by the community. Individual farmers should not enjoy what would in fact be 'community rights'.²⁴⁷ In any case, the members of a community that has registered a new farmer variety would be exempted from payment of the remuneration.

In the case of traditional farmers' varieties, the proposed regime would not prevent the commercial exploitation of the propagating material of such varieties by third parties, but would create an obligation, in such a case, to pay remuneration to a fund (the Seed Fund) which would have legal powers to enforce that obligation. This is to allow the implementation of benefit sharing on equity grounds without necessarily requiring the identification of the farmers' communities that contributed to the development of a particular variety.

As mentioned, one of the key objectives is to address misappropriation, that is, third parties (e.g., companies) profiting from the commercialization of traditional farmers' varieties without sharing such benefits with the farming communities. However, one concern is that payment of remuneration may discourage commercialization of traditional varieties.

²⁴⁶ See, e.g., Genetic Resources Policy Initiative, 'Exploring Legal Definitions of Farmers' Varieties in Strategies to Promote Farmers' Rights' (2006), 26-28 October.

²⁴⁷ Issues of legal standing of communities would need to be addressed at the national level, in accordance with the applicable law.

To address this concern, paragraph (3)(b) makes clear (by referring to paragraph (2)(b)) that remuneration should be determined taking into account the relevant genera/species and nature of use (discussed above). Paragraph (3)(b) also allows the competent authority to exempt relevant persons or entities from payment of remuneration, such as specific farmers or farming communities and any person or entity carrying out activities with the primary aim of promoting the revival and/or use of traditional farmers' varieties.

In addition, remuneration from the commercialization of traditional farmers' varieties is to be collected by a Seed Fund, which in turn should support the conservation and sustainable use of plant genetic resources such as food crops of special interest to the country and farming communities when particular farmers or farmers' communities can be identified as the source of a particular variety. The proposed provision also suggests that support be given, in particular, to on-farm conservation and community seed banks. It may be the case that the Seed Fund, motivated by the possibility of generating revenue, engages proactively to promote the commercialization of traditional farmers' varieties.

As a final point, it is important to note that for the categories of new farmer and other heterogeneous varieties and traditional farmers' varieties, remuneration is triggered only in situations involving acts in paragraph (1)(iii). Other acts such as saving and exchanging seeds/propagating material would not require payment of remuneration. Additionally, small-scale farmers are totally exempt from payment of any remuneration even in the case of commercializing propagating material of a new farmer and other heterogeneous variety or traditional farmers' variety (see section below on 'Acts not covered by conferred rights and exceptions').

4.8 Benefit-sharing contribution

- (1) A contribution to the Seed Fund, determined in accordance with the regulations, shall be paid upon issuance by the competent authority of a title on a new uniform plant variety.
- (2) The income from the Seed Fund shall be utilized to:
 - (a) support the conservation and sustainable use of plant varieties, particularly on-farm conservation and community seed banks; and
 - (b) pay benefit sharing, as determined by the competent authority, to farmers or the communities where it is identified that their new farmers' variety or traditional farmers' variety as defined by this law has been used as a donor of traits/genes in the development of a new uniform plant variety registered under this law.

In determining the amount of benefit sharing, the competent authority may take into account the extent and nature of the use of the new farmers' variety or traditional farmers' variety in the development of the new uniform plant variety, as well as the commercial utility and demand in the market for the new uniform plant variety.²⁴⁸

Paragraph (1) proposes a general benefit-sharing mechanism based on payment of a contribution to the Seed Fund whenever a PVP title is issued for a new uniform plant variety. This contribution would compensate the past conservation and improvement of plant varieties, since a new uniform plant variety can only be obtained through the improvement of existing varieties. This model provision requires payment of contribution only from the right holders of new uniform plant varieties, as, unlike with other categories of varieties protected under the model provisions, exclusive rights are granted to the right holder.

The proposed contribution should be set out in the regulations and could vary according to the genera/species, the intended use (food or non-food) of the variety, and other criteria determined by national regulations. It could be calculated on the basis of the net selling price of the propagating material of the protected uniform plant variety or based on a fixed amount depending on the range of sales for different crops.

²⁴⁸ Article 26(5) of the Indian PPVFR Act.

The proposed benefit-sharing mechanism is based on a simple collection of contributions from the registration of new uniform plant varieties. While this could be a significant advantage, the calculation of the amount to be paid (based, e.g., on anticipated sales, nationality and size of the applicant, etc.) may also be complex. Total or partial exemptions could be provided for small domestic breeding companies, universities and research institutes and individuals. Some governments willing to promote the development and registration of new uniform plant varieties may consider that such a contribution would discourage those activities, but this will obviously be dependent on the level of the required payment and the way it is implemented.

Paragraph (2) makes clear that the Seed Fund should be used to support the conservation and sustainable use of plant genetic resources, particularly on-farm conservation and community seed banks. The income should also be utilized to pay benefit sharing to farmers and communities where it is established that their varieties have been utilized in the development of the registered new uniform plant varieties. In this regard, disclosure obligations (discussed above under the section on ‘Registration’) may play an important role.

In addition, similar benefit-sharing requirements could also be considered in the context of other relevant legislation (such as the patent law) when patents or other technical restrictions are imposed to restrict multiplication or further breeding of a variety.

4.9 Acts not covered by conferred rights and exceptions

- (1) The rights conferred by the protection of a new uniform plant variety do not extend to the following acts:
 - (a) acts done privately or for non-commercial purposes;
 - (b) acts done for experimental purposes;
 - (c) acts done for the purpose of breeding other varieties and for the use and marketing of such other varieties, unless the repeated use of the protected new uniform plant variety is necessary for the commercial production of another variety;²⁴⁹
 - (d) use by farmers for propagating purposes or for exchange with other farmers for propagating purposes, of seeds or other propagating material which they have obtained by planting the protected variety or by exchange with other farmers, provided the propagation does not extend to production for purposes of commercial marketing.

[OPTIONAL PROVISION (in addition to paragraph (d))]: In the case of the crops specified in the regulations (e.g., flowers, ornamentals), the right holder may subject use for propagating purposes to payment of an equitable remuneration calculated as a percentage of the net sales price of the propagating material, except where the use is by a small-scale farmer. Failing an agreement between the right holder and the user of the variety on the amount or form of remuneration, these will be determined by the competent authority.

- (2) Additionally, the rights conferred by the protection of a new uniform plant variety shall not extend to the sale by small-scale farmers of the seeds or other propagating material that they have obtained by planting the protected variety, provided that the farmer shall not be entitled to sell seed or other propagating material of the protected variety with the trademark or trade name of the right holder.²⁵⁰
- (3) In the case of new farmer and other heterogeneous varieties and traditional farmers’ varieties, the obligation to pay remuneration shall not apply to small-scale farmers as defined by this law.
- (4) Any contract or agreement that restricts the acts or annuls the exceptions spelt out in this provision shall be deemed to be null and void.²⁵¹

²⁴⁹ See Article 5(3) of UPOV 1978.

²⁵⁰ See Article 39(1) of the Indian PPVFR Act.

²⁵¹ Based on Article 8 of the Swiss Federal Plant Variety Protection Act.

Paragraph (1) clarifies that the scope of protection conferred to new uniform plant varieties does not extend to acts that do not imply marketing of protected propagating material, including saving and exchanging seeds. This aims at preserving traditional practices of farmers that, as mentioned, are critical for their livelihood as well as vital for national food security, local economies, the conservation of agricultural biodiversity and sustainable agricultural production.²⁵²

A *sui generis* regime may provide for exceptions different from those admitted under UPOV-compliant laws. Paragraph (1) of the proposed model provision contains certain elements (e.g., sub-paragraphs (a) and (b) that follow (with some changes) Article 15 of UPOV 1991, while paragraph (1)(c) which concerns the breeder's exemption is modelled on UPOV 1978 (Article 5). Paragraph (1) also introduces elements absent in UPOV 1991.

Paragraph (1)(d) allows farmers planting the protected new uniform plant variety to use and exchange the seeds/propagating material they have obtained from the protected variety, for propagating purposes without authorization of the right holder, except where the production is for purposes of commercial marketing of the propagating material.

The model provision also suggests an option that could be added to paragraph 1(d), to distinguish between different types of crops in relation to the exception allowing the saving, re-use and exchange of seeds/propagating material. Thus, the right of farmers to use seeds or other propagating material²⁵³ for propagating purposes may be subject in some specified cases (for instance, in the case of flowers for export) to payment of remuneration to the right holder. This optional provision would not apply to small-scale farmers.

Paragraph (2) incorporates a specific exception for small-scale farmers, entitling such farmers to sell the seeds or other propagating material obtained by planting a protected new uniform variety, provided that the brand of the right holder is not used.²⁵⁴ This provision would not prevent small farmers from using the variety denomination. This exception is in addition to paragraph (1)(d), which allows small-scale farmers to use and exchange the seeds/propagating material of the protected new uniform variety without payment of any remuneration.

The importance of small-scale farmers and policies supporting such farmers is widely acknowledged. The UN Environment Programme (UNEP), the International Fund for Agricultural Development (IFAD), FAO and the UN Special Rapporteur on the right to food all estimate that small farmers produce up to 80% of the food in non-industrialized countries.²⁵⁵ In a recent paper on small farmers and agroecology, the UN Special Rapporteur on the right to food concluded that global food production could be doubled within a decade if the right policies towards small farmers and traditional farming were implemented.²⁵⁶ Thus, preserving the traditional practices of small farmers (saving, exchanging and selling seeds/propagating material) is an important policy measure that needs to be implemented nationally.

Other farmers planting a protected new uniform plant variety are allowed to freely save and exchange seeds/propagating material (but not to sell). If the proposed optional provision of paragraph (1)(e) is adopted, for the crops specified, these other farmers may need to pay remuneration to the right holder for saving and exchanging seeds/propagating material.

²⁵² See <http://www.fao.org/resources/infographics/infographics-details/en/c/270462/>.

²⁵³ It is worth noting that paragraph (1)(c) just clarifies that the acts of saving and exchanging propagating materials are not subject to the breeder's right since the scope of the rights conferred (in line with UPOV 1978) only covers commercial acts.

²⁵⁴ See, e.g., Article 39(1)(iv) of the Indian PPVFR Act. See also Article 28 of the Ethiopian Plant Breeders' Right Proclamation No. 481/2006; and Section 49 of the Philippine Plant Variety Protection Act of 2002 (Republic Act No. 9168).

²⁵⁵ See, for example, Kanayo F. Nwanze, IFAD, 'Small farmers can feed the world'; UNEP, 'Small farmers report'; FAO, 'Women and rural employment fighting poverty by redefining gender roles' (Policy Brief 5).

²⁵⁶ Olivier De Schutter, 'Agroecology and the Right to Food', report presented at the 16th session of the United Nations Human Rights Council (A/HRC/16/49), March 8, 2011 <<http://tinyurl.com/nmxyf87>>.

An exception is also spelt out for the other categories of varieties for which no exclusive rights are proposed: small-scale farmers would be exempted from payment of any remuneration in the case of commercialization of the propagating material of these varieties.

An important issue is how to define ‘small-scale farmers’. Each country will have to decide for itself the kind of definition which will best suit its agricultural conditions and administrative structures. National laws and international organizations have defined ‘small-scale farmers’ in a variety of ways. Farm size is a common measure, with some sources²⁵⁷ defining small farms as those with less than 2 hectares of cropland.²⁵⁸ For instance, recent analysis by GRAIN estimates that globally about 90% of farms are small with an average holding of about 2.2 hectares.²⁵⁹ Another way of defining ‘small-scale farmers’ is by reference to yields. The EU Council Regulation on Community Plant Variety Rights, for example, defines a small farmer in terms of production capacity as someone who does not grow ‘plants on an area bigger than the area which would be needed to produce 92 tonnes of cereals’, or comparable criteria for other crops.²⁶⁰

Yet another option would be to define a small farmer with reference to earnings or income levels.²⁶¹ The licensing agreement of Syngenta on Golden Rice, for example, refers to resource-poor farmers as those earning less than US\$10,000 per year from farming,²⁶² but this may be a high threshold in many contexts.

In order to even out the potentially strong fluctuations in purchasing power over time, reference could instead be made to a relative threshold such as the average household income. This is the approach taken by the draft Ethiopian PBR bill, which defines a smallholder farmer as someone whose total earnings from sales of farm-saved seed do not exceed the average household income.²⁶³ The Zimbabwean PBR law, on its part, refers to farmers who derive at least 80% of their annual gross income from farming (on communal land or resettlement land) as those that are allowed to save, use, exchange and sell farm-saved seed.²⁶⁴

4.10 Farmers’ Rights

In addition to the rights conferred under this law in relation to saving, using, exchanging and selling seeds/propagating material, farmers shall have the right to:

- (1) receive support from the Seed Fund for the conservation and sustainable use of plant genetic resources, in particular for on-farm conservation and community seed banks.
- (2) participate in making decisions on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture, including the determination of the conditions for implementation of the right to remuneration provided for by this law, the allocation of the funds by the Seed Fund, and the implementation of other aspects of this law.

²⁵⁷ See, e.g., World Bank, *Reaching the rural poor: A renewed strategy for rural development* (2003); S.K. Lowder, J. Skoet and S. Singh, ‘What do we really know about the number and distribution of farms and family farms worldwide?’ (2014), background paper for *The State of Food and Agriculture 2014*, ESA Working Paper No. 14-02, FAO.

²⁵⁸ However, the Malaysian PVP law narrowly defines a small-scale farmer as ‘a farmer whose farming operations do not exceed the size of holding as prescribed by the Minister’, and this is gazetted as ‘operations not exceeding 0.2 hectare’ (Gazette – October 20, 2008).

²⁵⁹ See <http://www.grain.org/article/entries/4929-hungry-for-land-small-farmers-feed-the-world-with-less-than-a-quarter-of-all-farmland>.

²⁶⁰ Council Regulation (EC) No. 2100/94, 1994, Article 14; e.g., 185 tons for potatoes, see Commission Regulation (EC) No. 1768/95, 1995 <<http://www.wipo.int/wipolex/en/details.jsp?id=6397>>.

²⁶¹ The Economic Research Service (ERS) of the United States Department of Agriculture, for instance, defined small family farms as those with revenues of less than US\$350,000. See R. Hoppe and J. MacDonald, ‘Updating the ERS Farm Typology’ (2013), EIB-110, US Department of Agriculture, Economic Research Service. See also Lowder et al., *op. cit.*

²⁶² http://www.goldenrice.org/Content1-Who/who4_IP.php

²⁶³ B. De Jonge, ‘Plant Variety Protection in Sub-Saharan Africa: Balancing Commercial and Smallholder Farmers’ Interests’ (2014), *Journal of Politics and Law*, 7(3), 100-111.

²⁶⁴ See, e.g., Zimbabwean Plant Breeders Rights Act (2001), Section 17(3)(d).

As noted above, Farmers' Rights should be understood as encompassing the right to save, use, exchange and sell seeds. The model provisions presented in this chapter attempt to effectively realize this right for different categories of varieties and farmers, particularly small-scale farmers.

The proposed model provisions would also permit the realization of other Farmers' Rights specifically mentioned in Article 9 of the ITPGRFA, particularly the right to equitably participate in the benefits arising from the utilization of farmers' varieties and in making decisions relevant for the implementation of the *sui generis* PVP law.

4.11 Compulsory licences

- (1) Upon request of any person, the competent authority shall grant a compulsory licence in respect of a registered new uniform plant variety for reasons of public interest, particularly when the reasonable requirements of the public for seed or other propagating material of the variety have not been satisfied, a high proportion of the propagating material is being imported, or the seed or other propagating material of the variety is not available to the public at a reasonable price.²⁶⁵
- (2) A compulsory licence shall also be granted when the right holder refuses to license it to a third party on reasonable terms and conditions or engages in anti-competitive practices.²⁶⁶
- (3) The right holder shall receive an equitable remuneration, to be determined by the competent authority, taking into account the reasons for the grant of the compulsory licence, the value of the authorization and the importance of the diffusion of the variety for food security.
- (4) The right holder shall provide the necessary seeds or propagating material to the person to whom a compulsory licence has been issued.
- (5) The right holder shall have the right to appeal any final decision granting a compulsory licence. However, the appeal shall not suspend the execution of the compulsory licence.

The UPOV Convention allows for the restriction of the breeder's right of a protected variety for reasons of public interest.²⁶⁷ National laws may determine on an illustrative basis when the circumstances that may justify a restriction to the breeder's right arise. Compulsory licences aim at allowing third parties to use – against payment of an 'equitable remuneration'²⁶⁸ – a protected uniform variety without the authorization of the right holder. There is ample flexibility to provide for the grounds and conditions for these compulsory licences. Article 31 of the TRIPS Agreement does not apply, as it only deals with patent-related compulsory licences.

The proposed model provision specifies some particular cases where compulsory licences shall be granted, upon request, in line with provisions in the US and Indian laws. It also incorporates circumstances (such as refusal to deal) provided under the Zambian and other national laws.

Importantly, the provision clarifies that an appeal would have no suspensive effects, so as to allow for the immediate execution of the compulsory licence even if the legality, scope or conditions of its grant are challenged by the right holder.

²⁶⁵ See as a reference Article 47(1) of the Indian PPVFR Act; Section 44 of the US PVPA, as quoted in Chapter 3; Article 17 of UPOV 1991; Sections 12(3) and 44 of the Zambian Plant Breeder's Rights Act, 2007; Section 36 of the Malaysian Protection of New Plant Varieties Act 2004.

²⁶⁶ See Article 196(1) of the Egyptian law and Article 175 of the Executive Regulation. See also Section 44(1)(a) and (b) of the Zambian Plant Breeder's Rights Act, 2007.

²⁶⁷ See Article 17(1) of UPOV 1991.

²⁶⁸ See Article 17(2) of UPOV 1991.

Compulsory licences are only proposed for new uniform varieties, since other categories of varieties would not give rise to exclusive rights under the proposed *sui generis* regime.

4.12 Variety denomination

- (1) Every applicant shall assign a single and distinct denomination to a variety in respect of which the applicant is seeking registration. No rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of protection granted under this law.
- (2) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties for certain crops, regions or localities. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the applicant. In particular, it must be different from every denomination which designates an existing variety, including unregistered traditional farmers' varieties, of the same plant species or of a closely related species.
- (3) The denomination of the variety shall be submitted to the competent authority. If it is found that the denomination does not satisfy the requirements of this article, the authority shall refuse to register it and shall require the applicant to propose another denomination within a prescribed period. The denomination shall be registered by the authority at the same time as the variety.
- (4) Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (5), is obliged to use it, the authority shall require the applicant or right holder to submit another denomination for the variety.
- (5) Any person who offers for sale or markets propagating material of a protected variety shall be obliged to use the denomination of that variety, even after the expiration of the protection under this law in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.
- (6) When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable. A denomination assigned to a variety shall not be registered as a trademark under the trademark law.²⁶⁹

Every new uniform plant variety, new farmer and other heterogeneous variety for which protection is sought must have a registered denomination. The model provision above is self-explanatory with regard to the scope of this requirement and its implementation. No registration of a denomination would be required in the case of traditional farmer varieties since rights thereon would accrue, to the extent that the variety is identifiable, without prior registration. However, the competent authority should not allow the use of the denomination of traditional varieties by third parties.

4.13 Duration

- (1) The protection conferred under this law to new uniform plant varieties shall last for 15 years from the date of the registration of the variety. For trees and vines, the said period shall be 18 years from the said date.
- (2) The same terms shall apply in respect of new farmer and other heterogeneous varieties as defined in this law.

²⁶⁹ Based on Article 20 of UPOV 1991 and Article 17 of the Indian PPVFR Act.

The duration established under UPOV 1978 is suggested for new uniform plant varieties, as well as for new farmer and other heterogeneous varieties.

Countries that are not UPOV members can make their own decision on the duration of protection and provide for terms shorter than those suggested above. Importantly, the TRIPS Agreement does not require a minimum term of protection, unlike in the case of patents and other intellectual property rights covered by the Agreement.

Some countries have adopted legislation that extends protection beyond the terms required by UPOV 1991. There is no sound justification for such an extension, which delays the free availability of plant varieties for multiplication. Indeed, the use of genomic techniques and breeding strategies has allowed breeders to significantly shorten the time necessary to breed a new variety.²⁷⁰

4.14 Parallel importation

Subject to compliance with other applicable regulations, a plant variety protected under this law may be imported for marketing in [the country], without the authorization of the right holder, from any country where the plant variety was put on the market by the right holder or by any authorized person.

This provision exploits the flexibility recognized in Article 6 of the TRIPS Agreement in relation to the ‘exhaustion of rights’.²⁷¹ It provides for an international principle of exhaustion of rights, according to which a right holder would not be allowed to prevent the importation of a protected variety that has been commercialized in another country by him or by a person who is authorized to do so, such as under a voluntary or a compulsory licence. This provision may be important, for instance, in situations where the prices of seeds are lower in a foreign country. Importation will normally be subject, however, to other regulations, such as phytosanitary measures and seed laws.

4.15 Infringement

- (1) The judicial authorities shall have the authority to order the payment of damages in case of proven infringement of the rights conferred under this law, including the false use of the denomination of a variety. No criminal sanctions will be applied. Damages shall not be payable or an injunction granted where a protected variety was acquired or used by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of rights conferred under this law.²⁷²
- (2) Judicial authorities may order the infringer to cease in the use of the protected variety unless it is found that the continuous use of the variety will be in the public interest.
- (3) In the case of use of a protected new uniform plant variety by the government, or by third parties authorized by the government, without the authorization of the right holder, the latter shall only be entitled to remuneration²⁷³ taking into account the purpose of the use and the value of the authorization.

²⁷⁰ See, e.g., Janis and Smith, *op. cit.*, 48.

²⁷¹ While the proposed provision deals with the exhaustion of rights in an importing country, Article 16 of UPOV 1991 contains a provision establishing some conditions on exhaustion in an exporting country.

²⁷² See, e.g., Article 41.1 of the TRIPS Agreement and Article 42 of the Indian PPVFR Act.

²⁷³ See Article 41.2 of the TRIPS Agreement.

Infringement of the conferred rights should only give rise to civil remedies. Criminal sanctions are not required under the TRIPS Agreement except in particular cases relating to copyright and trademark infringement.²⁷⁴ Such sanctions are also not justified because the rights conferred are private rights and the losses generated by an eventual infringement can be compensated through monetary payments. In most countries (including the developed countries) no criminal sanctions are provided for in the area of PVP as well as in other areas of intellectual property, such as patents.

Although a permanent injunction would normally be granted when infringement has been found, it should not be issued in cases of innocent infringement or where the refusal of a permanent injunction would be justified in the public interest. The former is especially important to protect innocent farmers who unknowingly become involved in PVP infringements. Remedies should be limited to remuneration in the case of government use of a registered new uniform plant variety.²⁷⁵ This is to ensure that government use (which is presumably done in the public interest) is not affected by an injunction.

4.16 Nullity and revocation

- (1) The right on a variety shall be declared null and void, in accordance with the provisions of the national law, if it is established that
 - (a) the requirements for protection were not effectively complied with at the time the variety was registered;
 - (b) registration has been granted to a person who had no right to register the variety, unless it is transferred to the person who is so entitled.²⁷⁶
- (2) The right on a variety may be revoked:²⁷⁷
 - (a) if, after being requested to do so and within a prescribed period, the right holder does not provide the competent authority with the propagating material capable of producing the variety with its characteristics as defined when the variety was registered, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety;
 - (b) if the right holder has failed to provide the required information or has furnished incorrect information in filing for the registration of a variety, or has failed to pay within the prescribed period such fees as may be payable to keep his rights in force;
 - (c) if the right holder does not commercialize the protected variety in a way sufficient to supply the demand within three years from the date of registration, except in cases of *force majeure* or government act that prevents such commercialization;
 - (d) for public interest reasons such as food security, national security, emergency or circumstances of extreme urgency that justify the cancellation of the right;
 - (e) if [the competent authority] determines, as a result of administrative or judicial procedures, that the right holder has committed abuses of its rights, for example, through practices declared as anti-competitive;
 - (f) if the right holder fails to provide the necessary seeds or propagating material to the person to whom a compulsory licence has been issued.

A PVP title may be nullified if it was granted (registered) in violation of the applicable law, for instance, if one of the requirements of protection (e.g., novelty) was not effectively met. Nullification takes place in cases when the registration was invalid and the cause or causes of invalidity cannot be subsequently cured.

²⁷⁴ Article 61 of the TRIPS Agreement only requires application of criminal procedures and penalties to cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.

²⁷⁵ For an example of a government-use provision, see Article 36(1) of the Brazilian Law 9456 of April 28, 1997.

²⁷⁶ See Article 21 of UPOV 1991.

²⁷⁷ For various causes of cancellation or revocation of the conferred right, see, e.g., Article 10 of UPOV 1978; Article 22 of UPOV 1991; Article 34 of the Indian PPVFR Act; Section 40 of the Zambian Plant Breeders' Act 2007.

Revocation may take place for reasons arising in relation to a validly granted title, for instance, lack of payment of maintenance fees or lack of commercialization of a protected variety.

Intellectual property rights, including those on plant varieties, are not absolute, but must be subordinated to the public interest. While a compulsory licence may be used to address various situations (see above), the granting of such a licence requires individual administrative acts and only benefits the party that applied for and obtained the licence. In some situations, the public interest may justify the termination of the protection altogether.

While the proposed model provision partially follows UPOV 1978 and 1991, it adds a number of hypotheses not permissible under the UPOV Convention for the revocation of rights. Paragraph (2)(b) includes situations where the right holder has furnished incorrect information, including where it failed to properly disclose the origin or intentionally provided wrong information about the source of the variety.

Likewise, in cases where the right holder committed abuses or conducted practices declared as anti-competitive, the competent authority should retain the capacity to cancel the conferred rights.

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CHAPTER 5

The Process of Adoption of a Sui Generis Regime

THIS chapter addresses the obstacles that developing countries may face in designing intellectual property legislation suited to their own conditions and needs, specifically in the area of plant varieties. It discusses some arguments against and in favour of a non-UPOV-type sui generis regime, and makes some general recommendations on actions to be taken when developing a PVP law, in particular what kind of assessments should be undertaken and how the process should be conducted, while ensuring transparency and inclusiveness.

5.1 Unused policy space

As discussed in Chapter 2, the TRIPS Agreement contains a general obligation to protect plant varieties that leaves broad policy space to design legal regimes appropriate to local conditions (e.g., predominance of small-scale agriculture and traditional farming practices) and objectives (e.g., poverty reduction, food security, biodiversity conservation, etc.).²⁷⁸ Some countries have followed the route of experimenting with tailor-made legal regimes for plant varieties. Various factors have influenced the policy options chosen by many developing countries on the matter, as noted by one commentator:

In the area of plant variety protection, many developing countries expressed interest in adopting sui generis approaches. In practice, however, governments were constrained by limited expertise, institutional capacity, and experience in this area. In lieu of devising completely new laws, most countries were persuaded by technical assistance providers to adopt or adapt the ‘off-the-shelf’ solutions supplied by the Union for the Protection of Plant Varieties (UPOV). Many governments had also signed bilateral trade deals in which they committed to joining the UPOV system.²⁷⁹

5.2 Arguments for adopting the UPOV model

It is not only limited expertise and institutional capacity that have frustrated the possibility of devising adequate sui generis regimes for PVP. In some cases, policy makers have been convinced that following the UPOV model or, even better, joining UPOV would be superior to any other possible option. The arguments for a UPOV option often include:

- applying a proven regime that is already implemented in a large number of countries is safer than experimenting with a system without tradition and precedents;
- there is evidence – particularly the impact studies undertaken by the UPOV Secretariat – showing that the UPOV model promotes plant breeding by encouraging investment in the field;
- there is no evidence, in contrast, regarding the impact of sui generis regimes in countries that have adopted them;
- it is not possible to find a viable legal model to replace the NDUS requirements;
- UPOV is a well-established organization with nearly 50 years of experience in implementing PVP; it would not be feasible to implement a new PVP regime without the technical assistance of UPOV;

²⁷⁸ As already noted, the TRIPS Agreement is not yet enforceable in LDCs. Non-members of the WTO are not bound by the Agreement either.

²⁷⁹ C. Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009), 315.

- UPOV membership ensures that plant varieties developed in the country may be easily protected in other countries;
- following a non-UPOV approach creates the risk of inviting complaints under the WTO dispute settlement mechanism that may end up in trade retaliation against the country;
- joining UPOV will attract foreign direct investment (FDI) in plant breeding;
- UPOV-type legislation will bring public research institutions revenue from royalties collected from the licensing of registered plant varieties.

Each one of these arguments may be rebutted.

Advantages of a proven regime: The UPOV model, as examined in Chapter 1, was essentially developed by European countries to address their own realities. The UPOV membership remained very small until the TRIPS Agreement made plant variety protection mandatory for WTO members. However, the application of a PVP regime harmonized to UPOV standards to countries which differ greatly in their agricultural patterns is contrary to any rational approach to lawmaking. In fact, ‘local conditions are a crucial determinant of the appropriate path of institutional reform’.²⁸⁰ Like with any other intellectual property regime, the impact of PVP will be strongly dependent on the context where it is to be applied.

Moreover, there are still many developing and developed countries that are not members of UPOV 1991, and among UPOV members themselves, many are members of UPOV 1978 which allows more flexibility than UPOV 1991. Hence, there are differences even among UPOV members, which shows that there is no single proven regime.

Evidence on UPOV impact: The evidence on the impact of UPOV-type PVP is elusive. Several academic studies draw skeptical conclusions or, at best, make findings indicating a limited impact of such protection in relation to certain crops.²⁸¹ In particular, the UPOV country impact studies²⁸² are based on ‘narrowly drafted indicators, without taking into account key issues like food security, agro-biodiversity, availability of seeds for small farmers, or defining what “for the benefit of society” is supposed to mean’.²⁸³ An increase in the number of registered plant varieties in a limited time period ‘leaves unanswered the question whether the UPOV Conventions do or do not have positive impacts on the countries that adopt them’.²⁸⁴ Moreover, the developing countries analyzed in the UPOV country studies were all members of UPOV 1978, which preserves more policy space for adaptation to local conditions than UPOV 1991.

Available studies find no evidence of a positive effect of the UPOV model on breeding and diffusion of adapted plant varieties in the context of developing countries. Several studies²⁸⁵ show that PVP is not indispensable for innovation in plant breeding. In fact, a lot of successful plant breeding was done before PVP was established and the majority of plant varieties are developed without asserting PVP. Available studies also show that the UPOV 1991 model is not suitable for developing countries, as it may have negative effects on farmers’ capacity to get access to and exchange seeds and thereby on the livelihoods of millions of people in developing countries.²⁸⁶

²⁸⁰ See, e.g., Peter Grajzl and Valentina P. Dimitrova-Grajzl, ‘The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law’ (2009), *Review of Law & Economics*, 5(1), 615-660, available at SSRN: <<http://ssrn.com/abstract=1499305>>.

²⁸¹ See the bibliography provided in the annex to this paper.

²⁸² UPOV, ‘Report on the Impact of Plant Variety Protection’ (2005), UPOV Pub. No. 353 (E).

²⁸³ See Berne Declaration, ‘UPOV report on the impact of plant variety protection – A critique’ <http://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_Critique_UPOV_report_final.pdf>, 9.

²⁸⁴ Id.

²⁸⁵ See Chapter 3.

²⁸⁶ See Chapter 3.

There is also growing evidence on the human rights impact of legislation modelled on the basis of UPOV 1991. Among other findings, a recently conducted human rights assessment noted that:

From a human rights perspective, restrictions on traditional practices and seed management systems (e.g., by a UPOV 91-based PVP law) adversely impact on Farmers' Rights, cultural rights, minority rights, indigenous peoples' rights, women's rights, as well as on biodiversity and the right to food.²⁸⁷

As noted above, compliance with the UPOV 1991 model affects the ability of developing countries to meet their international obligations, such as promoting Farmers' Rights and safeguarding against misappropriation, as discussed in Chapter 2.

It is important to note that analyses and studies of UPOV 1991 have not only raised concerns over the unsuitability of UPOV 1991 for developing countries but also recommended that developing countries should not join UPOV 1991 but should develop an alternative *sui generis* regime that is suitable to their realities.²⁸⁸

*Lack of evidence on *sui generis* regimes:* *Sui generis* regimes are relatively new; hence, information on their operation and impact is only starting to be generated. However, the evidence available suggests that *sui generis* systems do work effectively. For instance, Malaysia, which began operationalizing its PVP system in 2008, received 152 PVP applications between 2008 and 2013.²⁸⁹ International companies filed the majority of these applications (44%).²⁹⁰ Domestic private companies (22%), government research agencies (15%), universities (13%) and individuals (6%) accounted for the remaining applications filed.

Similarly a large number of applications for PVP have been filed in India. Table 4 shows the applications filed and grants issued, with a notable proportion (55.3%) of applications by farmers.

²⁸⁷ 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 at https://www.bernedclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf, 7.

²⁸⁸ Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 'The UPOV Convention, Farmers' Rights and Human Rights – An integrated assessment of potentially conflicting legal frameworks', available at <http://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>; 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 at https://www.bernedclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf; Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002), http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf; UNDP, 'Towards a balanced "Sui Generis" Plant Variety Regime: Guidelines to Establish a National PVP Law and an Understanding of TRIPS-plus Aspects of Plant Rights' (2008), <http://www.no.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/toward-a-balanced-sui-generis-plant-variety-regime/TowardaBalancedSuiGenerisPlantVarietyRegime.pdf>; The Special Rapporteur on the right to food, Olivier De Schutter, 'Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation' (2009), http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf.

²⁸⁹ Malaysia Country Report presented at the 7th East Asia Plant Variety Protection Forum in Laos and available at http://eapvp.org/report/docs/ANNEX15.%20Country%20Report_Malaysia.pdf.

²⁹⁰ *Id.*

Table 4. PVP applications and grants in India

Total PVP applications (2007-June 3, 2015)	9,564 (2,244 applications concerned new plant varieties)
Farmer applications received (2007-June 3, 2015)	5,288
Titles granted (up to June 3, 2015)	1,831
Breakdown of titles granted	Public: 665 Private: 376 Farmers: 574 State Agricultural Universities (SAU): 216

Source: India's Protection of Plant Varieties and Farmers' Rights Authority²⁹¹

In addition, India has utilized the Gene Fund set up under its PPVFR Act to establish awards, rewards and recognition for farmers and farming communities involved in the conservation of genetic resources used as donors of genes in varieties registrable under the Act.²⁹² These are the Plant Genome Saviour Community Award,²⁹³ Plant Genome Saviour Farmer Reward²⁹⁴ and Plant Genome Saviour Farmer Recognition.²⁹⁵ Thus far, several awards, rewards and recognition have been handed out. These include cash rewards to 10 farming communities of 10 lakh rupees (about US\$15,700) each between 2009 and 2011; and to 10 farmers, one lakh rupees (US\$1,570) each in 2012. Recognition (citation and memento) has also been given to 16 farming communities (2007-2010) and 15 farmers (2012).

As more studies are produced, the lessons learned from the implementation of *sui generis* regimes will be useful to other countries willing to follow a similar route.²⁹⁶

No alternative to the NDUS requirements: The requirements of protection can be determined depending on the objectives pursued. The NDUS requirements are just one option that does not exclude other possibilities, particularly when the legislation intends to cover less uniform and stable varieties developed by farmers.²⁹⁷ The NDUS requirements have been conceived for application in contexts where formal/commercial breeding prevails, while in most developing countries farmers, especially small farmers, are still the main suppliers of seeds.

UPOV's technical assistance is indispensable: There is no doubt that the UPOV Secretariat has developed the capacity to deal with complex legal and technical issues and to assist countries in setting up and implementing examination processes for the registration of plant varieties. This capacity is not, however,

²⁹¹ See <http://www.plantaauthority.gov.in/pdf>Status%20Crop%20wise%20Application1.pdf> and http://www.plantaauthority.gov.in>List_of_Certificates.htm.

²⁹² Sujith Koonan, 'India's *sui generis* system of plant variety protection' (2014), QUNO <<http://www.quno.org/sites/default/files/resources/QUNO%20India%20-%20plant%20variety%20protection%20-%202014.pdf>>.

²⁹³ See <http://www.plantaauthority.gov.in/PGSFA.htm>.

²⁹⁴ See <http://www.plantaauthority.gov.in/PGSFR.htm>.

²⁹⁵ See <http://www.plantaauthority.gov.in/PGSFR.htm>.

²⁹⁶ On the Thai PVP regime, see P. Lertdhamtewe, 'Thailand's *sui generis* system for plant variety protection' (2013), QUNO briefing notes on developing countries' *sui generis* options; P. Lertdhamtewe, 'Asian approaches to international law: focusing on plant protection issues' (2013), *Journal of Intellectual Property Law and Practice*, 8(5), 388-398; P. Lertdhamtewe, 'Plant variety protection in Thailand: the need for a new coherent framework' (2013), *Journal of Intellectual Property Law and Practice*, 8(1), 33-42; P. Lertdhamtewe, 'Thailand's plant protection regime: a case study in implementing TRIPS' (2012), *Journal of Intellectual Property Law and Practice*, 7(3), 186-193; P. Lertdhamtewe, 'Effective Plant Variety Protection as Development Policy: A Perspective for Thailand' (2011), *Thailand Journal of Law and Policy*, 14(1) <<http://www.thailawforum.com/articles/plant-variety-protection-as-development-policy-for-Thailand.html>>.

²⁹⁷ In Europe discussions are ongoing on the protection of heterogeneous varieties that would not comply with the NDUS requirements.

unique. Many PVP offices in developing countries (e.g., India, Brazil, Argentina) could, if the necessary funding is made available, provide technical assistance as efficiently as the UPOV Secretariat or offices from developed countries. This could be an important opportunity for South-South cooperation. Its realization is a matter of financing, not of technical competence. In addition, if the concern is about DUS testing, DUS reports can be bought from some PVP offices, e.g., the European Community Plant Variety Office (CPVO) which supplies such reports to even non-UPOV members.²⁹⁸ However, it would be important to create the capacity for examination in the developing countries themselves, and not to rely on the expertise of Northern countries, where separate DUS criteria are developed for each species mainly on the basis of breeders' interest in distinguishing their varieties, rather than the interests of farmers who are supposed to benefit from new varieties.

Protecting varieties in other countries: A common misconception in relation to the advantages of joining UPOV relates to the benefits that it may bring about in terms of protection of local varieties in other countries.

The rights arising from the implementation of the UPOV Convention are, like other intellectual property rights, of a territorial nature. This means that the acquisition of such rights depends on the completion of the procedures applicable in *each* country where protection is sought. A plant variety protected in one UPOV contracting party will not automatically be protected in other countries of the Union.

The UPOV Convention does provide for a 'right of priority' which gives a breeder who has 'duly filed an application for the protection of a variety in one of the Contracting Parties'²⁹⁹ the possibility of prevailing over another application for the same variety submitted in other contracting parties for a period of 12 months. Also, the use or publication of the variety during that period cannot constitute a ground for rejecting the application.³⁰⁰ The right of priority may facilitate the filing of applications to obtain protection in other countries that are members of UPOV.³⁰¹ While this is the only advantage derived from UPOV membership in terms of international protection, it is of limited practical value. A breeder from a particular country interested in obtaining protection abroad (whether a UPOV member or not) would still need to submit an application in every country and follow the applicable procedures until their completion. This is practically impossible for individual breeders, research institutes and small companies from developing countries as well as for small-scale farmers, given the need to pay for specialized advice in each country and the corresponding fees for examination and registration.

In addition, and importantly, the breeder's right only confers *negative* rights, that is, the right to exclude others from, for instance, multiplying and marketing a protected variety. It does not give a positive right to commercialize such variety, which is subject to compliance with seeds legislation and other regulations in force in each country. Moreover, in order to make the most of the efforts and costs involved in obtaining protection in a foreign country, the right holder needs to have the capacity to monitor whether infringement takes place and to bear the legal costs of actions eventually required to prevent it. This is also beyond the reach of most breeders/farmers from developing countries.

²⁹⁸ By the end of 2014, the CPVO had sold 4,874 technical reports to 52 countries. In general, most requests concern ornamental varieties. See the CPVO's Annual Report 2014 available at http://www.cpvo.europa.eu/documents/Rapportannuel/AR2014_EN.pdf.

²⁹⁹ Article 11(1) of UPOV 1991.

³⁰⁰ See Article 11(4) of UPOV 1991.

³⁰¹ Countries that are not UPOV members are not bound to recognize a right of priority.

In any case, a non-UPOV member may apply for and obtain without any particular burden PVP in UPOV members. For instance, Thailand (a non-UPOV member) is among the top applicants for CPVO plant breeders' rights.³⁰²

The risk of WTO complaints: As examined in Chapter 2, the TRIPS Agreement allows ample policy space to design *sui generis* regimes for PVP. No country that adopted a non-UPOV *sui generis* regime has been subjected to complaints under WTO rules. This is perhaps an area of the TRIPS Agreement where such complaints are most unlikely.

Foreign direct investment in plant breeding: FDI is dependent on a large number of factors, including market size, rate of growth, availability of human resources and infrastructure, and economic and political stability of the potential host country. Like in the case of other intellectual property rights, granting PVP in accordance with UPOV standards is unlikely to be a determining factor in attracting FDI. This will only take place if other conditions are met. For a foreign investor, a *sui generis* regime providing adequate protection for its new plant varieties is probably as good as a UPOV-style regime when it comes to deciding where to invest. For instance, in Malaysia, where a *sui generis* regime is in force, a trend towards an increase in the number of PVP applications by foreigners has been observed. While in 2008 (when PVP implementation began) there were no foreign applicants, by 2013, 35 of the 51 applications were filed by foreign applicants.³⁰³ Thailand has also received PVP applications from Japan and the US.³⁰⁴

Licensing fees for public research institutions: Some public research institutions develop new plant varieties as a public good (without asserting any PVP) while others seek PVP to generate licensing fees. In order to do this, they only need a regime that recognizes PVP. A UPOV-compliant regime does not provide any advantage over non-UPOV *sui generis* regimes. On the contrary, the possibility of obtaining rights over farmers' varieties, as proposed in this working paper, enhances opportunities for cooperation with farmers, such as through participatory breeding,³⁰⁵ and for the sharing of the benefits arising from the exploitation of new/improved varieties.

Moreover, it is important to note that there are significant costs attached to obtaining and maintaining a PVP grant (e.g., fees for application and maintenance) and enforcement of such a right, especially against experienced commercial companies with significant resources. Relying on PVP to generate revenue could also skew the focus towards the needs of the commercial sector, marginalizing other crops that may be far more important from a food and nutritional security standpoint and the needs of resource-poor smallholder farmers. This may eventually undermine the public mandate of public research institutions. The issue of generating fees from PVP is far from simple and it is important to be aware of the difficulties associated with such a strategy, the likely conflict with the public mandate of such institutions and the financial resources and expertise that will be required.³⁰⁶

³⁰² See CPVO Annual Report 2013, available at http://www.cpvo.europa.eu/documents/Rapportannuel/AR2013_EN.pdf, 45.

³⁰³ Malaysia Country Report presented at the 7th East Asia Plant Variety Protection Forum in Laos and available at http://eapvp.org/report/docs/ANNEX15.%20Country%20Report_Malaysia.pdf.

³⁰⁴ Thailand Country Report presented at the 7th East Asia Plant Variety Protection Forum in Laos and available at http://eapvp.org/report/docs/ANNEX19.%20Country%20Report_Thailand.pdf.

³⁰⁵ On this methodology, see, e.g., S. Ceccarelli, *Plant breeding with farmers – a technical manual* (ICARDA 2012), available at [file:///srvsc01/FolderRedirections/correia/Downloads/Plant_breeding_manual%20\(1\).pdf](file:///srvsc01/FolderRedirections/correia/Downloads/Plant_breeding_manual%20(1).pdf).

³⁰⁶ Niels Louwaars, Rob Tripp and Derek Eaton, 'Public Research in Plant Breeding and Intellectual Property Rights: A Call for New Institutional Policies' (2006), Agriculture and Rural Development Notes (June 2006), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/9604/370380ARD0Note1publicResrch01PUBLIC1.pdf?sequence=1>.

5.3 Developing a *sui generis* regime: an inclusive process

This section elaborates on some steps that may be taken to develop a *sui generis* regime and provides some recommendations. Although national governments have the main responsibility to implement a well-defined, transparent and inclusive process, providers of technical assistance and donors should not be engaged in or support any process which is not transparent, based on a sound assessment and inclusive.

1. Developing a *sui generis* regime requires a good knowledge of the local situation regarding seed supply, breeding activities, cultivated crops, market trends, diversity in the fields, the social conditions of small-scale farmers, farmers' organizations, local and indigenous communities, etc. Since there is no single regime that 'fits all sizes', it is essential to identify the legal solutions best suited for a particular country. While drafting a law requires legal advice, it would be an obvious mistake to leave the design of a PVP regime only in the hands of lawyers.³⁰⁷

To develop a relevant *sui generis* regime, it is important to conduct a thorough, objective and realistic multidisciplinary assessment of the local situation. This includes: what kind of seed supply system is in place, the extent to which farmers freely save, exchange and sell seeds/propagating material, what type of domestic seed industry and public breeding exists, the current domestic breeding capacity, international obligations of the country (CBD, Nagoya Protocol, ITPGRFA, human rights, etc.), and relevant national objectives and policies (e.g., on nutrition, food security, poverty reduction, agriculture).

Recommendation: Set up an interdisciplinary team to assess the local situation (as mentioned), including experts from disciplines such as agronomics, food production, agricultural economics, plant breeding, plant genetics, sociology/anthropology and law.

2. Precedents (e.g., laws and practices applied in other countries) may be used to facilitate the design or reform of new legislation. Comparative studies are useful. It is therefore important, prior to adoption, to assess the suitability of foreign precedents to the local conditions and whether or not they can contribute to the achievement of the overall national policies.

Recommendation: Explore and analyze legal precedents from other countries (particularly countries with similar conditions, levels of development and agriculture systems) taking into account the differences in the contexts where they have been generated and applied. While legal professionals may take the lead in undertaking such a study, an interdisciplinary assessment is necessary. It would be important, prior to engaging in the drafting of legislation, to examine the suitability of such precedents to national realities, policies and objectives.

3. Based on the information generated on various relevant aspects, a further task is to build up policy expertise to devise the legal regime best adapted to the local conditions, taking into account the nature (and limitations) of intellectual property rights. Importantly, it is worth noting that these rights are merely instruments, not an end in itself. Any PVP regime needs to be fully integrated into and supportive of relevant national policies (on agricultural development, poverty alleviation, trade, food security, biodiversity, innovation, climate change, etc.). Policy expertise needs to be built up with the participation of all relevant stakeholders.

Recommendation: The elaboration of a PVP regime should be seen as a multidisciplinary task involving farmers, commercial breeders, non-governmental organizations, consumers, academics and all the government agencies competent in the formulation or execution of public policies in areas that could be impacted by the introduction or reform of a PVP regime. An ex-ante impact assessment study should be undertaken of the legal options being considered by the government prior to devising the legal regime.

³⁰⁷ See Deere, op. cit., 323.

4. It is important that the process of designing a PVP regime is open to and inclusive of the views of all relevant stakeholders, as well as transparent, with relevant stakeholders having all the information necessary for effective engagement on the matter. As PVP is directly linked to use of plant genetic resources for food and agriculture, contracting parties of the ITPGRFA also have the responsibility to realize farmers' 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'.³⁰⁸ Engagement with relevant stakeholders should not be a one-off event of consultation but should be ongoing until concerns of relevant stakeholders, particularly those that are vulnerable (e.g., farmers and indigenous communities), have been addressed.

Normally, the private sector is in a better position to participate in policy making than other actors who have little or no knowledge of the relevant technical and legal issues. This is one of the greatest problems to be tackled in devising consultative processes:

[A] core challenge is the lack of capacity on IP issues within many relevant stakeholder groups. The influence of some interest groups will not necessarily match the role they deserve in the determination of appropriate IP policy. The business sector may, for instance, be better organized to engage in consultative processes than consumers, educators, or health-care advocates who may require help to have their voice heard.³⁰⁹

Recommendation: Set up a transparent and inclusive process of continuous engagement with relevant stakeholders (e.g., farmers, indigenous communities, NGOs, parliamentarians and government agencies), including enabling participation of farmers in making decisions at the national level. The first stage of this process should aim at reaching a common understanding of key concepts and methodologies. A sound policy can be developed only if all participants are capable of formulating and discussing proposals that reflect the interests of their respective constituencies.

5. In designing a PVP regime, careful consideration should be given to issues relating to its effective use and enforcement of the conferred rights. In particular, small-scale farmers and farmers' communities may not be able to benefit from a system that requires compliance with complex and costly formalities. Even if such formalities can be complied with, they may need support to claim their rights or enforce their rights in case of infringement, or to negotiate licences with interested parties. An effective *sui generis* regime should ensure that its potential beneficiaries, especially those at a disadvantage, can actually exercise their rights.

Recommendation: Develop procedures and institutions that ensure the effectiveness of the PVP regime in protecting the interests of small-scale farmers and farmers' communities.

6. Finally, the process of developing a PVP regime should consider its possible impacts in relation to compliance with the country's international obligations (notably the CBD, ITPGRFA and human rights) as well as what 'flanking measures' are needed to mitigate and remedy any potential adverse impacts of the PVP-related laws on human rights or on farmer-managed systems.³¹⁰

Recommendation: In designing a PVP regime, the international obligations of the country regarding genetic resources need to be taken into consideration. In cases where possible negative impacts are identified, additional measures to avoid or reduce them should be proposed and implemented as part of a coherent policy regarding plant variety production, use and commercialization.

³⁰⁸ Article 9.2(c) of the ITPGRFA.

³⁰⁹ See Deere, op. cit., 323.

³¹⁰ See 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 at https://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf.

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ANNEX

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CHEE YOKE LING AND BARBARA ADAMS with contributions
from Sangeeta Shashikant and Laurent Gaberell



Farmers' Right to Participate in Decision-making

– implementing Article 9.2 (c) of the International Treaty on
Plant Genetic Resources for Food and Agriculture

Executive summary **3**

Chapter 1

CONTEXT OF THE TREATY 6

Chapter 2

THE TREATY AND ARTICLE 9.2(C) IMPLEMENTATION 12

Chapter 3

CHALLENGES IN FARMERS' PARTICIPATION: SELECTED NATIONAL, REGIONAL AND INTERNATIONAL EXPERIENCES 18

Chapter 4

SOME EXISTING NORMS AND GOOD PRACTICES IN PARTICIPATION 31

Chapter 5

IMPLEMENTING ARTICLE 9.2(C) – ELEMENTS AND RECOMMENDATIONS 40



The Association for Plant Breeding for the Benefit of Society (APBREBES) is a network of civil society organisations from developing and industrialised countries. The purpose of APBREBES is to promote plant breeding for the benefit of society, fully implementing Farmers' Rights to plant genetic resources and promoting biodiversity.

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The Development Fund – Norway (DF) is an independent non-governmental organisation that supports small-scale farmers in their fight against hunger and poverty. It supports programmes on sustainable agriculture, climate change adaptation and biodiversity in Africa, Asia and Central America.

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The Southeast Asia Regional Initiatives for Community Empowerment (SEARICE) is a regional non-governmental organization promoting plant genetic resources conservation, development and utilization and advocating farmers rights in several countries in South and Southeast Asia.

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IMPRINT 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, September 2016. | **Authors** Chee Yoke Ling (Third World Network), Barbara Adams (Global Policy Forum), with contributions from Sangeeta Shashikant (Third World Network) and Laurent Gaberell (Public Eye) | **Copy Editor** Lean Ka-Min (Third World Network) | **Published by** Association for Plant Breeding for the Benefit of Society (APBREBES) and its member organizations: Public Eye, The Development Fund, Searice and Third World Network | **Layout** Karin Hutter, karinhutter.com | © APBREBES, 2016. Readers are encouraged to quote and reproduce this material for educational, non-profit purposes, provided the source is acknowledged. | **COVER PHOTO** CRSHELARE/Shutterstock.com

Executive summary

The right of farmers 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 (PGRFA) is recognized in Article 9.2(c) of the International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty). It is a prerequisite for the full and effective implementation of Farmers' Rights.

Article 9.2(c) applies to all types of decision-making processes (e.g. administrative, legislative) and outcomes (e.g. policies, legislations, regulations, budgets, strategies etc.). It also applies to a wide range of subject matter given the broad scope of "conservation and sustainable use of PGRFA," including the formulation of seed laws related to plant variety protection, seed certification and marketing. It is relevant to all roles of farmers related to conservation and sustainable use of PGRFA and given the importance of Farmers' Rights in this regard, the right to participate is intrinsic for matters related to Article 9 itself, including the implementation of Article 9.2(c).

This paper clearly shows that the participation required goes beyond mere consultation. Article 9.2(c) applies to national level decision-making, which would include participation in sub-national processes i.e. at the local and community level. However, this paper also demonstrates that decision-making at the national level is impacted increasingly by regional and international developments and processes, and these in turn, can adversely affect Farmers' Rights and implementation of the Treaty. Of particular concern is decision-making related to UPOV and other intellectual property systems, bilateral, regional and plurilateral trade or intellectual property agreements as well as seed

certification and marketing laws. Since regional and international decision-making affects national decision-making with implications for Farmers' Rights, it is only logical that the right to participate should also apply to decision-making processes at the regional and international levels.

The operationalization of Article 9.2(c) at the national, regional and international levels is severely lacking. Farmers face considerable challenges in exercising their right to participate at all these levels, with the consequence that decisions including on policies and laws not only ignore their needs, but also adversely affect farmers' freedom to operate. This is evidenced for example by the formulation of seed laws, in particular plant variety protection, seed certification and marketing laws that restrict and in some cases criminalize farmers' right to freely use, save, exchange and sell farm saved seed/propagating material.

The challenges farmers face with regard to the right to participate include: the absence of legal recognition of the right to participate; the absence of appropriate mechanisms to facilitate farmers' participation; the lack of political will (often due to bias in favour of the corporate sector and/or various external pressures); and limited or no access to information and/or financial support.

The right to participate in decision-making processes is a well-established right within the human rights framework. Specific provisions in relevant human right instruments, and interpretations and understandings of those provisions, can inform on elements that are essential for the effective implementation of Article 9.2(c). Some human rights instruments have mechanisms that may be utilized to assert Farmers' Rights to participate in decision-making processes. In addition to human rights instruments, there are good practices within the UN system with regard to participation. Examples include the Committee on World Food Security, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention) and the Convention on Biological Diversity (CBD).

Learning from the challenges as well as drawing from the norms, principles, good practices and mechanisms that exist within the UN system, especially within the human rights framework, this paper discusses some of the key elements that are essential for the effective operationalization of farmers' right to participate in decision-making. In a nutshell, the right to participate should include the following elements:

- It should have a solid legal basis and be enforceable by law.
- It should be supported by inclusive, independent, impartial, transparent and non-discriminatory processes and mechanisms, designed to engage farmers, including from the community level, allowing sufficient time and opportunity for meaningful consultation and to provide feedback and proposals.
- Special attention should be paid to the participation of disadvantaged groups, in particular small-scale farmers in view of their importance in conservation and sustainable food systems.
- Consultation at each phase of legislative drafting and policy making, to voice opinions and criticism, and to submit proposals. This means that comments and inputs need to be taken into account in making decisions.
- A long-term and genuine commitment on the part of the relevant authorities to engage in processes of intensive dialogue regarding the development of policies, programmes and measures.
- Prompt access to full and up-to-date information over process (e.g. the timeline and phases of a decision-making process, how and to whom to submit comments and/or proposals), and substance (the actual content of the instruments, documents, the evidence etc.) is imperative.
- Freedom of association, capacity building and financial support.
- Opportunity and ability to seek a review of a decision and redress/remedies if such decision results in adverse effects on the individual or group concerned, thereby violating their rights.

The key recommendations of this paper are below.

RECOMMENDATIONS FOR GOVERNMENTS

- **Establish a legally enforceable farmers' right of participation in decision-making processes.** Such a legal right should be supported by mechanisms building on and coherent with human rights and other principles for participatory mechanisms and processes, as elaborated in chapters 4 and 5. It is also important that the modalities for engagement and participation build on the good practices of the UN system and not regress with respect to either current formal or informal practices.
- **Participation of farmers must be ensured in decision-making on seed policies and laws at the national, regional and international levels,** based *inter alia* on the good practices, principles and elements discussed in chapters 4 and 5, in light of the impact of seed policies and laws especially pertaining to intellectual property (plant variety protection and patents) and seed certification and marketing, and on Farmers' Rights. Seed policies and laws that have been formulated without, or with limited, involvement of farmers, especially small-scale farmers, should be urgently reviewed with the participation of farmers.
- **Governments should recognise the specific role and importance of the “unfiltered voice” of farmers and their organisations/self-organised mechanisms of representation and especially adequate representation of small-scale farmers in implementing Article 9.2(c).**

RECOMMENDATIONS AT THE TREATY LEVEL

- **Gather data and information on national, regional and international rules and practices that provide for participation of farmers in decision-making in connection with PGRFA, and document and assess their impact on realising Farmers' Rights, including progress, obstacles and challenges.**
- **Develop “guidance” for the effective implementation of Article 9.2(c)** with the full and effective participation of farmers' representatives and public interest civil society organisations. Such guidance should build on good practices, principles and elements discussed in chapters 4 and 5.
- **Establish an ombudsman facility¹ under the Treaty** and open a window for addressing gaps/obstacles in implementation of Farmers' Rights, including farmers' right to participate in decision-making.
- **Reporting on implementation of the Treaty by every Contracting Party** required by the Treaty's compliance mechanism² should specifically require the Contracting Party to provide information on measures taken to implement Farmers' Rights, including farmers' right to participate in decision-making. These country implementation reports should be presented regularly and be publicly available. Farmers' representatives should also be given an opportunity to present their perspectives on implementation of Farmers' Rights in relation to their countries, including regional and international activities and instruments that involve their countries.



Women farmers describing and ranking coping strategies to overcome seasonal food insecurity,
Sufatubo, Glan, Sarangani province, The Philippines.

- **Conduct an assessment of farmers' participation in Treaty-related meetings, processes and initiatives** in consultation with farmers' representatives and public interest civil society organisations, with the intent to institutionalise and strengthen farmers' participation in such processes and initiatives. The assessment should draw on good practices in other fora such as the Committee on World Food Security (CFS) of the Food and Agriculture Organization (FAO) and the CBD.
- **Ensure adequate, predictable and timely funding to implement the right to participate** in the work of the Governing Body, including its inter-sessional work and relevant consultations and meetings that may be held. A wide range of Contracting Parties, with developed countries taking the lead, should finance a multi-donor trust fund to be administered by FAO/the Treaty (bearing in mind that the Governing Body resolutions of 2013 and 2015 made explicit linkages with FAO more broadly, specifically mentioning CFS).
- **Recognise and draw on farmers' expertise.** Representatives of farmers' organisations should be adequately represented and involved in any meeting, consultation, panel of experts, working group or equivalent body convened by the Secretariat as mandated by Contracting Parties. In ensuring this, the Secretariat should recognise and respect farmers' autonomy to self-organise and select their own representatives, and should provide the necessary financial support for the participation.

- **Enhance and support** (e.g., by ensuring financial support) **capacity-building of farmers** (especially of small-scale farmers) by farmer groups and public interest civil society organisations in respect of their rights, including the right to participate in decision-making processes; developments that may undermine Farmers' Rights; and the importance of active farmers' engagement in such relevant national, regional and international processes.

RECOMMENDATIONS FOR REGIONAL AND INTERNATIONAL ORGANISATIONS AND PROCESSES

- **Regional and international organisations and processes should respect Farmers' Rights** and ensure that their instruments and activities do not affect the policy space to realise Farmers' Rights, consequently contradicting or undermining the objectives and provisions of the Treaty.
- In line with the above, **regional and international organisations and processes should recognise, legally establish and institutionalise farmers' right of participation in their decision-making processes and activities.** Such a right should be supported by mechanisms building on the good practices of the UN system for participatory mechanisms and processes as well as principles and elements elaborated in chapters 4 and 5.

1 An official appointed to investigate individuals' complaints against maladministration

2 www.fao.org/plant-treaty/areas-of-work/compliance/en

Context of the Treaty

The International Treaty on Plant Genetic Resources for Food and Agriculture (hereafter referred to as “the Treaty”) is the first international legally binding treaty to recognise Farmers’ Rights.

The rights that are enumerated in the Treaty are:

- The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture (PGRFA);
- The right to equitably participate in sharing benefits arising from the utilisation of PGRFA;
- The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA; and
- The right to save, use, exchange and sell farm-saved seed and other propagating material.

However, these rights are not exhaustive and national laws can recognise more rights, including those under other international instruments and customary international law that are applicable to farmers and the objectives of the Treaty.

This study focuses on the right to participate in decision-making as a prerequisite to achieving the full and meaningful implementation of the bundle of integrated Farmers’ Rights. This is consistent with the acknowledgement by international human rights instruments and mechanisms of the right of all

people to be fully involved in and to effectively influence public decision-making processes that affect them.¹

The Treaty explicitly recognises the contribution and role of farmers in the conservation and development of plant genetic resources for food and agriculture. The particular role of smallholder farmers is a reality that remains valid today, and is recognised at the global policy level.²

The vast majority of farms in developing and least developed countries are small farms, with many family farmers, mostly women, cultivating plots of less than two hectares of land. Yet, smallholder farmers manage over 80% of the world’s estimated 500 million small farms and provide over 80% of the food consumed in a large part of the developing world, contributing significantly to poverty reduction and food security.³

As much as 75% of global seed diversity in staple food crops is held and actively used by a wide range of small farmholders.⁴

This central and crucial role of smallholder farmers is also acknowledged in the United Nations Sustainable Development Goal 2 to “End hunger, achieve food security and improved nutrition and promote sustainable agriculture”,⁵ one of the 17 Goals in the 2030 Agenda for Sustainable Development adopted by heads of state and government in September 2015.

Although they are a vital part of the global agricultural community and a backbone for food security, smallholder farmers are often neglected.⁶ This is despite having their rights rec-

1 Office of the United Nations High Commissioner for Human Rights, Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights laws: best practices, experiences, challenges and ways to overcome them (A/HRC/30/26) (2015), paragraph 9.

2 See, for example: IFAD/UNEP, Smallholders, food security, and the environment (2013); FAO-CFS HLPE6, Investing in Smallholder

Agriculture for Food Security (2013); FAO, Final Report for the International Symposium on Agroecology for Food Security and Nutrition 2014 (2015).

3 IFAD/UNEP (2013), p.10.

4 Zimmerer, K., World Crop Diversity Survives in Small Farms from Peri-Urban to Remote Rural Locations (2015), Pennsylvania State University.

5 Target 2.3 of Sustainable Development Goal 2: “By 2030, double the agricultural productivity and incomes of

small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.” Target 2.5: “By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their

related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge, as internationally agreed.” URL: sustainabledevelopment.un.org/sdg2

6 IFAD/UNEP (2013), p. 10.

ognised in the Treaty for more than 15 years. To fully and effectively implement Farmers' Rights, it is critical to effectively operationalise farmers' right to participate in decision-making processes. The availability of effective mechanisms giving smallholder farmers a voice in policy-making is imperative to address the needs and interests of smallholder farmers, to promote the conservation and sustainable use of plant genetic resources and ultimately to ensure food security.⁷

1.1 – LINKS BETWEEN THE TREATY, FAO AND THE CONVENTION ON BIOLOGICAL DIVERSITY

The Treaty is the result of the revision of the voluntary 1983 Food and Agriculture Organisation (FAO) International Undertaking on Plant Genetic Resources for Food and Agriculture⁸ following the adoption of the Convention on Biological Diversity (CBD).

The issue of Farmers' Rights was put forward at a very late stage in the negotiations leading to the CBD, the first legally binding international treaty to address the conservation of biological diversity, sustainable utilisation of components of biodiversity, and fair and equitable sharing of benefits derived from the utilisation of biodiversity.

While the Parties to the CBD committed themselves to respect, preserve and maintain traditional knowledge, innovation and practices of indigenous and local communities, and to promote their wider use,⁹ Farmers' Rights as well as several agriculture-related issues were eventually not explicitly addressed in the final CBD text.

A compromise was reached in the form of Resolution 3 ("The Relationship Between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture") of the Nairobi Conference for the Adoption of an Agreed Text of the CBD held on 22 May 1992. This recognised the question of Farmers' Rights as one of the "outstanding matters" that needed a solution.¹⁰ This call was reinforced in Agenda 21 adopted at the UN Conference on Environment and Development in Rio de Janeiro in June 1992.¹¹

The Nairobi Resolution also called for ways and means to be explored to develop complementarity and cooperation between

7 The Treaty entered into force on 29 June 2004 and the number of Contracting Parties as of 3 June 2016 is 140, which means that when Farmers' Rights are effectively implemented the scale of the achievement will be enormous.

8 Resolution 7/93 of the Twenty-seventh Session of the FAO Conference in 1993.

9 CBD Article 8(j): "[Each Contracting Party shall, as far as possible and as appropriate:] Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and

local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices."
10 The other outstanding matter was access to *ex situ* collections not acquired in accordance with the CBD. URL: www.cbd.int/doc/handbook/cbd-hb-09-en.pdf

the CBD and the Global System for the Conservation and Sustainable Use of PGRFA (under FAO).

In November 1993, the FAO Conference responded by adopting Resolution 7/93 requesting the FAO Director-General to provide an intergovernmental forum for negotiations for the adaptation of the International Undertaking on Plant Genetic Resources for Food and Agriculture, in harmony with the CBD, the consideration of the issue of access on mutually agreed terms to plant genetic resources, including *ex situ* collections not addressed by the CBD, and the issue of the realisation of Farmers' Rights.

Thus the realisation of Farmers' Rights was one of the principal objectives of the renegotiation of the International Undertaking that resulted in the Treaty.

It should be noted that the FAO Conference had earlier adopted three Agreed Interpretations of the International Undertaking pertaining to Farmers' Rights in 1989 and 1991.¹² These Agreed Interpretations provided the elements for the negotiation text on Farmers' Rights, a subject that occupied considerable time during more than seven years of the negotiating process that led to the Treaty.

The African Group of countries led the strong move to include Farmers' Rights during the negotiations, and with the support of other developing countries, a synthesis of the Asian, African and Brazilian submissions resulted in an official submission of the draft from the developing countries on 12 December 1996,¹³ followed by a revised submission made on their behalf by China on 13 December.¹⁴ The set of rights encompassed the right to participate, including in decision-making.

The negotiations were completed during the 31st FAO Conference in November 2001 with the adoption of the Treaty by consensus, with only two abstentions: Japan and the United States. The Treaty entered into force in June 2004.¹⁵

With this background, the Treaty's objectives are thus 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 CBD*, for sustainable agriculture and food security (Article 1.1 of the Treaty). These objectives are to be attained by closely linking the Treaty to FAO and to the CBD (Article 1.2).

11 Chapter 14, paragraph 60(a) of Agenda 21, UN Doc. A/CONF.151/4 (1992). A 1999 study on the Right to Food by the UN Commission on Human Rights also reaffirmed the need to realise Farmers' Rights.

12 FAO Conference Resolutions 4/89, 5/89 and 3/91.

13 Report of the Third Extraordinary Session of the FAO Commission on Genetic Resources for Food and Agriculture, Rome, 9–13 December 1996 (Document CGRFA-Ex3/96/Rep). The developing countries' text on Farmers' Rights is in Annex G at p. 3–4.

14 Frison, C., Lopez, F. and Esquinias-Alcazar, J.T. (editors), *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for food and Agriculture* (2011). See pages 48 to 50 for an account of the evolution of the developing countries' submission. Among the developed countries, Sweden and Norway were very supportive while the United States and France were not.

15 *Ibid.*, p. 10.

1.2 – FOUR INTEGRAL ASPECTS OF FARMERS' RIGHTS UNDER THE TREATY

Reading Article 9 together with preambular paragraphs 7 and 8, it is apparent that there are four integral aspects to Farmers' Rights under the Treaty:

- The right to save, use, exchange and sell farm-saved seed and other propagating material;
- The right to the protection of traditional knowledge;
- The right to equitably participate in sharing benefits; and
- The right to participate in making decisions.

However, these rights are not exhaustive as Article 9.2 uses the word "including" in enumerating the rights. This means that a broader scope of Farmers' Rights, including those rights in other international instruments, can be recognised in national law. For example, Article 9.1 explicitly refers to the role of "local and indigenous communities and farmers" in the "conservation and development of plant genetic resources", and many farmers are also indigenous people. As such, national implementation of the Treaty may also include implementation of the customary international law norms in the United Nations Declaration on the

Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in September 2007.¹⁶

Since Farmers' Rights are an integrated bundle of rights, the participation of farmers in decision-making on policies and legislation that affect them is essential to ensure that these rights are realised, and that decisions in other processes do not undermine those rights. This study argues that the implementation of the right to participate in decision-making is thus a *prerequisite* to achieving the bundle of Farmers' Rights.

The right of participation assumes even more urgency in light of the significant challenges that currently confront the realisation of Farmers' Rights, in particular those emanating from other legal instruments.

In relation to the **right to save, use, exchange and sell farm-saved seed/propagating material**, one of the most serious threats that have been identified is the 1991 Act to the International Convention for the Protection of New Varieties of Plants (UPOV 1991) or harmonised regional plant variety protection agreements and national laws modelled on UPOV 1991.¹⁷ Regulations governing seed patents, seed certification and marketing, contractual obligations and restrictions, hybrid seeds and various new technologies impacting on Farmers' Rights are also of rising concern.

FARMERS' RIGHTS IN THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

PREAMBULAR PARAGRAPH 7

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;

PREAMBULAR PARAGRAPH 8

Affirming also that the rights recognised 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 realisation 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 recognise 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 realising 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 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 utilisation 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.

¹⁶ UN General Assembly Resolution 61/295 dated 13 September 2007.

¹⁷ See Shashikant, S. and Meienberg, F., *International*

Contradictions on Farmers' Rights: The Interrelations Between the International Treaty, Its Article 9 on Farmers'

Rights, and Relevant Instruments of UPOV and WIPO (2015). See also *Owning Seeds, Accessing Food: A Human Rights Impact*

Assessment of UPOV 1991 (2014), published by Berne Declaration et al.

This right was a controversial issue at the time of the Treaty negotiations. During the negotiations one view was that farmers should be free from any restriction with regard to the use and disposition of seeds, including those protected under intellectual property rights (IPRs).¹⁸ Some others were of the view that unrestricted use of IPR-protected materials by farmers would “erode incentives to commercial breeding and create a threat to future world food security”.¹⁹

Notably, under UPOV 1978, farmers' saving, using and exchanging of seeds for non-commercial purposes are not expressly restricted and, as such, are generally accepted as permitted. However, UPOV 1991 dramatically expanded breeders' rights,²⁰ making them comparable to those granted under a patent, thereby limiting Farmers' Rights. Under UPOV 1991, the abovementioned acts are subject to the breeder's right. Article 15(2) of UPOV 1991 introduced an “optional exception”, which only allows farmers to save seeds/propagating material of the protected variety for use on the farmers' own holding, and this exception is further limited by its application to specific crops and in certain cases may be subject to payment of remuneration to the right holder.²¹ The exchange and sale of farm-saved seeds/propagating material of the protected variety between farmers is, in principle, prohibited.

Against this backdrop, Article 9.3 of the Treaty was therefore a compromise between those who sought a positive recognition of farmers' right to save, use, exchange and sell farm-saved seeds/propagating material in the revised International Undertaking and those who feared that the Treaty could limit breeders' rights in a way that would be inconsistent with UPOV 1991.²²

Nevertheless, Article 9.3 is clear in affirming that national laws can recognise farmers' right to save, use, exchange and sell farm-saved seeds/propagating material. This is also consistent with the right of World Trade Organisation (WTO) Members to protect new plant varieties with a *sui generis* national law that fully implements Farmers' Rights.²³ Yet the pressure is growing on developing countries to limit Farmers' Rights by adopting higher and broader standards of intellectual property, e.g., acceding to UPOV 1991 or legislating national and regional plant variety protection systems based on UPOV 1991.²⁴

The protection of traditional knowledge relevant to PGRFA as a Farmers' Right under the Treaty is a recognition of the contribution of farmers' knowledge to the conservation and improvement of PGRFA.

Traditional knowledge is the basis of local innovation and *in situ* seed conservation, and also the basis of the informal seed system, which is crucial to achieving food security in many developing countries.²⁵

With the immense challenges posed by climate change, the crucial role of traditional knowledge for agriculture and food security is gaining even more recognition. A recent study²⁶ concluded: “Drawing from the body of traditional community knowledge, particularly that of women farmers, the promotion of traditional crop varieties, food systems and cultivation practices is contributing immensely to our knowledge of climate change adaptation and, therefore, towards building climate-resilient communities.”²⁷

Accordingly, the value of indigenous peoples' knowledge and perceptions regarding food, livelihood systems, natural resources management and biodiversity conservation are key elements that must be incorporated into climate change policy at the national and international levels.²⁸

Article 7(5) of the 2015 Paris Agreement under the UN Framework Convention on Climate Change acknowledges that “[climate change] adaptation action should follow a country-driven, gender-responsive, *participatory and fully transparent approach*, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, *traditional knowledge, knowledge of indigenous peoples and local knowledge systems ...*” (emphasis added).

Despite the ever-increasing recognition of the importance of protecting traditional knowledge for the survival of humanity, instruments such as UPOV 1991 fail to recognise and acknowledge the wealth of practices that farmers use and develop at the local level, including the preservation, sustainable use and creation of agrobiodiversity. A human rights assessment of UPOV 1991 shows that the implementation of restrictions (and UPOV 1991-style laws) on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and seed preservation, including how to respond to pest infestations, and how to adapt their seed system to changing climatic conditions.²⁹

Given these challenges, farmers' participation in decision-making processes that impact on Farmers' Rights, including those related to UPOV 1991, is crucial.

On ensuring the **right to equitably participate in sharing benefits** arising from the utilisation of PGRFA and related traditional knowledge, it has to be noted that until now this right has been very poorly implemented. Very few countries that are Party to the Treaty have so far enacted a law explicitly implementing farmers' right to equitably participate in sharing benefits.³⁰ Even the benefit-sharing mechanism of the Treaty itself has failed to achieve the objective of fair and equitable benefit-sharing from the users of plant genetic resources, as incorporated in the Multilateral System (Article 13). A review of the Multilateral System is therefore ongoing.³¹

18 Moore, G. and Tymowski, W., *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture* (2005), IUCN Environmental Policy and Law Paper No. 57.

19 *Ibid.*

20 Article 14(1) and 14(2), UPOV 1991.

21 Article 15(2), UPOV 1991. See also *Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention*.

22 Moore and Tymowski (2005), p.75.

23 Correa, C., *Plant Variety Protection in Developing Countries – A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991* (2015).

24 See Shashikant and Meienberg (2015).

25 Shashikant and Meienberg (2015), p.11.

26 IFAD, *The Traditional Knowledge Advantage: Indigenous peoples' knowledge in climate change*

adaptation and mitigation strategies (2016).

27 *Ibid.*, p. 51.

28 *Ibid.*, p. 52.

29 *Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991* (2014).

30 Examples include India, Thailand and Bangladesh.

The disclosure of origin and evidence of compliance with access and benefit- sharing requirements in intellectual property applications is widely seen as a crucial tool to prevent misappropriation of genetic resources and traditional knowledge.³² Disclosure is also necessary to facilitate the implementation of prior informed consent for access to genetic resources or traditional knowledge.

While some national intellectual property laws have incorporated disclosure requirements³³ and many countries are advocating for this at the WTO, the World Intellectual Property Organisation (WIPO) as well as the CBD and its Nagoya Protocol, the UPOV Council by contrast has taken the position that disclosure requirements are incompatible with the UPOV provisions.³⁴ This reduces countries' ability to effectively implement fair and equitable benefit-sharing under the Treaty, the CBD and its Nagoya Protocol, and UNDRIP.³⁵

Meanwhile misappropriation of genetic resources and traditional knowledge continues at the expense of farmers, indigenous peoples and their countries.³⁶

The **right to participate in making decisions at the national level** covers matters related to the conservation and sustainable use of PGRFA.

Articles 5 and 6 of the Treaty provide for a non-exhaustive list of measures that are relevant to the conservation³⁷ and sustainable use of PGRFA, which are clearly relevant to Article 9.2(c) of the Treaty.

Article 5 of the Treaty advocates promotion of an integrated approach to the exploration, conservation and sustainable use of PGRFA, in particular:

- Survey and inventory of PGRFA;
- Collection of PGRFA and relevant associated information on those resources that are under threat or are of potential use;
- Farmers' and local communities' efforts to manage and conserve on-farm their PGRFA;
- Efforts of indigenous and local communities in *in situ* conservation of wild crop relatives and wild plants for food production, including in protected areas; and
- Steps to minimize or, if possible, eliminate threats to PGRFA.

Article 6 elaborates on measures for sustainable use of PGRFA as including:

- Pursuing fair agricultural policies that promote the development and maintenance of diverse farming systems that en-

hance the sustainable use of agricultural biological diversity and other natural resources;

- Strengthening research which enhances and conserves biological diversity by maximising intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests;
- Promoting plant breeding efforts which, with the participation of farmers, particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas;
- Broadening the genetic base of crops and increasing the range of genetic diversity available to farmers;
- Promoting the expanded use of local and locally adapted crops, varieties and underutilised species;
- 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, and promote increased world food production compatible with sustainable development; and
- Reviewing, and, as appropriate, adjusting breeding strategies and regulations concerning variety release and seed distribution.

Given that Article 9.2(c) refers to matters "related to" and thus relevant to conservation and sustainable use of PGRFA and the non-exhaustive list of measures in Articles 5 and 6, the right to participate extends to a broad spectrum of subject matter, beyond those listed above. Considering that "conservation and sustainable use" is an objective of the Treaty, Article 9.2(c) would sensibly also apply to other aspects of the Treaty such as Article 13 ("Benefit-sharing in the Multilateral System") and Article 18 ("Financial Resources") which in any case also refer to conservation and sustainable use of PGRFA.

Moreover, in view of the central role farmers play in the conservation and sustainable use of PGRFA and the importance of Farmers' Rights in this regard, the right to participate is intrinsic for matters related to Article 9 itself, including the implementation of Article 9.2(c) itself, in relation to the processes and mechanisms of participation.

31 The Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing had its fifth meeting on 12–14 July 2016. See: twn.my/title2/biotk/2016/btk160801.htm

32 Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 (2014), p. 42.

33 Examples include Brazil, China, Costa Rica, India, Norway and Switzerland. See also Sarnoff, J. and Correa, C., *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications* (2006), UNCTAD.

34 UPOV, *Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention*, UPOV/INF/6/3, 24 October 2013. UPOV has required developing countries (e.g., Malaysia) to remove disclosure obligations (with regard to origin, prior informed consent and compliance with access and benefit-sharing legislation) before allowing accession to the Union.

35 Shashikant and Meienberg (2015), p. 10.

36 Examples of documented cases: McGown, J., *Out of Africa: Mysteries of Access and Benefit-Sharing* (2006), Edmonds Institute; Hammond, E., *Biopiracy Watch: A compilation of some recent cases* (Vol. 1) (2013), Third World Network; Hammond, E., *Biopiracy of Turkey's purple carrot* (2014), Third World Network; Hammond, E., *Mardi Gras Misappropriation: Sri Lankan Purple Rice Served Up at Louisiana Celebration* (2014), Third World Network; Berne Declaration et al., *The Bitter Sweet Taste of Stevia* (2015).

37 The Treaty in Article 2 defines "*in situ* conservation" as "the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated plant species, in the surroundings where they have developed their distinctive properties." It further defines "*ex situ* conservation" as the conservation of plant genetic resources for food and agriculture outside their natural habitat.

As the Treaty objectives are to be attained by closely linking the Treaty to FAO and to the CBD as provided in the Treaty itself, the right to participate in decision-making logically extends to decision-making in those arenas.

The text of Article 9.2(c) refers to "making decisions at the national level". Thus it is applicable to all sorts of decision-making outcomes including (i) legislation, (ii) implementing regulations/rules, (iii) executive decrees, (iv) administrative decrees, (v) administrative guidelines, (vi) policies and strategies, (vii) programmes and plans, (viii) budget allocations and expenditures, and (ix) national positions in bilateral, regional and international negotiations.

Clearly the participation required goes beyond mere consultation, as discussed in Chapter 5. "National level" would also include participation in sub-national processes, i.e., at the local and community level. However, as shown in Chapter 3, increasingly decision-making at the national level is impacted by regional and international developments and processes which in turn can adversely affect Farmers' Rights and implementation of the Treaty. Of particular concern is decision-making related to UPOV, as well as bilateral, regional and plurilateral trade or intellectual property agreements, seed certification and marketing laws, as discussed in Chapter 3. Since regional and international decision-making can affect national decision-making with implications for Farmers' Rights, it is only reasonable that the right to participate should also apply to decision-making processes at the regional and international levels.

According to Article 9.2 of the Treaty, the responsibility for realising Farmers' Rights rests with national governments, and a Contracting Party should "in accordance with [its] needs and priorities", "as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights." Such qualifications make it even more essential that farmers and their constituent organisations actively advocate for implementing their right to participate in decision-making especially on policy and law to ensure that Farmers' Rights under the Treaty (and beyond) are protected, promoted and effectively implemented. This would be consistent with the right to participate within the wider human rights framework, as discussed in Chapter 4.

One major challenge stems from the relatively less advocacy-oriented organisation among the broader farmers' community at the global level, compared to indigenous peoples' organisations and women's organisations that have over the past 30 to 40 years engaged systematically in decision-making at the United Nations with several achievements in terms of global norms and legal commitments among governments, as well as the creation of space for participation at the national level.

However, some farmers' representatives are increasing their participation in the work of the Treaty.³⁸ The mechanisms in place for the FAO Committee on Food Security³⁹ are an important achievement for the realisation of Farmers' Rights at the international level, as elaborated in Chapter 4. There have also

been initiatives such as citizens' jury and scenario workshops on food and farming futures that offer both organising opportunities and methodologies for farmers' participation in decision-making.⁴⁰ These also contribute to building the capacity of farmers to exercise their right to participation, a key recommendation in Chapter 5.

Meanwhile, since the entry into force of the Treaty, there have been five resolutions on Farmers' Rights adopted by the Treaty's Governing Body at its biennial sessions in 2007, 2009, 2011, 2013 and 2015.⁴¹ As can be seen from the recent resolutions highlighted in Chapter 2, the Contracting Parties have gradually taken on a more action-oriented stance since 2011. However, considerable challenges remain in the implementation of the right to participate in Article 9.2(c), as can be seen from the submissions made under the Treaty by some Contracting Parties, farmers' organisations and civil society organisations (CSOs) over the years (which are analysed in Chapter 2),⁴² and from experiences at the national, regional and international levels highlighted in Chapter 3.

1.3 – OBJECTIVE AND SCOPE OF THE STUDY

As discussed above, "matters related to the conservation and sustainable use of PGRFA" for the purposes of decision-making as set out in Article 9.2(c) cover a broad spectrum. This study focuses on implementation of the right to participate in making decisions with respect to policies and laws. To illustrate the issues and challenges in implementing Article 9.2(c), this study has drawn on experiences in relation to seed laws and especially with UPOV. This is because developing countries are under considerable pressure to accede to UPOV 1991 which will affect the ability of those countries to implement the Treaty and to realise Farmers' Rights.

This chapter has discussed the context and scope of Article 9.2(c), and its importance for the realisation of the bundle of integrated Farmers' Rights. Using country and stakeholder submissions to the Treaty as well as examples and experiences at the national, regional and international levels, Chapters 2 and 3 review the status of farmers' participation in decision-making processes,

identifying some of the key issues and challenges that arise with respect to Article 9.2(c) implementation. The evidence also illustrates how implementation or non-implementation of participation rights can respectively promote or hinder the realisation of Farmers' Rights.

Chapter 4 highlights some existing principles, norms and standards expressed in the existing human rights framework, and good practices as well as mechanisms that may be considered for enhancing implementation of Article 9.2(c). Chapter 5 discusses elements that are essential for effective and meaningful implementation of Article 9.2(c), and provides some recommendations.

38 Especially La Via Campesina.
39 www.fao.org/cfs/cfs-home/about/structure/en/

40 For some examples see www.excludedvoices.org and pubs.iied.org/pdfs/14603IIED.pdf?

41 www.planttreaty.org/content/GB_resolutions
42 www.planttreaty.org/sites/default/files/gb6inf05e_Add1.pdf

[default/files/gb6i5e.pdf](http://www.planttreaty.org/sites/default/files/gb6i5e.pdf) and
www.planttreaty.org/sites/default/files/gb6inf05e.pdf

2

The Treaty and Article 9.2(c) Implementation

This chapter analyses submissions made by Contracting Parties, farmers' organisations and other groups in response to calls by the Treaty Governing Body's resolutions (2007 to 2013) on sharing national knowledge, views, experiences and best practices pertaining to implementation of Farmers' Rights, and reviews outcomes of global consultations on Farmers' Rights in order to identify some of the issues with respect to implementation of farmers' right to participate in decision-making.

Farmers also face a number of challenges with regard to their participation in Treaty- related processes and initiatives. This chapter highlights some of the key challenges that should be addressed to strengthen participation of farmers in the Treaty's decision-making processes.

2.1 – SUBMISSIONS ON FARMERS' RIGHTS UNDER THE TREATY

The Governing Body has called for submissions on the knowledge, views, experiences and best practices on the implementation of Farmers' Rights since 2007.¹ To date (from the entry into force of the Treaty till July 2015), 17 Contracting Parties,² 2 farmers' organisations/movements,³ 13 CSOs and research institutions⁴ as well as 2 industry associations⁵ have made submissions to the Secretary of the Treaty in respect of their experiences in the implementation of Article 9 on Farmers' Rights.⁶

In 2015, the Treaty Secretariat reviewed the submissions.⁷ It noted, *inter alia*, that "implementation of Farmers' Rights is... considered as being related to various legislative acts, including seed law, plant variety protection laws, seed certification regulations, other regulations regarding seed distribution and trade, patent laws, bioprospecting laws or regulations, laws on the conservation and sustainable use of biodiversity, laws on the rights of indigenous peoples and traditional knowledge".⁸

Specifically with regard to Article 9.2(c) itself, the Secretariat's review of submissions highlights the following points:

- "Countries provide for participation of farmers in the decision-making process by means of public consultation or through their relevant agricultural representative at the national level." (§17)
- There is a need for "more awareness raising for farmers in respect of their rights as well as the limitations and challenges that still exist for farmers to participate in decision-making bodies." (§18, emphasis added)
- "Opportunities for farmers to participate in decision-making processes on the conservation and sustainable use of PGRFA... are still limited and farmers are not consulted in a systematic manner nor included in the national decision making on the management of agricultural biodiversity." (§18)
- A certain level of organisation among farmers is needed "so as to ensure their effective participation throughout decision-making and implementation processes. This would also allow

1 Governing Body Resolutions 2/2007, 6/2009, 6/2011 and 8/2013.

2 Contracting Parties: Australia, Canada, Czech Republic, Democratic People's Republic of Korea, Ecuador, France, Germany, Italy, Madagascar, Mali, Niger, Norway, Pakistan, Poland, Syrian Arab Republic, Uruguay and Zambia.

3 Farmers' organisations/

movements: Asociacion de Organizaciones de Los Cuchumatanes (ASOCUCH) and La Via Campesina.

4 CSOs and research institutions: The Berne Declaration, Biowatch, Centre for Genetic Resources (CGN), Centre for Sustainable Development (CENESTA), Community Technology Development Trust (CTDT), Development Fund,

Fridtjof Nansen Institute, Green Foundation, International Institute for Environment and Development (IIED), Let's Liberate Diversity-Coordination of the European Forum, LI-BIRD, Practical Action, and The Global Community Biodiversity Development and Conservation Network.

5 Industry: European Seed Association and the Internatio-

nal Seed Federation (ISF).
6 The submissions to date are compiled here: www.planttreaty.org/sites/default/files/gb6i5e.pdf and www.planttreaty.org/sites/default/files/gb6inf05e_Add1.pdf
7 [Report and Review of Submissions on the Implementation of Article 9, Farmers' Rights](#) (IT/GB-6/15/13), July 2015.
8 *Ibid*, paragraph 31.

countries to determine whose participation they should seek and farmers to have control over their representatives." (§19) This would require *strong farmers' organisations* to be established.

The Secretariat's review is a brief summary of information provided in the submissions. It does not provide any analysis, such as implications of non-implementation of Article 9.2(c), or lessons that may be learnt from the positive results when meaningful participation in decision-making takes place.

A closer examination of specific submissions reveals several interesting additional aspects.

The submissions of several developed countries suggest that no further action is needed to implement the right to participate in decision-making. Some of these countries are also resistant to boosting action at the Treaty level to concretely operationalise Farmers' Rights.

For example, Germany in its 2010 submission⁹ stated that the participation of farmers in the decision-making process concerning conservation and sustainable use of PGRFA is ensured in line with generally established participation principles, and that its rules of procedure include "relevant agriculture associations" being involved in a timely manner in the drawing up of bills. It further added that development and implementation of its National Programme on Plant Genetic Resources of Agricultural and Horticultural Crops is by a committee of 17 members from science and industry, including "representatives of agriculture".

It is conspicuous that farmers' organisations do not feature in this section of the submission on Article 9.2(c) which concluded with the statement: "Further need for fundamental action in Germany to safeguard 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 *is thus not deemed necessary*" (emphasis added).

The Czech Republic in its submission indicated that "in general [it] accepts the Farmers' Rights concept [but] nevertheless the rights are not to [sic] relevant for Czech farmers and actually they are not applied".¹⁰ Australia in a 2008 submission¹¹ stated: "The Australian Government cannot provide views or experiences on the development of national measures to address specifically the objectives of Article 9 of the Treaty. The rights of

Australian farmers, in the context of the objectives of Article 9, are established under a broad legislative framework that provides a comprehensive set of intellectual, property and legal rights, including common law rights."¹²

Canada expressed a similar position to that of Australia,¹³ asserting also that "Canadian Farm groups consulted at the National level have the opportunity to raise issues and concerns on PGRFA on a wide range of national consultation(s) processes including in web-based public consultation and variety registration".¹⁴

Canada was very vocal at the Sixth Session of the Governing Board (2015), stressing that the responsibility for Article 9 implementation rests with national governments and calling for information exchange, but not assistance, towards implementation of Farmers' Rights. It was opposed to the development of voluntary guidelines on the implementation of Farmers' Rights. Canada and Australia also specifically objected to a study on best practices, policies and legislation as options for national implementation of Farmers' Rights, but the countries that wanted such a study eventually prevailed.¹⁵

In contrast, Norway, a consistent and active supporter of Farmers' Rights implementation,¹⁶ was more forthcoming about the challenges facing Norwegian farmers with respect to participation.

Submissions from the Norwegian government (2012 and 2014) reveal active engagement of farmers' cooperatives and farmers' unions in policy processes at the national level. However, there was also acknowledgment in 2012 that "[while] farmers in principle have great influence in Norway, the farmers who are especially interested in genetic diversity ('biodiversity farmers') are usually in minority and will often feel that their views are not shared or understood by other farmers. As a result they often experience that their views are not heard in farmers' cooperative boardrooms and other relevant fora."¹⁷ The submission went on to suggest that "Organisation – whether within an existing body or by creating a separate organisation or network – might be one way of facilitating a better flow of information, enabling the biodiversity farmers to become more actively involved in relevant decision-making processes".¹⁸

Interestingly, Norway's 2014 submission reported that farmers cultivating traditional varieties have become more organised, including through loose networks and the establishment of cooperatives. Therefore, they have become more visible and it

9 www.planttreaty.org/sites/default/files/gb4i06e.pdf, p. 7.

10 www.planttreaty.org/sites/default/files/gb4i06e.pdf, p. 3.

11 IT/GB-3/09/Inf. 6 Add. 1, p. 3.

12 *Ibid.*

13 Canada's acceptance of UPOV 1991 in 2015 was preceded by strong protests from the National Farmers Union, a membership-based community of family farmers across Canada: see www.nfu.ca/issues/save-our-seed and www.save-our-seed.ca.

14 apbrebes.org/news/canadas-national-farmers-union-launch-campaign-against-upov-1991

15 Shashikant, S., *Contentious negotiations over Farmers' Rights resolution* (2015), Third World Network.

16 Norway rejected membership of UPOV 1991 due to the adverse implications of UPOV 1991 on Farmers' Rights. Norway provided resources for the 2007 informal international consultation on Farmers' Rights in

Lusaka, Zambia and the 2010 Global Consultations in Addis Ababa, Ethiopia. The recommendations from these consultations contributed to the Governing Body's negotiations on the resolutions on Farmers' Rights. The Development Fund of Norway cooperates closely with local partners in Asia, Africa and Central America, providing support that focuses on farmers' rights and underlining farmers' participation in decision-making

processes. The Norway-based Fridtjof Nansen Institute conducts consultations and research studies on Farmers' Rights at the national and international levels, with funding from and participation of the Norwegian government.

16 Submission of Norway in 2012, p. 8. URL: www.planttreaty.org/sites/default/files/Norway_FR_submissions.pdf

17 *Ibid.*

has become easier for the authorities to involve them in various processes.¹⁸

Submissions of developing countries stressed on the need for support to implement Article 9. Mali indicated it had no experience in the implementation of Farmers' Rights, while Niger explained it had no specific legal provisions regarding Farmers' Rights.¹⁹ In a 2011 submission, Madagascar indicated that it needed support for implementing Farmers' Rights and in particular for ensuring the participation of farmers in policy-making.²⁰

Zambia's submission in 2008 stated that national consultations on the Treaty and Farmers' Rights in particular, including with policy-makers, called for further consultations involving all relevant stakeholders and in particular sought greater sensitisation of farmer groups and farmers to get them to express their views and make demands on what they require from the realisation of Farmers' Rights at the national level.²¹

A limited number of submissions were received from farmer organisations, thus demonstrating the need for additional measures to support their participation and involvement in the Treaty discussions (see Section 2.4 below). Nevertheless, the international peasant movement La Via Campesina, in its 2008 submission, stressed that biodiversity cannot be preserved and renewed without the recognition of Farmers' Rights, in particular their right to take part in decision-making, and requested the Treaty Governing Body to involve not only the industry but also small farmers in its decision-making process.²²

CSOs also made several references to participation in their submissions.

The International Institute for Environment and Development (IIED) in its submission²³ highlighted findings from its research in 5 developing countries over 5 years. It pointed out that farmer participation in agriculture policy- and decision-making was limited and that in some cases participation was through "general consultation rather than active participation in policy-making". The submission added that "industry and scientists tend to be by far the most influential in national decision-making, and increasingly foreign industry through Free Trade Agreements and other trade deals."

IIED concluded its submission by stating that "Farmer participation in national decision-making is far from being standard practice", and called for laws, legal reform and institutional structures "to enable farmer representatives especially traditional farmers to participate in national policy and legal processes on genetic resources and agriculture, and ensure that farmers can actually influence the outcome of decisions, and have the same voice and influence as trade and economic actors." It added that this "is also likely to require funding for

farmer information, capacity building and consultations at local level, to enable farmers to participate effectively".

The Berne Declaration in its submission²⁴ highlighted the need to strengthen the involvement of farmers and farmers' organisations in processes and discussions related to Farmers' Rights under the Treaty. It recommended, in particular, producing and disseminating farmer-friendly outreach material, organisation of regional Farmers' Rights consultations and capacity development workshops. It specifically pointed to the fact that the potential of online notifications and dissemination of information by electronic means to reach directly concerned farmers is "very limited".

The Development Fund, which supports development projects in several developing countries, noted in its submission²⁵ that "several national programs on PGRFA are being designed and managed by government institutions and they are out of reach of farming communities". It emphasised the importance of empowering communities to make decisions about conservation and use of genetic resources, adding also that since decisions regarding Farmers' Rights are being taken at the international level, farmers' participation should also be ensured at that level.

The Fridtjof Nansen Institute of Norway highlighted, in its submission of 2009,²⁶ results from its "Farmers' Rights Project". It noted that development of laws and regulations related to the management of plant genetic diversity in agriculture is clearly relevant for farmers' participation, as is implementation of laws and regulations, adding that "[i]deally, policies and programmes targeted at farmers should take farmers' situations and perspectives as points of departure, based on their participation". It also stressed the importance of farmer participation in the implementation of Farmers' Rights as "they are the ones who can best define the needs and priorities of farmers in the context of Farmers' Rights, and they are central actors in the implementation process."

The submission also highlighted two important preconditions for increased participation of farmers in decision-making. Firstly, "decision-makers need to be aware of the important role played by farmers in conserving and developing plant genetic resources for food and agriculture, in order to understand why their participation is required". Secondly, "many farmers are not in a position to participate effectively in complicated decision-making processes without prior capacity-building".

The submission concluded by stating that there are few examples of legislation on farmers' participation, although some countries in the South have extensive legislation in this regard. "All the same, actual participation in decision-making processes seems marginal, and is often confined to large-scale farmers

18 Submission of Norway in 2014, p. 3. URL: www.planttreaty.org/sites/default/files/Norway_FR_submission_2014.pdf

19 www.planttreaty.org/sites/default/files/Madagascar_FR_submissions.pdf

20 www.planttreaty.org/sites/default/files/gb3i06e.pdf

21 www.planttreaty.org/sites/default/files/gb3i06e.pdf, p. 7. Another submission was made by Zambia in 2010 that reported on a policy review study of existing national policies and laws to ascertain, *inter alia*, their adequacy regarding Article 9 with identification of policy opportunities and gaps. URL: www.planttreaty.org/sites/default/files/gb4i06e.pdf

22 www.planttreaty.org/sites/default/files/gb3i06a1e.pdf

23 www.fao.org/3/a-be075e.pdf

24 www.planttreaty.org/sites/default/files/gb5i08e_FRs_compilation.pdf

25 www.planttreaty.org/sites/default/files/Development%20Fund%20FR_submissions.pdf

26 www.planttreaty.org/sites/default/files/gb3i06a3e.pdf

who are normally not engaged in the maintenance of plant genetic diversity." It further stated, "In the North, the participation of farmers in decision-making processes is more common, even if diversity farmers are not so often represented, but without reference to specific laws or policies. However, farmers in the North claim that their influence is now decreasing, due to their countries' commitments to regional and international organisations and agreements."

It is evident from the Treaty Secretariat's review and the abovementioned submissions that effective implementation of Article 9.2(c) appears to be the exception rather than the norm, and there is a need for enhanced action at all levels to overcome the challenges and support its implementation.

2.2 – GLOBAL CONSULTATIONS ON FARMERS' RIGHTS

In 2010, global consultations were organised, with a lead role played by the Fridtjof Nansen Institute, in response to the Treaty Governing Board's Resolution 6/2009 that called for regional workshops on Farmers' Rights.

The consultation process consisted of two phases: an e-mail-based questionnaire survey from July to September 2010,²⁷ and the Global Consultation Conference on Farmers' Rights that was hosted by the Institute of Biodiversity Conservation of Ethiopia in Addis Ababa on 23–25 November 2010. During the two phases, a total of 171 experts and stakeholders from 46 countries in Africa, Asia, the Near East, Latin America and the Caribbean, North America and Europe participated. The participants came from farmer organisations, government institutions, the seed industry, non-governmental organisations (NGOs), intergovernmental organisations (IGOs), and research and other relevant groups.

The prime concern among most of the survey respondents was the need for guidance and support from the Governing Body to develop or adjust national legislation, policies, strategies and programmes for the realisation of Farmers' Rights. In this context, the establishment of adequate bodies and implementation practices was mentioned as an issue in need of support.²⁸ The need for awareness-raising and capacity-building measures for farmers, government officials, researchers and the seed sector was also highlighted.

The survey found that both a lack of relevant laws and policies, and lack of implementation of existing laws and policies, were a barrier to the realisation of Farmers' Rights.²⁹

On Article 9.2(c), the survey identified the following gaps and needs: (i) lack of legislation, policies and mechanisms prop-

erly targeting farmers' participation and facilitating effective farmer participation; (ii) farmers had insufficient awareness of their rights, as well as insufficient capacity to actually participate; (iii) in some regions the need for farmers' organisations was mentioned, and especially in Europe and North America the issue of balanced representation of various farmer groups came up.³⁰

Many respondents from Europe expressed concern that actual participation in decision-making processes is often confined to large-scale farmers who are normally not engaged in the maintenance of plant genetic diversity.³¹ The main problems for North American respondents were the power of the agri-business corporations and the corporate concentration in this sector.

Respondents from all regions provided recommendations on how to enable farmer participation in decision-making at all levels. Awareness-raising and capacity-building were seen as important means to enable the development of such participation. The consulted farmers in Meso-America recommended creating space for the active participation of farmers under the Treaty; taking into account the opinions and situation of farmers in the decision-making process of the Governing Body; opening a space through various channels/media where farmers can express themselves and ensure the recognition of their rights; and putting pressure on governments for greater openness in decision-making processes for farmers.³²

In summary, the 2010 Global Consultations (and an earlier international consultation in 2007 in Lusaka, Zambia) reached the following conclusions/recommendations:³³

- Information-sharing among and between the Contracting Parties (Lusaka consultations);
- Guidance from the Governing Body to assist Contracting Parties in their implementation of Article 9 and related provisions (Lusaka consultations);
- Develop voluntary guidelines for this purpose in a transparent, participatory and inclusive manner, with the effective involvement of farmers' organisations and other relevant organisations (Lusaka consultations, online consultations, Addis Ababa conference);
- An *ad hoc* working group to be established to facilitate the development of such guidelines (Lusaka consultations, Addis Ababa conference).

The consultations clearly identified the need for the Governing Body to consider ways and means to guide, assist and support Contracting Parties, especially developing countries, in their implementation of Article 9, beyond collecting views and experiences and making them available.

²⁷ Andersen, R. and Winge, T., The 2010 Global Consultations on Farmers' Rights: Results from an Email-based Survey (2011), FNI Report 2/2011, The Fridtjof Nansen Institute. There were 131 respondents from 36 countries, from farmers, the public sector,

the seed industry, non-governmental organisations (NGOs) and others. An earlier informal international consultation had also been held in Lusaka, Zambia on 18–20 September 2007 in preparation for the Second Session of the Governing

Body.
²⁸ Andersen and Winge (2011), p. 107.
²⁹ *Ibid.*, p. 110.
³⁰ *Ibid.*, p. 89.
³¹ *Ibid.*, pp. 90–91.
³² *Ibid.*, p. 107.
³³ Submission by the Fridtjof

Nansen Institute in response to Governing Body Resolution 6/2011. URL: www.planttreaty.org/sites/default/files/Fridtjof%20Nansen%20Institute%20%20FR_submissions.pdf

2.3 – TREATY GOVERNING BODY RESOLUTIONS: TRENDS AND OPPORTUNITIES

Implementation of Farmers' Rights has been on the agenda of the Treaty's Governing Body since its Second Session in 2007. However, the focus had initially been on sharing national knowledge, views, experiences and best practices.

A shift began to take place since the Fourth Session of the Governing Body in 2011 whereby more proactive and action-oriented resolutions on Farmers' Rights were adopted. For example, Resolutions 8/2013 and 5/2015 go further by inviting farmers' organisations to actively participate in "relevant inter-sessional processes" and not just the biennial Governing Body sessions. Resolution 5/2015 "[i]nvites Contracting Parties and relevant organisations to... convene regional workshops and other consultations, *including with farmers' organisations*, for the exchange of knowledge, views and experiences to promote the realisation of Farmers' Rights as set out in Article 9" (emphasis added).

The recognition of farmers' organisations as a distinct constituency in the work of the Governing Body has been acknowledged by Contracting Parties since 2007.³⁴ There is however much to be desired with respect to farmers' participation in Treaty-related processes and initiatives, as discussed below.

Moreover, some developed countries continue to resist concrete support for national implementation, as can be seen in the negotiations of the resolution on Farmers' Rights at the Sixth Session of the Governing Body in 2015 where the following key areas were contentious: development of voluntary guidelines for implementation of Farmers' Rights; study on best practices as options for national implementation of Farmers' Rights; and addressing the interrelations between Article 9 of the Treaty, UPOV and WIPO.³⁵ The final outcome was the longest Farmers' Rights resolution adopted so far (IT/GB-6/15/Res 5), and the actions called for in the resolution provide timely opportunities to engage the participation of farmers and public interest CSOs in furthering the implementation of Article 9.2(c).

The resolution calls for the gathering of information not only at the national level as in previous resolutions, but also at regional and global levels, for exchanging knowledge, views, experiences and best practices. Importantly, agreement was reached for the Secretariat to prepare a study on lessons learnt from implementing Article 9, including policies and legislation. Contracting Parties and all relevant stakeholders, *especially farmers' organisations*, are invited to submit their views and experiences to derive examples as possible options for national implementation of Article 9.

Therefore this mandated study is to go beyond compilation of information, to a more analytical and action-oriented remit. In addressing Article 9.2(c), the study should include decision-making at the national, regional and global levels as well as related processes in addition to the Treaty.

However, there was no consensus at the Governing Body session to develop voluntary guidelines on implementing Farmers' Rights as proposed by the African Group. Ethiopia had proposed that the draft resolution request the Secretariat "to develop voluntary guidelines on the implementation of farmers' rights at national level, through an *ad hoc* working group in a transparent, participatory and inclusive manner, with effective participation of farmers and other organisations".³⁶

Resolutions of the Governing Body's Fifth and Sixth Sessions invited Contracting Parties to consider developing *national plans* for implementing Article 9, and to *review and adjust national measures* affecting realisation of Farmers' Rights.³⁷ Both also reiterated the call for *regional workshops and other consultations* to promote the realisation of Farmers' Rights, highlighting the involvement of farmers' organisations.³⁸

The logical next step would be to develop participation mechanisms and processes at the national, regional and global levels, and to do so with the effective participation of farmers and other public interest groups.

2.4 – PARTICIPATION OF FARMERS IN TREATY-RELATED PROCESSES AND INITIATIVES

On several occasions a number of issues with regard to farmers' participation in Treaty-related processes and initiatives have been raised.

A major constraint hampering the participation of farmers, especially those from developing countries, is the lack of financial support, as farmers are generally in no position to finance their own participation in Treaty meetings. The Treaty on its part has simply no funds available to finance farmers' participation.

Opportunities to participate during the sessions of the Governing Body are also quite constrained. During the plenary sessions, farmers are only allowed to participate in the capacity of observers; as such, they can only speak after the Contracting Parties, if time is available. Their proposals, e.g., concrete drafting proposals regarding a resolution, are only taken into account if supported by a Contracting Party.

Another concern is the total absence of farmer representation in certain Treaty meetings.³⁹ In Treaty meetings open to farmer participation, such participation is often limited, for sev-

³⁴ Governing Body Resolutions 2/2007, 6/2009, 6/2011, 8/2013 and 5/2015.

³⁵ Shashikant (2015).

³⁶ *Ibid.*

³⁷ Resolution 8/2013, paragraph 6 and Resolution 5/2015, paragraph 3.

³⁸ Resolution 8/2013, paragraph 8

and Resolution 5/2015, paragraph 6.

³⁹ A recent example is the 2015 Consultation on the Global Information System: there were 10 participants representing governments from the different regions and seven experts, but no farmer representative

(see www.planttreaty.org/sites/default/files/COGIS1re.pdf).

Another example is the 2013 meeting of the *Ad Hoc Advisory Committee on the Funding Strategy*, in which 11 government representatives participated, again with no farmer representatives (see www.planttreaty.org/sites/default/files/COGIS1re.pdf).

Interestingly, the list of participants of a closed meeting of the co-chairs of the Committee and co-leads of the working group indicates seven participants, including two industry representatives (Syngenta), and yet still no farmers.

eral reasons. Sometimes meetings are held at short notice, making it difficult for farmer organisations to organise their participation.⁴⁰ Usually there is no financial support for such participation, and the late notice makes it even more difficult to find the necessary funds. The concern of short notice also extends to other aspects such as limited time to respond to electronic consultations.⁴¹

More generally, there are no formal rules firmly establishing the right of farmers to participate in processes of the Treaty such as working groups and committees. This means that participation is on an *ad hoc* basis and very much depends on the terms of reference and rules of procedure of the relevant working group or committee, as well as the decision (resolution) taken by the Governing Body.⁴² This is in contrast to the institutionalised participation of farmer groups in the Committee on World Food Security, or of indigenous peoples and local communities in the CBD processes, as discussed in Chapter 4.

Farmers also do not have a seat in the Benefit Sharing fund under the Treaty and therefore have no say in the allocation of funds⁴³ although the fund is for implementation of the Treaty, wherein Farmers' Rights are an essential component, and Article 18.5 of the Treaty explicitly states that implementation of plans and programmes for farmers in developing countries who conserve and sustainably utilise plant genetic resources for food and agriculture should be prioritised for funding.

It is also often the case that for specific events such as high-level segments or opening addresses, or events at the regional level, the farmer representative is selected by the Treaty Secretariat rather than by the farmer organisations themselves.⁴⁴

The paucity of funds has also impacted the holding of consultations on Farmers' Rights, an important forum for exchanging information and identifying the needs of farmers and possible avenues for enhancing implementation of Farmers' Rights. There are no funds in the Treaty's core budget to finance the consultations (global or regional). The request to the Secretariat in Governing Board resolutions on Farmers' Rights to convene regional workshops is also "subject... to the availability of financial resources."⁴⁵ Consequently such consultations are usually held on an *ad hoc* basis, dependent on the availability of financial support (often limited), and on a voluntary basis by one or a few national governments. The Treaty then is limited

⁴⁰ One example is the next meeting of the *Ad Hoc Technical Committee on Sustainable Use (ACSU)* to be held on 24 October 2016: the notice only went out on 2 September. Another is the joint Treaty/UPOV symposium on interrelations between UPOV and the Treaty in the context of Farmers' Rights, scheduled for 26 October 2016; no official notification has been sent at the time of writing.

⁴¹ According to Guy Kastler from La Via Campesina, the latest consultation on Farmers' Rights

was done electronically and scheduled to last only one month. Initially La Via Campesina refused to respond due to the short duration which would not allow for internal consultations. The Secretariat then agreed to prolong the consultation period by another two months. Source: discussion between Laurent Gaberell from Public Eye and Guy Kastler from La Via Campesina on 7 September 2016.

⁴² For example, while Governing Body Resolution 4/2015 on

to being a co-organiser and sometimes only a participant in such events.

Effective participation of farmers is also hindered by lack of translation facilities. For example, while the main plenary sessions may have interpretation services, the smaller negotiating groups and meetings may not. On a number of occasions La Via Campesina has had to arrange and finance its own interpretation facilities to enable its participation.⁴⁶

The Treaty, in wanting to have a wider reach, does from time to time undertake web-based consultations. However, such a format is often not appropriate for farmers and farmer organisations in developing countries that may have only limited access to the internet.

These are some of the points that highlight how there is much to be desired with respect to farmers' participation in the decision-making processes of the Treaty and its related processes and initiatives. If the Treaty is to truly realise Farmers' Rights, in partnership with farmer organisations, it should examine how to improve farmers' involvement and engagement in its processes and initiatives in a way that enables farmers to guide the outcomes. In doing so, the Treaty may draw on good practices and standards in other fora (see discussion in Chapter 4).

sustainable use explicitly invited inputs from farmers' organisations and the terms of reference of the ACSU provide for the participation of 10 experts, including from farmers' organisations (www.fao.org/3-a-bl143e.pdf?q=content/resolution-042015-implementation-article-6-sustainable-use-plant-genetic-resources-food-and-), this is not the case with the funding strategy (www.planttreaty.org/sites/default/files/RES2_Implementation_Funding_Strategy.pdf) or the

Global Information System (www.planttreaty.org/sites/default/files/RES3_Glis.pdf).

⁴³ For a list of the Panel of Experts that review proposals for funding that should be supported, see www.fao.org/plant-treaty/areas-of-work/benefit-sharing-fund/panel-of-experts/en/

⁴⁴ Discussion with La Via Campesina on 7 September 2016.

⁴⁵ See Resolutions 6/2009 (paragraph 3) and 6/2011 (paragraph 4).

⁴⁶ Discussion with La Via Campesina on 7 September 2016.

3

Challenges in Farmers' Participation

SELECTED NATIONAL, REGIONAL AND INTERNATIONAL EXPERIENCES

This chapter looks at the challenges farmers face at the national, regional and international levels in advocating for Farmers' Rights and the on-the-ground realities within which farmers asserting their right to participate operate. Understanding the challenges is a crucial step to identifying components that are imperative for Article 9.2(c) implementation.

The cases that have been selected reflect the pressures faced by many developing countries to adopt seed laws that affect Farmers' Rights, especially to accede to UPOV 1991 and/or to enact national and regional laws based on UPOV 1991, including through trade agreements. The cases provide a snapshot of the challenges in operationalising Article 9.2(c) applicable also to many other developing and developed countries in relation to participation in policy- and law-making, including on plant variety protection (PVP) and seed registration and marketing.

3.1 – NATIONAL EXPERIENCES

A) COLOMBIA

Colombia, a member of the Andean Community,¹ signed the Treaty in 2002, but has yet to ratify it. It has also been a member of UPOV 1978 since 1996.

In 1992, a draft plant breeders' rights bill modelled on UPOV 1991 was tabled in the Colombian Congress, written by proponents of a strong intellectual property regime without any involvement of farmers or CSOs. Once alerted, CSOs pushed for amendments that included rights for farmers and local communities and these were accepted by the Senate.²

However, concerned about the precedent it might set for other Latin American countries, industry and UPOV that had prepared the initial draft advocated for an Andean pact based on UPOV 1991, resulting in Decision No. 345 (Establishing the Common Regime on the Protection of the Rights of Breeders of New Plant Varieties) in 1993.³ On this decision Velez notes: "This decision legally binds all Andean Pact [now Andean Community] countries to establish UPOV-like plant breeders' rights legislation. No mention of farmers and local communities as innovators, no worry about genetic erosion ... With a stroke of the pen – and without any public discussion at the national levels – the Andean Countries were neatly brought into no-nonsense UPOV spheres."

Nevertheless, as a result of intense lobbying by NGOs and others in 1993, Decision No. 345 also required member countries, before 31 December 1993, to approve common provisions governing access to biogenetic resources and guaranteeing the biosecurity of the region, pursuant to the provisions of the Convention on Biological Diversity.

A wide coalition of NGOs, indigenous peoples' representatives, farmer groups, black and local community leaders, lawyers and people from several state universities formed an *Ad Hoc* Working Group in 1994 to closely monitor and influence developments in relation to common provisions governing access to biogenetic resources. At the governmental level, a Colombian proposal was drafted after extensive national and local consultations, and included a *sui generis* Special Access Regime dealing with the genetic resources of local communities.

In 1996, changing direction, Colombia decided to accede to UPOV 1978 instead of pursuing a *sui generis* option.⁴ Soon after, Colombia entered into a Trade Promotion Agreement (TPA)

1 Colombia, Venezuela, Ecuador, Peru and Bolivia are members of the Acuerdo de Cartagena, a Latin American trade zone. Decisions of the Commission of

the Andean Community are legally binding on its members.
2 Velez, G. and GRAIN, *Biodiversity Sell-Out in the Andean Pact?* (1995), GRAIN.

3 www.wipo.int/wipolex/en/details.jsp?id=9417. At the same time, Decision No. 344 (Establishing a Common Regime in Industrial Property) was also

passed; see www.wipo.int/wipolex/en/text.jsp?file_id=223745#tab2

with the US that entered into force on 15 May 2012.⁵ The TPA was negotiated without any public participation and required accession to UPOV 1991 by 1 January 2008 or the date of entry into force of the agreement, whichever was later.

On 15 April 2012, President Juan Manuel Santos signed into law the bill approving Colombia's accession to UPOV 1991, and transmitted the law and the UPOV Convention for review by the Constitutional Court.⁶

On 5 December 2012, the majority of the Constitutional Court ruled that Law No. 1052 violated the Constitution because indigenous and Afro-Colombian ethnic groups who would be directly affected by the law were not consulted prior to its enactment.⁷ The court concluded that there should have been a prior consultation with indigenous and Afro-Colombian groups regarding the effect of Law 1518 because UPOV 1991 "directly regulates substantial matters that concern those communities." The court opined that much of the intellectual property involved in improving and diversifying plant varieties consists of "ancestral knowledge of these peoples." In the court's judgment, "the imposition of... restrictions on new plant varieties as enshrined in UPOV 1991 could limit the natural development of the biodiversity which is a product of the conditions of the ethnic, cultural, and ecosystems inhabited by such peoples."⁸

To date, Colombia has not acceded to UPOV 1991.

The case of Colombia shows a shift in policy from a *sui generis* direction favourable to farmers and the safeguarding of traditional knowledge and local genetic resources – when farmer and civil society organisations were engaged in the policy-making process – to the UPOV option as forces supportive of the latter gained more influence in decision-making. In this case, the Constitutional Court presented indigenous communities, many of whom are farmers, an avenue to raise their concerns and to balance the failure of the executive arm of government to consult indigenous peoples and farmers.

Nevertheless, the final decision on policy and law still remains with the executive and legislative parts of government, and thus meaningful participation mechanisms and processes that allow for effective influencing of decision-making remain crucial. Judicial awareness and independence can then safe-

guard those rights and provide the needed system of checks and balances.

B) GUATEMALA

Guatemala is a party to the Treaty. In 2005, when Guatemala signed the US-Dominican Republic-Central America Free Trade Agreement (US-DR-CAFTA), it was legally obliged to become a member of UPOV 1991.

In 2014, the Congress of Guatemala legislated a PVP law to pave the way for accession to UPOV 1991. The law *inter alia* criminalised the use, exchange and sale of farm-saved seed of a PVP-protected variety and made it punishable with one to four years in prison and a fine of between 1,000 and 10,000 quetzals (US\$130- 1,300).⁹ The law was drafted with the support of the UPOV Secretariat and without any consultation with farmers, indigenous groups and other parts of civil society that would be affected by the law.¹⁰

This controversial PVP law triggered mass protests in the country, with indigenous and small-scale farmers in Guatemala referring to it as the "Monsanto law". A large part of Guatemala's population, of whom more than half are indigenous people, depend on agriculture for their livelihoods and food security. Some 80% of seed production comes from small farmers who produce most of the country's staple food. Therefore, the PVP law was seen as a violation of the rights of indigenous peoples as well as a threat to food security.

The matter was taken to the Constitutional Court, which on 29 August 2014 ruled to suspend the law based on demands of different farmers' organisations and CSOs. On 5 September 2014, the Congress of Guatemala repealed the PVP law, stalling Guatemala's accession to UPOV 1991.

A broad civil society alliance mobilised through the indigenous national platform Mesa Nacional Indígena played an instrumental role in convincing the Constitutional Court, government and Congress that the PVP law was detrimental to the country and its peoples. The Guatemalan experience shows that a broad alliance with active participation of farmers and indigenous peoples can succeed in ensuring Farmers' Rights against

4 In 1996, Colombia's Constitutional Court had considered the effect of Colombia's accession to UPOV 1978. The Court found that it was necessary to protect traditional farming and production practices of minority groups, such as indigenous peoples and Afro-Colombian communities. The disruption of such practices can harm minority communities by causing cultural disintegration, malnutrition, and diminished health and well-being, and can threaten the very survival of those minority populations: *Sentencia C-262/96* (Corte Constitucional de Colombia 1996). See aiph.org/aiph_new/colombian-court-strikes-down-law-approving-1991-upov-convention/

5 Due to an extended dispute within the US Congress over domestic concerns with the TPA and protests over Colombia's labour standards, ratification by the US Congress was delayed.

6 Article 241 of Colombia's Constitution requires its Constitutional Court to approve the ratification of international treaties like UPOV 1991. It states: "Decide in definitive manner on the constitutionality of international treaties and the laws approving them. For this purpose, the government will submit them to the Court within the six days subsequent to their

aiph.org/aiph_new/colombian-court-strikes-down-law-approving-1991-upov-convention/ See *Sentencia C-1051/12* (Corte Constitucional de

sanction by law. Any citizen may intervene to defend or challenge their constitutionality. Should the Court declare them unconstitutional, the government may engage in a diplomatic exchange of notes; in the contrary case the laws will not be ratified. When one or several provisions of a multilateral treaty are declared invalid by the Constitutional Court, the President of the Republic alone may ratify it, under reserve of the offending provision."

aiph.org/aiph_new/colombian-court-strikes-down-law-approving-1991-upov-convention/ See *Sentencia C-1051/12* (Corte Constitucional de

Colombia), 5 December 2012. URL: www.corteconstitucional.gov.co/comunicados/No.%2050%20comunicado%2005%20y%2006%20de%20diciembre%20de%202012.php

8 *Ibid.*

9 GRAIN, *Seed laws that criminalise farmers: additional country experiences* (2015).

10 Extracts from a translation of an article published in Norway titled "Social mobilisation crowned with victory". The original article is here: www.utviklingsfondet.no/nyheter/sosial_mobilisering_kronet_med_seier

the dictates of a free trade agreement and powerful seed industry interests.¹¹

C) PERU

Peru, a member of the Andean Community, became a party to the Treaty in 2003.

The 1996 PVP regulations in Peru came about following the adoption of Andean Community Decision No. 345 that established a common PVP regime based largely on UPOV 1991 (but not fully compliant with it). According to a Human Rights Impact Assessment (HRIA) study, this move was more the result of international pressures (WTO membership, and active lobbying by UPOV Secretariat officials) than of specific national economic and technological needs and requirements from Andean countries and their breeding sectors. No social or economic analysis was undertaken prior to adopting the regional PVP system.¹²

Decision No. 345 also called for the development of an Andean regime on access to genetic resources and benefit-sharing (ABS) and on biosafety, a victory claimed by CSOs in their pushback against Decision No. 345 (as discussed above).

This resulted in the 1996 Peruvian PVP regulations incorporating disclosure requirements based on the 1996 Andean Community Decision No. 391 (Establishing the Common Regime on Access to Genetic Resources).¹³ Article 15(e) of the regulations required applications for plant breeders' rights to contain "*the geographical origin of the raw plant material of the new variety to be protected*, including, as the case may be, the document that proves the legal origin of the genetic resources, issued by the Competent National Authority as regards access to genetic resources" (emphasis added). Disclosure of origin and legal provenance is a well- recognised tool to fight illegal utilisation of genetic resources and traditional knowledge and to promote fair and equitable benefit-sharing.

When it entered into the US-Peru Free Trade Agreement (FTA) in 2006, Peru was obligated to join UPOV 1991 by 2008. Prior to the domestic implementation of the FTA, Peru saw a lively national debate about its likely impacts, mobilised mostly by civil society. The public debate and criticisms did not, however, translate into a transparent and participatory process, and

many civil society groups criticised the lack of participation and transparency in the FTA negotiations.¹⁴

In 2011 Peru amended its 1996 regulations and removed Article 15(e) from its legislation in order to become a member of UPOV 1991 on 8 August 2011.¹⁵

According to Peruvian officials, the new draft regulations were posted on the website of the PVP Office for comments, but none were received. The above HRIA study concluded: "Web-posting, the conventional way of making official documents available for comment, appears inadequate as a mode of consultation here as communities in the Andean and Amazonian regions have limited access to the Internet, and the texts are not made available in indigenous languages (only Spanish is used)."¹⁶ It added: "Leading human rights scholars have noted that procedures of 'participation are [...] of limited practical significance where membership in a particular cultural community has the effect of excluding citizens from [...] influence'.¹⁷

Without disclosure requirements, the ability of Peru to fulfil its obligations under the Treaty, the CBD and its Nagoya Protocol is reduced. As a country with a large population of indigenous peoples and a government that recognises the rights of those peoples, Peru's ability to meet its commitments under UNDRIP is also affected.

The lack of public participation, especially the participation of farmers (of whom many are indigenous people and women), in the negotiation and subsequent implementation of FTAs (see also Section 3.3 below) has contributed to the current situation where the realisation of Farmers' Rights is considerably weakened.

D) GHANA

Ghana became a party to the Treaty in 2002.

In 2013, civil society groups under the umbrella of Food Sovereignty Ghana (FSG) launched a national campaign against the Plant Breeders' Bill¹⁸ that would have enabled the government to accede to UPOV 1991.¹⁹ Farmers' organisations, faith-based groups and CSOs expressed serious concerns over the lack of public consultation and the content of the Bill (in particular, the undermining of Farmers' Rights) and over Ghana's intention to join UPOV 1991.

11 *Ibid.*

12 *Owning Seeds, Accessing Food* (2014), p. 38.

13 Supreme Decree No.

008-96-ITINCI, 3 May 1996, *Regulations for the Protection of Plant Breeders' Rights*.

Disclosure requirements are also contained in the Andean Community Decision No. 486 of 2000 (Establishing the Common Industrial Property Regime) that covers traditional knowledge as well.

14 *Owning Seeds, Accessing Food* (2014), p. 38. A small number of CSOs and academics were invited to information meetings

on the FTA negotiations but CSO presence was the exception rather than the rule.

15 *Owning Seeds, Accessing Food* (2014), p. 42: "Already in 2003 the UPOV Council wrote that 'With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, [...] the UPOV Convention requires that the breeder's right should not be subject to any further or different conditions than

[distinctness, uniformity, stability and novelty] in order to obtain protection' (UPOV, 2003).

Furthermore, informed sources who choose to stay anonymous have reported that UPOV staff have advised countries (for example, Malaysia and Egypt) considering UPOV ratification to delete the disclosure requirement in their national PVP laws to bring them into conformity with UPOV." In light of this position, Article 15(e) of the Peruvian PVP regulations would most likely not have been accepted if Peru had asked the UPOV Council to advise it in

respect of the conformity of its laws with UPOV 1991.

16 *Owning Seeds, Accessing Food* (2014), p. 39.

17 *Owning Seeds, Accessing Food* (2014), p. 39, quoting Marks, S. and Clapham, A., *International Human Rights Lexicon* (2005), Oxford University Press, Oxford.

18 www.parliament.gh/publications/36/560

19 www.apbrebes.org/news/massive-protests-ghana-over-upov-style-plant-breeders-bill. See also www.apbrebes.org/news/ghana-csos-continue-protest-against-plant-breeders-bill?pk_campaign=NL9

Civil society sent a petition to parliamentarians calling for specific changes to the Bill that would, *inter alia*, require PVP applications to include disclosure of origin, be compliant with access and benefit-sharing principles and allow farmers to save, use, sow, re-sow, exchange, share or sell farm-saved seed of a protected variety.²⁰

FSG was then invited to a meeting on 4 December 2013 with the Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs to discuss issues raised in the petition. However, the Bill remained unchanged.

The public campaign escalated in early 2014 when farmer, religious, political and civil society organisations and labour unions took to the streets of the capital, Accra, on 28 January to demonstrate against the adoption of the Bill.

A letter dated 20 February 2014 from 51 NGOs and networks from around the world, titled "Ghana's Plant Breeders Bill Lacks Legitimacy! It Must Be Revised",²¹ was sent to the Speaker of the House, Edward Korblly Doe Adjaho, the Chairperson of the Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs, Alban Kingsford Sumanu Bagbin, and all Members of Parliament. It urged Parliament to refrain from adopting a Bill that, in its current form, lacked credibility and legitimacy and did not benefit Ghana. The signatories called for extensive consultations involving all stakeholders, including the farming communities and civil society, to be initiated urgently with the aim of developing balanced and equitable legislation with appropriate safeguards to protect the interests of smallholder farmers and public interests.

The mobilisation delayed the passing of the Bill as public debate continued. On 11 November 2014 when Parliament met, the Speaker suggested that the Bill be further considered due to the public outcry, and that more consultations be undertaken.²²

Three years since its launch, the national campaign has continued. Farmers' and civil society organisations including FSG have been pressing the government to reject UPOV 1991 and withdraw the Plant Breeders' Bill as well as to honour its obligations under the Treaty and the CBD by using the flexibility provided under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to legislate a *sui generis* PVP law that is appropriate for Ghana.

In a radio interview on 16 March 2016, the Vice-Chairperson of the Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs, George Loh, reportedly said: "We have done extensive consultations. We even did two consultations carried live on television with all stakeholders. So, nobody can pretend that we haven't spoken to people... If after consultations, you do stand where you are, fine! We have consulted."²³

FSG expressed its surprise at this claim and questioned how a 4 December 2013 meeting could be considered as part of the

"further consultations" called for by the Speaker on 11 November 2014, almost a year later.²⁴

Subsequently in April 2016, it was reported that Ghana's Parliament announced that it would provide "organisations and the general public the unique opportunity to have their say in the passage of any law" through a Bill Symposium Series. FSG responded by making a public call for Parliament to completely withdraw the Plant Breeders' Bill and replace it with a *sui generis* PVP system suitable to the country's conditions.²⁵

FSG also reiterated its call for the publication of the consultation report. It noted that "it is almost three years now since these consultations begun. We are also aware that a lot of petitions have been presented to Parliament. It does no one any good to ignore all these and organise a one-day symposium to replace such valuable and detailed work already presented to Parliament over the years... None of the demands by Ghana's civil society and faith-based organisations have been included. For there to be a meaningful symposium, it would be professional to publish first the report on all the consultations, together with the proposed changes as a result of these consultations, so the symposium could serve as our final comments on this report. Otherwise, this symposium appears to be yet another convenient excuse to avoid accounting for the consultations so far and hiding under a symposium to pursue the same agenda (of passing the controversial law)."²⁶

Ghana's experience shows that even when there is concerted and organised protest and advocacy sustained over many years, supported by social and legal research and analysis, the absence of meaningful participatory mechanisms and processes results in "consultations" that are more "lip service" than actual participation in decision-making.

However, it is encouraging that the Ghanaian people's mobilisation involves a broad alliance, including farmers' organisations, faith-based and civil society organisations, and continues to make demands that are in line with Ghana's rights under the Treaty, the CBD and the WTO-TRIPS Agreement.

E) KENYA²⁷

Kenya joined UPOV 1978 in 1999 and recently ratified UPOV 1991. It became a party to the Treaty in 2003.

In 2012, Kenya amended its seeds and PVP legislation to bring it into compliance with UPOV 1991. The amendments, which came into force in 2013, had a significant impact on Farmers' Rights. For example, while prior to the amendments, the legislation did not contain any provision restricting farmers from saving, reusing and exchanging farm-saved seed/planting materials of a protected variety, the 2012 amendments introduced UPOV 1991 requirements, with the consequence that farmers' right to freely use, sell and exchange farm-saved seed of a protected variety was restricted.

20 foodsovereigntyghana.org/petition-to-parliament-on-the-plant-breeders-bill-2013/

21 www.twn.my/title2/biotk/2014/btk140211.htm

22 www.parliament.gh/publications/30/906

23 foodsovereigntyghana.org/publish-report-on-consultations-over-plant-breeders-bill/

24 *Ibid.*

25 foodsovereigntyghana.org/replace-plant-breeders-bill-with-a-sui-generis-pvp-system/

26 *Ibid.*

27 The discussion on Kenya is extracted from *Owning Seeds, Accessing Food* (2014), pp. 37-38.

A study on Kenya and its PVP system reported, "Other than the Seed Trade Association of Kenya (STAK) and Kenya Plant Health Inspectorate Service (KEPHIS), no association (including farmers' associations) reported having been consulted or contributing to the process leading to the enactment, and 'neither the Ministry of Agriculture nor KEPHIS allude to having engaged in consultations with farmers'."²⁸ The study also found a lack of information and participation related to regional (African) efforts to harmonise seed legislation and plant breeders' rights laws based on UPOV 1991²⁹ (see discussion in Section 3.2(a) below).

Proponents of the adoption of the UPOV 1991-consistent amendments in Kenya were mainly driven by the rationale of boosting trade in agricultural products at the regional and international levels, pointing to the success of the Kenyan flower industry as the best example to justify this reasoning.³⁰ However, the flower industry has been booming since 1988 (i.e., even before PVP was introduced) and continued to boom under the previous law.³¹

THE PHILIPPINES³²

The Philippines became a Contracting Party to the Treaty in 2006.

It is a legal requirement in the Philippines to hold public consultations on new legislation, and the abovementioned HRIA study reported that consultations on the Philippine PVP Act had been held. One government official interviewed mentioned extensive consultations involving multiple sectors and including indigenous peoples' interests. However, other informants indicated that consultations had only been conducted at a very late stage of the process (after the drafting process and after the bill had been filed in Congress).

There was no evidence that the government mandated any assessments of the likely impacts of revised PVP legislation. Compliance with the WTO's TRIPS Agreement was cited as the main reason for the enactment of the PVP law. One NGO representative noted that "key personalities from the public research institutions and the International Rice Research Institute (IRRI) actively lobbied Congress and used their influence to ensure the enactment of the law. The Department of Agriculture's policy and planning office also actively pushed for the bill." Interestingly, there was little involvement of the Philippines' seed industry in the lobbying stage – probably due to the lack of a robust domestic seed industry.

Several informants for the HRIA study mentioned a "push" from USAID (US Agency for International Development)-fund-

ed think-tank AGILE, and all those spoken to for the study agreed that AGILE was a major player, and "was there inside the bicameral conference committee advising the bicameral panel".

However, a farmers' exception provision on saving, re-using, exchanging and selling of farm-saved seeds was included in the law that was finally enacted, testifying to civil society's and farmers' groups' involvement, albeit at a late stage in the process. An earlier version of the PVP bill also had strong provisions in favour of indigenous people and traditional knowledge protection, but those were taken out of the final act because a separate Indigenous Peoples' Rights Act had been enacted at that time.

The HRIA study concludes that the inclusion of exceptions to breeders' rights in order to better protect Farmers' Rights was probably not a coincidence. This is because the process in the Philippines was the only one (among the three countries examined in the study, the other two being Kenya and Peru) where adherence to UPOV 1991 was not an implicit goal of the reform of the PVP law. If it had been the implicit goal, there would have been almost no room for manoeuvre, because the law would have to be in compliance with UPOV 1991. In such a case, even if stakeholders were consulted, they would not have had a big impact, as UPOV 1991 does not provide much flexibility in national implementation.

3.2. – REGIONAL EXPERIENCES

A) ARUSHA PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS 2015

On 6 July 2015, in Arusha, Tanzania, a Diplomatic Conference held under the auspices of the African Regional Intellectual Property Organization (ARIPO)³³ adopted a harmonised regional legal framework for the protection of plant breeders' rights, the Arusha Protocol for the Protection of New Varieties of Plants (Arusha Protocol).

This was greeted with chagrin by farmers' organisations and CSOs in the region grouped under the Alliance for Food Sovereignty in Africa (AFSA).³⁴ AFSA has, since late 2012, sought to actively engage with the ARIPO Secretariat and member states.

For farmers and civil society, the Arusha Protocol raises significant concerns as it is modelled on UPOV 1991, a regime designed to accommodate the interests of the large-scale commercial farming sector in industrialised countries. Such a regime is considered to be inappropriate for the ARIPO region as 13 of the 19 ARIPO member states are categorised by the UN as least de-

28 *Owning Seeds, Accessing Food* (2014), p. 37.

29 *Ibid.*

30 *Owning Seeds, Accessing Food* (2014), pp. 37–38.

31 *Ibid.*

32 The Philippine discussion is extracted from the *Owning Seeds, Accessing Food* HRIA

report (2014), p. 39. The HRIA project contacted a range of actors who had been involved in 2001–2002 in the drafting and/or enactment of the Philippine Plant Variety Protection Act and its implementing instruments. These included key officials from the Department of Agriculture,

the Institute of Plant Breeding at the University of the Philippines Los Baños, staff of the NGO SEARICE, and technical consultants of the Agriculture Committees of the House of Representatives and the Senate.

33 The ARIPO members are Botswana, Gambia, Ghana,

Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, São Tome and Príncipe, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

veloped countries and agriculture in the region is largely dependent on small-scale farmers who rely heavily on informal systems for access to seeds, irrespective of the varieties the farmers cultivate.³⁵

Farmers and civil society are also concerned that the Protocol severely restricts the ability of farmers to freely use, save, exchange and sell farm-saved seeds/propagating materials of a protected variety, lacks safeguards to prevent misappropriation of genetic resources, and adversely impacts the sovereign rights of member states as the Protocol is about adopting a centralised system for the grant and administration of plant breeders' rights, meaning that issues which are usually in the hands of national governments would be determined centrally by the ARIPO Secretariat.

The whole process of developing the Protocol has been extensively criticised for being dominated by foreign interests and for failing to adequately inform and include small farmers' groups from across the ARIPO region.

In January 2016, AFSA issued an open letter³⁶ to all UPOV members expressing its outrage at the "deliberate" exclusion of African civil society and representatives of smallholder farmers from key negotiation processes leading to the adoption of the Arusha Protocol. This letter came in response to an ARIPO representative, Emmanuel Sackey, informing the 49th session of the UPOV Council that CSOs had been able to participate in the whole process of developing the Protocol.

AFSA's letter stated that its numerous direct requests to the ARIPO Director-General and even to the Tanzanian government, the host of the Diplomatic Conference to adopt the Protocol, to allow AFSA to participate "were pointedly ignored". However, at the same time, "the ARIPO Secretariat facilitated the participation of representatives of foreign entities and the seed industry, including the World Intellectual Property Organization (WIPO), the EU Community Plant Variety Office (CPVO), the French National Seeds and Seedlings Association (GNIS), the United States Patent and Trademark Office (USPTO) and the International Union for the Protection of New Varieties of Plants (UPOV)".

The letter also documented the multiple submissions³⁷ AFSA had sent to the ARIPO Secretariat expressing concerns over the content of the Protocol and its process, the lack of in-

34 AFSA Press Release, [ARIPO Sells Out African Farmers, Seals Secret Deal on Plant Variety Protection](#), 8 July 2015. AFSA is a pan-African platform comprising civil society networks and farmer organisations working towards food sovereignty in Africa, representing smallholder farmers, pastoralists, hunter/gatherers, indigenous peoples, citizens and environmentalists. Members of AFSA include networks and farmer organisations working in Africa including the African Biodiversity Network (ABN), Coalition for the Protection of African Genetic

Heritage (COPAGEN), Comparing and Supporting Endogenous Development (COMPAS) Africa, Friends of the Earth- Africa, Indigenous Peoples of Africa Coordinating Committee (IPACC), Participatory Ecological Land Use Management (PELUM) Association, Eastern and Southern African Small Scale Farmers' Forum (ESAFF), La Via Campesina Africa, FAHAMU, World Neighbours, Network of Farmers' and Agricultural Producers' Organizations of West Africa (ROPPA), Fellowship of Christian Councils and Churches in West Africa (FECCIWA),

formation from the ARIPO Secretariat, the efforts that AFSA had made to seek participation in regional meetings and workshops, the limited representation allowed on some occasions with costs to be borne by civil society, and the exclusion of farmers and CSOs from some of the key meetings including the Diplomatic Conference that adopted the Protocol.³⁸

Notably, AFSA asserted in the letter that ARIPO's written response to the abovementioned detailed concerns raised by organisations from the sub-Saharan region, although made available to ARIPO members, was never officially communicated to the signatories that had raised the concerns. Nevertheless, on gaining a copy of this response, AFSA sent to the ARIPO Director-General a detailed reply, countering with evidence key points of ARIPO's response.³⁹

AFSA further noted that the "ARIPO Secretariat has never bothered to make the process transparent, open or inclusive and neither has it shared any information concerning the process", stressing that "the process for developing this legal framework is driven by foreign entities with vested interests and not by the needs and interests of the people in the region."

AFSA considered the actions of ARIPO to be a "violation" of Article 9.2(c) of the Treaty, given that the Arusha Protocol has major implications at the national level for the ARIPO members that are also members of the Treaty. It added that the lack of effective public consultation may also be inconsistent with the constitutions of several ARIPO countries which require prior public consultation.

International organisations such as UPOV and WIPO had intentionally enabled the non-fulfilment of Article 9.2(c) of the Treaty, AFSA argued in its letter, while expressing disappointment with the role the CPVO played in supporting this process, considering that members of the European Union are also members of the Treaty.

This case shows clearly that regional lawmaking has significant national implications. The Arusha Protocol sets centralised standards in relation to the substantive and procedural aspects of PVP that will bind national governments that ratify the Protocol.

There was no information available at the national level as well on the ARIPO discussions, nor was there any inclusive public discussion. For example, the HRIA study of Kenya in relation to PVP found that organisations in Kenya (an ARIPO

African Centre for Biosafety, Rural Women Forum, Ground Swell Africa, Tanzanian Bio-diversity Organizations, ANORAF Togo and Plate forme Sous Régionale des Organisations Paysannes d'Afrique Centrale (PROPAC).

35 More than 80% of all seed in Africa is still produced and disseminated through "informal" seed systems: Smale, M., Byerlee, D. and Jayne, T., Maize revolutions in sub-Saharan Africa (2011), Policy Research Working Paper 5659, World Bank Development Research Group, p. 7.

36 AFSA open letter to members of UPOV, 28 January 2016. URL: afsafrica.org/open-letter-to-members-of-the-international-union-for-the-protection-of-new-varieties-of-plants-upov-2/

37 See acbio.org.za/wp-content/uploads/2015/02/CSOconcernsonARIPO-PVPframework1.pdf and acbio.org.za/wp-content/uploads/2015/02/AFSA-Submission-ARIPO-PVP-Protocol.pdf

38 *Ibid.*

39 See acbio.org.za/wp-content/uploads/2015/02/AFSA-letter-ARIPO-March2014-.pdf

member) such as the Kenya National Federation of Agricultural Producers (KENFAP) were not aware of, involved in or consulted in the ARIPO process.⁴⁰

B) COMESA SEED TRADE HARMONISATION REGULATIONS 2014

On 24 February 2014, the Council of Ministers of the Common Market for Eastern and Southern Africa (COMESA) approved the COMESA Seed Trade Harmonisation Regulations. The Regulations allow for the expedited registration of seeds to enable the creation of a seed free trade zone within the COMESA region.

However, civil society attempts to engage came late in the process, which had already started in 2008 when the COMESA Council of Ministers declared that COMESA should urgently rationalise and harmonise seed regulations and policies in its 19 member states within two years. The seed industry and formal seed sector were very much involved. However, CSOs were not aware of the COMESA proceedings until 2013, by which time the process was already at a very advanced stage. After much persuasion and persistence, a group of concerned CSOs managed to gain access for a representative to meetings in Harare and Lusaka. At first they were told that they were not invited to consultations because they had no knowledge about seed laws and issues concerning seed variety release, certification and so forth. When attending the first meeting in Harare, the CSO representative, who made a presentation raising concerns especially over impacts on smallholder farmers, was even ridiculed by many of the government officials present.⁴¹

At a USAID-supported regional workshop conducted in March 2013, CSOs and smallholder farmers through AFSA expressed serious concerns over the substance and process of the COMESA initiative.⁴² One concern voiced in their statement was that "seed trade" is not defined in the Regulations as being restricted to only the commercial seed sector, raising concerns that they do not provide any safeguards that small farmers will be allowed to freely use, save, sell, barter and exchange traditional varieties of seed. This lack of safeguards would open the door for the criminalising of the customary practices of small farmers to exchange, sell and other use of traditional seed [sic] within the COMESA region".⁴³ Thus they sought the inclusion of an appropriate safeguard in the text.⁴⁴

On the process, their statement described it as "flawed", because "there is no evidence to demonstrate the involvement of and consultation with the citizens in COMESA countries, par-

ticularly small-scale farmers. It is our view that a technical group from COMESA countries in collaboration with the African Seed Trade Association (AFSTA) and Alliance for Commodity Trade in Eastern and Southern Africa (ACTESA) and funded by USAID, deliberated on the issues and drafted regulations that are now said to be ready for submission to COMESA member state governments for endorsement during May/June 2013, when they will become binding on all member states of the COMESA region. The Regulations have far-reaching implications for millions of small farmers in the COMESA region. Their exclusion from the process renders it deeply flawed and inadequate."

Following the approval of the Regulations, national implementation is now the focus. The COMESA Seed Harmonisation Implementation Plan 2014-2020 (COM-SHIP) was developed by the COMESA Secretariat and ACTESA to guide and support member states in implementing the Regulations. The Executive Summary of COM-SHIP notes that "COMESA, with support from its Specialised Agency, the Alliance for Commodity Trade in Eastern and Southern Africa (ACTESA), and in conjunction with the African Seed Trade Association (AFSTA) led the baseline analysis development, stakeholder engagement and review and finalisation of the COMESA Seed Trade Harmonisation Regulations."⁴⁵ AFSTA is a continent-wide umbrella body representing the private seed industry.

It further adds that COM-SHIP "was developed from the ground up with extensive involvement of national governments and local and regional industry stakeholders".⁴⁶

Thus, in addition to PVP laws based on UPOV 1991, smallholder farmers in Africa also have to face challenges to their rights posed by seed laws, with little or no participation in decision-making on those seed laws when regional harmonisation takes place which limits the options for national policies and laws.

C) SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) DRAFT PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS⁴⁷

Another regional harmonisation effort that triggered smallholder farmer and CSO concerns was the draft SADC Protocol for the Protection of New Varieties of Plants modelled on UPOV 1991.

The first civil society submission was made on 2 April 2013 by 33 signatories from the SADC region, 18 from other African countries and 32 from outside Africa.⁴⁸ They comprised farmer and civil society organisations and networks (national to global),

40 *Owning Seeds, Accessing Food* (2014), p. 37.

41 Email communication dated 8 July 2016 with Mariam Mayet, Director of the African Centre for Biodiversity (ACB). ACB is one of the most active research and advocacy organisations in Africa working on Farmers' Rights and seed sovereignty. It is also a member of AFSA.

42 AFSA Press Release, Comesa

Approval of Seed Trade Regulations Spells Disaster for Small Farmers and Food Sovereignty in Africa (2013).
43 Civil Society and Small Holder Farmer Statement at the Awareness Creation on COMESA Seed Trade Harmonisation Regulations for the COMESA Region (27-28 March 2013, Lusaka, Zambia).
44 "These Regulations shall apply to

seed varieties developed and released by the commercial/ formal seed sector, including those released for commercial use by public institutions and the private sector. Nothing in these Regulations shall preclude, prohibit or inhibit farmers from sharing, exchanging, saving and replanting their traditional seeds for the conservation and development of plant

genetic resources."

45 *COMESA Seed Harmonisation Implementation Plan (2014-2020)*.

46 *Ibid.*

47 This account draws from an AFSA Briefing Paper, *AFSA Makes Small Gains for Farmers' Rights in Draft PVP Protocol* (June 2014).

48 *Civil Society Submission on SADC's Draft Protocol on Plant Breeder's Rights* (2013).

scientists and researchers. Strong concern was expressed that the proposed legal framework was “a restrictive and inflexible legal regime that grants extremely strong intellectual property rights to commercial breeders and that it undermines farmers’ rights.” It was pointed out that there were provisions “that diverge from positions and commitments of SADC members undertaken regionally and internationally around issues concerning community and farmers’ rights as well as plant breeders’ rights.”

The letter stated that most of the SADC members have ratified the Treaty.⁴⁹ In addition, the Council of Ministers of the Organisation of African Unity (predecessor to the African Union) had adopted an African Model Law on “The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources”, and recommended that its members adopt the Model Law. One of the aims of this Model Law is to provide an effective *sui generis* option for plant variety protection relevant to African nations. However, the letter pointed out, “the draft Protocol has simply ignored the Model Law, including critical aspects that are intended to preserve and promote farmers’ rights, crop diversity, and mechanisms to deal with biopiracy and benefit sharing.”

Serious concerns were also raised about the lack of consultation with smallholders and civil society regarding the modeling of the draft Protocol on UPOV 1991 and their exclusion from the drafting of said Protocol. These concerns were heard and addressed by the SADC Secretariat in that some AFSA members (including smallholder farmer representatives)⁵⁰ were invited to participate in an SADC Regional Workshop on 13-14 March 2014 in Johannesburg, South Africa to review the draft Protocol. The seed industry in Africa was well represented at the workshop,⁵¹ as were several farmer unions/associations.⁵²

The proceedings took the form of line-by-line discussions between AFSA members and representatives of the SADC member states on the draft Protocol. The discussions were extremely contentious and often hostile. AFSA members made numerous interventions throughout the proceedings.⁵³ AFSA members repeatedly placed on record their serious objections to the draft Protocol being based on UPOV 1991.

After highly contentious and difficult discussions, AFSA members were able to persuade SADC member states to amend

⁴⁹ There are 15 SADC members: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Except for Botswana, Mozambique and South Africa, the other 12 are Treaty Contracting Parties.

⁵⁰ These included: African Centre for Biosafety (ACB), Zimbabwe Small-scale Organic Farmers Forum (ZIMSOFF), Eastern and Southern Africa Farmers Forum (ESAFF), Centre for Environmental Policy and Advocacy (CEPA), Tanzania Alliance for

Biodiversity (TABIO), Community Development Technology Trust (CTDT) and the Food Sovereignty Campaign/Surplus People’s Project (SPP).
⁵¹ Seed Traders Association of Malawi, National Seed Trade Association Angola, Pannar South Africa, Tanzania Seed Trade Association, Zambia Seed Trade Association, Seed Co Zimbabwe and the South African National Seed Organisation.

⁵² Southern African Commercial Agriculture Union (SACAU), Lesotho National Farmers Union, Small Farmers Welfare Fund Mauritius, Seychelles Farmers Association and Zimbabwean

the provision on “farmers’ exception” and to introduce “disclosure of origin”.

The original text on an exception for farmers⁵⁴ modelled on Article 15(2) of UPOV 1991, was totally unacceptable to AFSA members. They engaged the SADC member states for almost seven hours on this provision alone. They made several recommendations for a substitute clause, some of which were also supported by the FAO representative present. Continued interventions by AFSA members eventually prompted representatives from Botswana and South Africa to support the inclusion of an alternative clause; they worked with AFSA members to draft the following compromise clause on exception to plant breeders’ rights: “acts done by a farmer to save, sow, re-sow or exchange for non-commercial purposes his or her farm produce, including seed of a protected variety, within reasonable limits and subject to the legitimate interests of the holder of the breeder’s right. The reasonable limits and the means of safeguarding the legitimate interests of the holder of the breeder’s right shall be prescribed.”

While this was an improvement on the original clause, a great deal will depend on how “non-commercial purposes”, “reasonable limits” and “safeguarding the legitimate interests of the holder of the breeder’s right” are further elaborated in the implementing regulations if the Protocol does come into being.

SADC member states also agreed to include, as part of the application requirements for plant breeders’ rights, a declaration to the effect that the genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired. This came after much discussion and following a positive intervention from the SADC Secretariat that “we cannot exploit farmers”.⁵⁵

While some space was opened up at the tail end through the participation of AFSA members at the 2014 workshop, the AFSA objections still remain with regard to the draft Protocol being based on UPOV 1991.

Following the March 2014 workshop, a SADC meeting was held a few days before the July 2015 Diplomatic Conference that adopted the Arusha Protocol on PVP discussed above. Some AFSA members were invited but not allowed to make any inputs except through the SADC member states.⁵⁶

⁵³ National Farmers’ Union.

⁵⁴ SADC, Record of Proceedings of a SADC Regional Workshop to Review the Draft Protocol for the Protection of New Varieties of Plants (Plant Breeders’ Rights) in Southern African Development Community Region. Johannesburg, 13-14 March 2014. Cited in AFSA Briefing Paper (June 2014).

⁵⁵ The draft Article 28(d) read: “acts done by subsistence farmers for the use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings the protected variety or varieties covered by Article 27(3) (a)(i) or

(ii) to this Protocol.”

⁵⁶ This account draws from an AFSA Briefing Paper, “AFSA Makes Small Gains for Farmers’ Rights in Draft PVP Protocol” (June 2014).

⁵⁶ Email communication dated 8 July 2016 with Mariam Mayet, Director of the African Centre for Biodiversity, who was a participant. The SADC Secretariat denied that they had given an opinion to the meeting that CSOs were free to participate in the proceedings. A considerable part of the discussion was on coherency issues between the Protocol and the memorandum of understanding in relation to the SADC Seed Centre.

It is interesting to note that the SADC Treaty obliges member states to treat all the farmers in the region equitably and that SADC is obliged to conduct meaningful consultation⁵⁷ with smallholder farmers to discuss issues of national and regional importance to these farmers, including creating an enabling environment for the protection of farmers' varieties and providing extension support for farmers' seed systems to enable them to flourish.

3.3 – INTERNATIONAL EXPERIENCES

A) INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)

UPOV is a system for the protection of plant varieties, with a mission to encourage development of new varieties of plants "for the benefit of society". It claims that farmers are one set of beneficiaries of the system. Yet documentation of the contradictions between UPOV and the Treaty shows that apart from the right to participate in decision-making, UPOV's activities are also undermining other farmers' rights.⁵⁸ Available evidence thus suggests that UPOV has been enabling non-fulfilment of Farmers' Rights, including the right to participate in decision-making.

Technical assistance

UPOV is known to support processes that are not participatory or inclusive of farmers or their representatives. For example, the UPOV Secretariat provided extensive technical assistance to the ARIPO Secretariat in the development of the controversial Arusha Protocol (discussed above). The UPOV Secretariat prepared the drafts of the Protocol,⁵⁹ participated as experts in various ARIPO meetings, funded the participation of resource persons in the ARIPO meetings, and co-organised regional workshops and other meetings on the same matter with the ARIPO Secretariat.⁶⁰

Clearly UPOV was in a position to ensure that ARIPO should engage meaningfully with concerned farmer and civil society organisations and to facilitate an open, inclusive and ev-

idence-based discussion on whether UPOV 1991 is an appropriate framework for the region, given that ARIPO members are also Parties to the Treaty. Instead, the UPOV Secretariat continued to support the ARIPO Secretariat in keeping farmer and civil society organisations out of the ARIPO process while accommodating the participation of foreign entities.

It is noteworthy that a document titled "UPOV's training and assistance strategy" (2015)⁶¹ makes no mention of the Treaty or the need to consider Farmers' Rights.

Participation in UPOV governing bodies and access to documents

Historically, UPOV has operated within a closed circle of governments (mainly developed countries) and representatives of the seed industry, with documents in a restricted area accessible only to country representatives.⁶² It has been rather averse to participation of farmers as well as CSOs advocating for Farmers' Rights.

On 21 October 2009, the UPOV Consultative Committee rejected an application for observer status in UPOV bodies made by the Association for Plant Breeding for the Benefit of Society (APBREBES) and the European Coordination Via Campesina (ECVC) comprising 24 farmers' and agricultural workers' unions from across Europe. ECVC is a member of La Via Campesina, the biggest international movement of peasants, small- and medium-sized producers, landless, rural women, indigenous people, rural youth and agricultural workers.

The observer status was sought to enable organisations working on PVP and Farmers' Rights to follow UPOV's inter-governmental discussions on an equal footing with the seed industry which is heavily represented in UPOV.

In a press release, APBREBES and La Via Campesina disputed the reasons given by UPOV for the rejection. They argued that their competence was beyond question⁶³ and the rejection was a violation of UPOV's rules on granting observer status.⁶⁴ According to the statement, "It is truly remarkable that UPOV asserts that other observers, such as the International Association for the Protection of Intellectual Property (AIPPI) has more competence on these issues than one of the world's biggest farmer organisations! In addition, it is widely known that mem-

57 The SADC Treaty principles include human rights and equity: Treaty of the Southern African Development Community, Article 4. See also Article 6(2) on non-discrimination. Article 23(1) obliges SADC "to seek to involve fully, the people of the Region and key stakeholders (including private sector, civil society, NGOs and workers and employers organisations) in the process of regional integration".

58 Shashikant and Meienberg (2015).
59 ARIPO Document ARIPO/CM/XIII/8 dated 30 September 2011 prepared for the 13th session of the Council of Ministers in Ghana states: "Following the decision of

the Council of Ministers, the ARIPO Secretariat requested technical assistance from UPOV in the preparation of policy and legislative frameworks on the protection of new varieties of plants. As a result of the request, UPOV prepared draft legislative framework for the Organisation." 60 ARIPO's report to the 14th session of the Council of Ministers (ARIPO/CM/XIV/8) states: "The Secretariat also in cooperation with UPOV organised an expert meeting to review the substantive articles of the legal instrument ... In July, 2013, a regional consultative workshop was organised by

ARIPO in collaboration with UPOV and United States Patent and Trademark Office (USPTO) to bring together experts from the IP [intellectual property] Offices and Ministries of Agriculture to critically examine the substantive articles of the legal texts in order to submit a revised text for consideration by the Fourteenth Session of the Council of Ministers." The ARIPO Secretariat also organised, "in cooperation" with UPOV and "with the assistance" of the USPTO, a regional workshop on the Draft ARIPO Protocol for the Protection of New Varieties of Plants on

29-31 October 2014 in Zimbabwe (ARIPO/HRE/2014/INF/1).

61 UPOV document CC/90/7. Access to this document requires a password.

62 www.apbrebes.org/content/transparency-and-governance

63 www.apbrebes.org/press-release/upov-denies-participation-farmers-and-civil-society-organizations

64 UPOV Rules Governing the Granting of Observer Status to States, Intergovernmental Organisations and International Non-Governmental Organisations in UPOV Bodies (2005, revised in 2012).

ber organisations of APBREBES have been active on issues such as plant breeding and intellectual property rights related to seeds and plants for many years and this competence is clearly stated in its statutes.⁶⁵

More than 80 farmer and other NGOs signed an open letter addressed to the UPOV Secretariat in support of APBREBES and ECVC's application for observer status.⁶⁶ Lars Peder Brekk, then Norwegian Minister for Agriculture and Food, and Manfred Bötsch, then Director of the Swiss Federal Office for Agriculture, also sent their respective letters of support.

In October 2010 observer status was eventually granted to APBREBES and ECVC allowing participation in some UPOV bodies⁶⁷ but not the Consultative Committee, the main decision-making body restricted to UPOV member states.

In 2011 APBREBES made the following recommendations under the call "50 Years of UPOV – Time to Change": (i) all documents should be publicly available; (ii) the Consultative Committee of UPOV should be open for all observers; and (iii) observers should join its work with a view to achieving a balanced representation of the different stakeholders and interests.⁶⁸

APBREBES noted that UPOV's work method is outdated, and serious concern was expressed that UPOV was negotiating rules and regulations on breeders' rights behind closed doors, when such laws have detrimental impacts on farmers' rights to farm-saved seeds and the conservation and sustainable use of agricultural biodiversity.⁶⁹

In 2012, the rules governing the granting of observer status for participation in UPOV bodies were revised, and a new rule was added that effectively limits farmers' participation. The rule states: "In the case of an international non-governmental organisation with different coordination entities, observer status will be granted to only one coordination per organisation."⁷⁰

In a press release, APBREBES said, "This strange article is not found in the rules of any other international organisation. It is clearly aimed at targeting farmer groups such as La Via Campesina which has 'regional coordination entities' as part of its structure. The European Coordination of La Via Campesina (ECVC) presently has observer status at UPOV. But the new rule will pre-

vent other coordination entities such as Latin American Coordination of Countryside Organisations (CLOC-Via Campesina) from obtaining observer status although La Via Campesina is the biggest and most important organisation of farmers worldwide."⁷¹

APBREBES members expressed "disappointment" that the formulation of rules excluded their participation and the revision did not lead to rules that were consistent with international principles of good governance, including transparency and participation. "On the contrary, these rules make UPOV less inclusive" and "further exacerbate the current imbalance in the representation of stakeholder groups", according to APBREBES, which added that the new rules "are in sharp contrast to practices in other international bodies such as WIPO, the Convention on Biological Diversity and the FAO Seed Treaty, which encourage participation of a broad spectrum of stakeholders".⁷²

Double standards were also pointed out, i.e., UPOV is willing to accept over-representation by the seed industry, with corporations such as Monsanto or Syngenta being represented several times,⁷³ but is reluctant to accept the low possibility of multiple representation of a farmer organisation that comprises national and regional members.⁷⁴ More recently, UPOV granted the World Farmers' Union observer status. Even so, representation of the various stakeholder groups is far from balanced as the seed industry and its advocates⁷⁵ still account for the majority of observers in UPOV and remain the dominant voice in UPOV meetings.

While revising the rules for observer status, the UPOV Council also agreed to make publicly available documents considered by the Administrative and Legal Committee, which were previously password-protected and accessible only to member states. However, documents of the Consultative Committee (the main decision-making body) continue to be password-protected.⁷⁶

Therefore APBREBES began obtaining the Consultative Committee documents through the national freedom-of-information legislation of some UPOV member states, and publishing them on its website.⁷⁷ Meanwhile CSOs and farmers' organisations continue to call for all meeting documents to be made public.

65 www.apbrebes.org/press-release/upov-denies-participation-farmers-and-civil-society-organizations

66 www.twn.my/announcement/Open_letter_UPOV_with_signatories.pdf

67 The UPOV Council, the Administrative and Legal Committee, the Technical Committee and the Technical Working Parties.

68 www.apbrebes.org/press-release/50-years-upov. APBREBES argued that these changes would be in line with the general trend among many intergovernmental organisations over the last decade to gradually expand transparency and participatory mechanisms.

Further, UPOV needs to also put in place mechanisms to ensure that all its activities and decisions are assessed with regard to their impact on the right to food, Farmers' Rights, biodiversity and development in general. The recommendations were based on a report commissioned by two APBREBES members, The Berne Declaration (now called Public Eye) and Development Fund, "Observer Status and Access to Documents: Comparative Analysis across Selected International Organizations", to provide inputs to the working group to look at rules concerning observers that was established by the UPOV Council at the same time

as observer status was granted to APBREBES and ECVC.

69 *Ibid.*

70 See paragraph 3(4) of UPOV Rules Governing the Granting of Observer Status to States, Intergovernmental Organisations and International Non-Governmental Organisations in UPOV Bodies (2005, revised in 2012). 71 APBREBES, UPOV Creates Barriers to Farmers Participation (2012).

72 *Ibid.*

73 For example, Syngenta is represented in UPOV by CropLife, the International Seed Federation, the European Seed Association, the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties.

74 APBREBES (2012).
75 For example, the International Association for the Protection of Intellectual Property, International Seed Federation and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties.

76 IP Watch, UPOV Council to Formalise Access to Documents; Civil Society Seeks Greater Participation, October 2012.

77 www.apbrebes.org/UPOV-Restricted-Area

This case illustrates the hurdles faced by farmers' organisations and CSOs that seek to be in a treaty process that impacts so significantly on Farmers' Rights.

B) WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

WIPO is an influential provider of technical assistance to developing countries on the subject of intellectual property. As a UN specialised agency,⁷⁸ it would be reasonable to expect WIPO to take special measures to facilitate the realisation of Farmers' Rights, in particular the right to participate in decision-making, to the extent that such rights intersect with intellectual property. However, evidence suggests otherwise. WIPO's actions and activities have been found to not support Article 9.2(c) of the Treaty, or even to ignore it.⁷⁹

One area in which WIPO renders technical assistance is the development of national intellectual property strategies, which presumably would guide development of national laws, policies and practices. To this end, WIPO has developed a set of tools on the Methodology for the Development of National Intellectual Property Strategies. These are: the Process (Tool 1), Baseline Questionnaire (Tool 2), and Benchmarking Indicators (Tool 3).⁸⁰

Tool 1 gives guidance on the process that should be employed in developing national intellectual property strategies, and there is no mention of involving farmers in such a process.

Tools 2 and 3 each contain an entire chapter on PVP. Cluster 5 of Tool 2 raises questions that should be considered with regard to PVP in the development of a national intellectual property strategy. While there is a question on whether a country is a member of UPOV, there is no such question in relation to the Treaty. The Questionnaire includes questions about the status of the private sector, the government's policy in relation to plant breeding, and partnerships between breeders, research organisations and industry, but is silent on farmers, their rights and role in the agricultural system, government policy in relation to PGRFA or partnerships with farmers.

Chapter 6 of Tool 3 on "Plant Variety Rights and Seed Industries" essentially champions UPOV as the legal framework for the protection of plant varieties. There is no mention of Farmers' Rights or that under the WTO-TRIPS Agreement countries have full freedom to adopt alternative *sui generis* systems of protection that incorporate Farmers' Rights.⁸¹ In fact, the same chapter contains a list of plant breeding and seed associations, but no information is available on farmers' groups and the CSOs working with them.

Apart from the tools, the various technical assistance missions of WIPO are also about promoting UPOV 1991 at the expense of Farmers' Rights.

In 2013, WIPO co-organised a regional workshop in Malawi

with ARIPO, the US Patent and Trademark Office and UPOV.⁸² The topic of the workshop was the ARIPO Legal Framework for the Protection of New Varieties of Plants. In 2014, WIPO co-organised another regional workshop in Harare, with ARIPO and UPOV.⁸³ These meetings were part of the process of developing the Arusha Protocol for the ARIPO region that triggered widespread criticism for its exclusion of farmers and lack of transparency, as discussed above. WIPO did not require ARIPO to ensure compliance with Article 9.2(c) of the Treaty prior to supporting its activities.

In May 2012, WIPO hosted a workshop in Geneva on Intellectual Property, Innovation and Food Security, focused on East Africa, particularly Tanzania. Following the workshop, Tanzanian CSOs and others raised concerns in a letter dated 18 July 2012 addressed to the WIPO Director-General. The letter said that, among other things, "The program and participants list suggest that participants representing the interests of the industry in particular the multinational corporations heavily dominated the workshop." It added that the "program and participants list shows hardly any representation of civil society organisations that champion farmers' rights or even key national farmer organisations such as the Tanzania based Eastern and Southern Africa Farmers Forum (ESAFF), and MVIWATA (representing farmers associations in Tanzania). In addition, the program fails to reflect the full range of views that exist on the topic of [intellectual property] and food security such as critical views about the [intellectual property] system relating to the adverse impacts on food security or agro-biodiversity."⁸⁴

With the above examples, one can conclude that like UPOV, WIPO is enabling the non-fulfilment of Farmers' Rights, including the right to participate in decision-making. This is unsurprising considering that UPOV (although not a UN agency) is hosted by WIPO and the Director-General of WIPO also heads UPOV as its Secretary-General. WIPO's lack of recognition of Treaty members' obligations in relation to Farmers' Rights is of particular concern given its role and influence as a provider of technical assistance.

C) TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPPA)

The US-led TPPA, which covers 12 countries,⁸⁵ is a highly contentious trade agreement. It has 30 chapters and many annexes, totalling more than 6,300 pages, with parties also adopting bilateral side-letters, many with the US.

In March 2010 at the start of the TPPA negotiations, the 12 governments had agreed to keep an extraordinary range of information secret for 4 years after the entry into force of the TPPA or, if no agreement enters into force, for 4 years after the last round of negotiations.⁸⁶ The thick shield of secrecy around more than 6 years of intense negotiations drew vocal protests in

78 WIPO was established in 1967 under the Convention Establishing the World Intellectual Property Organization and subsequently became a specialised agency of the UN in

1974.

79 Shashikant and Meienberg (2015), p.19.

80 www.wipo.int/ipstrategies/en/

81 An option exercised by countries such as India, Malaysia and

Thailand.

82 Shashikant and Meienberg (2015), p.17.

83 www.wipo.int/tad/en/activity-details.jsp?id=7426

84 Shashikant and Meienberg

(2015).
85 Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

many of the 12 countries concerned, including among CSOs, farmers' organisations, patient groups, unions, small and medium-sized domestic firms, parliamentarians and judges. UN human rights rapporteurs, including the Special Rapporteur on the right to food,⁸⁷ added strong voices of concern over the TPPA provisions and lack of transparency in the negotiations.

Over the years, only leaked versions of some TPPA chapters, including on intellectual property and investment, allowed for details to be seen. The outcry in many countries reflected widespread concerns over the scope of the TPPA that practically covers every aspect of a country's development space and will affect its entire population.

The TPPA negotiations concluded in Atlanta (US) on 5 October 2015⁸⁸ and the text was officially released on 5 November, the first time the public had access to the treaty contents.

The TPPA requires all⁸⁹ Parties that have not done so, to join UPOV 1991.⁹⁰ Joining UPOV 1991 would mean a country such as Malaysia having to abandon its current *sui generis* PVP law.⁹¹ As Malaysia is a Party to the CBD and the Treaty, its PVP law is distinct from UPOV 1991, containing provisions aimed at protecting Farmers' Rights and promoting the objectives of the CBD, that will need to be deleted if the country joins UPOV 1991.⁹² A concerted national CSO campaign against the TPPA and public debate in Malaysia led to a 4-year transition period⁹³ before it is required to join UPOV 1991, in the event that the country ratifies the TPPA.

TPPA countries must also allow patents on "inventions that are derived from plants",⁹⁴ and allow the extension of the patent duration beyond the 20 years required by the WTO if there are delays in the examination and granting of patents.⁹⁵

These obligations go beyond the requirements of the WTO-TRIPS Agreement and are intended to expand the scope of intellectual property protection in favour of the multinational seed industry. The policy space for governments to implement Farm-

ers' Rights is greatly affected and the consequences for farmers, especially small farmers, are significant: further limits on their freedom to operate, higher costs of seeds and inputs, increased misappropriation of local genetic resources, among others.

Yet the decisions on the TPPA were made in secrecy. From the leaked versions of the intellectual property chapter, it could be seen that several developing countries had attempted to include provisions such as requirements to disclose country of origin and evidence of compliance with national access and benefit-sharing legislation in patent applications. However, since the US is not a CBD Party, such proposals were rejected.

Public pressure pushed the governments of several TPPA countries to conduct some consultations at the national level.⁹⁶ However, these were without access to the text, which made the consultations largely meaningless in terms of influencing decisions on negotiating positions and compromises. Farmers' organisations in the various countries were even more excluded as the "consultations" often took place with those that were more organised and had greater access to the national media.

In Malaysia, one of the most vocal CSOs that consistently called for the government to withdraw from the TPPA negotiations was invited by the government to be a "cleared advisor", but a non-disclosure document had to be signed. In rejecting the invitation, the organisation stated that "as a CSO committed to being the conscience of the people and nation, there would be a conflict of interest if we become a cleared advisor sworn to secrecy".⁹⁷

In the US, more than 130 Democratic members of Congress had protested against the secrecy of the negotiations in a letter⁹⁸ to the US Trade Representative in June 2013. In contrast, industry, especially in the US, had good access, and in fact shaped the demands of the US in the TPPA and other similar negotiations.⁹⁹

Nevertheless, civil society activism continues in many TPPA countries to urge non-ratification.¹⁰⁰

86 All negotiating parties agreed that the negotiating texts, proposals of each government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, were provided and would be held in confidence, unless each participant involved in a communication subsequently agrees to its release. See Kelsey, J., The TPP: Treaty making, parliamentary democracy, regulatory sovereignty and the rule of law, *Third World Resurgence*, No. 303/304 (Nov/Dec 2015).

87 Smith, S., Potential Human Rights Impact of the TPP (2015), Third World Network report. See also: UN Expert Urges TPP Countries Not to Sign the TPP Without Committing to Human Rights and Development, 26 February 2016.

88 All 12 countries signed the agreement on 4 February 2016 in New Zealand, which is the formal depositary for the TPPA. Protests continued in several countries including in New Zealand at the venue of the signing ceremony. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPPA will come into force within two years if all original signatories notify that they have completed their domestic processes, or after two years and 60 days if at least six, including the US and Japan and several other larger countries, have done so.

89 New Zealand obtained some form of exception to comply with the Treaty of Waitangi that safeguards Maori rights.

90 TPPA Article 18.7.2(d). New Zealand has an attempted

exception where it can implement a *sui generis* system of protecting plant varieties instead of joining UPOV 1991 as long as it gives effect to UPOV 1991 (Annex 18A). This Annex has an attempted exception for measures to protect indigenous plant species under the Treaty of Waitangi (Paragraph 2). What this actually means for New Zealand's policy choice remains to be seen.

91 Protection of New Plant Varieties Act 2004 (Act 634).

92 www.upov.int/meetings/en/details.jsp?meeting_id=7163

93 The 4 years run from the date the TPPA enters into force for Malaysia.

94 TPPA Article 18.37.4.

95 TPPA Article 18.46.4.

96 For example, in Malaysia the Ministry of International Trade and Industry, which coordinated the country's participation in the TPPA negotiations, held

several consultations and "town hall" meetings. In Australia, New Zealand and the US, where there was high level of civil society activism, meetings were also held with the negotiators.

97 Rejection letter dated 4 December 2014 provided by the Consumers' Association of Penang, Malaysia, which had received an invitation from the Minister of International Trade and Industry to provide input to assist the government on its stand in the TPPA negotiations.

98 delauro.house.gov/index.php?option=com_content&view=article&id=997:delauro-miller-push-for-more-transparency-congressional-consultation-in-trade-negotiations&Itemid=21

99 IP Watch, Confidential USTR Emails Show Close Industry Involvement in TPP Negotiations.

The TPPA experience illustrates the urgent need for farmers, especially smallholder farmers who constitute a crucial part of the population in many developing countries, to be directly engaged in demanding their rights and to join the struggle against secrecy and exclusion in decision-making on so-called trade agreements that in effect intrude into every policy sphere of a country.

This is reinforced by a 2015 statement by 10 UN Special Rapporteurs on human rights and Independent Experts, including Hilal Helver, Special Rapporteur on the right to food, that expressed "concern about the secret nature of drawing up and negotiating many [trade and investment] agreements and the potential adverse impact of these agreements on human rights".¹⁰¹ They recommended that "All current negotiations of bilateral and multilateral trade and investment agreements should be conducted transparently with consultation and participation of all relevant stakeholders" and "All draft treaty texts should be published so that Parliamentarians and civil society have sufficient time to review them and to weigh the pros and cons in a democratic manner."¹⁰²

3.4 – CONCLUSIONS

It is evident that lack of farmers' participation in decision-making undermines Farmers' Rights as a whole. The cases discussed above show that without participation of farmers in decision-making, laws and policies are unlikely to reflect the needs and interests of farmers, in particular smallholder farmers. In fact, in such a scenario the laws and policies tend to jeopardise Farmers' Rights, especially the right to freely use, save, exchange and sell seeds/propagating materials. This can undermine the overall implementation of the Treaty and, more widely, family and community-based farming systems and the right to food. In instances where farmers have engaged in the policy processes, opportunities and space for implementing Farmers' Rights have been created.

The above cases also show that farmers face multiple challenges in their struggle to realise Farmers' Rights. These challenges may be summarised as follows:

- **Lack of recognition in law of the right to participate** makes it difficult for farmers to legally assert their right to participate, to challenge decisions that have been taken without due participation, and to seek redress. As seen in the experiences above, participation of farmers is neither mandatory nor guaranteed. It is very much dependent on the discretion and even whims of the relevant authority, including regional secretariats.
- **Lack of participatory mechanisms** is a major challenge, as evidenced by the cases mentioned above. Even where the right to participate is legally recognised in national constitutions or legislations, adequate participatory mechanisms that enable the

most vulnerable and marginalised communities to communicate their views are needed. Participatory mechanisms should ensure openness and meaningful and evidence-based engagement rather than being *pro forma* or "paying lip service" to the notion of participation, as seen in the experience of Ghana.

- **Limited or no access to information** makes it difficult for farmers to assert their right to participate or to effectively engage in policy processes, as evidenced particularly by the experiences relating to Kenya, the Arusha Protocol, the COMESA Seed Trade Harmonisation Regulations and the TPPA.
- **Increasingly, regional and international processes are formulating policies impacting Farmers' Rights.** The experiences of Colombia, Guatemala and Peru illustrate that national efforts to promote Farmers' Rights may be undermined by regional and international developments such as the Andean Community Decision No. 345 on PVP and North-South free trade arrangements. The regional experiences in Africa suggest that a significant number of policies affecting farmers are increasingly being formulated at the regional level. Activities of intergovernmental organisations such as UPOV and WIPO also have major implications for Farmers' Rights.
- **Lack of political will and, related to that, special interests prevailing over smallholder farmers' and national interest.** National governments, regional entities and secretariats of some international agreements usually/often ignore farmer participation when they decide to promote, often aggressively, legislation that is biased in favour of formal sector breeding and corporate interests. These policy measures are not based on evidence or in farmers' interests or even in the national interest. Instead, they are strongly promoted by special interests, including those of external donors, agribusiness, and the secretariats of UPOV and WIPO. The lack of participation worsens the unequal power relations to the detriment of Farmers' Rights.
- **Perception that farmers are incapable of engaging in policy-making processes.** As shown in the cases above, farmers are willing and able to engage in policy discussions where governments and regional and international secretariats are open to alternative views and perspectives. CSOs and research institutions also have an important role, working with farmers to promote knowledge-building and awareness among decision-makers on Farmers' Rights as well as to provide intellectual contributions and pertinent evidence-based analysis to policy-makers and legislators for decision-making related to PGRFA.

Taking account of these challenges, Chapter 4 addresses in greater detail the scope and elements critical to effectively operationalising Article 9.2(c) with the aim of ensuring that laws and policies reflect the needs and interests of farmers especially smallholder farmers, given their important role in safeguarding the sustainability of our food systems.

100 See, for example: [Latin America: Civil society campaigns against Trans-Pacific Partnership, IPS report, 20 June 2016; Khor, M., TPPA could be discarded due to US political dynamics.](#)

101 [UN experts voice concern over adverse impact of free trade and investment agreements on human rights](#) (2 June 2015).

102 They also recommended that *ex ante* and *ex post* human rights

impact assessments should be conducted with regard to such existing and proposed agreements, stressing that, "Given the breadth and scope of the agreements currently under

negotiation, robust safeguards must be embedded to ensure full protection and enjoyment of human rights." *Ibid.*

4

Some Existing Norms and Good Practices in Participation

Although the principle of Farmers' Rights has for the first time been legally recognised under the Treaty, in particular through Article 9, the wider set of rights of farmers are also respected, promoted and protected by principles, norms and standards of human rights, including explicitly the right to participation in decision-making. Other international instruments and UN processes also reinforce this participation right of farmers.

This chapter reviews some of the principles, norms and standards expressed in the existing human right framework, highlighting elements that are critical for the operationalisation of Article 9.2(c) and good practices as well as mechanisms that may be utilised for strengthening the right of participation. It also explores the wider UN system, lessons that may be learned and entry points within the UN system that may be useful to further reinforce farmers' right to participate.

4.1 – THE HUMAN RIGHTS FRAMEWORK FOR THE RIGHT TO PARTICIPATE

The right to participate in decision-making processes is a well-established right within the human rights framework. Specific provisions in relevant human rights instruments and interpretations and understandings of those provisions can inform implementation of Article 9.2(c). Some human rights instruments have mechanisms that may be utilised to strengthen farmers' right to participate in decision-making processes. It is in this context that this section discusses relevant human rights instruments.

A) INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Universal Declaration of Human Rights (UDHR), which is the most universally accepted standard of human rights, recognises everyone's right to take part in the government of the country, while the International Covenant on Civil and Political Rights (ICCPR) recognises as a human right the right of public participation in the conduct of public affairs.¹ The ICCPR was adopted in 1966 and currently has 168 State Parties.

In its authoritative interpretation of the right to take part in the conduct of public affairs, the UN Human Rights Committee clarified that "the conduct of public affairs, referred to in paragraph (a) [Article 25 of the ICCPR], is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy *at international, national, regional and local levels*" (§5, emphasis added).²

It also added that "citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or *through their capacity to organise themselves*. This *participation is supported by ensuring freedom of expression, assembly and association*" (§8, emphasis added). The Human Rights Committee further stressed that "the right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25 [of the ICCPR]" (§26).

The Human Rights Committee requires that *positive measures* be adopted to ensure the full, effective and equal enjoyment of participatory rights, including through inclusive, meaningful and non-discriminatory processes and mechanisms. States also

1 Article 21 of the UDHR and Article 25 of the ICCPR.

2 UN Human Rights Committee,

CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote),

The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public

Service, 12 July 1996.

should guarantee full and effective *access to justice* and redress mechanisms to people who have been unduly deprived of their right to participate in political and public affairs (§12, 26, 27).

A 2015 report of the Office of the United Nations High Commissioner for Human Rights on "Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them"³ (hereafter referred to as the "OHCHR report") identifies challenges to the right to political and public participation and ways to overcome those challenges.

The OHCHR report starts by making clear that "international human rights instruments and mechanisms acknowledge the right of all people to be fully involved in and to effectively influence public decision-making processes that affect them" (§9).

The OHCHR report stresses "some individuals or groups are often denied the opportunity to participate in the conduct of public affairs because of *socioeconomic inequalities*. Individuals and groups concerned are confronted with a vicious circle: the greater the inequality, the less the participation; the less the participation, the greater the inequality" (§19, emphasis added). In relation to the right to participation, the report adds that "people living in poverty experience discrimination not only on the grounds of poverty itself, but also due to membership in other disadvantaged groups" (§23).

This is certainly true in the case of smallholder farmers, who are often sidelined in decision-making processes. Today 50% of the world's hungry are smallholder farmers who depend mainly or partly on agriculture for their livelihoods.⁴

The OHCHR report emphasises that the general right to participate in political and public affairs must be supported with processes to ensure that all segments of society are able to influence agenda-setting and decision-making. "Pro forma participatory processes only reinforce existing power structures and the feeling of exclusion" (§21).

The OHCHR report highlights certain principles that participatory mechanisms and processes should conform to, "to ensure full and effective participation in political and public affairs on an equal basis".⁵ These are:

- "Full and effective participation in political and public affairs is best ensured when it rests on a *solid legal basis*" (§40, emphasis added). "It is equally important that the right to participation be enforceable by law and that the denial of participation be open to challenge through the courts at low cost" (§45).
- All stakeholders must have *access to information* in a timely, complete and transparent manner, which implies that State authorities must make every effort to ensure easy, prompt, effective and practical access to information of interest to the public.⁶ "The right to information is best guaranteed

when it is made available in a manner accessible to the most disadvantaged, taking into account the constraints they suffer, including illiteracy, language barriers and the 'digital divide'" (§41).

- Participation mechanisms and processes should be sufficiently resourced, *non-discriminatory*, inclusive and designed so that concerned groups, even the most marginalised, have the opportunity to voice their opinions.⁷
- Public participation rights encompass the right to be consulted at each phase of legislative drafting and policy-making; to voice opinions and criticism; and to *submit proposals* aimed at improving the functioning and inclusivity of all State bodies.⁸
- Participation requires a *long-term and genuine commitment* to engage in processes of intensive dialogue regarding the development of policies, programmes and measures in all relevant contexts.⁹ "Participation shows best results when meaningful decisions, including those on resource allocation, are tabled for consideration and discussion" (§43).
- "Participation mechanisms are most effective when they are *premised on empowerment* and aimed at building the capacity, social capital, confidence, rights awareness and knowledge of individuals. This includes strengthening skills and capacity of the public and of officials, and devoting resources to long-term, sustainable participatory mechanisms" (§44, emphasis added).

The right to participation may also be advanced in the context of equality and group rights, meant to ensure equal and full participation of a designated group in society. For example, the OHCHR report outlined this in the context of indigenous peoples, women and persons with disabilities. Farmers clearly constitute such a designated group.

These elements are essential for the operationalisation of Article 9.2(c). Interestingly, the ICCPR also offers opportunities for supporting implementation of farmers' right to participate in decision-making.

A body of independent experts (the Human Rights Committee) reviews and monitors implementation of the ICCPR by its State Parties. All States Parties are obliged to submit regular reports to the Committee on how the rights recognised in the ICCPR are being implemented, including information on the State's constitutional and legal framework and the legal and practical measures taken to implement the Covenant. This is to be done usually every three to six years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations".

NGOs can engage in the reporting process before, during and after the review of their country, including through the submission of written information (reports) or oral statements.¹⁰

3 Document A/HRC/30/26 dated

23 July 2015.

4 Final study of the Human Rights Council Advisory Committee on the advancement of the

rights of peasants and other people working in rural areas (A/HRC/19/75), paragraph 9.

5 A/HRC/30/26, paragraph 9. These principles are contained in

several documents cited in the report.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*, paragraph 10.

9 *Ibid.*, paragraph 11.

10 ccprcentre.org/files/media/NGO_Guidelines_English1.pdf

Farmer organisations could consider using this mechanism to support implementation of Article 9.2(c) in the legal framework of their country by relying on the human right to participate in the conduct of public affairs.

In addition to this reporting procedure, the first Optional Protocol to the ICCPR gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States Parties to the Protocol.¹¹ If the Committee finds a violation in a particular case, the State Party is requested to remedy that violation.¹²

B) INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The right to participation is also recognised and further developed in the context of the right to food, which is derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR was adopted in 1966 and currently has 164 State Parties.

The authoritative interpretation of the right to food within the UN human rights system is General Comment No. 12¹³ issued by the UN Committee on Economic, Social and Cultural Rights in 1999, which is the treaty body that monitors the implementation of the ICESCR. General Comment No. 12 is explicit on the importance of participation in securing the right to food: "The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, *people's participation*, decentralisation, legislative capacity and the independence of the judiciary" (§ 23, emphasis added).

The Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security,¹⁴ adopted in 2004 by the

FAO Council, clearly articulate the essential-ness of participation and provide some guidance on how to implement it:

"States should ensure that relevant institutions provide for full and transparent participation of the private sector and of civil society, in particular representatives of the groups most affected by food insecurity" (§5.4).

"States are encouraged to cooperate with all stakeholders, including regional and international consumer organisations, in addressing food safety issues, and consider their *participation in national and international fora* where policies with impact on food production, processing, distribution, storage and marketing are discussed" (§9.9, emphasis added).

"Indicators could enable States to implement legal, policy and administrative measures, detect discriminatory practices and outcomes, and ascertain the extent of political and social participation in the process of realising that right" (§17.4).

Olivier De Schutter, the United Nations Special Rapporteur on the right to food (2008-2014), also emphasised the importance of the right to participate in decision-making for the implementation of the right to food – in particular farmers' right to participate – and provided extensive guidance on how to operationalise it.

In its 2009 report to the UN General Assembly,¹⁵ the Special Rapporteur on the right to food stressed, "Farmers should be actively involved in the *design of legislation covering the certification and trade of seeds or the conservation of plant genetic resources*, as well as of *plant variety protection laws and laws regarding patents* [as well as] for *legislation or policies relating to the rest of agriculture* (as opposed to the stewardship of plant genetic resources), since choices made in that area can significantly alter the structure of incentives for farmers who conserve genetic resources" (§53, emphasis added).

The Special Rapporteur added in a background report:¹⁶ "In order to be effective, such participation presupposes capacity-building, which in turn may *call for information being provided to farmers' organisations* and for the preparation of *impact assessments* accompanying proposals for all important changes in legislation or policies" (p. 27, emphasis added).

Similarly to the ICCPR, the ICESCR offers opportunities for supporting implementation of farmers' right to participate in decision-making through its reporting procedures as well as individual complaint mechanism.¹⁷

In addition, the Special Rapporteur on the right to food can intervene directly with governments on specific allegations of violations of human rights that come within its mandate. Farmer organisations could also consider using this mechanism to support implementation of Article 9.2(c) by relying on the right to food and the interpretation of the Committee on Economic, Social and Cultural Rights (General Comment 12), the FAO Voluntary Guidelines and the work of the Special Rapporteur that have all stressed the importance of participation in securing the right to food.

C) UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Over the last two decades, the rights of indigenous peoples have been articulated in a number of instruments and processes, and the astute and dedicated activism of indigenous peoples has

11 The Optional Protocol to the ICCPR has been ratified by 115 State Parties.

12 Office of the United Nations High Commissioner for Human Rights, Civil and Political Rights: The Human Rights Committee (2005), Fact Sheet No. 15 (Rev.1).

13 www.fao.org/fileadmin/templates/righttofood/

documents/RTF_publications/EN/General_Comment_12_EN.pdf

14 www.fao.org/3/a-y7937e.pdf
15 Olivier De Schutter, *Seed policies and the right to food: enhancing agrobiodiversity, encouraging innovation* (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).

16 Background document to the report "Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation" (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).

17 However, it should be noted that the Optional Protocol to the ICESCR entered into force in 2013 and has for the time being only been ratified by 21 State Parties – and individual complaints can therefore only be brought against those 21 countries.

turned these “paper rights” into rights against which they can make claims. These rights include the right to participate in decision-making.

Starting from advocacy through the more traditional human rights processes, indigenous peoples have succeeded in creating the UN Permanent Forum on Indigenous Issues (UNPFII) and in getting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in September 2007.

Provisions on participation in UNDRIP are particularly relevant for the implementation of Article 9.2(c) of the Treaty since in Article 9.1 not only farmers but also “local and indigenous communities” are included. Therefore the national implementation of Farmers’ Rights under the Treaty would also require implementation of the customary international law norms in UNDRIP. Participation norms and procedures can be distilled from, *inter alia*, Articles 5, 18, 19, 27 and 41 of UNDRIP, and should inform implementation of Treaty Article 9.2(c).

The right of indigenous peoples to participate in decision-making is recognised in Articles 5 and 18 of UNDRIP. Article 18 further recognises “the right of indigenous peoples to participate 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” (emphasis added).

Such direct representation through their own processes of selection on an independent basis results in an “unfiltered voice” of indigenous peoples that is very crucial. A prerequisite is a high degree of self-organisation that has the confidence of indigenous peoples that seek to exercise their rights.

Article 19 focuses on *free, prior and informed consent* of indigenous peoples before States adopt and implement legislative or administrative measures that may affect them. This puts an obligation on States to consult and cooperate in good faith with the indigenous peoples concerned.

Article 27 obligates States to use a “fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems” when recognising and adjudicating the rights of indigenous peoples pertaining to their lands, territories and resources.

Another important aspect of the right to participate that is incorporated in UNDRIP is in Article 41, which establishes that the *UN system and other intergovernmental organisations* shall contribute to the full realisation of the provisions of the Declaration, including through “ways and means of ensuring participation of indigenous peoples on issues affecting them”. Specific reference is made to the mobilisation, *inter alia*, of *financial cooperation and technical assistance*. Trust funds with voluntary contributions from governments have been set up in several UN fora to enable participation of indigenous peoples’

representatives, for example in the UN Permanent Forum on Indigenous Issues.

The articles highlight key aspects that are critical for implementation of Article 9.2(c) of the Treaty. It is also apparent that the effective operationalisation of the right to participate requires measures to be put in place not only at the national level but also at the regional and international levels and especially by UN agencies and other intergovernmental organisations.

UNDRIP-related policies and mechanisms also present opportunities for farmers from indigenous communities to raise their concerns. For example, UNDRIP-related processes may be used to challenge PVP laws and policies developed without the participation of such communities. The UNPFII as well as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) serve as advisory expert mechanisms and could also be used to create awareness and advocate for the right to participate.¹⁸

In addition, there is a Special Rapporteur on the rights of indigenous peoples, similar to the Special Rapporteur on the right to food, that can intervene directly with governments on specific allegations of violations of human rights that come within its mandate. Farmers’ organisations could use this mechanism to support implementation of Treaty Article 9.2(c) by relying on the participatory rights recognised in UNDRIP.

D) CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

While the International Bill of Rights¹⁹ references women’s rights more than once, these have been made concrete in terms of their impact on women’s lives through specific articulations. As with the experience of indigenous peoples, advancing women’s human rights has required repeated strategies, declarations and agreements, not only one.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the UN General Assembly. Described as an international bill of rights for women, it was instituted on 3 September 1981 and has been ratified by 189 States.

CEDAW has been the basis of nationalising and securing national legislation and modalities for women’s empowerment at the national level. For the purposes of participation, Article 7(b) requires States to take measures to ensure women’s participation in the formulation and implementation of government policy. CEDAW also has a specific article on the participation of rural women that requires States to enable them to participate in the elaboration and implementation of development planning (Article 14.2(a)).

The Committee on the Elimination of Discrimination Against Women released in March 2016 General Recommen-

¹⁸ They meet usually once a year and indigenous peoples’ organisations as well as civil society organisations are able to participate, including by making statements. Those

bodies issue thematic expert reports that can then inform implementation of the rights of indigenous peoples. The 2011 EMRIP report was on indigenous peoples and the right to

participate in decision-making.
¹⁹ The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant

on Economic, Social and Cultural Rights (ICESCR) constitute the International Bill of Rights.

tion 34 on the rights of rural women. This represents the most authoritative interpretation on how State Parties to CEDAW shall implement their obligations related to the rights of rural women. Of particular relevance for our purpose is paragraph 54(b) which recommends to State Parties to "Ensure that rural women and their organisations can influence *policy formulation, implementation and monitoring at all levels and in all areas that affect them*" (emphasis added). The Committee also recommends States to ensure rural women and their representatives are able "to participate directly in the assessment, analysis, planning, design, budgeting, financing, implementation, monitoring and evaluation of all agricultural and rural development strategies" (§54(d)).

Similar to the ICCPR and the ICESCR, CEDAW has a reporting procedure and a complaint mechanism²⁰ that could be used to support implementation of Article 9.2(c), at least when it comes to the right of women farmers to participate in decision-making. However, unlike the ICCPR and the ICESCR that only accept complaints from individuals, the CEDAW complaint mechanism also accepts communication from groups submitting claims of violations of rights protected under the Convention.

As with indigenous peoples, activists' strategies were not limited to processes that were "about women". Since women and indigenous peoples constitute the majority of smallholder farmers who are the major agents in securing the right to food, CEDAW and related women's rights processes and mechanisms can be powerful tools for Farmers' Rights realisation, the starting point being the activation of the right to participate in national and regional laws.

E) HUMAN RIGHTS COUNCIL

Another opportunity for supporting implementation of Article 9.2(c) within the human rights framework is the Universal Periodic Review (UPR), a new mechanism of reporting and review for each of the 193 UN Member States of their human rights obligations and commitments. This mechanism has formalised the reporting process on a country-by-country basis and covers the full spectrum of UN human rights instruments. The review takes the form of an interactive dialogue between the State under review and the member and observer States of the UN Human Rights Council (HRC). In addition to submitting reports for the country reviews, NGOs/CSOs can attend the UPR Working Group sessions and make statements at the regular session of the Council when the outcomes of the State reviews are considered. The process results in the formulation of recommendations that the State under review can decide to accept and implement. Implementation of agreed recommendations is then subject to a follow-up process. As the right to participate in decision-making is recognised in several human rights treaties (ICCPR, ICESCR, CEDAW, UNDRIP

20 The Optional Protocol came into force in 2000 and has been ratified by 107 State Parties.

21 The working group has already held three meetings (in 2013, 2015 and 2016), and negotiations

etc.), farmer organisations could certainly use the UPR mechanism to support implementation of Article 9.2(c), in particular its operationalisation through a legal framework at the national level.

The HRC is also a channel to develop new norms on Farmers' Rights. Through a dedicated intergovernmental open-ended working group, it is currently drafting a new UN declaration on the rights of peasants and other people working in rural areas.²¹ The decision to launch such a process was taken by the HRC following a 2012 study by its Advisory Committee (A/HRC/19/75) which recognised that despite the existing human rights framework, peasants and other people living in rural areas are victims of multiple discrimination and systematic violations of their human rights, and recommended, among others, that a new international instrument be developed to better protect and promote their rights. Violations of participatory rights as well as of the right to freedom of association figured prominently in the Advisory Committee study as justification for the new instrument.

The draft declaration proposed by the Advisory Committee (see annex of A/HRC/19/75) included an article on freedoms of association, opinion and expression (Article 12) and provisions on the right to participate in decision-making (Article 2.4).

Those provisions have been further developed and reinforced in the current draft as of March 2016 (A/HRC/WG.15/3/2). It now has a specific article on "Right to participation and information" (Article 12) which recognises, with regard to peasants and other people working in rural areas, "the right to *active, free, effective, meaningful and informed participation, directly and/or through their representative organisations, in the elaboration, implementation and assessment of policies, programmes and projects that may affect their lives, land and livelihoods*" (emphasis added).

Article 12 of the draft declaration also establishes the obligation of States to "facilitate, on a voluntary basis, the creation and activities of *strong and independent organisations of peasants and other people working in rural areas as an effective means of ensuring [their] participation*" (emphasis added). It also places on States the obligation to "ensure that peasants and other people working in rural areas have access to *information relating to policies, programmes and projects that may affect them*, in a language and form and through means that ensure the effective participation of peasants and other people working in rural areas" (emphasis added).

A right to participation is also recognised in the context of a right to food sovereignty, which "entails peoples' right to participate in decision-making and to define their own food and agriculture systems" (Article 5.4).

Specifically related to seeds and biodiversity, the draft declaration recognises, in relation to peasants and other people working in rural areas, a right similar to Treaty Article 9.2(c): the right "to participate in decision-making on matters related

are continuing on a draft declaration.

to the conservation and sustainable use of agricultural biodiversity" (Article 23.8).

Importantly, and similarly to UNDRIP, the draft declaration (in Article 30.2) elaborates on the responsibilities of the UN and of other international organisations, and requests them to establish "ways and means of ensuring the participation of peasants and other people working in rural areas on issues affecting them".

The adoption of this declaration could provide major impetus and guidance for the implementation of the right to participate in decision-making under the Treaty. Importantly also, the development of this declaration is an example of good practice with respect to the participation of farmer organisations. The proposal initially came from La Via Campesina, the international peasant movement. Representatives of peasants and other peoples working in rural areas were able to participate extensively in the work of the Advisory Committee that led to the 2012 study and the first draft declaration, including through written submissions. From the start, the HRC invited civil society and representatives of peasants and other people working in rural areas to contribute actively and constructively to the work of the working group (A/HRC/RES/21/19).

The latest resolution of the HRC requested the OHCHR "to ensure the participation in the annual sessions of the working group of up to five expert panelists, including representatives of peasants and other people working in rural areas, civil society and grass-roots organisations from developing countries, in order to contribute to the analysis and interactive dialogues" (A/HRC/RES/30/13). This resulted in a strong participation of farmer organisations in the sessions of the working group and their proposals have so far been well taken into account.

4.2 – MULTIPLE ENTRY POINTS, INCLUDING THROUGH THE WIDER UN SYSTEM

The strategic approach to realising rights cannot be described as a linear one, nor one that is automatic. Turning "paper rights" into actionable ones is a continuous process with advances and setbacks and requires not only vigilance but assessment and re-assessment of entry points, capacities, alliances etc.

In addition to the human rights framework discussed above in Section 4.1, the interpretation and implementation of farmers' right to participate can be further informed and reinforced

22 In mandating the functioning of the HLPF in UN resolution A/67/290, Member States detailed the rights of participation of major groups, including farmers, as follows: "15. [Decides, in this regard, that, while retaining the intergovernmental character of the forum,] the representatives of the major groups and other relevant stakeholders shall be allowed: (a) To attend all official meetings of the forum; (b) To have access to all official information and

documents; (c) To intervene in official meetings; (d) To submit documents and present written and oral contributions; (e) To make recommendations; (f) To organise side events and round tables, in cooperation with Member States and the Secretariat."

23 SDG 2 – "End hunger, achieve food security and improved nutrition and promote sustainable agriculture" – is to be met by achieving, *inter alia*, Target 2.3 ("By 2030, double the

forced through a number of other UN instruments, entities and processes.

A) RIO DECLARATION, AGENDA 21 AND THE AARHUS CONVENTION

The 1992 UN Conference on Environment and Development in Rio de Janeiro explicitly recognised farmers as one of nine major groups whose participation is essential to achieving sustainable development. This recognition in Agenda 21, the blueprint adopted in 1992, of the vital participation of major groups has been further elaborated through the annual reviews of Agenda 21, and is central in the outcome of the 2012 Rio Summit on Sustainable Development and the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs).

The major-groups configuration continues to frame participation in many parts of the UN system, including the High-level Political Forum for Sustainable Development (HLPF)²² established to review and monitor the implementation of the 2030 Agenda and the SDGs. As one of the major groups, farmers can advocate for strengthened participatory mechanisms in other relevant processes, including implementation of Article 9.2(c), as an essential component of achieving SDG 2 and its targets which are explicit on the fundamental role of small-scale farmers.²³

The 1992 Rio Conference also adopted the Rio Declaration on Environment and Development detailing a number of principles that have set the standard for participation and been incorporated into other conventions. Principle 10 under the Declaration states the importance of participation, including access to information:

"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including ... the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided" (emphasis added).

agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment") and Target 2.5 ("By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and

domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge, as internationally agreed").

The UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention) spells out that these rights include the following elements:

- the right of everyone to receive environmental information that is held by public authorities, including information on policies or measures taken
- the entitlement of “applicants” to obtain information within one month of the request and without having to say why they require it
- the obligation of public authorities to actively disseminate environmental information in their possession
- the right to participate in environmental decision-making
- the obligation of public authorities to make arrangements to enable the public affected to comment on proposals, plans and programmes
- the need for public comments to be taken into account in decision-making, and information to be provided on the final decisions and the reasons for it
- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

These standards set benchmarks relevant to the participation of farmers, especially as farmers are “concerned citizens” impacted by environmental issues.

B) UN FOOD AND AGRICULTURE ORGANIZATION

Several FAO instruments recognise a right to participation in the context of the right to food and food security, most recently in the Voluntary Guidelines for National Seed Policy Formulation (2015). These guidelines contain a number of relevant provisions that can strengthen and inform implementation of Article 9.2(c):

“The effectiveness of a seed policy depends on the capacity of government to manage the policymaking process, as well as the *full participation of seed sector stakeholders... including small farmers*” (p. 3, emphasis added).

“Increasingly also, the civil society and *farmer-based organisations* are playing pivotal roles in crop improvement and therefore should *be part of the seed policy formulation*” (p. 14, emphasis added).

Moreover, FAO offers examples of good practices for the participation of farmers in decision-making. In 2013 it adopted a revised Strategy for Partnership with Civil Society Organisations.²⁴

24 www.fao.org/docrep/018/i3443e/i3443e.pdf

25 www.foodsovereignty.org/the-ipc-and-fao-establish-common-priority-themes-for-a/

26 Its members include La Via Campesina (LVC), World collaborative-work-in-the-fight-against-hunger-and-food-insecurity/

tions.²⁴ It is premised on the recognition of the importance of the participation of civil society and aims at strengthening and providing guidance for FAO’s partnerships. In particular, “this Strategy promotes that the views of small farmers, fishers, women, youth and others are brought to the policy, normative and technical discussions convened by FAO”.

The strategy has specific objectives regarding engagement at the decentralised level and the global level. At decentralised level, the objectives of the strategy include: to assist in undertaking mapping exercises and identifying key local CSOs; to foster collaboration and partnerships during different stages of programme and project development; to capitalise on the outreach capacities of CSOs, as well as their detailed knowledge of grassroots realities and regional contexts; and to support national and regional consultative and multistakeholder mechanisms with wide representation of different civil society constituencies for policy discussion, implementation and monitoring of programmes.

At the global level, the strategy aims at engaging a broad and equitable range of CSOs in partnership with FAO, ensuring balanced geographic representation; ensuring that the views of the poor and marginalised are brought to FAO policy discussions through their CSOs; encouraging inclusive processes for policy dialogue, technical management and sharing of expertise and knowledge; and improving FAO’s knowledge and capacity to work in partnership with CSOs.

Within the framework of this strategy, an agreement was signed by FAO in May 2014 with the International Planning Committee for Food Sovereignty (IPC).²⁵ The IPC is the world’s largest alliance of small-scale food producers, peasant family farmers, artisanal fisherfolks, pastoralists, nomads, indigenous peoples and indigenous organisations, the landless, urban producers, alternative consumer movements, rural workers and grassroots organisations, whose aim is to advance the food sovereignty agenda at the global and regional level.²⁶

The FAO-IPC agreement contains a number of provisions aimed at ensuring and promoting the participation of small-scale food producers in policy-making and implementation.

In the area of policy dialogue, “FAO will encourage, guide and facilitate at different levels the establishment of fora for policy dialogue and debates so that the needs and interests of small-scale food producers, rural workers’ associations, grassroots/community-based organisations and social movements can be voiced and taken into account in policy formulation and adoption, for the implementation of policies at national, regional and international level.”

“Steps will be taken to reinforce the participation of IPC and other civil society organisations and social movements in future sessions of the FAO technical committees and other governing bodies, in particular its regional conferences.”

Forum of Fisher Peoples (WFFP), World Forum of Fish Harvesters & Fish Workers (WFF), World Alliance of Mobile Indigenous People (WAMIP) and the

International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF).

In the area of normative activities, "FAO will support the involvement of IPC and other civil society organisations and social movements... in the implementation of guidelines, codes of conduct, global conventions, international treaties and regulatory frameworks in areas related to FAO's mandate".

Interestingly, the FAO-IPC agreement resulted in the establishment of a fund to finance the participation of smallholder organisations and other food producers' organisations in policy dialogue, and support initiatives by smallholder organisations.

This agreement resulted in an enhanced participation of IPC members in the activities of FAO. And importantly it resulted in the IPC being recognised as the legitimate partner for FAO to engage small-scale food producers in its activities and discussions.

C) COMMITTEE ON WORLD FOOD SECURITY

The Committee on World Food Security (CFS) also offers examples of good practices for promoting participation of farmers in decision-making. CFS was established in 1974 as an intergovernmental body to serve as a UN forum for review and follow-up of policies concerning world food security including production and physical and economic access to food. It underwent a reform process during 2009 to make it more effective in the promotion of policies that reduce food insecurity. The vision of the reformed CFS is to be "the most inclusive international and intergovernmental platform for all stakeholders to work together to ensure food security and nutrition for all."²⁷

A key plank of the reformed CFS is the inclusion as one of five categories in its Advisory Group of "civil society and non-governmental organisations particularly organisations representing smallholder family farmers, fisherfolk, herders, landless, urban poor, agricultural and food workers, women, youth, consumers and indigenous peoples".²⁸ Civil society representatives are able to fully take part in the discussions and enjoy the same rights as governments, except when it comes to adopting decisions (voting).

A Civil Society Mechanism was created in 2010 to organise the relations with CFS. The CSM does not have formal members but participating organisations. They all belong to one of the 11 constituencies listed above. The CSM has a Coordination Committee (CC)²⁹ that takes all relevant political decisions within the CSM on internal and external issues. The CSM operates on the basis of an *Ad Hoc* Policy Working Group that relates to ongoing CFS processes. The CSM also has a Secretariat as well as a Finance and Administrative Working Group. CSM activities are mainly financed by voluntary donations of national governments.

The CSM is a facilitation mechanism. It performs this function by widely sharing information on the work of CFS and organising civil society consultations on CFS policy issues; facilitating the development and communication of common policy positions and lobby strategies; facilitating the identification of CSO spokespersons in CFS inter-sessional meetings and CFS plenary sessions; facilitating the participation of a broad range of CSOs in CFS events and processes, whilst ensuring a balance across civil society constituencies, sub-regions and gender; and prioritising the voices of the people most affected by food and nutrition insecurity (e.g., smallholder producers, fisherfolk, pastoralists, indigenous, urban poor, migrants, agricultural workers etc.).³⁰

This new structure, a first for the UN system, recognises that the participation of representatives of small-scale food producers and other CSOs is essential for achieving food security, and provides innovative mechanisms to facilitate and promote it.

D) INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT

The International Fund for Agricultural Development (IFAD) is a specialised UN agency and was established as an international financial institution in 1977 as one of the major outcomes of the 1974 World Food Conference. It is the first international financial institution to adopt Free Prior Informed Consent (FPIC) as an operational principle in its policy documents.³¹ This represents an important precedent for other intergovernmental bodies as well as a valuable illustration of coherence across international agreements.

IFAD's exclusive focus is on rural people and their largely agriculture-based livelihoods. It has a clear published policy on Reaching the Rural Poor, in which its approach to "policy dialogue and policy development" is to "seek to make a more systematic and coordinated use of the experience and lessons learned from its projects and programmes to promote inclusion of rural poverty and smallholder agricultural development into the international development agenda and in national development priorities, and to foster policy processes that address the needs of rural poor people."³² Accordingly, "IFAD will support the direct involvement of poor people and their organisations in the formulation and implementation of national policies and strategies that have an impact on their livelihoods. The systematic participation of smallholder farmers' and rural people's organisations in designing, managing, monitoring, supervising and evaluating IFAD-supported operations will be considered a stepping stone for their broader involvement in national policy decision-making processes."³³

27 www.fao.org/cfs/en/

28 The other four categories are: UN agencies and other UN bodies; international agricultural research institutions; international and regional financial institutions such as the World Bank, the International

Monetary Fund, regional development banks and the World Trade Organization; and private sector associations and philanthropic foundations.

29 The CC consists of 41 members from the 11 constituencies and 17 sub-regions.

30 sustainabledevelopment.un.org/content/documents/6981civilsociety.pdf

31 Policies on Improving Access to Land and Tenure Security (2008) and Engagement with Indigenous Peoples (2009); Policy on Environment and Natural

Resource Management (2011) and in IFAD's Social, Environmental and Climate Assessment Procedures (2014).

32 IFAD, *Targeting: Reaching the Rural Poor – Policy* (2008), p. 23.

33 *Ibid.*

E) CONVENTION ON BIOLOGICAL DIVERSITY

The role and contribution of indigenous peoples and local communities with regard to conservation and sustainable use of biological resources is explicitly recognised in the CBD.³⁴ Since the CBD's entry into force, its Conference of the Parties (COP) has adopted decisions, and good practices have evolved, that are exemplary in implementing participation rights. The CBD mechanisms for the full and effective participation of indigenous and local communities range from financial support that enables indigenous peoples and local communities to attend the meetings, to logistical support as well as participation in formal and informal groups (such as contact groups and Friends of the Chair groups). The CBD practices are seen now as a good practice model for the rest of the UN system.³⁵

The establishment of the *Ad Hoc* Open-ended Working Group on Article 8(j) and Related Provisions was an important start. The current practice is that representatives of indigenous peoples and local communities are invited to designate seven "Friends of the Bureau" to participate in Bureau³⁶ meetings as well as to act as co-chairs of possible contact groups. The International Indigenous Forum on Biodiversity (IIFB), which is the platform for the engagement of indigenous peoples at the CBD, proposes the seven persons based on internally agreed criteria and procedures.

Representatives of indigenous peoples and local communities are thus at the table with government delegations participating in decision-making on matters that directly affect them, and most significantly co-chairing the Working Group and contact groups.

The CBD Secretariat also administers a Voluntary Fund to facilitate the participation of indigenous and local communities in the work of the Convention as set out in the annex to decision VIII/5.D of the COP, and in accordance with the selection criteria established in section B of the annex.

Nominations to receive financial assistance are submitted following a self-selection process established by the IIFB. Organisations and networks other than the IIFB may also submit nominations. The Bureau of the COP assisted by the CBD Secretariat then considers and approves the representatives to be funded to attend the relevant meetings of the CBD. If more funds are available following the first round of selection, additional funded participants may be added. The list of beneficiaries of financial assistance is sent to the CBD mailing list and posted on its website.

34 Article 8(j) on the traditional knowledge, practices and innovations of indigenous and local communities is the key provision. The Preamble of the Convention also recognises "the vital role that women play in the conservation and

sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation."
35 www.cbd.int/traditional/general.shtml

CONCLUSION

It can be seen from this review that the right of farmers to participate in decision-making in Article 9.2(c) is clearly supported and reinforced by many instruments and agreements, particularly within the human rights framework. There are provisions and mechanisms in those instruments that can be used to inform, guide and strengthen implementation of Article 9.2(c).

Lessons drawn from these instruments and their use as well as experiences and good practices in other fora, including within the wider UN system, thus provide a wealth of experience and expertise to support the implementation of Article 9.2(c).

regarding the ongoing work under the treaty, the organisation of its sessions and the operation of the secretariat, especially at times when the COP is not in session.

36 In UN treaties, Parties nominate through their UN recognised groupings their respective representatives to constitute the Bureau of the Conference of the Parties (COP). The Bureau supports the COP through the provision of advice and guidance

5

Implementing Article 9.2(c) – Elements and Recommendations

In this chapter, we explore the meaning of the right of farmers to participate in decision-making as formulated in Article 9.2(c) of the Treaty and identify elements critical for its meaningful and effective operationalisation. This chapter is mainly based on elements drawn from submissions to the Treaty on Farmers' Rights (Chapter 2) and other international instruments, in particular the human rights framework (Chapter 4). It also takes into account the experiences at the national, regional and international levels and challenges identified with respect to farmers' participation in decision-making processes. Based on these, a number of recommendations are made in this chapter.

5.1 – ELEMENTS FOR IMPLEMENTING ARTICLE 9.2(C)

Treaty Article 9.2(c) has three components that will be analysed separately: (a) the right to participate in making decisions, (b) at the national level, (c) on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

A) "PARTICIPATE IN MAKING DECISIONS..."

Chapter 1 established that Article 9.2(c) applies to all types of decision-making processes (e.g., administrative, legislative) and outcomes (e.g., policies, legislations, regulations, budgets, strategies etc.) related to the conservation and sustainable use of PGRFA.

A number of elements regarding a meaningful and effective implementation of farmers' participation in making decisions can be drawn from the human rights framework, including from (but not limited to) the right to participate in public affairs as recognised in the ICCPR and its further elaboration by the

Human Rights Council and the OHCHR, as well as from other international instruments discussed in Chapter 4.

One key element is that this right of farmers should have a *solid legal basis* and be enforceable by law. It should also be supported by inclusive, independent, impartial, transparent and non-discriminatory processes and mechanisms designed to engage farmers including from the community level, allowing sufficient time and opportunity to provide feedback and proposals.

It is important for such processes and mechanisms for participation to pay special attention to participation by disadvantaged groups, in particular small-scale farmers, as too often participation processes are taken over by the interests of a few large-scale industrial farmers. Indicators *inter alia* to assess the level of participation especially of small-scale farmers and detect discriminatory practices would also be important.

Effective and meaningful participation in decision-making is not just about consultations through written submissions and online surveys, or even a few face-to-face meetings, that purport to seek views and inputs which have little or no bearing on the outcomes and decisions. As noted by the OHCHR, *pro forma* participatory processes only reinforce existing power structures and the feeling of exclusion.¹ Effective and meaningful participation is about active participation, not only consultation. A fundamental principle of public participation rights is that such rights encompass the right to be consulted at each phase of legislative drafting and policy-making; to voice opinions and criticism; and to submit proposals.² This means that comments and inputs need to be taken into account in making decisions. It entails a long-term and genuine commitment to engage in processes of intensive dialogue regarding the development of policies, programmes and measures,³ which in the context of the Treaty is particularly relevant given its long-term, even inter-generational objectives.

1 OHCHR, A/HRC/30/26, paragraph 21.

2 *Ibid.*, paragraph 10.

3 *Ibid.*, paragraph 11.

Such participation is, however, distinct from the actual taking of a decision, which remains the prerogative of the State. Therefore, essential to the right to participation is also the right to seek a review of a decision and redress/remedies if such decision results in adverse effects on the individual or group concerned, thereby violating their rights.⁴ Access to justice with appropriate administrative and judicial procedures and mechanisms and the right to participate are thus inextricably linked.

The right to participate in decision-making presupposes *access to information*. Generally there are two important aspects to "information", i.e., information over process (e.g., the timeline and phases of the decision-making process, how and to whom to submit comments and/or proposals) and substance (the actual content of the instruments, documents, the evidence etc.). Access in both these aspects is imperative for realising the right to participate.

It is a participation principle that the relevant authorities (States, regional and international organisations) must make every effort to ensure easy, prompt, effective and practical access to information of interest to the public.⁵ They should be proactive in making widely available information in their possession that is important for effective engagement in the decision-making process. Information should also be provided on the final decision.

All information needs to be full, updated and understandable as well as be free of charge.⁶ The relevant authorities should also put in place appropriate mechanisms for concerned persons to request for information without having to say why they require it and for the requested information to be available within one month of the request.⁷

Moreover information must be accessible, i.e., available in local languages and formats that are reachable for farmers from indigenous and local communities. For example, information may not reach farmers in the rural areas with limited access to the internet, if information is made available only through electronic means.

Another key element of the right to participate in making decisions is the right to *freedom of association*, including the right to form and join organisations and associations, and farmers being able to choose their own representatives according to their own procedures.

Implementation of Article 9.2(c) is also premised on empowerment of farmers. Awareness- raising and capacity-building of farmers in respect of their rights, including the right to participate in decision-making processes, and issues at stake is crucial. Such awareness- raising and capacity-building may be

⁴ Article 2.3 of the International Covenant on Civil and Political Rights: "Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by

persons acting in an official capacity;
To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the

done by exchanges between farmer groups. Support from, and collaboration with, public interest CSOs can contribute to the advocacy capacity- building of farmers as well as forge joint advocacy engagement at the national, regional and international levels.

Facilitating participation requires funding and *financial support* and the relevant authorities should allocate a sufficient budget, for example, to finance travel of farmer representatives to participate in meetings etc. At the international level, the establishment of voluntary trust funds with contributions from governments as highlighted in Chapter 4 is a good practice.

B) "... AT THE NATIONAL LEVEL..."

Human rights instruments are quite clear that the human right to participate in decision- making encompasses not only the national level but also the local, regional and international levels (see General Recommendations of the Committee on Human Rights and the Committee on Economic, Social and Cultural Rights highlighted in Chapter 4). In other words, as pointed out by CEDAW, the right to participate applies to decisions taken at "all levels".

Similarly with respect to Article 9.2(c), there are two aspects to national-level decision- making. Firstly, *decision-making at the national level would also include decisions taken at the sub-national and local levels* on matters related to the conservation and sustainable use of PGRFA. Secondly, it should also apply to regional, sub-regional, plurilateral and international decision-making processes, as such processes impact national decision- making.

Since the Treaty entered into force, there has been a trend of increasing decision-making at the regional, sub-regional and international levels that has far-reaching impacts on national decision-making, in particular on the policy space to implement Farmers' Rights. As can be seen in Chapter 3, the lack of farmer/ public consultation and participation in regional arrangements (e.g., Arusha Protocol) and plurilateral/international arrangements (e.g., the TPPA) has led to plant variety protection laws and treaties based on UPOV 1991, which in turn threatens Farmers' Rights. The lack of respect and implementation by regional and international organisations of the right to participate that is well-acknowledged within the broader human rights framework, is a major constraint to the effective operationalisation of Article 9.2(c), as illustrated in Chapter 3.⁸

Today, with the right to food established by the international community and ambitious targets in the UN Sustainable De-

State, and to develop the possibilities of judicial remedy;
To ensure that the competent authorities shall enforce such remedies when granted."
⁵ OHCHR, A/HRC/30/26, paragraph 9.
⁶ *Ibid.*, paragraph 73.
⁷ See Chapter 4 on the Aarhus Convention.

⁸ See, for example, the experiences in relation to the Arusha Protocol for the Protection of New Varieties of Plants for the ARIPO region, the COMESA Seed Trade Harmonisation Regulations, UPOV and WIPO.

velopment Goals⁹ adopted in September 2015, it is imperative for regional, sub-regional, plurilateral and international decision-making processes to be coherent with well-established principles and standards of participation within the Treaty, human rights framework and beyond, as discussed in Chapter 4. This is fundamental to the realisation of Farmers' Rights. Contradictions and the lack of coherence such as those identified between UPOV 1991 and norm-setting and technical assistance by WIPO on the one hand, and the Treaty on the other hand, can only undermine Farmers' Rights, and consequently affect realisation of the right to food as well as the UN SDGs.¹⁰

Therefore farmers' participation is needed for decision-making related to the negotiating positions of national governments in supra-national processes that create commitments and obligations, and for decision-making in these supra-national processes themselves. As seen in Chapters 2 and 3, where there is effective and meaningful participation such as in the CBD and in some countries, the outcomes support and implement the rights of farmers. In contrast, where participation is perfunctory or absent, as seen in the experiences related to UPOV 1991, WIPO and free trade agreements, the outcomes undermine and even contradict Farmers' Rights.

C) "... ON MATTERS RELATED TO THE CONSERVATION AND SUSTAINABLE USE OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE"

The right to participate applies to a wide range of subject matter, given the broad scope of "conservation and sustainable use of PGRFA" as discussed in Chapter 1. It is a prerequisite to implementation of Article 9 itself, as well as covering Treaty provisions that relate to the conservation and sustainable use of PGRFA, including Treaty Article 5 (Conservation, Exploration, Collection, Characterisation, Evaluation and Documentation of Plant Genetic Resources for Food and Agriculture), Article 6 (Sustainable Use of Plant Genetic Resources), Article 13 (Benefit-sharing in the Multilateral System) and Article 18 (Financial Resources). In short, it is relevant to all roles of farmers "related to conservation and sustainable use of PGRFA".¹¹

The human rights framework also provides useful guidance on the right of farmers to participate in making decisions. From the recommendations of the Special Rapporteur on the right to food, the right of farmers to participate in decision-making should be interpreted as including matters related to: certification and trade of seeds; PVP and patent laws; as well as the rest of agriculture.¹² Applying the UNDRIP and CEDAW principles,¹³ farmers' right to participate in decision-making would extend to all matters that affect them, their rights or their livelihoods. FAO is also clear that farmers should be able to participate in seed policy formulation.

5.2 – RECOMMENDATIONS

Many actors have responsibilities, implicitly and explicitly, in the implementation of Article 9.2(c). Below are some recommendations for strengthening implementation of Article 9.2(c), and of Farmers' Rights in general.

5.2.1 – RECOMMENDATIONS FOR GOVERNMENTS

- a) **Establish a legally enforceable farmers' right of participation in decision-making processes.** Such a legal right should be supported by mechanisms building on and coherent with human rights and other principles for participatory mechanisms and processes, as elaborated in Chapter 4 and this chapter. It is also important that the modalities for engagement and participation build on the good practices of the UN system and not regress with respect to either current formal or informal practices.
- b) **Participation of farmers must be ensured in decision-making on seed policies and laws at the national, regional and international levels,** based on good practices, principles and elements discussed in Chapter 4 and this chapter, in light of the impact of seed policies and laws especially pertaining to intellectual property (PVP and patents) and seed certification and marketing, on Farmers' Rights. Seed policies and laws that have been formulated without or with limited involvement of farmers, especially small-scale farmers, should be urgently reviewed with the participation of farmers.
- c) **Governments should recognise the specific role and importance of the "unfiltered voice" of farmers and their organisations/self-organised mechanisms of representation and especially adequate representation of small-scale farmers in implementing Article 9.2(c).**

5.2.2 – RECOMMENDATIONS AT THE TREATY LEVEL

- a) **Gather data and information on national, regional and international rules and practices that provide for participation of farmers in decision-making in connection with PGRFA, and document and assess their impact on realising Farmers' Rights, including progress, obstacles and challenges.**
- b) **Develop "guidance" for the effective implementation of Article 9.2(c)** with the full and effective participation of farmers' representatives and public interest civil society organisations. Such guidance should build on good practices, principles and elements discussed in Chapter 4 and this chapter.

9 sustainabledevelopment.un.org/sdg2

10 See Shashikant and Meienberg (2015).

11 Email communication dated 24 May 2016 with Lim Eng Siang,

who was in the national delegation of Malaysia and a key negotiator of the Treaty. The authors thank him for his insights into the history and context of Article 9, as well as its

implementation.

12 De Schutter (2009).

13 Many of the indigenous peoples and women are farmers.

14 An official appointed to investigate individuals'

complaints against maladministration.

15 www.fao.org/plant-treaty/areas-of-work/compliance/en/

- c) Establish an ombudsman facility¹⁴ under the Treaty and open a window for addressing gaps/obstacles in implementation of Farmers' Rights, including the farmers' right to participate in decision-making.
- d) Reporting on implementation of the Treaty by every Contracting Party required by the Treaty's compliance mechanism¹⁵ should specifically require the Contracting Party to provide information on measures taken to implement Farmers' Rights, including farmers' right to participate in decision-making. These country implementation reports should be presented regularly and be publicly available. Farmers' representatives should also be given an opportunity to present their perspectives on implementation of Farmers' Rights in relation to their countries, including regional and international activities and instruments that involve their countries.
- e) Conduct an assessment of farmers' participation in Treaty-related meetings, processes and initiatives in consultation with farmers' representatives and public interest civil society organisations, with the intent to institutionalise and strengthen farmers' participation in such processes and initiatives. The assessment should draw on good practices in other forums such as CFS and the CBD.
- f) Ensure adequate, predictable and timely funding to implement the right to participate in the work of the Governing Body, including its inter-sessional work and relevant consultations and meetings that may be held. A wide range of Contracting Parties, with developed countries taking the lead, should finance a multi-donor trust fund to be administered by FAO/the Treaty (bearing in mind that the Governing Body resolutions of 2013 and 2015 made explicit linkages with FAO more broadly, specifically mentioning CFS).
- g) Recognise and draw on farmers' expertise. Representatives of farmers' organisations should be adequately represented and involved in any meeting, consultation, panel of experts, working group or equivalent body convened by the Secretariat as mandated by Contracting Parties. In ensuring this, the Secretariat should recognise and respect farmers' autonomy to self-organise and select their own representatives and should provide the necessary financial support for the participation.
- h) Enhance and support (e.g., by ensuring financial support) capacity-building of farmers (especially of small-scale farmers) by farmer groups and public interest civil society organisations in respect of their rights, including the right to participate in decision-making processes; developments that may undermine Farmers' Rights; and the importance of active farmers' engagement in such relevant national, regional and international processes.

5.2.3 – RECOMMENDATIONS FOR REGIONAL AND INTERNATIONAL ORGANISATIONS AND PROCESSES

- a) Regional and international organisations and processes should respect Farmers' Rights and ensure that their instruments and activities do not affect the policy space to realise Farmers' Rights, consequently contradicting or undermining the objectives of the Treaty.
- b) In line with the above, regional and international organisations and processes should recognise, legally establish and institutionalise farmers' right of participation in their decision-making processes and activities. Such a right should be supported by mechanisms building on the good practices of the UN system for participatory mechanisms and processes as well as principles and elements elaborated in Chapter 4 and this chapter.

