

# Farmers' Rights

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## Introduction

Farmers' Rights are a key element of the Food and Agriculture Organization of the United Nations (FAO) *International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty)* that entered into force in 2004.<sup>1</sup> Recognising Farmers' Rights (which can be distinguished from 'Farmers' Privilege and the ability to save, reuse and exchange seeds)<sup>2</sup> was seen as a way of acknowledging the past, present and future contributions of farmers in conserving, improving and making available the genetic materials used in agriculture. This Briefing Paper traces the origins of Farmers' Rights through their negotiation in the *Plant Treaty* and their early practice. By setting out the legal objects of farmers' rights, as well as the scope of the legal obligations attached to Farmers' Rights, the Briefing Paper shows how Farmers' Rights remain aspirational, and continue to reflect the gulf between developing and developed countries.

## The origins of Farmers' Rights

Perhaps the founding context for Farmers' Rights was the United Nation's (UN) *Declaration on the Establishment of a New International Economic Order* of 1974 that addresses concerns about raw materials and development, and the prospect of bridging the divide between developed and developing countries. The Declaration was the outcome of ongoing discussions about the existing allocation of the world's resources and how the economic relations between countries might be re-ordered in favour of developing countries. The debates about economic relations between developed and developing countries extended to the arrangements for the collection, storage and breeding of plant materials.<sup>3</sup> These economic justice concerns over plant genetic resources crystallised in the 1981 initiative to establish a legal instrument for

the conservation and exchange of agricultural genetic resources held in existing germplasm banks.<sup>4</sup> The outcome of these concerns was the *International Undertaking on Plant Genetic Resources for Food and Agriculture* that was adopted in 1983.<sup>5</sup>

By recognising that plant genetic resources were the 'heritage of mankind' and available to all, the objective of the *International Undertaking* was to make plant genetic resources available for plant breeding.<sup>6</sup> More specifically the object of *International Undertaking* was to make 'adhering Governments and institutions having plant genetic resources under their control to allow access to samples ... free of charge, on the basis of mutual exchange or on mutually agreed terms'.<sup>7</sup> Of particular note was that 'plant genetic resources' included 'cultivated varieties (cultivars) in current use and newly developed varieties', 'obsolete cultivars', 'primitive cultivars (land races)', 'wild and weed species, near relatives of cultivated varieties', and 'special genetic stocks (including elite and current breeders' lines and mutants)'.<sup>8</sup> This was significant as this expansive definition would include both the plant materials of the developing countries and many of the materials used in the developed countries, including materials protected by plant breeder's rights and other property claims. In particular this would include proprietary elite and current varieties used by breeders and seed sellers in developed countries.<sup>9</sup>

With the exception of the major developed countries—including the United States and some European countries—the *International Undertaking* was broadly adopted.<sup>10</sup> The developed countries reservations centred on the undertaking being

<sup>1</sup> CGRFA/MIC-2/04/REP (2004, [7]).

<sup>2</sup> See *International Convention for the Protection of New Varieties of Plants* (1991), Art 15(2); *International Convention for the Protection of New Varieties of Plants* (1978), Art 5.

<sup>3</sup> See, for examples, Correa (2000, pp. 3-4); Bordwin (1985, pp. 1058-1062); Walsh (1984, p. 148). See also Mooney (1993).

<sup>4</sup> C 1981 (1981, [153] (Resolution 6/81, Preamble)). See also C 83/25 (1983); COAG/83/10 (1983)

<sup>5</sup> C 1983 (1983, [285] (Resolution 8/83)).

<sup>6</sup> Ibid, [285] (Resolution 8/83, Article 1).

<sup>7</sup> Ibid, [285] (Resolution 8/83, Article 5).

<sup>8</sup> Ibid, [285] (Resolution 8/83, Article 2.1).

<sup>9</sup> See Kloppenburg and Kleinman (1988, p. 174).

<sup>10</sup> By 1985 '77 [out of 156 countries] had agreed in principle to adhere to, or expressed support for, the [*International Undertaking on Plant Genetic Resources*]: C 1985 (1985, [290]). See also CPGR/85/REP (1985, [7]).



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inconsistent with plant breeder's rights protections and various 'other domestic considerations', although it was generally argued that these reservations might be overcome if the agreement was 'modified'.<sup>11</sup> Attempts to make the *International Undertaking* more acceptable were achieved by agreed interpretations.<sup>12</sup> It was these agreed interpretations that set out the early understanding of Farmer's Rights:

- (a) Accepting a balance between plant breeder's rights and Farmer's Rights by maintaining unrestricted access to germplasm recognising the rights of both technology and germplasm donors to be compensated (Resolutions 4/89 and 5/89).<sup>13</sup>
- (b) Accepting that the plant breeder's rights advocated by the *International Undertaking* were to be interpreted as accepting Farmer's Rights as the contribution of farmers to the conservation and development of plant genetic resources as the basis of plant production (Resolution 4/89).<sup>14</sup>

These interpretations also contemplated a mechanism for Farmers' Rights – an International Fund<sup>15</sup> to support plant genetic conservation, management and utilization programmes, with an emphasis on developing countries and the important sources of plant genetic material, through educational programmes for biotechnology resource conservation and management capabilities, and the improvement of plant breeding and seed production (Resolution 4/89).<sup>16</sup> This was later endorsed (albeit never realised)<sup>17</sup> to 'support plant genetic conservation and utilization programmes, particularly, but not exclusively, in the developing countries' (Resolution 3/91).<sup>18</sup>

The FAO decided to address Farmers' Rights through a process of intergovernmental negotiations in the then Commission on Plant Genetic Resources forum.<sup>19</sup> Through 1997 and 1998, however, there

was essentially no progress on Farmers' Rights.<sup>20</sup> Then, in 1999, a compromise text was agreed after an informal meeting.<sup>21</sup> The threshold disagreement appears to have been about the reach of Farmers' Rights and this was resolved by limiting the responsibility to national governments.<sup>22</sup> After further formal negotiation the text for farmers' rights was settled by consensus.<sup>23</sup> While negotiations continued about other aspects of the agreement<sup>24</sup> the text dealing with farmers' rights remained the same.<sup>25</sup> The Commission on Plant Genetic Resources then adopted the almost completed re-negotiated *International Undertaking* in 2001,<sup>26</sup> the FAO Council completed the negotiations,<sup>27</sup> and finally, the FAO Conference adopted the text as the *Plant Treaty* in 2001.<sup>28</sup> In adopting the *Plant Treaty* the FAO Conference expressly '[r]ecogniz[ed] the importance of realizing Farmers' Rights as set out in the [*Plant Treaty*]'.<sup>29</sup>

## Farmers' Rights in the Plant Treaty

The culmination of the various perspectives about Farmers' Rights was agreed in broadly cast language in the *Plant Treaty*. The Preamble provides:

*Affirming* that the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving, improving and making available these resources, is the basis of Farmers' rights.

*Affirming* also that the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' rights, as well as the

<sup>11</sup> C 1985, *ibid*, [291]. See also CPGR/85/REP, *ibid*, [8]-[13].

<sup>12</sup> See C 1991 (1991, [104] (Resolution 3/91)); C 1989 (1998, [108] (Resolutions 4/89 and 5/89)).

<sup>13</sup> C 1989, *ibid*, [105].

<sup>14</sup> *Ibid*, [108] (Resolution 4/89, [3]).

<sup>15</sup> The 'International Fund for Plant Genetic Resources' had been addressed by a Working Group established by the Commission of Plant Genetic Resources at its first session and then elaborated to be a fund for the conservation of plant genetic resources, plant genetic improvement and seed production: see CPGR/87/REP (1987, [9]); CPGR/85/REP (1985, [76]-[80]). See also CPGR/87/10 (1987). Later this was conceived as a financial mechanism 'to apply the principles of the Undertaking within a system of mutual and equitable benefits, to which some countries contributed with germplasm and others with funds and technology': CPGR/89/3 (1989, p. 2).

<sup>16</sup> C 1989 (1989, [108] (Resolution 4/89, [4])).

<sup>17</sup> The 'international fund' was, however, the basis for further discussions about the ways Farmers' rights might be operationalized in a broader context of other conservation and sustainable use arrangements: see, for example, CPGR-Ex1/94/5 (1994, [47]).

<sup>18</sup> C 1991 (1991, [104] (Resolution 3/91)).

<sup>19</sup> C 1993 (1993, [108]).

<sup>20</sup> See CPRG-Ex5/98/REP (1998, [5]-[7] and Appendix C (pp. 9-11)); CPRG-Ex4/97/REP (1997, [5]-[6] and Appendix C (pp. C11-C15)); CPRG-7/97/REP (1997, [34]-[35] and Appendix I (p. 15)). See also C 97/REP (1997, [48] (Resolution 1/97)).

<sup>21</sup> See CGRFA-8/99/13 (1999).

<sup>22</sup> CGRFA-8/99/13 (1999, [9]). See also Coupe and Lewins (2007, pp. 20-21).

<sup>23</sup> CGRFA-8/99/REP (1999, [7]-[9] and Appendix E (p. E2)). See also C 99/REP (1999, [62]). For a detailed assessment of the negotiations see Batta Bjørnstad (2004, pp. 49-64).

<sup>24</sup> These other matters were essentially about benefit sharing, the scope of the Multilateral System, finance and intellectual property: see *ibid*, 64-72.

<sup>25</sup> See CGRFA-Ex-6/01/REP (2001, [6]); CGRFA/CG-5/01/TXT (2001); CGRFA/CG-4/00/TXT (2000); CGRFA/CG-3/00/TXT (2000); CGRFA/CG-2/00/TXT (2000); CGRFA/CG-1/99/TXT (1999).

<sup>26</sup> CGRFA-Ex-6/01/REP, *ibid*, [6] and Appendix B.

<sup>27</sup> CL 121/REP (2001, [60]-[66]).

<sup>28</sup> C 2001 (2001, [58] (Resolution 3/2001) and Appendix D). See also C 2001/16 (2001); UNEP/CBD/COP/6/20 (2002, [107] and Annex I (Decision VI/6 (p. 91))).

<sup>29</sup> C 2001, *ibid*.

promotion of Farmers' rights at national and international levels.<sup>30</sup>

The main body of the *Plant Treaty* sets out the substantive Farmers' Rights provisions in Article 9:

9(1) The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

9(2) The Contracting Parties agree that the responsibility for realizing Farmers' rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' rights, including:

- (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

9(3) Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

The broad language used in the *Plant Treaty* reflects the uncertain content of farmers' rights. At best the *Plant Treaty* merely requires *only* that 'national governments'<sup>31</sup> as Contracting Parties 'should' take measures 'to protect and promote Farmers' Rights' that include, but are not limited to, protecting some traditional knowledge associated with plant genetic resources, some forms of participation in benefit sharing, and some participation in decisions about conserving and sustainably using plant genetic resources. In addition the *only* limits imposed on saving, using, exchanging and selling farm-saved seeds and propagating materials (in Article 9(3)) is that the *Plant Treaty* itself should not be interpreted as limiting these activities. The challenge in implementing farmers' rights is therefore to clearly

identify the content of these rights and the legal obligations imposed to realise these rights.

A minimalist interpretation of the *Plant Treaty* requires *only* that national governments 'should ... take measures to protect and promote Farmers' Rights'. This does not involve any obligation to actually implement farmers' rights. Instead the tenor of the commitment in the *Plant Treaty* is at best an opportunity for national government to implement measures directed to 'local and indigenous communities and farmers' within a broad conception of recognising their contributions in conserving and developing plant genetic resources. This is an incredibly broad ambit, and may be particularly problematic when seen in the light of more substantial (and binding) international obligations under, for example, patent and plant variety rights schemes.

How does the *Plant Treaty* interact with other international obligations? As a generalisation, the Preamble statements in international agreements provide the context for the agreement and can affect its likely interpretation. While these statements do not provide a guarantee that the *Plant Treaty* will not affect the obligations in other agreements, the clear intention from these statements appears to be that the *Plant Treaty* should not affect those other international agreement obligations. This is particularly important as this suggests that the *Plant Treaty* as a later agreement does not in any way limit a national government's existing obligations under other international agreements. This is surprising as the strong rights for patents and plant breeders' rights under the World Trade Organisation's *Trade-related Aspects of Intellectual Property Rights* agreement (TRIPS) and the *International Union for the Protection of New Varieties of Plants* (UPOV) would appear to be intended to trump these weak assertions of Farmers' Rights. For Farmers' Rights this likely means that their implementation by national governments will need to be consistent with existing international commitments on trade, intellectual property, and the like. This means that the optional obligations available under the UPOV 1991 for national governments to implement plant breeder's rights that limit farmers saving, using, exchanging and selling farm-saved seeds and propagating materials (the 'Farmers' Privilege') will trump the *Plant Treaty's* Farmers' Rights.<sup>32</sup> Similarly, patents under TRIPS will also trump the *Plant Treaty's* Farmers' Rights.<sup>33</sup> The *Plant Treaty* Article 9(3) will therefore operate merely to maintain the existing scope of the existing

<sup>30</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture*, Preamble.

<sup>31</sup> Notably the Preamble refers to 'the promotion of Farmers' rights at national and international levels': *International Treaty on Plant Genetic Resources for Food and Agriculture*, Preamble.

<sup>32</sup> *International Union for the Protection of New Varieties of Plants*, Art 15(2). This provides: 'Notwithstanding [the scope of plant breeder's rights], each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by [essentially derived and certain other varieties]'.

<sup>33</sup> *Trade-related Aspects of Intellectual Property Rights*, Art 28.

commitments in both TRIPS and UPOV that already severely limit the Farmers' Privilege to save, reuse and exchange seeds.<sup>34</sup>

Not all is lost, however, as other provisions of the *Plant Treaty* may have some effect in ameliorating the weak Farmers' Rights provisions. The benefit sharing and financial provisions favour farmers with Article 13(3) providing for the benefits to 'flow primarily, directly and indirectly, to farmers in all countries, especially in developing countries, and countries with economies in transition', Article 13(b)(iii) for benefit sharing to include the transfer of technology, including intellectual property protected technology, and Article 18(5) for the Funding Strategy to give priority to plans and programmes 'for farmers in developing countries, especially in least developed countries, and in countries with economies in transition'.

## Farmers' Rights beyond the *Plant Treaty*

At the Ministerial Meeting adopting the *Plant Treaty* the Ministers expressly recognized 'the importance of implementing Farmers' Rights',<sup>35</sup> and the topic has been discussed at numerous Sessions of the *Plant Treaty's* Governing Body. The outcome of these discussions has been, in part, to fund a range of projects<sup>36</sup> in developing countries.<sup>37</sup>

Following on from the Third Session of the *Plant Treaty's* Governing Body in 2009 there was also a global consultation about Farmers' Rights.<sup>38</sup> One of the outcomes of this consultation was to identify the following difficulties, including:

- (a) The ways to develop or adjust national legislation, policies, strategies and programmes to realise Farmers' rights, and in particular, enabling farmers to continue conserving, developing and sustainably using plant genetic resources.
- (b) Protecting and adequately documenting, as well as encouraging the sharing of, traditional knowledge.
- (c) Scaling up and strengthening informal seed systems (seed banks, seed exchange networks, participatory plant-breeding projects, registries of crop genetic resources and so on).
- (d) Awareness-raising and capacity-building measures to facilitate greater awareness among farmers and decision-makers about

Farmers' rights and to ensure farmers' participation in decision-making.<sup>39</sup>

Following on from these consultations there have been various recommendations made about the ways the Governing Body might assist Contracting Parties to protect traditional knowledge, participate in benefit sharing, participate in decision making, balance Farmers' Rights with seed laws and plant breeder's rights, and so on.<sup>40</sup> The ongoing work from the Fourth Session of the *Plant Treaty's* Governing Body involved collecting more experiences and providing financial and technical support (where available) to national government seeking to realise Farmers' Rights<sup>41</sup> and expanding the ambit of Farmers' Rights to relate to other work being conducted on sustainable uses.<sup>42</sup> The Fifth Session compiled these various views, experiences and examples of implementation.<sup>43</sup> Further discussion can be expected as Farmers' Rights remains a formal agenda item and a matter of concern to many Contracting Parties.<sup>44</sup>

In addition to the work of the *Plant Treaty's* Governing Body on Farmers' Rights, a number of national governments, intergovernmental organisations and other bodies have implemented laws or principles that include Farmers' Rights. In the remaining part of this section, we will consider how national governments, particularly India and Africa, have included Farmers' Rights into their national laws and how the Consultative Group on International Agricultural Research (CGIAR) and the Conference of Parties to the Convention on Biological Diversity have dealt with Farmers' Rights.

The leading proponent of Farmers' Rights so far has been the government of India and its implementation of the *Protection of Plant Varieties and Farmers' Rights Act 2001*.<sup>45</sup> The entitlements flow to 'farmers' that are defined in s 2(k) to mean:

- ... any person who:
- (i) cultivates crops by cultivating the land himself; or
  - (ii) cultivates crops by directly supervising the cultivation of land through any other person; or
  - (iii) conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.

<sup>34</sup> See *Trade-related Aspects of Intellectual Property Rights*, Art 28; *International Convention for the Protection of New Varieties of Plants* (1991), Art 15(2); *International Convention for the Protection of New Varieties of Plants* (1978), Art 5

<sup>35</sup> IT/GB-1/06/Report (2006, p. vi).

<sup>36</sup> See IT/GB-4/11/Report (2011, [23] and Appendix A.3 (Resolution 3/2011, p. 15)).

<sup>37</sup> See, for example, IT/GB-5/13/Inf.4 (2013, [25]-[49]). See also IT/GB-4/11/9 (2011); IT/GB-4/11/9 Add.1 (2011).

<sup>38</sup> See IT/GB-4/11/Circ.1 (2011 [3]). See also Andersen and Winge (2011); Andersen and Winge with Batta Torheim (2011).

<sup>39</sup> IT/GB-4/11/Circ.1, *ibid*, [5].

<sup>40</sup> *Ibid* [10]-[89]. See also IT/GB-4/11/Report, Appendix A.6 (Resolution 6/2011, Preamble (p. 45)).

<sup>41</sup> IT/GB-4/11/Report, *ibid*, [29] and Appendix A.6 (Resolution 6/2011, [4] and [9] (p. 46)).

<sup>42</sup> *Ibid*, [28] and Appendix A.7 (Resolution 7/2011, [7] (p. 48)).

<sup>43</sup> See IT/GB-5/13/Inf.8 (2013).

<sup>44</sup> See IT/GB-5/13/10 (2013).

<sup>45</sup> For overviews of the scheme and its dealing with Farmers' rights see, for examples, Chaturvedi (2011); Srinivasan (2003); Sahai (2003); Gopalakrishnan (2001).

The Indian national scheme essentially establishes entitlements to register a new plant variety (s 39(1)(i)), compensation from the Gene Fund (s 45) for 'conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation' (s 39(1)(iii)), and a right 'to save, use, sow, re-sow, exchange, share or sell his farm produce' that is not packed and labelled as a protected variety (s 39(1)(iv)). In addition to these entitlements there is a statutory right to claim compensation for registered plant varieties that do not perform as represented (s 39(2)), for 'tribal or rural families' to be consulted about using genetic materials they have conserved in plant variety claims (s 40(1)), and an expanded standing to bring actions on behalf of farmers (including to non-governmental organisations) (s 41(1)). Central to Farmers' Rights is the broad ambit of the Gene Fund, that includes making payments for 'supporting the conservation and sustainable use of genetic resources including *in-situ* and *ex-situ* collections' and for 'strengthening the capability of [village councils] in carrying out such conservation and sustainable use' (s 45(2)(c)).

A slightly different conception of Farmers' Rights is reflected in the *African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources*.<sup>46</sup> The African model legislation provides distinct rights (Art 26):

- (1) Farmers' rights shall, with due regard for gender equity, include the right to:
  - (a) the protection of their traditional knowledge relevant to plant and animal genetic resources;
  - (b) obtain an equitable share of benefits arising from the use of plant and animal genetic resources;
  - (c) participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources;
  - (d) save, use, exchange and sell farm-saved seed/propagating material of farmers' varieties;
  - (e) use a new breeders' variety protected under this law to develop farmers' varieties, including material obtained from gene banks or plant genetic resource centres; and
  - (f) collectively save, use, multiply and process farm-saved seed of protected varieties.
- (2) Notwithstanding sub-paragraphs (c) and (d), the farmer shall not sell farm-saved seed/propagating material of a breeders' protected variety in the seed industry on a commercial scale.
- (3) Breeders' Rights on a new variety shall be subject to restriction with the objective of

<sup>46</sup> See also African Union Commission (2012, pp. 9-12). See also Ekpere (2003, pp. 275-286).

protecting food security, health, biological diversity and any other requirements of the farming community for propagation material of a particular variety.

The African model law also gives preference to the customary practices and laws protecting farmers' varieties as a community intellectual protection through a variety certificate with preference over plant breeder's rights (Arts 25 and 30(2)), used farm saved seeds (Art 31(2)), and a fund to collect and share financial resources (Art 66(2)).

A number of other countries have identified elements of their laws that support farmers' rights<sup>47</sup> and others have signalled an intention to adopt such laws.<sup>48</sup> Considerable work has also been undertaken to try and identify the likely scope of farmers' rights.<sup>49</sup> In national legislation, and despite best efforts, the scope and content of farmers' rights remains uncertain and contested.<sup>50</sup>

## Farmers' Rights and the CGIAR Centers

In adopting the *Plant Treaty* for its germplasm collections the CGIAR has developed its own *CGIAR Principles on the Management of Intellectual Assets (IA Principles)*.<sup>51</sup> The principles set out the way that 'Intellectual Assets' that are produced or acquired will be managed. 'Intellectual Assets' are 'any results or products of research and development activities of any nature whatsoever' (footnote 3). To be consistent with the *Plant Treaty* these principles expressly address Farmers' Rights to 'support the development of appropriate policies and procedures for their recognition and promotion' (Art 3.2). This has been operationalized through the *Implementation Guidelines for the CGIAR IA Principles on the Management of Intellectual Assets (Implementation Guidelines)* as:

- (a) That 'Centers should comply, in the countries where they work, with applicable national laws protecting and promoting Farmers' Rights' – This is interpreted to mean complying with national access and benefit sharing laws, plant breeder's rights laws, seed regulations and indigenous and or local peoples' land, resource and cultural laws, and laws implementing

<sup>47</sup> See IT/GB-3/09/Inf.6 Add.1 (2009, pp. 3-4); IT/GB-3/09/Inf.6 Add.4 (2009); IT/GB-3/09/Inf.6 Add.5 (2009). See also Ruiz and Vernooij (2012, pp. 174-175 and the cases referred to therein).

<sup>48</sup> See IT/GB-3/09/Inf.6 Add.1, *ibid*, 4; IT/GB-3/09/Inf.6 (2009, [9] and Annex I). See also Commission on Genetic Resources for Food and Agriculture (2010, pp. 133-134).

<sup>49</sup> See IT/GB-3/09/Inf.6 Add.2 (2009, Centre for Genetic Resources, The Netherlands and the Community Technology Development Trust, Zimbabwe); IT/GB-3/09/Inf.6 Add.3 (2009, Fridtjof Nansen Institute, Norway). See also Chaves Posada (2013).

<sup>50</sup> A literature has also addressed Farmers' rights in the context of intellectual property: see, for examples, Winter (2010); Oguamanam (2006); Borowiak (2004); Blakeney (2002); Williams (1991).

<sup>51</sup> CGIAR Consortium (2012). See also Chaves Posada (2013, pp. 10-15).

international commitments such as the *Plant Treaty*, the *Convention on Biological Diversity*, UPOV, and so on.<sup>52</sup>

- (b) That ‘Centers should, where possible, seek to work in ways that promote’ Farmers’ rights as they are set out in the *Plant Treaty* – protection traditional knowledge, sharing benefits, participate in making decisions, and allow seed saving.<sup>53</sup>

A ‘non-exhaustive list of practical actions’ that Centers can take is provided in the CGIAR’s *Implementation Guidelines*. These actions include: when collecting plant materials associated with traditional knowledge engage farmers to be sure their consent and understanding is obtained; share research results with farmers; appropriately credit traditional owners; involve farmers in projects; and so on.<sup>54</sup> The essence of these principles is that the CGIAR Centers need to comply with any national farmers’ rights laws and ‘seek to work in ways that promote’ broadly conceived ideals about Farmers’ Rights.<sup>55</sup> The experience of the Centers implementing the *IA Principles* and *Implementation Guidelines* will over time provide the content of these rights and the legal obligations imposed to realise these rights.

While not always expressly articulating Farmers’ Rights *per se* there are other international institutions that advocate similar objectives, or take such rights into consideration.<sup>56</sup> Perhaps the key alternative forum is the Conference of Parties to the Convention on Biological Diversity and its programs

on agricultural biodiversity<sup>57</sup> and Article 8(j) and related provisions.<sup>58</sup> The agricultural biodiversity program, for example, recently advocated assistance to farmers ‘to support, among others, farmers in *in-situ* conservation of traditional and local varieties, races and breeds and efforts to conserve crop wild relatives’.<sup>59</sup> Again, the content of Farmers’ Rights will evolve out of implementing these commitments over time.

## Concluding Remarks

This Briefing Paper demonstrates that the conception of Farmers’ Rights as finally adopted in the *Plant Treaty* is a minimalist scheme. Indeed, the *Plant Treaty* does not impose positive obligations on Contracting Parties to implement a ‘farmer’s right’, but rather, it merely encourages national governments to make some concessions to farmers and to promote these concessions internationally. While the content of these rights and the legal obligations is presently uncertain, their implementation over time will establish the norms and likely realise these rights. Perhaps the major advance in the *Plant Treaty* on this issue so far has been to focus attention on farmers’ issues and crystalized farmers as suitable beneficiaries of benefit sharing arrangements.<sup>60</sup> In itself this appears to be a very small gain although it might be significant as the start of further international debates about the roles of farmers and how farmers might be compensated for their roles in conservation.

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<sup>52</sup> CGIAR Consortium (2013, p. 2).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, pp. 2-3.

<sup>55</sup> *Ibid.*, p. 2.

<sup>56</sup> See, for examples, SCP/15/3 (2010, [2] and Annex III); C/38/16 (2004, [14] and Annex V); and so on; E/CN.4/Sub.2/1999/12 (1999, [121]).

<sup>57</sup> See UNEP/CBD/COP/11/35 (2012, [159], [361] and Annex I (Decision XI/6 (p. 123))). See also UNEP/CBD/SBSTTA/14/11 (2010); UNEP/CBD/COP/9/29 (2008, [108] and Annex I (Decision IX/1, [6] (p. 64))).

<sup>58</sup> See UNEP/CBD/COP/11/35, *ibid.*, [237] and Annex I (Decision XI/14 (p. 149)). See also UNEP/CBD/COP/7/INF/18 (2003).

<sup>59</sup> UNEP/CBD/COP/10/27 (2010, [363] and Annex (Decision X/34 (p. 283))).

<sup>60</sup> Coupe and Lewins (2007, p. 32).

## References and further reading

- African Union Commission, A Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Union Commission, 2012).
- Andersen, R. (2005) The History of Farmers' rights: A Guide to Central Documents and Literature, FNI Report 8/2005. The Fridtjof Nansen Institute, Lysaker, Norway.
- Andersen, R. (2006) Realizing Farmers' rights under the International Treaty on Plant Genetic Resources for Food and Agriculture: Summary of Findings from the Farmers' rights Project (Phase 1), FNI Report 11/2006. The Fridtjof Nansen Institute, Lysaker, Norway.
- Andersen, R. and Winge, T. (2008) Success Stories from the Realization of Farmers' rights Related to Plant Genetic Resources for Food and Agriculture, FNI Report 4/2008. The Fridtjof Nansen Institute, Lysaker, Norway.
- Andersen, R. and Winge, T. (2011) The 2010 Global Consultations on Farmers' rights: Results from an Email-based Survey, FNI Report 2/2011. The Fridtjof Nansen Institute, Lysaker, Norway.
- Andersen, R. and Winge, T. with contributions from Batta Torheim, B. (2011) Global Consultations on Farmers' rights in 2010. The Fridtjof Nansen Institute, Lysaker, Norway.
- Argumedo, A., Swiderska, K., Pimbert, M., Song, Y. and Pant, R. (2011) Implementing Farmers' rights under the FAO International Treaty on PGRFA: The Need for a Broad Approach Based on Biocultural Heritage, Paper prepared for the Fourth Governing Body of the International Treaty on PGRFA, Bali 14-18 March 2011. Available at: <<http://pubs.iied.org/pdfs/G03077.pdf>> [Accessed 14 October 2013].
- Batta Bjørnstad, S-I. (2004) Breakthrough for 'the South'? An Analysis of the Recognition of Farmers' Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture, FNI Report 13/2004. The Fridtjof Nansen Institute, Lysaker, Norway.
- Berhan, T., Egziabher, G., Matos, E. and Mwila, G. (2011) 'The African Regional Group: Creating Fair Play between North and South' in Frison, C., López, F. and Esquinas-Alcázar, J. (eds), Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture. Earthscan, London, pp. 41-56.
- Bertacchini, E. (2008) 'Coase, Pigou and the Potato: Wither Farmers' rights?', *Ecological Economics*, 68(1), 183-193.
- Blakeney, M. (2002) 'Protection of Plant Varieties and Farmers' rights', *European Intellectual Property Review*, 24(1), 9-19.
- Bordwin, H. (1985) 'The Legal and Political Implications of the International Undertaking on Plant Genetic Resources', *Ecology Law Quarterly*, 12(4), 1053-1069.
- Borowiak, C. (2004) 'Farmers' rights: Intellectual Property Regimes and the Struggle over Seeds', *Politics and Society*, 32(4), 511-543.
- Brush, S. (1994) Providing Farmers' rights Through In Situ Conservation of Crop Genetic Resources, Background Study Paper No 3. Commission on Plant Genetic Resources. Available at: <<ftp://ext-ftp.fao.org/ag/cgrfa/BSP/bsp3E.pdf>>. [Accessed 14 October 2013].
- Brush, (2007) 'Farmers' rights and Protection of Traditional Agricultural Knowledge', *World Development*, 35(9), 1499-1514.
- CGIAR Consortium (2012) CGIAR Principles on the Management of Intellectual Assets. CGIAR Consortium. Available at: <<http://www.cgiar.org/consortium-news/principles-on-management-of-intellectual-assets-approved>>. [Accessed 14 October 2013].
- CGIAR Consortium (2013) Implementation Guidelines for the CGIAR IA Principles on the Management of Intellectual Assets. CGIAR Consortium, Montpellier, France.
- Chaves Posada, J. (2013) Mechanisms by which Centers of the CGIAR Consortium can Support the Development of Appropriate Policies and Procedures for the Recognition and Promotion of Farmers' rights. Global Forum on Agricultural Research. Available at: <[http://infoagro.net/archivos\\_Infoagro/Infotec/biblioteca/GFAR\\_CGIAR\\_farmers\\_r.pdf](http://infoagro.net/archivos_Infoagro/Infotec/biblioteca/GFAR_CGIAR_farmers_r.pdf)>. [Accessed 14 October 2013].
- Chaturvedi, C. (2011) 'Analysis of Farmers' rights: In the Light of Protection of Plant Varieties and Farmers' rights Act of India', *European Intellectual Property Review*, 33(11), 708-714.
- Commission on Genetic Resources for Food and Agriculture (2010) The Second Report on The State of the World's Plant Genetic Resources for Food and Agriculture. FAO, Rome, Italy.
- Cooper, D. (2002) 'The International Treaty on Plant Genetic Resources for Food and Agriculture', *Review of European Community and International Environmental Law*, 11(1), 1-16.
- Correa, C. (2000) Options for the Implementation of Farmers' Rights at the National.
- Coupe, S. and Lewins, R. (2007) Negotiating the Seed Treaty, Practical Application Publications, Warwickshire, United Kingdom.



- Frison, C., López, F. and Esquinas-Alcázar, J. (eds) (2001) *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture*. Earthscan, London, United Kingdom.
- Gerstetter, C., Görlach, B., Neumann K. and Schaffrin, D. (2007) 'The International Treaty on Plant Genetic Resources for Food and Agriculture within the Current Legal Regime Complex on Plant Genetic Resources', *Journal of World Intellectual Property*, 10(3-4), 259-283.
- Guneratne, C. (2012) *Genetic Resources, Equity and International Law*. Edward Elgar, United Kingdom.
- Haight, G. (1975) 'The New International Economic Order and the Charter of Economic Rights and Duties of States', *International Lawyer*, 9(4), 591-604.
- Kloppenborg, J. and Kleinman, D. (1988) 'Seeds of Controversy: National Property Versus Common Heritage' in Kloppenborg, J. (ed), *Seeds and Sovereignty: The Use and Control of Plant Genetic Resources*. Duke University Press, Durham, North Carolina, pp. 172-303.
- Lawson, C. (2012) *Regulating Genetic Resources: Access and Benefit-sharing in International Law*. Edward Elgar, United Kingdom.
- Mooney, P. (2011) 'International Non-governmental Organizations: The Hundred Year (or so) Seed War – Seeds, Sovereignty and Civil Society – A Historical Perspective on the Evolution of “The Law of the Seed”' in Frison, C., López, F. and Esquinas-Alcázar, J. (eds), *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture*. Earthscan, New York, pp. 135-148.
- Mooney, P. (1993) 'Genetic Resources in the International Commons', *Review of European Community and International Environmental Law*, 2(2), 149-150.
- Moore, G. and Tymowski, W. (2005) *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*, IUCN Environmental Policy and Law Paper No 57. IUCN, Gland, Switzerland.
- Oguamanam, C. (2006) 'Intellectual Property Rights in Plant Genetic Resources: Farmers' rights and Food Security of Indigenous and Local Communities', *Drake Journal of Agricultural Law*, 11(3), 273-305.
- Rose, G. (2003) 'International Law in the 21<sup>st</sup> Century: The International Treaty on Plant Genetic Resources for Food and Agriculture', *Georgetown International Environmental Law Review*, 15(4), 583-632.
- Ruiz, M. and Vernooy, R. (2012) 'Race to the Bottom Versus Slow Walk to the Top' in Manuel Ruiz and Ronnie Vernooy (eds), *The Custodians of Biodiversity: Sharing Access to and Benefits of Genetic Resources*. Earthscan, New York, pp. 163-180.
- Sahai, S. (2003) 'India's Plant Variety Protection and Farmers' rights Act 2001', *Current Science*, 84(3), 407-412.
- Srinivasan, C. (2003) 'Exploring the Feasibility of Farmers' rights', *Development Policy Review*, 21(4), 419-447.
- Walsh, J. (1984) 'Seeds of Dissension Sprout at FAO', *Science*, 223(4632), 147-148.
- Williams, S. (1991) 'There is Not a Conflict Between Intellectual Property and the Rights of Farmers in Developing Countries', *Journal of Agricultural and Environmental Ethics*, 4(2), 143-150.
- Winter, L. (2010) 'Cultivating Farmers' rights: Reconciling Food Security, Indigenous Agriculture, and TRIPS', *Vanderbilt Journal of Transnational Law*, 43(1), 223-254.