

May 2009



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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Item 14 of the Provisional Agenda
INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE
FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
THIRD SESSION OF THE GOVERNING BODY
Tunis, Tunisia, 1 – 5 June 2009
COLLECTION OF VIEWS AND EXPERIENCES SUBMITTED BY CONTRACTING PARTIES AND OTHER RELEVANT ORGANIZATIONS ON THE IMPLEMENTATION OF ARTICLE 9

This addendum contains an information document entitled Results of an Online conference on ‘Options for Farmers’ Rights’ [Initiated by the Centre for Genetic Resources, The Netherlands (CGN) and the Community Technology Development Trust (CTDT, Zimbabwe)].

The information contained in this document relates to the implementation of Article 9. It was received by the Secretary of the Treaty **on 27 May 2009** and it is presented in the form and language in which they were received.

Results of an Online conference on **'Options for Farmers' Rights'**

May 2009

1. Introduction

In 1989 for the first time, Farmers' Rights were formally recognized by the FAO Conference. In May 1992 the Convention on Biological Diversity was agreed in Nairobi, and with it a resolution stating by which approach the CBD would deal with the promotion of sustainable agriculture. In this resolution, the FAO was requested to explore ways and means to develop complementarity and cooperation between the CBD and the work of the FAO on plant genetic resources for food and agriculture. In addition, the FAO was invited to seek solutions to some outstanding matters in particular, including the question of implementation of Farmers' Rights. Agenda 21 also featured this request. This request to the FAO to address the specific requirements of plant genetic resources for food and agriculture marked the start of lengthy negotiations which finally led to the International Treaty on Plant Genetic Resources for Food and Agriculture (here referred to as "the Treaty").

In 1996 the Global Plan for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture was adopted by the International Technical Conference on Plant Genetic Resources in Leipzig. It, too, addressed the issue of Farmers' Rights. With the adoption of the Treaty in 2001, a legally binding international agreement for the management of plant genetic resources for food and agriculture was established. Article 9 of the Treaty specifies that the Contracting Parties to the Treaty are obliged to protect and promote Farmers' Rights, but at the same time are free to choose the measures they deem appropriate. Article 9 was the result of long and complex negotiations. The text of the Treaty does not offer a definition of Farmers' Rights, but simply describes the measures that are needed to promote and protect them (see box, p 3).

Initiated by the Centre for Genetic Resources, The Netherlands (CGN) and the Community Technology Development Trust (CTDT, Zimbabwe).

Jointly funded by the Directorate General of Development Cooperation (DGIS) of the Netherlands Ministry of Foreign Affairs and by OxfamNovib, the Netherlands.

Farmers' Rights are about recognition and compensation

Recognition in the context of Farmers' Rights refers to the notion that farmers who maintain and develop their own farmers' varieties have been and continue to be major stewards of plant genetic diversity. Recognition is strongly reflected in Articles 9 of the Treaty.

Compensation in the context of Farmers' Rights refers to the idea that tangible benefits should be generated in order to facilitate continuing conservation and development of plant genetic resources by farmers.

Farmers need 'freedom to operate'

For farmers to maintain and develop their plant genetic resources, the legal environment needs to be optimally conducive. Adoption of seed legislation and of laws on intellectual property rights often served to regulate commercial agricultural production, but may also affect practices and livelihoods of small-scale farmers. The 'freedom to operate' has thus become a major issue in the context of Farmers' Rights.

Farmers as breeders

The notion of *farmers as breeders*, which was broadly recognized in the online conference is based on the idea that farmers as well as professional plant breeders have important knowledge and skills that can complement one another. In line with this idea, Participatory Plant Breeding (PPB) can be defined as a range of approaches that involve a **collaboration of different actors (including scientists, breeders, farmers and other stakeholders) that can effectively complement each other.**

2. Why this information document?

At the first session of the Governing Body of the Treaty in Madrid in June 2006, Norway with the support of a number of other countries and Civil Society Organisations represented by SEARICE proposed that Farmers' Rights be put on the Working Agenda of the Governing Body. As a result, the Governing Body discussed Farmers' Rights at its Second Session, which was held in Rome in November 2007. To prepare for this discussion, an informal international consultation was organized in Lusaka, Zambia. The three-days consultation that was co-hosted by the Zambia Agricultural Research Institute, the Norwegian Ministry of Agriculture and Food, and the Fridtjof Nansen Institute of Norway, resulted in a report¹. Based on that report, Zambia and Norway submitted an information document on Farmers' Rights to the Governing Body of the Treaty in order to facilitate the discussion of the Governing Body on Farmers' Rights at its Second Session².

Based on the discussions, the Governing Body adopted Resolution 2/2007 on Farmers' Rights, in which it decided the following:

(vii) Contracting Parties and other relevant organizations are encouraged to submit views and experiences on the implementation of Farmers' Rights as set out in Article 9 of the International Treaty, involving, as appropriate, farmers' organizations and other stakeholders.

(viii) the Secretariat of the Governing Body is requested to collect these views and experiences as a basis for an agenda item for consideration by the Governing Body at its Third Session to promote the realization of Farmers' Rights at the national level.

(ix) affirms its commitment to continue to involve farmers' organizations in the work of the Governing Body - as appropriate and according to the Rules of Procedures.

According to the Resolution it is important that countries as well as relevant organizations

¹ Informal International Consultation on Farmers' Rights, 18 - 20 September 2007, Lusaka, Zambia (co-hosted by the Ministry of Agriculture and Food and the Fridtjof Nansen Institute, Norway, and the Zambia Agricultural Research Institute of the Ministry of Agriculture, Food and Fisheries).

² Implementation of Article 9 of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture: Farmers' Rights (document IT/GB-2/07/Circ.1) prepared for the Second Session of the FAO Governing Body (Rome, October/November 2007).

This document was composed by Robin Pistorius, Eng Siang Lim, Huib Ghijsen and Bert Visser, based on the many contributions to the online conference platform and the outcomes of the national farmers' workshops in Southern Africa.

prepare reports on their experiences and views on the implementation of Farmers' Rights to the Secretariat in due time before the Third Session of the Governing Body, which is taking place in Tunisia 1-5 June 2009.

It is in this context that on the initiative of the Centre for Genetic Resources, The Netherlands (CGN) and the Community Technology Development Trust (CTDT, Zimbabwe) an on-line conference platform was opened to discuss legal options to facilitate the contribution of farmers to on-farm maintenance and development of plant genetic resources (titled *Options for Farmers' Rights*). The initiative was taken in a search for agreed principles shared widely between major stakeholder groups, and with the ambition to present to the Governing Body alternative options for the implementation of Farmers' Rights with their advantages and disadvantages. The output of the on-line consultation process, as well as the results of a number of farmers' workshops held in parallel to the internet-based discussion in Malawi, Zambia and Zimbabwe³ are summarized in this document. They are submitted to the Governing Body as an information document.

3. Focus of this document

This document offers the output of the above mentioned discussions, summarizing the views and opinions contributed to the discussion regarding (a) the provisions of Article 9.1, 9.2 and 9.3, (b) options for the manner and mechanisms of adoption of Article 9 at the national level and (c) the possible implications of that adoption at the national level. Although the discussion covered Article 9 a whole, the participants went into great detail regarding the farmers' 'freedom to operate' as reflected in 9.3.

Over almost six months, through the online platform 'Options for Farmers' Rights' three rounds of discussions were held among representatives of governments, non-governmental organisations, national and

³ Regional Outlook on the Implementation of Farmers' Rights in Southern Africa: The case of Malawi, Zambia and Zimbabwe, March 2009, Community Technology Development Trust (unpublished draft document).

international research institutes and private industry. Active moderation of the platform discussion and the frequent publication of summarizing newsletters were used to keep participants informed and active. This resulting document has been published on the online platform for comments by participants before its publication.

Article 9.1 provides the rationale for the establishment of Farmers' Rights: 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.

In the operational Article 9.2 of the Treaty it is stated that *"the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments"*. Article 9.2 of the Treaty continues to state that *"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,"*. In full recognition of this major principle, this document solely intends to provide advice to national governments that are considering further measures towards the implementation of Farmers' Rights.

Article 9.3 safeguards the right of farmers to save, use and exchange farm saved seeds subject to national law. In the online conference and in this document, this provision was interpreted in the light of national legislation on plant breeder's rights (PBRs) and clauses on "farmers' privileges", as well as of seed laws.

With respect to the focus of this document, it should be noted that Article 9, being an Article of the Treaty, limits the scope of Farmers' Rights to the conservation and sustainable use of PGRFA. However, in the discussions on the platform and in the farmers' workshops it was noted that other factors are equally important to Farmers' Rights. In particular, land tenure rights, access to water, access to credit, to proper infrastructure, and to extension services were mentioned as major elements of Farmers' Rights in a wider context. At the national level, Contracting Parties may wish to consider these additional elements that lie outside the scope of the Treaty and indeed this discussion, when implementing Farmers' Rights, in order to take a holistic view and to increase the effectiveness of implementation measures.

Article 9 of the International Treaty on PGRFA Farmers' Rights

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

9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party 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.

4. Some observations by participants

- a) Views were expressed that 'farmers' cannot be treated as a single homogeneous group of stakeholders. One participant formulated it as follows: *"...[the] idea of categorizing small farmers (who practice these collective systems of PGR management) and farmers who are really businessmen engaged in agricultural production is useful for me. Small farmers maintain and create diversity. Big commercial farmers don't. Having a coherent system of classification adapted to different national conditions is a huge challenge. Fairness calls on us to ensure that Farmers'*

- i. 'poor (mostly subsistence) farmers' depending on local varieties, selling only surpluses at local and regional markets, practically without access to external inputs;
- ii. 'intermediate farmers' who produce food crops for local and national markets, contributing to national food security, with some access to external inputs.
- iii. farmers producing for commercial markets, including export markets and contributing to export earnings, that have good access to national and international markets.

The discussions indicated that Farmers' Rights are most relevant for the first category, as the farmers in this category may benefit most from the 'freedom to act' and contribute most to the conservation and utilization of plant genetic resources. Farmers' Rights may be regarded as the codification of communal rights. As such, they complement seed laws and Intellectual Property Rights laws that impose conditions on the use and marketing of seeds and improved varieties. .

- b) Also, views were expressed that national Seed Acts have major but so far relatively unexplored effects on the use and exchange of seeds by farmers through their traditional informal seed systems. It was recalled that Seeds Acts are often older than legislation on intellectual property rights (IPRs) and were originally designed to provide farmers with good quality seeds. For example, the criteria of Distinctness, Uniformity and Stability (DUS) originally stem from Seed Acts and not from IPR legislation. Further studies on the impacts of Seed Acts on the implementation of Article 9 of the Treaty may well contribute to discussions on the revision of Seed Acts in order to allow for proper implementation of FRs at the national level. One participant made a practical suggestion in this direction: "*I think scarce resources should be invested in mainstreaming legal space of Farmers' Rights*

On-line consultation process on *Options for Farmers' Rights*

Basic data

Number of participants: 55
 Number of contributions: 138
 Geographical span: worldwide
 Participation: on invitation
 Output: 6 Newsletters and this Information document

Discussion rounds:

- A. *Objectives to be reached by creating legal space* (November 15 - December 21, 2008)
- B. *Current experiences with legal space* (December 31 - February 15)
- C. *Future options for legal space* (February 16 – April 10, 2009)

Moderator/editor: Robin Pistorius; www.facts-of-life.nl

Initiators: Bert Visser, Niels Louwaars (CGN) and Andrew Mushita (CTDT)

URL:

<http://groups.google.co.uk/group/optionsforfarmersrights?hl=en-GB>

The website is still online at the date of publication of this document.

Methodology

The web-based conference was structured on a free Google Groups online discussion facility. Invited were participants active in the area of plant genetic resources and intellectual property rights.

The exchange was organized in separate discussion rounds. To give participants ample time to react, each discussion round covered a six to seven week time slot, during which period the moderator continuously approached participants collectively and individually and attempted to juxtapose opinions. This resulted into 138 contributions in total. The output was summarized in a three-weekly Newsletter which wide distribution attracted additional participants.

In spite of the global coverage of the invitation list, approximately 45 per cent of the participants were from European based organisations (24), 5 from Africa, 8 from Latin America, 6 from Asia, and 3 from the USA and Canada. The background of seven participants was unidentified. Farmer input was secured by a series of three national farmers workshops in Zimbabwe, Malawi and Zambia. The great majority of the participants represented the public sector with a more or less equal division between governments, research institutions, and NGOs. Three representatives from the private sector contributed extensively.

into current legislation, rather than creating new legislation. In many countries there is already too much legislation for governments to follow up, and implementation becomes a problem. In addition, there are often conflicts between and among acts of legislation. Thus, mainstreaming is the most important task in my view.”

- c) Furthermore, in the online conference Round B ‘Current Experiences with Legal Space’ experts were asked to highlight and exchange practical experiences in early adopting countries with the implementation of Art. 9.2 and 9.3. on Farmers’ Rights vis-à-vis the applicable National Seed Acts. These experiences have been individually summarized in text boxes in this document. The early experiences concern the following countries (alphabetical order):
- i. **Brazil**, where the government has ratified the 1978 Act of UPOV and has taken measures to exempt small farmers from some provisions of the national Seed Act.⁴
 - ii. **India**, in which country the *Protection of Plant Varieties and Farmers’ Rights Act* from 2001 now permits farmers to keep and sell farm saved seed, while exchange and resowing in his/her own field is also allowed.⁵
 - iii. **Italy**, where mechanisms have been developed for the conservation and improvement of traditional local varieties under newly established regional regulations.⁶
 - iv. **Norway**, where in 2005 the government decided to reject a bill enabling Norwegian membership of UPOV 1991 to replace UPOV 1978. Norway’s commitment to implement Farmers’ Rights was a main argument for turning down the bill.⁷
 - v. **Vietnam**, where local and regional government officials and other actors in the Vietnamese seed sector have created better options for farmers to market newly developed farmer varieties in spite of the existing PVP law, that does not allow such practices.⁸

⁴ Based on contributions by Juliana Santilli to the online conference.

⁵ Based on contributions by S. Nagarajan to the online conference.

⁶ Based on contributions by Enrico Bertacchini to the online conference.

⁷ Based on contributions by Regine Andersen to the online conference.

⁸ Based on contributions from Ditdit Pelegrina to the online conference.

Brazil

So far, Brazil does not have a specific law on Farmer’s Rights. However, Brazil has already approved and ratified FAO’s International Treaty, which provides a good opportunity for the implementation of Farmers’ Rights at the national level.

The discussions on Farmers’ Rights are just starting, and there is no consensus among major stakeholders as to what would be the best way to implement these rights in Brazil. At the same time, the Brazilian Seed Law does recognize local, traditional and creole varieties, which are defined as “varieties developed, adapted or produced by family farmers, agrarian reform communities and indigenous farmers, which have phenotypical traits that are well determined and recognized by farming communities, as long as they are not substantially equal to commercial varieties, according to the criteria established by the Ministry of Agriculture”.

The law also exempts family farmers, agrarian reform communities and indigenous farmers from the legal obligation of being officially registered at the Ministry of Agriculture in order to distribute, exchange and sell seeds among themselves (that is, among other family farmers, agrarian reform communities and indigenous farmers). However, when the law was regulated by Decree 5.153/2004, an additional requirement was created: it established that farmers’ organizations can only distribute (not sell) local seeds, and that local seeds can only be distributed to affiliated members of the farmers’ organizations.

The fact that so few ‘early implementers’ of Farmers’ Rights emerged, might be explained by the following analysis made by a participant in the online discussion: “I believe that the realization of Farmers’ Rights is still a struggle waged by citizens within their nation states. The imperfections of the Article on Farmers’ Rights under the ITPGRFA, especially from the viewpoint of citizens movements, reflects the

level of maturity of governments of nation states that negotiated this Treaty. It also reflects the relative power of citizens movement within nation states to influence their governments. I therefore agree with the NGO entries regarding the weaknesses of Farmers’ Rights under the ITPGRFA. In addition, I stress the need for and support their

struggle within their nation states to correct these weaknesses.”

- d) Finally, views were expressed that an ‘open source’ approach should be promoted similar to that developed in the software industry (Linux) as a possible alternative to the current IPR regime, in particular to patents. The idea of the proponents of such option is that varieties will remain in the public domain. In the view of a number of participants it may include protection by plant breeders’ rights since these do not restrict the rights of others to experiment, innovate, share or exchange seeds. In the latter opinion Plant Breeder’s Rights may in itself be regarded as an open source system. An open source approach effectively facilitates and stimulates progress, and as one participant formulated it: *“That approach reflects the nature of evolutionary technology development, such as in plant breeding. New varieties represent stepwise improvements of older varieties, and that is incompatible with the very idea of patents. While the ‘open source’ approach does not conflict with traditional rights, it effectively facilitates and stimulates progress.”* For other participants, UPOV is still restricting the functioning of seed diffusion practices since in small-scale farming systems the distinction between saving, using, exchanging and selling farm saved seed is blurred and these activities cannot easily be separated.
- e) Some participants noted that Free Trade agreements including bilateral ‘package agreements’ on the implementation of UPOV and patent legislation, may seriously limit national states in their ability to adapt National Seed and PBR Acts that allow for the full implementation of Farmers’ Rights.

5. Consensus on some principles

Amongst the participants in the online conference full consensus appeared on a number of major issues related to the implementation of Farmers’ Rights. This is worth noting since this consensus may reflect a rather recent development of perspectives amongst a number of stakeholder groups:

- a) Consensus appeared on the idea that Farmers’ Rights are not another form of Intellectual Property Rights, such as patent rights or plant breeder’s rights. This was not to say that intellectual property could not play a role: in fact, traditional knowledge may be regarded by both its holders and third parties as a form of intellectual property. However, Farmers’ Rights do not necessarily translate in

India

India is among the first countries in the world to have passed legislation granting Farmers’ Rights. It did so in the form of the Protection of Plant Varieties and Farmers’ Rights Act, 2001. India’s experience is important in view of the complexities of agriculture in India within which the country is attempting to implement these rights.

India’s law is unique not only because of its far-reaching rights for farmers, but also in that it simultaneously aims to protect both breeders and farmers. India has framed a unique legislation, but still faces the task of full implementation. The Indian law permits farmers to use and sell farm saved seed.

In India, the average land holding size is less than one hectare and a large majority of farmers is to be considered as subsistence farmers. A small fraction of farmers own more than five hectares of land. The seed replacement ratio in India is 20 percent on average, although in some states of south, west and northwest India it is substantially higher. India is the sixth largest seed market in the world with a flourishing seed industry.

individual ownership rights, as they mostly refer to communal rights that do not automatically lead to claims for (monetary) compensation. In this context participants remarked that such would *“(..discourage farmers from freely exchanging their seeds and (..) will kill the system that maintains and creates diversity”*, and also that *“Failure to appreciate this collective nature will lead to Farmers’ Rights as individual rights and will end the collective systems that maintain and create diversity”* or put in stronger wordings: *“To argue Farmers’ Rights is an IPR issue is ludicrous. what sort of IPR goes on for millennia? A patent lasts for 20 years max, but Farmers’ Rights go on such that today’s generation accrues all that the past 8.000 years of farmers have done. This is a ridiculous concept in terms of IPR!”* One participant formulated the incompatibility of Farmers’ Rights with a strict ownership approach as follows: *“A large proportion of the consumers of varieties developed or held in custody by small holder farmers are other small holder farmers. As a result, there is a risk of introducing transaction costs into an essentially closed system with little or no appreciable net benefit.”*

- b) In general, two major motives for Farmers' Rights were identified, i.e.: (1) the need for recognition of the contribution that farmers and farming communities have made and continue to make over the centuries in generating and maintaining the world's agricultural biodiversity, and (2) the right for compensation for the utilization of the PGRFA developed and maintained by farmers and third parties. Whereas recognition may result in optimal Freedom to Operate for farmers, so that they can continue to play their role and contribute to the conservation of PGRFA, the need for compensation of the investments that farmers have made to maintain PGRFA on-farm should result in benefit-sharing, regardless of the mechanism. Or as one participant formulated it: *"We need law. A right is not a right unless it is a legal right. Without law, farmers' rights are still rights – but only customary rights. If we need to codify those rights, custom must be the source of the law."*
- c) In the online conference various distinctions were discussed to approach the implementation of Farmers' Rights, such as between the 'stewardship approach' and the 'ownership approach'. During the discussions it became clear, however, that these approaches are linked to the concepts of 'Freedom to Operate' on the one hand and 'Benefit-sharing' on the other.
- d) All participants in the online conference, including representatives of NGOs and the private plant breeding sector, agreed that farmers can be breeders, and that under given conditions, farmers can develop new varieties outcompeting varieties provided by the public or private sector (see box, p. 1). During the discussions this notion was translated into the right of farmers to breed: *"The first right of a farmer is to breed."* Or, put differently by a participant of private industry: *"I don't think that seed laws should restrict the choice that farmers have in the variety they wish to grow - if a farmer chooses to grow an heirloom variety, for example, then they should be able to have that option. (...) Countries might want to review their seed registration laws and determine if conducting variety, cultivation and use trials or restricting farmers' choice to varieties that are on a national recommended list is still needed or relevant today."* Interesting data about the work of 'farmer-breeders' came from a Latin American participant: *"In total, the farmers in Central America and Cuba have released 31 varieties of different staple crops (beans, sorghum and maize), which are usually of no interest to conventional breeding, and which help relieve the hunger and provide good-quality-seed to*

Italy

Since 1997 a number of regions in Italy have adopted regulations to protect and promote traditional farmers' seeds and animal breeds. The main regional mechanisms for the conservation and enhancement of traditional local varieties and breeds are:

- a) Establishment of a regional catalogue where individuals and organizations, on a voluntary basis, may register local traditional varieties and breeds;
- b) Establishment of technical and scientific committees that will evaluate the proposed accessions to the regional register;
- c) Creation of a "network of conservation and enhancement" for both on-farm and *ex situ* conservation
- d) Recognition that the heritage of the local and traditional varieties belongs to the local communities (referring to Art.8j of the CBD), and recognition of the Regional Authority as the body which manages and guarantees the collective and sustainable use of such resources.

The Italian experience of regional laws may be regarded as an interesting case for several reasons. The European situation with regard to landraces and traditional varieties is different from that in other regions of the world. In Italy, as in the rest of Europe, most of the farmer varieties are marginalized by commercial agricultural systems. The framework for saving and exchanging farmers' seeds provided by regional regulations addresses a very specific situation in which only small numbers of farmers still grow and manage traditional varieties. Nevertheless, the regional regulations do create legal space for protecting and promoting traditional varieties that are not recognized by national seed laws and registers. These regional regulations recognize collective rights of the communities over traditional and local varieties.

many rural communities. Participatory Plant Breeding works, it compliments conventional breeding and has the advantage of being more

"dynamic" in terms of time for varieties' production and in adaptation to climate changes."

- e) In connection to this previous issue of consensus, most participants also agreed that Participatory Plant Breeding (PPB) can form a major instrument in improving the maintenance of PGRFA on-farm, and indeed resembles some long-standing practices of private industry. PPB brings together the knowledge

and experiences of farmers and (often public sector) breeders, to improve the efficacy of plant breeding at the community level as well as in public institutions. Closer contacts with farmers provides breeders with a better insight in what drives farmers in selecting and adopting their crop varieties. The closer contact with breeders provides farmers with better access to germplasm and with an improved knowledge on making crossings and/or selections in the crops they have at their disposal. Or as a participant put it: *“There are regions of the world where farmers are currently not being served by plant breeders, public or private. These farmers would be better served if more trained plant breeders were available. Participatory plant breeding, where farmers are closely linked with the breeders in determining traits for selection and in selecting the improved cultivars, is an important way to help extend the services of plant breeders to meet the needs of those farmers. Improved funding is needed for public plant breeding to provide support to farmers where the private sector cannot justify business reasons to engage in breeding.”*

6. Observations on IT Article 9.3

Article 9.3 of the Treaty states that *“nothing in this article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm saved seed, subject to national law and as appropriate”*. This text in particular appears to be in need of additional interpretation. The preamble to the Treaty sets out that *“the rights recognized in this Treaty to save, use, exchange and sell farm saved seed and other propagating material (...) are fundamental to the realization of Farmers' Rights”*. So, despite the lack of precision of the text of Article 9.3, the general line of thought is clear. The online discussion pointed out that farmers be granted rights in this direction, but also that individual countries are responsible to define the legal options they deem necessary and sufficient for farmers in this regard. One participant put it as follows: *“Nor does UPOV prohibit breeding with PVP'd varieties. Indeed UPOV was specifically designed to facilitate continued breeding with a PVP'd variety. Individual countries can enact UPOV PVP with a range of options for allowing farmers to reseed their farms with seed harvested from a PVP'd variety. These options range from having to pay no royalties at all (as in the US), to an exemption on royalties for certain categories or sizes of farms (as in Europe).”*

It was also noted, however, that the freedom to define legal space for farmers at the national level may be restricted by other international commitments in which a country engages. Most

Norway

Currently, Norway is in the process of revising its seed regulations, which were harmonised with EU regulations in 2004 to comply with Norway's commitments to the European Economic Area (EEA) – to which Norway, as non-EU member, belongs. The new rules prohibit seed exchange and sales among farmers. In addition, they require that crop varieties are approved for release, based on criteria which cannot be fulfilled for most landraces and farmers' varieties used in Norway. Seed certification is a further problematic requirement. As a result, Norwegian diversity farmers are seriously hindered in conserving, sustainably using, and further developing landraces and older varieties.

There is a general consensus among relevant authorities and stakeholders in Norway that the new EU-directive on conservation varieties is not adequate to solve these new hurdles to the implementation of the International Treaty. This is because (1) seed exchange and sale is still prohibited among farmers under the new directive; (2) only varieties deemed interesting for conservation and sustainable use by certain authorities can be covered by the system, which is limiting diversity; (3) the variety release and certification criteria are still too strict, (4) the marketing and use of the varieties are limited to the regions of origin; (5) only limited quota can be marketed; and (6) the conservation varieties cannot be further developed by farmers.

Critics argue that these provisions do not encourage the conservation and sustainable use of crop genetic diversity, and pose serious barriers to the implementation of Articles 9 (as well as 5 and 6) of the Treaty in Norway. The revision of the seed regulations is carried out in close dialogue with farmers and their organizations, as well as with other stakeholders.

countries in the world are members of the World Trade Organization (WTO), and are thus obliged to implement the WTO Agreement on Trade

Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement states that all WTO member countries must protect plant varieties either by patents, or by an effective *sui generis* system, or a combination. The limits to a *sui generis* system and the meaning of an

'effective' *sui generis* system are not defined in the text. In other words, countries have to introduce some sort of *effective* plant breeders' rights legislation, not necessarily based on UPOV. As stated above, some countries may have engaged in more specific obligations based on obligations posed by Free Trade Agreements.

One participant underlined the relatively expedient introduction of UPOV based legislation in a number of developing countries, as compared to the difficult trajectory the implementation of clauses on Farmers' Rights is confronted with: "(...) *any African government wanting to adopt UPOV 1991 would get technical assistance and support of any nature within the shortest possible timeframe. The question should be why? Whose interests and benefits is this instrument serving?*" It was also outlined that the World Bank in one of its recent reports does not go into any detail with respect of using UPOV 91 Article 15(1): "(...) *it considers that creating different levels of protection within a country could create a workable solution. The authors analyse that his may best be done by establishing a low level basic right with additional rules for the most commercial crops or sectors, but they also describe the option to create additional exemptions in an otherwise strict law (as described above). Such different levels of protection would optimally serve the needs of the subsistence, (local) commercial and the industrial or export sectors.*"

A more flexible version of plant breeders' rights was the subject of many discussions during the online conference. Contributions from India underlined that it stands out as the country with the most extensive legislation on this topic in the world (see box, p. 6) and further research may draw from this country case.

What follows are the most important highlights regarding the discussion on Art. 9.3.

IT Art. 9.3, UPOV, farm saved seed and 'private use'

The Union for the Protection of New Varieties of Plants (UPOV) has held that the most effective way to comply with the TRIPS provision of an effective *sui generis* system is to follow the model of the UPOV Convention, and there were several proponents of this position in the online discussion. The UPOV 1991 Act provides that plant breeders are to be granted comprehensive rights - limiting farmers' customary rights to sell seeds. It is still possible for UPOV member states to create exemptions for farmers to enable them to save and re-use seeds, as long as limited to their own holdings.

Vietnam

Vietnam has embarked on a serious national dialogue on PVP law (Vietnam adopted UPOV 1991 in 2006) and seed regulations. Problems with UPOV 91 arose because farmers started producing their own rice varieties which surpassed the performance of formally released varieties. The farmer varieties then spread amongst the communities, covering several tens of thousands of hectares through informal seed exchanges and sales. The local plant breeding centres and seed centre officials saw the good performance of the materials and started to 'formalize' the materials by including them in their testing process. They have no written regulations or rules as to how to go about such a phenomenon.

With pressure from farmers, local government was forced to issue local seed certification on materials developed by farmers, despite the fact that the materials developed by farmers are not officially considered as varieties because they have not gone through the national varietal registration process. Subsequently, Vietnamese farmers have started asking for a revision of the National Seed Act to allow them to trade across provinces. They argue that this trade is an economic opportunity which should be made available to farmers and has been their practice anyway. Most farmers are small holders (less than 1 hectare) or intermediate- size farmers (1-5 hectares).

In spite of the pressure from the farming communities, they themselves, the local government officials and other actors in the Vietnamese seed sector accepted the fact that a PVP law is already in place. As a compromise, the National Assembly has promised to explore avenues to address the concerns of farmers regarding the distribution of farmer varieties. In this context, the Ministry of Agriculture and Rural Development issued a Decision on the regulation of on-farm variety production. Its objective is to encourage households and communities to participate in the conservation and effective utilization of local genetic resources, including selection and creation of new varieties, and to create favourable conditions for households or the communities to produce plant varieties with good quality and at low cost in order to meet production demands.

The discussion on opening up options allowing for the marketing of farmer varieties is still ongoing, as the Vietnamese try to redefine policies so that these best capture the realities in the field.

On private use UPOV 91, Art. 15(1) clearly states *“that breeders’ rights shall not extend to acts done privately and for non-commercial use”*. In other words: one may expect that in countries that have adopted UPOV '91, sale of commercial seeds among farmers is prohibited. In the online discussion, some participants regarded the prohibition of sales of commercial varieties as logical and not a threat to traditional diversity and small-scale production systems, since the cultivation of commercial varieties would be marginal. This UPOV model met with reservations from other participants, fearing that joining UPOV would be detrimental to the rights of farmers to sell propagating material, on the basis that this activity can not clearly be separated from other activities contributing to the maintenance of genetic diversity in small-scale farming systems. The discussion pointed in the direction of a conclusion that further study on the particular UPOV provisions and its impact is necessary.

At the same time Art. 15(2) of UPOV 91 states that *“(..) each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety (..)”* This means that in accordance with UPOV 1991 national law may regulate that farmers are allowed to reproduce seed for their own use.

It appeared from the discussion in the online conference that most countries have established rules specifying for which crops this restriction of breeders’ rights is applicable, and under which conditions. The term *‘within reasonable limits and safeguarding the interests of the breeder’* is intended to restrict farm saved seed to those crops where this is a tradition and possibly to a maximum ceiling for the total area planted with farm saved seed, in order to not damage the interests of the breeder and to create the conditions for a return on investments. For example, in the European Union farmers have to pay a royalty to the breeder for the re-use of their home-produced seed, generally at a rate of 50% of the commercial royalty, whereas small farmers (defined as farmers who produce less than 92 metric tonnes cereal equivalent) do not have to pay such royalty.

A remaining question is to what extent Art 15(1) of UPOV 91 can be interpreted such that seed exchange within small-scale farming communities may be considered as “private use”. In order to facilitate a balanced implementation of Farmer’s Rights and UPOV 91, one may use the “private use” exemption to allow the exchange of seeds between small-scale farmers, who use seed for their own, non-commercial needs. This limited

“right” might be codified in national law. In this context it must be stressed that farmers retain full freedom to sell non-protected varieties.

It was noted that WTO member countries must meet the TRIPS obligations regarding Intellectual Property Rights for plant varieties (PBRs or patent law), and at the same time must create the necessary legal space for the realization of Farmers’ Rights under the International Treaty. In this context the overall question can be reframed in terms of which ‘freedom to operate’ (‘room to manoeuvre’) is left to countries within the framework of their international obligations, in order to grant small farmers the right to exchange and sell seeds.

Under present UPOV based legislation no sales of seed of protected varieties is permitted without the authorization of the PBR holder, given that the use of farm saved seed has a significant negative impact on the income of the breeder. In the view of some participants, national policy with regard to the use of farm saved seed should take into account whether breeding is a public task or carried out by private enterprises. In the latter case a reasonable return on investments should be facilitated. If not, private breeding may disappear or not develop.

In this context, a constraint to Farmers’ Rights frequently mentioned was seed certification in National Seed Acts. Certification may not only be a binding condition for bringing seeds out on the market, but also a condition for exchange among farmers. As traditional varieties are normally not genetically homogenous enough to meet the requirements for certification, these varieties are then excluded from selling and exchanging. National seed laws concerned may stipulate for example that only authorized seed shops are allowed to sell seeds and that all other exchange is prohibited (sometimes with exceptions for horticultural plants or certain other species). In fact this used to be the case throughout most of Europe, but this situation was changed by Directives 98/95 and 2008/62. It may still be the case in a number of other countries.

IT Art. 9.3, UPOV and ‘remuneration’

Under current legislation in the EU, collecting royalties by breeders on the use of protected varieties has shown to be laborious, costly and not highly effective.

Views were therefore expressed that the use and exchange of farm saved seed of protected varieties may not only be regulated through remuneration to the breeder paid by the farmer, but also, alternatively, through remuneration to the breeder via a fund fuelled by taxation (e.g. on the harvested product at the mill, during processing or

seed inspection) or by the government, thus allowing for free exchange and sales of farm saved seed of protected varieties by (small-scale) farmers. Part of the resulting fund could even be used for the maintenance of genetic resources. Some examples of creative remuneration systems have already been set, e.g. in France and Australia where royalties are collected at the grain mills. Another option mentioned was to introduce a levy on land area or all seed sales for remuneration of the breeders, as once implemented through a pre-UPOV Dutch Plant Breeder's Rights decree of 1941. Under that decree, farmers could freely produce and trade their seed. The levy was collected by the seed inspectors of the existing certification and inspection systems. In accordance with UPOV requirements, such levy system could be arranged via a contract between government, farmers' and breeders' organizations.

7. Observations on Article 9.2

Article 9.2 refers to three different areas that require the attention of national governments.

- a) The first area of attention regards the protection of traditional knowledge relevant to plant genetic resources for food and agriculture. Various participants in the online conference considered that one option to protect traditional knowledge would be to allow for the registration of farmer varieties, and referred to existing experiences. For example, the *Indian Protection of Plant Varieties and Farmers' Rights Act, 2001* offers the possibility for farmers to have their varieties registered according to the same rules as varieties developed by public and private breeders. Another development regards the initiative to develop Farmers Registers for farmer varieties in the Philippines. This second initiative does not aim to provide a registration similar to those of varieties developed by breeders, but simply to make key information on farmer varieties public in order to prevent misappropriation of these varieties by third parties. It is important to stress that these options to register farmer varieties are voluntary. In this context one participant pointed to a risk stating that: "*One of the immediate downsides of this local-seed-registry is that any local variety that is not registered there becomes illegal automatically*".

Not all farmers and farming communities may be interested. Some participants in the online conference pointed to the possibility that such registration of farmer varieties might constitute a first step towards a regulation of farmer

varieties. All stakeholders involved, including national governments, may pose themselves the question to which extent such registration would be a desirable development. It was noted that a further formalization of the seed trade often appears inevitable when commercial interests start playing a role in the development of new varieties. In this context the idea came up that a threshold for regulation may be posed at a fixed minimum amount of seed produced for the market, below which threshold seed trading may remain unregulated.

Participants also noted that registration under certain conditions may require the use of uniform criteria to distinguish the farmer varieties listed. They also noted that if such options would be provided for by national governments that have already introduced seed legislation, it would be only logical to consider the requirements on Distinctness, Uniformity and Stability (DUS) as a starting point where these requirements already occur in the seed legislation. At the same time it was felt that DUS requirements may not all be applicable for the registration of farmer varieties to the same extent as they are for the registration of varieties developed by public and private breeders; farmer varieties may be less homogeneous and uniform than the requirements would prescribe. In this respect some participants pointed to the recently enacted EU Directive on Conservation Varieties 98/95/EC that foresees in a more relaxed interpretation of the uniformity requirement for "conservation varieties". It must be noted however that the provisions concerning conservation varieties in this Directive cover only old, existing varieties and not newly developed varieties.

Another mechanism to recognize farmers' contributions to the maintenance of plant genetic diversity may be offered by regulations offering the possibility to register crop varieties and/or their products as coming from a specific geographic origin thereby protecting the marketing of those varieties or their products under a specified name or names by restricting it to the producers of that specific geographic origin. Examples of such options include Basmati and Pandan Rice, as well as various agricultural products in the EU, in particular wines and cheeses. In the EU, the use of certain names is restricted to products that come from a certain origin and are produced according to specified procedures. The regulations do not cover the marketing of certain products per se, but only the marketing under specified names. Such regulation may also offer economic advantages to the farmers or the region of origin, in addition to the recognition it may entail.

- b) The second area of attention regards *“the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture”*. The Multilateral System of the Treaty as well as its Funding Strategy foresee a compensation for the role that farmers and farming communities play in the maintenance of plant genetic diversity. In addition, other measures have been suggested by some participants in the online conference platform as well as by the farmers in the associated national farmers’ workshops in Southern Africa (Malawi, Zambia and Zimbabwe). One measure concerns the possible requirement of Prior Informed Consent (PIC) regarding the access to farmer varieties. It was felt by some that introduction of PIC as a requirement would be prudent and appropriate to guarantee attention for the interests of the maintainers of the material or its associated knowledge, whereas other participants felt that such requirement would be more demanding than the requirements of plant breeder’s rights. According to most if not all acts on plant breeder’s rights, PIC is not necessary for the use of protected materials for the purpose of research and breeding. Labelling of materials was also suggested as a way of benefit-sharing. This option has already been discussed above under the area of protection of traditional knowledge.
- c. The third area of attention regards *“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”* (Art. 9.2c). Several participants in the online conference referred to the need to better inform farmers and farming communities about the Treaty, including its Article on Farmers’ Rights. Many farmers are not yet aware of the provisions of the Treaty and their capacity to contribute to the maintenance of plant genetic diversity might still be underexploited. More attention is needed in the general media, national workshops and online conferences, or as one participant put it: *“(.) we should be the first to avoid recommending or suggesting seed policies and laws rather than recommending that seed policies and laws should be formulated by organisations which include farmers. The participation of farmers in all the decision making processes on these matters is essential.”*

8. Recommendations

The above consultation process has led the composers of this report to the following recommendations:

- 1) A request to the Secretary to study, in collaboration with FAO, the options for provisions in national seed legislation of Contracting Parties, with a view to provide recommendations and/or guidelines for the introduction of legislation that would allow for the unrestricted or less restricted sales of farmer varieties.
- 2) A request to the Secretary of the Treaty to study, in collaboration with UPOV, the possible means and mechanisms to streamline Article 9.3 into UPOV 78 and UPOV 91 regarding protected varieties, in particular regarding the options for provisions in national legislation based on UPOV 78 or 91 that would allow small-scale farmers in developing countries to save, use, sell and exchange protected varieties within their communities .
- 3) A request to the Secretary of the Treaty to study, in collaboration with UPOV, the possible means and mechanisms to develop means and mechanisms to further define ‘small-scale farmers’ in the legal context of UPOV 78, UPOV 91 and the Treaty, for the benefit of implementing legislation as suggested above in paragraphs 1) and 2).
- 4) An encouragement to donors to provide financial assistance to continue with the online conference group as a forum for further discussion and exchange of experiences on the implementation of Farmers’ Rights at the national level, or to continue helping discussions on the implementation of Farmers’ Rights through any other means and approaches.
- 5) An encouragement to donors to provide financial assistance to help developing countries to organize farmers’ workshops to gather inputs for policy decisions on the implementation of Farmers’ Rights, seed legislation, and intellectual property rights legislation.