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Farmers' Rights in the Plant Treaty: interrelations and recent interactions with other international regimes and processes

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ABSTRACT

The concept of Farmers' Rights (FR) relating to crop genetic resources is covered by the International Treaty on Plant Genetic Resources for Food and Agriculture. However, Farmers' Rights is a weak concept in legal terms, providing limited recognition vis-à-vis competing interests under stronger legal regimes. The realization of FRs in any given country will therefore depend on interaction with, and shared understanding of, other international legal regimes to which the countries in question are parties, to provide sufficient legal space. Recognition of the concept of Farmers' Rights was supported by the adoption in 2018 of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), which places it in a human rights context and with stronger expression of its various elements. However, UNDROP is not a legally binding instrument, and the question of how to provide sufficient legal space through other international instruments is still relevant. This article discusses whether relevant international regimes, and UNDROP in particular, have interacted and contributed to the realization of Farmers Rights. It is concluded that there remains a need for outreach and collaboration with other international instruments to remove the legal barriers involved.

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1. Introduction

The concept of Farmers' Rights (FR) as it relates to crop genetic resources was born nearly 40 years ago out of concerns for equity and justice for farmers, particularly those in the global South. It refers to rights regarding seed, propagating material and crop genetic diversity in general, as well as associated knowledge.¹ The concept is covered by the International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty) whose preamble affirms 'that the past, present and future contributions of farmers in all regions of the world, particularly those in centers of origin and diversity, in conserving, improving and making available these resources, is the basis of Farmers' Rights'.²

The meaning of Farmers' Rights, however, remains uncertain, with differing perceptions of its core elements related to traditional knowledge, benefit-sharing, participation in relevant decision-making and rights related to saving, using, exchanging, and selling seeds. Moreover, the Plant Treaty text provides scant guidance about the intended scope of legal obligations. In a narrow sense, realizing Farmers' Rights has been interpreted as applying to the right to acquire intellectual property

for farmer-developed plant materials or to limit the reach of existing intellectual property, such as plant breeders' rights. Others, however, have interpreted Farmers' Rights as recognition of farmers' important contributions to conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA). In this sense, the realization of Farmers' Rights concerns not the formal recognition of a right in legislation but rather the policies, measures, projects, and activities that promote the rights of farmers.

Today, Farmers' Rights is a weak concept in legal terms, providing limited protection against competing interests under stronger legal regimes (Lawson and Bikundo 2019). Its realization will require interaction with, and shared understanding of, other international legal regimes to which the countries in question are parties, to provide sufficient legal space (Andersen 2013, 21–29).

Recognition was supported by the adoption in 2018 of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP). It places Farmers' Rights in a human rights context with stronger articulations of the various elements of FRs than the Plant Treaty, but it lacks status as a legal binding instrument.³ Although

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UNDROP ‘upgraded’ Farmers’ Rights, providing sufficient legal space is still a relevant concern.

The legal connections of Farmers’ Rights to other rights and obligations have been addressed extensively by Santilli (2012), in her *Agrobiodiversity and the Law*. Chiarolla, Louafi, and Schloen (2012) has addressed the relationship to the Nagoya Protocol under the Convention on Biological Diversity. Otherwise, the academic literature addresses the issue mostly in relation to intellectual property rights (Borowiak 2004), with considerable coverage of the experience of India in reconciling FRs and IPRs (Agrawal 2019; Winge, Andersen, and Ramanna-Pathak 2013). To a lesser extent, the literature has dealt with the interrelations with legislation on plant variety release and the marketing of seeds (seed laws) (Prip and Fauchald 2016). UNDROP has been addressed mostly in relation to its bottom-up preparatory process (Claeys 2019). Recently, also the UNDROP connections to other international instruments have been covered (Haugen 2020, 288–309). However, the interconnections between UNDROP in a human rights context and Farmers’ Rights in the context of the Plant Treaty have been dealt rather sparsely (Girard and Frison 2021, 461–476).

This article asks the following question: To what extent have international regimes addressing plant varieties and associated knowledge in the last 10 years, and UNDROP in particular, interacted and contributed to implementing the provisions on Farmers Rights in the ITPGRFA internationally and nationally?

The article applies legal methodology, including analysis of the existing legal status (*de lege lata*) and options for how this status could and should change (*de lege ferenda*). In this context, it also addresses national legal frameworks on the production and marketing of plant reproductive material (‘seed laws’), which are not addressed by global legal frameworks, but which often share objectives and basic elements.

2. Farmers’ Rights in the Plant Treaty

The history of Farmers’ Rights has been well described in the literature, especially by Regine Andersen, and will not be repeated here (Andersen 2005; 2008; 2016a; 2016b).

Farmers’ Rights emerged on the agenda of international negotiations in the context of the non-legally binding International Undertaking on Plant Genetic Resources for Food and Agriculture (IU) adopted by the FAO in 1983.⁴ The developing countries saw the Plant Treaty as an opportunity to legally recognize and define the concept of Farmers’ Rights. However, the developed countries wished to avoid a legal interpretation that could interfere with the existing IPR law that had recently been strengthened in terms of coverage

of plant varieties through the Agreement under the World Trade Organization (WTO) on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁵ The negotiations revealed that the situation of farmers differed greatly from country to country, as did the perceptions of Farmers’ Rights.⁶ At one point, no less than 13 different themes were proposed by various delegations under this heading – making it even more difficult to give Farmers’ Rights a precise definition and thereby legal effect (Fraleigh and Harvey 2011).

The language of the Treaty on Farmers’ Rights represents a delicate compromise, as set out in paras. 7 and 8 of the Preamble and Article 9. Article 9.2 establishes that the responsibility for realizing Farmers’ Rights rests with national governments – without indicating any parameters or minimum standards for national realization, but merely listing some measures that may be adopted to implement Farmers’ Rights, not excluding others. Moreover, each party ‘should’ (*not* ‘shall’) take measures to protect and promote Farmers’ Rights ‘as appropriate’ and ‘subject to its national legislation’. The legal provisions on Farmers’ Rights in the Treaty have been described as ‘a mere encouragement for national governments to make some concessions to farmers and a vague imperative to promote these concessions internationally’ (Lawson and Bikundo 2019).

Even what is widely perceived as the core element of Farmers’ Rights concerning intellectual property rights – the right to save, use, exchange and sell farmed-saved seed/propagating material – does not explicitly follow from any operative provision of the Treaty. Article 9.3 simply refers to existing rights to save, use, exchange and sell farmed-saved material, stating that nothing in Article 9 shall be interpreted to limit such rights. Thus, Article 9 does not limit any rights granted to farmers at the national level (Prip and Fauchald 2016).

Article 9.2 identifies three other components of Farmers’ Rights: protection of traditional knowledge, the right to participate equitably in sharing benefits, and the right to participate in making decisions, at the national level.

Article 9 can be interpreted as confirming the right of countries to realize Farmers’ Rights, and to encourage states to take specified measures to this end. Therefore, undertaking commitments at national level that significantly reduce states’ ability and freedom to realize Farmers’ Rights in accordance with the recommendations of Article 9 is arguably contrary to states’ commitments under the provision. However, it does not establish that Farmers’ Rights are to prevail over other types of regulation of crop genetic resources. This understanding is supported by the judgement by the

European Court of Justice in the *Kokopelli case*.⁷ The Court stated that the Treaty (including Article 9) does not include any provisions which, as regards their content, are unconditional and sufficiently precise to challenge the validity of EU legislation on the marketing of seed.

Not only Article 9, is relevant for the realization of Farmer's Rights. According to Article 6 of the Treaty, Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture. The examples of measures outlined in Article 6.2 could be viewed as practical guidance in FRs implementation: They include:

- fair agricultural policies that promote the development and maintenance of diverse farming systems;
- strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers;
- promoting plant breeding efforts with the participation of farmers which strengthen the capacity to develop varieties particularly adapted to social economic and ecological conditions, including in marginal areas;
- broadening the genetic base of crops, and increasing the range of genetic diversity available for farmers;
- promoting expanded use of local and locally adapted crops, varieties and underutilized species;
- supporting the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops; and
- reviewing and adjusting breeding strategies and regulations concerning variety and seed distribution.

Article 9 and 6 leaves no doubt that the implementation of Farmers' Rights is a national responsibility. However, this does not leave the Governing Body of the Treaty without any responsibility in terms of Farmers Rights. The Governing Body is responsible for promoting the full implementation of the Treaty, including the provision of policy direction and guidance, and monitoring of implementation (Article 19). According to Article 21, the Governing Body is to ensure compliance with all provisions of the Treaty, and the Preamble of highlights the necessity of promoting Farmers' Rights at the national as well as international levels.

Over the years, the Governing Body has adopted a number of resolutions on Farmers Rights.⁸ The Seventh Session of the Governing Body (GB7) established an Ad hoc Technical Expert Group on Farmers' Rights mandated to produce an inventory of national measures that might be adopted, best practices and lessons

learned from the realization of Farmers' Rights. Based on the inventory, options for encouraging, guiding, and promoting the realization of Farmers' Rights were to be developed.⁹

GB8 in 2019 welcomed the Inventory developed by the Expert Group and mandated the Group to reconvene and fulfill its mandate to prepare options.¹⁰ Like the Inventory, the 32 options presented for GB9 in 2022 were structured under eleven categories.¹¹ The options, derived from the inventory, are accompanied by examples of measures taken by countries, and enumerated in the Inventory.

Category 10 of the options is 'legal measures for the implementation of Farmers' Rights, such as legislative measures related to PGRFA'. The options include direct legal measures to realize Farmers' Rights within national legislation, administrative and policy frameworks relevant for the conservation and sustainable use of PGRFA, and indirect measures through reviewing and adjusting intellectual property rights laws, seed laws and laws for access and benefit-sharing.

It is noteworthy that the Governing Body decision, while welcoming the work of the Expert Group in general, merely *takes note* of the options presented. Moreover, the decision specifically points out that the options under Category 10 on legal measures are not proposals of the full Expert Group but only of its Co-Chairs – a result of lack of agreement within the Expert Group.¹²

3. UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)

A development of particular importance for the further recognition and realization of Farmers' Rights is the adoption by the UN General Assembly Third Committee (dealing with promotion and protection of human rights) of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), of 30 October 2018.¹³

The bottom-up process of elaborating UNDROP was very innovative. It was pushed, and directly brought to negotiations in the UN, by the transnational agrarian movement La Via Campesina (LVC), representing 200 million peasants across 73 countries, and very active in promoting Farmers' Rights under the Plant Treaty (Claeys 2012).

The Declaration lays out human rights for peasants, small fishermen and others living in rural areas far beyond the scope of Farmers' Rights in the Plant Treaty context. Within the context of the Treaty, it contains stronger, more binding language on Farmers'

Rights elements than the Treaty itself, without referring to them explicitly.

Already its Preamble recognizes

the past, present and future contributions of peasants and other people working in rural areas in all regions of the world to development and to conserving and improving biodiversity, which constitute the basis of food and agricultural production throughout the world, and their contribution in ensuring the right to adequate food and food security, which are fundamental to attaining the internationally agreed development goals, including the 2030 Agenda for Sustainable Development.¹⁴

The Preamble also explicitly refers to the Plant Treaty in the context of FAO's extensive work on the right to food, tenure rights, access to natural resources, and other rights of peasants.¹⁵

In the operative part, the Declaration in Article 19 include the content of all provisions of Farmers' Rights as addressed in Article 9 of the Plant Treaty. In addition, the four elements of Farmers' Rights are spelled out in greater detail in several other Articles, as shown in the Annex.

Other important articles include the right to:

- adequate food and be free from hunger (15)
- land, individually and/or collectively (17)
- conservation and protection of the environment, and to prevent the depletion and ensure the conservation and sustainable use of biodiversity (18 and 20).

Besides the level of detail, the UNDROP articles employ the verb 'shall'. In addition, the articles are expressed without the reservations in the Treaty that subject Farmers' Rights to be implemented by states 'in accordance with their needs and priorities' and 'as appropriate, and subject to national legislation'. Finally, the UNDROP articles on the rights of peasants are accompanied by many equivalent articles on duties of states.

Of particular importance in this context, according to Article 2.4, States shall elaborate, interpret, and apply relevant international agreements and standards to which they are party, including those protecting intellectual property rights, in a manner consistent with the Declaration.

UN Resolutions are generally not considered legally binding. They do, however, represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles. Thereby they may codify or come to be accepted as customary international law

fully or partly – as was the case with the 1948 Universal Declaration of Human Rights (Barnabas 2017, 242–261).

It is generally assumed that for UNGA resolutions to constitute or create customary international law, they need to be accepted unanimously or almost unanimously (International Law Association 2000). However, that was not the case for UNDROP, which was adopted with 119 votes in favor, 7 against and 49 abstentions. Developing countries generally voted in favor; the developed countries voted against or abstained.¹⁶ It has been held that the most controversial provision in UNDROP, and thus a reason for lack of full support among states, is Article 19 on right to seeds: the key UNDROP article in relation to Farmers' Rights (Haugen 2020, 9). It was objected that the right to seed is not appropriate for inclusion in a human rights instrument adopted by the Human Rights Council: that other UN bodies are more suitable, most notably the World Intellectual Property Organization (WIPO) or the Food and Agricultural Organization (FAO).¹⁷

Collaboration does not appear to have been established between the relevant UN bodies, the UN Human Rights Commissions and FAO/the Plant Treaty, in promoting farmers/peasants' rights. At the 9th meeting of the Plant Treaty Governing Body, some developing countries proposed requesting the Treaty Secretariat to cooperate with the Human Rights Council with specific reference to UNDROP and other human rights instruments. However, some developed countries objected to such a specific reference.¹⁸

Given the number of states that have not voted in favor of UNDROP, farmers'/peasants' rights are still not ready to be globally recognized as human rights. UNDROP has, however, provided a clear upgrade of Farmers' Rights by adopting them in a human rights context, where also other rights, including the right to food, appear, and in far more detail and authoritative language than in the Plant Treaty. This is encouraging as regards achieving greater recognition in 'competing' forums.

4. Other international instruments and processes of actual or potential influence for FR

4.1. The Convention on Biological Diversity, including Art. 8(j) and the Nagoya Protocol

The Convention on Biological Diversity (CBD) does not explicitly cover Farmers' Rights, but it acknowledges their importance. Upon adoption of the Convention in 1992, countries also adopted the Nairobi Final Act that recognized 'the need to seek solutions to outstanding

matters concerning plant genetic resources', including 'the question of farmers' rights'.¹⁹ This was an important factor leading to the recognition and provisions on Farmers' Rights in the Plant Treaty.

The CBD implicitly addresses components of Farmers' Rights by creating a legal framework for the protection of traditional knowledge innovations and practices of indigenous and local communities. This is expressed in Article 8(j) of the CBD and in various provisions of the Nagoya Protocol under the CBD on access to traditional knowledge associated with genetic resources and fair and equitable benefit sharing with indigenous and local communities holding this knowledge. These provisions on traditional knowledge extend beyond the knowledge of plant genetic resources.

4.1.1. CBD Article 8(J)

According to Article 8(j), Parties shall

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

That a specific open-ended working group on Article 8(j) and related provisions has been established under the Convention underlines that this issue has been given high priority by the CBD.

Some coherence between Farmers' Rights and Article 8(j) is indicated implicitly by Article 9.1 of the Plant Treaty, which recognizes the enormous contributions for the conservation and development of plant genetic resources made by not only farmers but also local and indigenous communities.

While the CBD work under Article 8(j) has had its primary focus on indigenous communities and peoples, it has recently also paid attention to the broader concept of 'local communities', with a probable larger overlap with farmers and farming communities.²⁰

CBD Article 8(j) can be considered as overlapping with ITGRFA Art 9.2(a) in terms of traditional knowledge relevant to plant genetic resources for food and agriculture. Article 8(j) also addresses another component of Farmers' Rights – benefit sharing from the use of traditional knowledge. Moreover, without this being explicitly mentioned in Article 8(j), its working group deals with other issues relevant for Farmers' Rights, such as participation in decision-making by indigenous and local communities and legal *sui generis* protection of traditional knowledge.²¹ The 'related provisions' of the

working group, other than Article 8(j), include CBD Article 10c, another Farmers' Rights-related provision calling on Parties 'to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'.

In support of the work of the Expert Group on Farmers' Rights, the CBD Secretariat has provided specific inputs articulating Article 9 of the International Treaty vis-à-vis Article 8(j) and related provisions of the CBD, and some decisions taken by the CBD Conference of the Parties (COP) and recommendations to COP 14, of relevance to Farmers' Rights.²² Otherwise, there has been no coordinated work on Farmers' Rights under the Plant Treaty and Article 8(j) and related provisions under the CBD.

4.1.2. The Nagoya Protocol on Access and Benefit-sharing: stewardship vs ownership

The CBD provides a general legal framework for access to genetic resources and benefit sharing from their use (ABS) which has been further elaborated by the Nagoya Protocol (NP).²³ Whereas the general CBD framework addresses ABS of genetic resources between states, the NP also addresses ABS in relation to indigenous and local communities (ILCs), in terms of access to genetic resources and the associated traditional knowledge held by them. In the Preamble and in the operative provisions, these considerations are strongly represented, and the NP can be interpreted as enhancing the legal protection of holders of traditional knowledge in international law (Buck and Hamilton 2011) and thereby implicitly also a component of Farmers' Rights.

Under the Nagoya Protocol, the parties are required to take measures aimed at ensuring that benefits from the use of genetic resources and associated traditional knowledge held by ILCs are shared with them in a fair and equitable way.²⁴ More specifically, the parties shall take measures, as appropriate, to ensure that traditional knowledge associated with genetic resources is accessed with their prior informed consent (PIC) and on mutually agreed terms (MAT) with the ILCs holding this knowledge.²⁵ The parties are also obliged to consider the role of customary laws and community protocols in implementing their obligations under the NP,²⁶ and to establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations.²⁷

Equivalent to the Farmers' Rights component on participation in decision-making, the Nagoya Protocol sets out some complementary support measures to strengthen indigenous and local communities in decision-making on access and in negotiations of

mutually agreed terms.²⁸ Consistent with the provision that nothing in Article 9 in the Plant Treaty (on Farmers' Rights) shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, the NP specifies that parties shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities.²⁹

Importantly, the Nagoya Protocol also specifies that Parties take measures to support compliance with PIC and MAT from ILCs if this is required by domestic legislation.³⁰

The NP provisions, like Article 9 of the Plant Treaty, are so formulated as to leave a wide margin of discretion to states on whether and how to implement them: qualifications are used, such as 'as far as possible', 'as appropriate', 'as applicable' and 'in accordance with national legislation'.

The apparent consistency between Farmers' Rights and the Nagoya Protocol provisions on genetic resources and associated traditional knowledge held by ILCs holds promises of synergies in implementation. However, one possible obstacle concerns the differing approaches to access, rights and benefit sharing by the CBD/NP and the Plant Treaty – referred to as the 'stewardship' and the 'ownership' approach, from an analytical framework developed by Regine Andersen (Andersen 2005; 2016b). The CBD and the NP transaction-based approach to regulation of access to genetic resources and associated traditional knowledge, building on PIC and MAT between purported 'owners' and 'buyers', can be viewed as an expression of the ownership approach. The same applies to protection of genetic material and associated knowledge by intellectual property rights. In the context of Farmers' Rights, this approach can be justified by provisions whereby farmers are to be rewarded for genetic material that has been obtained from their fields and used in commercial varieties and/or protected with intellectual property rights. The 'reward' could be in the form of a *sui generis* intellectual property rights system to plant varieties developed by farmers to prevent misappropriation.

However, it has been argued that exclusive rights would deny the collective and cumulative character of innovations of achieved by farmers which for many are at the heart of Farmers' Rights (Andersen 2005). The *stewardship approach* holds that agro-biodiversity belongs to the common heritage of mankind and that it should be shared for the common good as part of the public domain. Farmers as stewards of agrobiodiversity should be collectively rewarded and supported to enable them to continue in this role. This was the

dominant rationale until the advent of intellectual property rights, when genetic resources became subjected to national sovereignty. In this respect the most important benefit for farmers is probably the maintenance and creation of sufficient rights to save, use, exchange, produce and sell their seeds (Santilli 2012).

The difference between the two approaches is perhaps most apparent in connection with how 'traditional knowledge' should be understood: The ownership approach would understand this as protection from misappropriation, enabling its holders to make decisions over its use – whereas the stewardship approach would understand it as protection of knowledge from extinction and thus as an encouragement for its further use (Andersen 2016b).

In contrast to a bilateral CBD/NP ownership approach, many would see the Farmers' Rights provisions of the mainly multilateral Plant Treaty as an expression of the stewardship approach. In support of this view is the fact that there is no legal obligation in the Treaty to grant exclusive entitlements to farmers' communities or individuals over their plant genetic resources in the sense envisaged by the ownership approach (Chiarolla, Louafi, and Schloen 2012). This is a result of the qualifications of the Farmers' Rights provisions that implementation 'rests with national governments' and is 'subject to national legislation'.³¹

Conversely, the Nagoya Protocol assumes the rights of individual indigenous and local communities from which approval is to be granted for access to genetic resources and associated knowledge.

As yet, there have been no attempts to establish a coherent understanding.

4.2. Intellectual property rights frameworks

The question of legal space to fulfill Farmers' Rights has been seen mainly in relation to Intellectual Property Rights (IPRs). Whichever approach is applied, the right to save, use, exchange and sell farmed-saved seeds is an important component, as concerning how IPRs are established in relation to seeds. Negotiations of the Plant Treaty clearly framed Farmers' Rights in contrast to Intellectual Property Rights and especially the rights of plant breeders (Lawson and Bikundo 2019). The following will provide a brief account of the most relevant IPR instruments and forums in this context.

4.2.1. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS Agreement under the WTO is the essential legal framework here. Its article 27.3 (b) obliges all WTO members to protect plant varieties by patents or

by an effective *sui generis* system or any combination thereof. However, the Agreement does not define what is meant by 'sui generis' or 'effective', thus giving no indication of whether and to what extent it allows for a national IPR system to provide rights for farmers to save, use, exchange and/or sell farm-saved seed.³² Whereas the *sui generis* flexibility was used to appease the many who protested against obligatory IPR protection of plant varieties, the seed industry holds the view that Plant Breeders' Rights (PBR) under the Union for the Protection of Plant Varieties (UPOV, discussed below), sets the only acceptable standards for implementing TRIPS Article 27.3(b) (Borowiak 2004, 511–543).

India is one of few countries that has enacted a *sui generis* system for the protection of plant varieties which includes the rights of plant breeders as well as farmers through its 2001 Protection of Plant Varieties and Farmers' Rights Act. The Act provides farmers with the right to save, use, exchange or sell seeds. However, the right to sell seeds does not include selling protected varieties in branded packages. Further, farmers as well as breeders may be granted intellectual property rights over the varieties they breed. (Article 39). As Indian legislation here has not been challenged by the WTO dispute settlement system, it has been seen as a possible model for other countries' legal protection of Farmers' Rights (Ramanna-Pathak and Andersen 2022. Winge, Andersen, and Ramanna-Pathak 2013).

The TRIPs Agreement also includes a provision for review within four years of the entry into force of TRIPS – but that provision has never been implemented.

4.2.2. UPOV and plant variety protection

Plant Breeders' Rights (PBR) under the Union for the Protection of Plant Varieties (UPOV) provide breeders with exclusive rights to the propagating material (such as seeds) of new plant varieties.³³ This type of legal protection is influenced both by patent law and by seed certification legislation – the latter by requiring that protected plant varieties must be distinct uniform and stable (Correa 2016). Unlike the patent system, a Breeder's Exemption allows access to protected material for research, for further breeding and for non-commercial use by farmers, without authorization or payment of royalties.

The farmers' privilege originally allowed farmers to retain seeds for their own use and for non-commercial exchange. However, a 1991 revision of the UPOV Convention limited this right for farmers and strengthened breeders' rights *vis-a-vis* other breeders and farmers, bringing plant variety protection closer to protection by patents. The scope of protection was extended beyond the propagating material of protected varieties

to include also 'essentially derived varieties'.³⁴ The main derivation criterion is met when the essential characteristics of the first plant are replicated in the second one (Chiarolla, Louafi, and Schloen 2012). This concept was introduced as a safeguard against the use of breeders' exemption for 'cosmetic modifications' and plagiarism. Under the 1991 Act, farmers are still allowed to retain seeds for their own use on their own holdings under certain conditions, but it is left to states' discretion whether to allow or prohibit exchange of seeds.³⁵

UPOV is recognized as an effective *sui generis* system under the TRIPs Agreement Article 27.3(B) as discussed above, and 77 states have opted for the UPOV IPR protection of plant varieties.

Because the developing countries have seen the concept of Farmers' Rights as a counterbalance to plant breeders' rights under the 1978 Act of the UPOV Convention, it is not surprising that the question of interrelationship between Farmers' Rights and plant variety protection has been the subject of much discussion, especially after the adoption of the 1991 Act, which its critics consider to be even less compatible with Farmers' Rights than the earlier acts.

Recently, the Plant Treaty and UPOV have engaged in a cautious dialogue on their interrelations. At the meeting of the 8th Governing Body (GB) of the Plant Treaty in 2013, it was agreed 'to jointly identify possible areas of interrelations among their respective international instruments.'³⁶ GB9 in 2015 called for a participatory and inclusive process to finalize the process.³⁷ This led to the 'Symposium on possible interrelations between the International Treaty on Plant Genetic Resources for Food and Agriculture and the International Convention for the Protection of New Varieties of Plants'.³⁸ No formal report was issued from the symposium: only a compilation of the presentations given, and the statements made at the discussion rounds.³⁹

The proceedings from the Symposium reconfirmed familiar differing perceptions on the relations between PBRs and FRs: On the one side, that plant breeder's rights consistent with UPOV (and TRIPS) may not be supportive of Farmers' Rights or may undermine those rights so they cannot be fully realized. On the other side, the argument from a legal perspective: there is no conflict, as realization of Farmers' Rights is the responsibility of national governments, whereas balancing their responsibilities under the Plant Treaty, TRIPS, UPOV, and other commitments shall proceed according to their national needs and priorities (Adhikari et al. 2021). Some parties, representing small-scale farmers and breeding-industry interests, have stressed the importance of both PBRs and FRs and argued for

workable solutions of co-existence at national level. For example, Oxfam International urged UPOV to establish a proper and explicit balance between the two by providing a clear interpretation of the private and non-commercial use exemption, allowing smallholder farmers to freely save, exchange and sell farm-saved seed of protected crop varieties amongst themselves and in local markets, and to assist states to include such interpretation in their national legislation.⁴⁰

Despite decisions at subsequent GB meetings calling for a continuation of the process of identifying areas of interrelations between the Treaty and the UPOV Convention, there have been no joint initiatives like the 2016 symposium between the two instruments to further explore interrelations and ways for coherent implementation.

In 2021, UPOV established a working group on guidance to smallholder farmers in relation to private and non-commercial use.⁴¹ Such guidance could be in the form of a revision of the explanatory notes on exceptions to the breeders' right under UPOV 1991⁴² and the Frequently Asked Questions (FAQs) on exceptions to this right.⁴³

The work of this group is based on a report with suggestions for interpretations prepared by a project team with representatives of Euroseeds, Plantum and Oxfam together with the UPOV Office. There are no references to Farmers' Rights and the Plant Treaty, but the work is clearly relevant for the former as regards the rights of small-scale farmers to save, use, exchange and sell farmed-saved seed. The project team has recommended that

UPOV recognizes that many smallholders are not connected to the formal (commercial) seed systems and that these farmers may engage in the use, exchange and local sale of self-produced seeds which remain as a surplus in cases where not all the harvest has been consumed by the farmer's household.⁴⁴

A key issue here is to clarify the relationship between the optional exception, as foreseen in UPOV Article 15(2) and the exception for acts done privately and for non-commercial purposes, as foreseen in Article 15(1)(i).

As of this writing, the working group has held three meetings, marked by disagreements both on the suggested interpretations and on the need for renewed guidance on this issue.⁴⁵

4.2.3. The World International Property Organization

The decision at the Plant Treaty GB7 in 2017 mentioned above, that called for continued cooperation with UPOV to explore interrelations, also called for a similar type of

cooperation with the World International Property Organization (WIPO).⁴⁶

In 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)⁴⁷ For many years, this was mainly a forum for policy dialogue, but in 2009 it was mandated to begin formal negotiations aimed at reaching agreement on one or more international legal instrument(s) to ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions.⁴⁸ Such an instrument or instruments could range from a recommendation to WIPO members, to a formal treaty that would bind the countries that ratified it. Of the three components, it is especially the protection of genetic resources and traditional knowledge that is relevant to Farmers' Rights.

The IGC has generated a significant amount of research and analysis such as fact-finding missions, technical studies, and toolkits. In contrast, the normative outcomes of the IGC have been quite modest: 13 years after its original mandate was given to negotiate one or more instruments, this task has not been fulfilled and the process is still ongoing. The limited progress is due to the firmly entrenched division of opinions between developing and developed countries as typical provider and user countries of genetic resources and associated traditional knowledge. As in negotiations in the CBD/NP and the Plant Treaty context, the interface between intellectual property, genetic resources and associated traditional knowledge has been shown to very complex ramifications (Vivas-Eugui 2012).

In terms of avoiding misuse and misappropriation by others through the intellectual property rights (IPR) system, one tool has attracted considerable attention: the disclosure of origin of genetic resources and associated traditional knowledge in IPR applications as evidence of compliance with requirements of the country or the indigenous or local community. Other measures include more rigorous patent examination, comprehensive search of prior art (any evidence that the invention is already known) – as through databases, use of the existing IP system to protect traditional knowledge or developing a *sui generis* protection system (Muñoz Tellez 2015).

The inability of the IGC to find a consensus position led its chairman to issue a Chairs Text of an international legal instrument in 2019, re-issued in 2022.⁴⁹ The scope of the instrument has been narrowed down to address only disclosure requirements and only in relation to patents – not other types of IPRs.

The WIPO General Assembly in 2022 decided to convene, no later than 2024, a Diplomatic Conference

to conclude an international legal instrument.⁵⁰ Like TRIPS and UPOV, WIPO has not addressed Farmers' Rights explicitly. Moreover, the request for cooperation between the Plant Treaty and WIPO referred to above has not been met.

4.2.4. Concluding remarks on Farmers' Rights and intellectual property rights

To a considerable degree, the concept of Farmers' Rights emerged as a counterweight to Intellectual Property Rights. The interrelationships between the two have always been at the core of discussions on legal space for the realization of Farmers' Rights. However, attention to the interrelationship has been scarce from the side of Intellectual Property Rights forums. To the limited extent that the subject has been taken up, a common understanding between the two considerations has not been reached. Finding a shared understanding and coherent legal frameworks is therefore more likely to take place in individual countries through *sui generis* legal systems appropriate to the specific circumstances and needs.

5. Seed laws

The question of legal space for Farmers' Rights has generally been seen in relation to Intellectual Property Rights being viewed as a restrictive factor for seed sovereignty and the conservation and sustainable use of crop genetic resources. Increasingly, 'seed laws' have also been seen as a restrictive factor (Wattne 2016, 850–867). By 'seed laws' is meant legislation on plant variety release and the marketing of seeds requiring that varieties must meet certain criteria to be approved for marketing and that the seeds are formally certified. The rationale is the concern for plant health and seed quality. There is no international framework for seed laws, but they have become widespread across the globe.

Seed laws typically regulate how seed is produced, used, and marketed to ensure its identity and quality. The concept was introduced after World War II to support the rapid modernization and industrialization of agriculture. The main characteristics were productivism, standardization of agricultural products and fragmentation of the many stages involved in agricultural production. This led to widespread shifting of responsibility of breeding and seed production, from farmers to professional sectors that viewed farmers more as producers and consumers of seed (Prip and Fauchald 2016).

Seed legislation is distinct from intellectual property rights (IPR) which grant ownership rights over new plant varieties, typically in the form of plant breeders'

rights and patents. However, the two fields of legislation share concepts such as requirements for distinctiveness, uniformity and stability, and their significant interaction and interdependence means that seed legislation cannot be properly analyzed without considering IPR legislation.

The EU has developed seed legislation since 1966, and this legislation is among the world's most elaborate (Winge 2015). It consists of one horizontal directive (establishing a Common Catalogue of varieties) and eleven 'vertical' directives (regulating specific types of crops), supplemented by approximately 90 other legal acts. Adding to the complexity is the fact that the legislation contains terms that are defined differently in various contexts: for example, 'marketing' is defined in four different ways (Winge 2015).

Two central requirements in the EU directives are the *registration* of varieties and the *certification* of seed lots. The registration requirement implies that, in order to be marketed in the EU, a plant variety must be listed in a national catalogue and, depending on the species, in the EU Common Catalogue as required by the horizontal directive.⁵¹ To qualify for registration, a variety must be *distinct, stable* and *sufficiently uniform* (DUS) and, in the case of agricultural crops, it must be of satisfactory *value for cultivation and use* (VCU).⁵² The certification process is intended to ensure, among other things, identity, varietal purity, germination capacity, and freedom from diseases.

Between 2008 and 2010 the EU adopted several directives on derogations of harmonized rules to support the marketing of conservation varieties for agricultural plants seed, vegetable seeds, and fodder plant mixtures.⁵³ These Directives empower Member States to design a registration system for conservation varieties, with greater flexibility regarding substantive as well as procedural requirements, to allow for marketing of seed in relation to *in situ* conservation and sustainable use of plant genetic resources. However, derogations apply to only some of the crops covered by the basic directives – and seed exchange and sale among farmers remain prohibited.

Disagreements on how to address conservation varieties, together with a wish to streamline and simplify the fragmented and complex EU legislation, led to a review process that concluded with a proposal for a single regulation on producing plant reproductive material and making it available on the market.⁵⁴ For conservation varieties, this proposal involved maintaining and even expanding the current derogation regime. However, after a heated debate and much lobby activity among a wide range of stakeholders, the European Parliament vetoed the entire proposal in

2014. The harshest criticism of the proposal had come from representatives of small-scale growers, including organic farmers, plant breeders and gardeners, who saw it as criminalizing the saving and exchanging seeds between farmers: the basis of the proposal was that plant reproductive material would be practically illegal until it had been registered.⁵⁵ The EU Commission then withdrew its proposal.⁵⁶

A new review process was initiated in the EU in 2021. The aim was to align the seed legislation with the political objectives of the Green Deal, ‘to support technical developments, sustainable and climate-resilient agri-food systems and forests, and conserve biodiversity and plant and forest genetic resources’ as well as to ‘remove barriers to trading on the single market’.⁵⁷ In the justification for the revision, the EU Commission was remarkably self-critical to the current seed legislation – arguing, *inter alia*, ‘that the basic legislation does not facilitate the introduction of lighter registration requirements for traditional and locally adapted plant varieties and tree species which could contribute to seed diversity and security’.⁵⁸

The European Commission in 2023 put forward a proposal for a single regulation on the production and marketing of plant reproductive material.⁵⁹ The proposal introduces sustainability requirements for registering new varieties of agricultural plants, vegetables and fruits intended for professional users, while material intended for amateur gardeners and conservation Organizations, including seed banks, would be exempt from many of the requirements. The proposal introduces less stringent conditions for registering conservation varieties that are adapted to specific local conditions and exchange of seed between farmers would be allowed in limited quantities. At the time of writing, the proposal is in an early phase of legislative processing by the European Parliament and the EU Council.

Also, the USA has introduced seed laws – however, with fewer regulations and restrictions than the EU. The main difference is that the US system does not entail mandatory registration, certification, or quality testing. These practices are still carried out, but on a voluntary basis organized by decentralized Organizations and associations (Batten, Plana Casado, and van Zeben 2021). Thus, whereas in Europe, national governments regulate standardization, the USA has a multi-actor system of governance which is friendlier to the continued existence of informal seed systems and to the commercialization of non-uniform varieties. The underlying rationale is the assumption that proper labeling and market dynamics allow farmers to be sufficiently informed to obtain the most appropriate seed for their operations (Batten, Plana Casado, and van Zeben 2021).

While the USA – unlike Europe – does not have mandatory certification legislation, it has a stronger patent-based IPR protection of seeds than Europe, which has resulted in increasingly homogenized seed systems (Wattnem 2016).

Inspired by the EU rather than the US model, seed laws have also emerged in the Global South.

Santilli (2012) has reported on mandatory seed registration and certification requirements that can be met only by the large seed industry in Latin American countries such as Mexico, Costa Rica, Peru, Ecuador and Chile. Wattnem (2016) has provided a detailed study of the introduction seed legislation in Colombia that basically prohibits farmers from saving, producing, commercializing, sharing free of charge and/or using seed that is not registered or certified without approval by the competent authority.

6. Report of the UN Special Rapporteur on the right to food

An important global initiative in support of Farmers’ Rights is a report submitted in 2021 by the Special Rapporteur on the right to food, Michael Fakhri, to the UN Human Rights Council.⁶⁰ In 2010, the predecessor of Michael Fakhri in this function, Olivier de Schutter, issued a similar report, with a specific focus on the adaptation of the IPR system to Farmers’ Rights based on human rights.⁶¹

The report of Michael Fakhri focusses on four thematic areas: the coronavirus disease (COVID-19) pandemic and the hunger crisis; food systems and global governance; seeds and Farmers’ Rights; and the right to food in armed conflict and protracted crises.

In terms of seeds and Farmers’ Rights, the report highlights that access to seeds is a human right, as indicated in UNDROP. Further, the report stresses that the current situation, with control of 60 per cent of the global seed market and 75 per cent of the pesticides market by only four multinational companies, threatens both farmers’ livelihoods and people’s access to food more broadly through the companies’ significant influence on the price of seeds.⁶²

Referring to Article 9 of the Plant Treaty, the report argues that Farmers’ Rights need to be articulated in greater detail. The Special Rapporteur notes that, although grounded in the Treaty, Farmers’ Rights are also spread across a network of treaties and legal instruments (including those addressed in this article). However, it seems unclear ‘how all those treaties and instruments connect in a way that provides a coherent definition of farmers’ rights consistent with a human rights’ understanding.⁶³

Of particular interest to the Special Rapporteur is the interplay between national Farmers' Rights regimes and the international IPR instruments TRIPS and UPOV discussed above. On the first, he sees a potential overlap between national Farmers Rights regimes and the undefined TRIPS understanding of a *sui generis* intellectual property rights regime, and what that would mean from the perspective of the right to food. On UPOV, he argues that the UPOV logic 'is primarily industrial or commercial and has contributed to the global concentration of power over seeds and plants by a relatively small number of companies' rather than to prioritize and incentivize practices that are committed to enhancing biodiversity. According to the Special Rapporteur, Farmers Rights encourage the development of landrace varieties, whereas UPOV makes such development significantly harder.⁶⁴

The Special Rapporteur declares that besides providing an analysis of the state of global seed sharing through the market and public institutions, he intends to 'outline a definition of farmers' rights that is sensitive to the commercial needs of smallholders, attentive to gender (since most seed savers are women) and ensures that peoples' human rights are fulfilled, despite the current normative ambiguity.' This work remains to be done.

7. Discussion and conclusions

The Plant Treaty addresses Farmers Rights with encouragement rather than with positive legal obligations imposed on Contracting Parties to implement Farmers' Rights at national level. In terms of obligations, Article 9 of the Treaty at most could be interpreted to commit States to avoid taking measures that significantly reduce their ability and freedom to realize Farmers' Rights (Prip and Fauchald 2016).

However, even with this understanding, stronger international obligations may provide States with limited legal space to realize Farmers' Rights especially the component on rights to save, use, exchange and sell farmed-saved seed/propagating material.

In this 'competition' between Farmers' Rights and more prescriptive international obligations, the adoption of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) – albeit being a soft law instrument – is an upgrading of Farmers' Rights and their broader recognition. UNDROP includes the same components of Farmers' Rights as the Plant Treaty but without its heavy qualifications. They appear in a human rights context of a broader set of rights pertaining to peasants and other people working in rural areas. The Declaration could

thereby serve to clarify and provide a common understanding of rights that should be considered Farmers'/Peasants Rights also by the Plant Treaty (Lawson and Bikundo 2019).

As put by Adhikari et al. (2021), UNDROP together with matters identified from the deliberations under the Plant Treaty on Farmers' Rights, 'is a basic framework for the possible substance of Farmers' Rights.

This broad context supports the argument that Farmers' Rights express a stewardship approach reflecting the long-standing idea that agro-biodiversity belongs to the common heritage of mankind and is to be shared for the common good as part of the public domain, rather an ownership approach narrowly focussed on access, benefit-sharing and intellectual property rights. The UNDROP approach acknowledges the contribution of small-scale farmers to agro-biodiversity conservation and sustainable use and thereby sustainable food production and food security. It also stresses the value of cultural autonomy and community rights to manage resources collectively (Girard and Frison 2021). With the growing awareness of the negative environmental impacts, including on biodiversity and climate, caused by industrial agriculture, and the related crises of food and nutritional security, Farmers' Rights in the UNDROP understanding are important for achieving the Sustainable Development Goals.

Does UNDROP, and the momentum it has gained, imply that the Plant Treaty has played out its role in promoting Farmers' Rights? Girard and Frison (2021) claim that UNDROP represents a paradigm shift towards biocultural approaches, and that Farmers' Rights under the Treaty have 'remained trapped within a restrictive view of farmers as passive users of improved seeds to be grown in highly controlled environments (mechanization, irrigation, use of inputs)'. Demeulenaere and Piersante (2020), see the emergence of what has been described as seed sovereignty as marking a shift in the struggle over seeds, 'from simply defending farm seed-saving to promoting and defending a radical change in farming practices'. Via Campesina, the international peasant's movement which played a key role in the processes leading to both Farmers' Rights under the Plant Treaty and UNDROP, views the emergence of the latter as partly frustration over the lack of progress in terms of Farmers' Rights under the Treaty (Peschard and Randeria 2020).

The decreasing support for the Treaty from strong Farmers' Rights actors, while at the same time highlighting the role of UNDROP, should be a cause of concern for the Governing Body of Plant Treaty. Rather than ignoring UNDROP, it should be an encouragement for recognition and outreach. As discussed above, the Plant Treaty could and should not work in isolation on a cross-cutting topic

like Farmers' Rights. Despite more attention to Farmers' Rights in recent years through establishing an ad-hoc working group on Farmers' Rights, the Treaty has made limited progress in promoting their application at national level and encouraging other international instruments to provide sufficient legal space. In that light, the Plant Treaty should welcome the new momentum to Farmers' Rights that UNDROP provides. Both instruments would indeed benefit from not working in silos but collaborate and provide a coherent understanding of Farmers' Rights in a human rights context, as pointed out by the UN Special Rapporteur on the right to food, Michael Fakhri. However, the lack of support to UNDROP from several developed countries, combined with the non-legally binding status of UNDROP, is a serious limiting factor as regards establishing such coherence between the two instruments.

The Plant Treaty has not been made redundant in terms of Farmers' Rights. From the side of UNDROP, it should be appreciated that Farmers' Rights are part of a legally binding instrument with other provisions having more binding effects on states than Farmers' Rights, but of also great relevance to Farmers' Rights. This applies not least to Article 6 on the sustainable use of plant genetic resources for food and agriculture. Besides, the Plant Treaty represents a history of Farmers' Rights, with its many negotiations, discussions, and other developments to learn from. Unlike the impression one can get from some of the harsh critics of the Treaty, these deliberations have not been restricted to a narrow Article 9 understanding of Farmers' Rights. Also, under the Plant Treaty, Farmers' Rights have often been addressed in the bigger picture of food security, biodiversity, and cultural diversity.

Although Farmers' Rights will achieve greater recognition and impact through aligning the work of the Plant Treaty and UNDROP, Farmers' Rights is still not a strong concept in legal terms with weak wording in the Treaty and with UNDROP being a non-binding instrument without support from several countries. Thus, there remains a need for outreach and collaboration with other international instrument to remove the legal barriers for realizing Farmers' Rights that continue to exist.

Such collaboration has yet to be established with the CBD and its Nagoya Protocol as regards regulating access to traditional knowledge and genetic resources held by indigenous peoples and local communities as well as benefit sharing from their use. The fact that the CBD and the NP apply an ownership approach, whereas the understanding of Farmers' Rights is leaning more and more towards a stewardship approach, may be an impeding factor.

Nonetheless, a commitment to the stewardship approach for Farmers' Rights does not imply that ownership

elements are still not relevant. A core element of the stewardship approach is the free use and exchange of farmers' seed. However, this could prove to be illusory and result in genetic resources and associated information being privatized by others than farmers if intellectual property rights are not adapted to respect the free use and exchange (Andersen 2017). The ongoing work under UPOV on smallholder farmers' use of seeds (without any explicit reference to Farmers' Rights) indicates that such adaptation is not imminent in relation to Plant Breeders Rights.

As regards TRIPS, the widespread assumption that the *sui generis* exception is reserved for UPOV and Plant Breeders' Right is challenged by India, Michael Fakhri and others who see potential synergy between the development of national FR's regimes and the undefined understanding of *sui generis*. Given the renewed focus on Farmers' Rights provided by UNDROP, it would be relevant and interesting from a legal perspective if more countries enact legislation on farmers' rights to save, use, exchange and sell farmed-saved seed and thereby test the legal space for the *sui generis* exception.

Seed laws are another type of legal instrument that may represent legal obstacles to Farmers' Rights because they favor uniformity and short-term productivity at the expense of crop diversity and informal seed systems. Here, there seems to be more development occurring in favor of Farmers' Rights than is the case for the international IPR legal framework. The EU Commission has now put forward a proposal for a revised seed law system using many Farmers' Rights and sustainability-related arguments and admitting shortcomings in the existing, highly prescriptive, legal system.

At the time of writing, the level of ambition for change remains to be seen. It also remains to be seen whether discussions on the Commission proposal between the main actors, the seed industry and small hold farmers, will again be polarized, or whether UNDROP and a stronger EU focus on 'farm to fork', biodiversity and climate change may soften the hitherto sharp fronts. If new EU seed legislation manages to provide the proclaimed change, EU may again serve as a model for seed laws of other countries – this time not at the expense of Farmers' Rights, but in support of their realization.

Notes

1. Website on Farmers' Rights established and managed by the Fridtjof Nansen Institute, Norway.
2. FAO International Treaty on Plant Genetic Resources for Food and Agriculture (entry into force, 2004).
3. UNGA Resolution 73/165. United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.
4. FAO Conference Resolution 8/83.

5. TRIPS Agreement, 1994.
6. IT/GB-3/09/Inf. 6 Add.3. Information paper submitted by the Fridtjof Nansen Institute on the implementation of the Plant Treaty.
7. Case C-59/11, Association Kokopelli v Graines Baumax SAS. (2012).
8. The Farmers' Rights website hosted by the Fridtjof Nansen Institute, Norway, provides an account of negotiations on Farmers' Rights at the meetings of the Governing Body. See: Plant Treaty Negotiations – Farmers Rights.
9. Plant Treaty GB Resolutions 7/2017 and 6/2019.
10. Plant Treaty GB Resolution 6/2019.
11. Plant Treaty GB Resolution 7/2022.
12. Plant Treaty Resolution 7/2022.
13. UNGA Resolution 73/165. United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. Understandings of the term 'peasant' versus 'farmer' vary, but it is generally held that peasants may be smallholder farmers – the category of farmers most relevant in relation to Farmers' Rights. This article does not distinguish between the two terms.
14. UNDROP recital 7.
15. UNDROP recital 29.
16. Vote distribution on UNDROP.
17. Vote distribution of UNDROP.
18. IISD, *Earth Negotiation Bulletin*, Daily report for 23 September 2022 at the 9th Session of the Plant Treaty Governing Body.
19. Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, Resolution 3: The Interrelationship Between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture 1992.
20. CBD COP Decision XI/14. Article 8(j) and related provisions, paras 17–21.
21. CBD COP Decision XI/14. Article 8(j) and related provisions, paras 17–21.
22. IT/GB-8/19/12 Rev.1. Report on the Implementation of Farmers' Rights.
23. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. Entered into force in 2014.
24. NP Articles 5.2 and 5.5.
25. NP Article 7.
26. NP Article 12.1.
27. NP Article 12.2.
28. NP Article 12.3.
29. NP Article 12.4.
30. NP Article 16.1.
31. The Plant Treaty, Article 9.2.
32. Taken literally, *sui generis* means 'of its own kind.'
33. UPOV website
34. International Convention for the Protection of New Varieties of Plants (UPOV Convention) (2 December 1961, as revised in 1972, 1978 and 1991) Art. 14.5.
35. UPOV Convention Art. 15
36. Plant Treaty, GB Resolution 8/2013.
37. Plant Treaty, GB Resolution 5/2015.
38. Symposium on possible interrelations between the International Treaty and the UPOV Convention, 26 October 2016.
39. Proceedings from the Symposium.
40. Symposium on possible interrelations between the International Treaty on Plant Genetic Resources for Food and Agriculture and the International Convention for the Protection of New Varieties of Plants. Presentation by Bram de Jonge, Oxfam Novib, Netherlands: 'Reconciling Farmers' and Plant Breeders' Rights'. October 26, 2016.
41. UPOV. Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (2022). WG-SHF/1/2 (2022). Background material.
42. UPOV/EXN/EXC/1. (2009). 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention.
43. UPOV (2022). Frequently asked questions (FAQs).
44. UPOV. (2022). Analysis and report with suggestions prepared by the project team.
45. UPOV, Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (2022). WG-SHF/2/3 (2022). Report.
46. The Plant Treaty, GB Resolution 7/2017.
47. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) homepage.
48. WIPO General Assembly, Forty-third (21st Ordinary) Session, 23 Sept. – 2 October 2013.
49. WIPO/GRTKF/IC/43/5. Chair's Text of a Draft International Legal Instrument relating to Intellectual Property, Genetic Resources and Traditional Knowledge associated with Genetic Resources.
50. A/63/9. Assemblies of the Member States of WIPO, Summary Report, para. 27.
51. Directive 2002/53/EC on the common catalogue of varieties of agricultural plant species. Directive 98/56/EC on ornamental plants.
52. Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species, Articles 4 and 5.
53. Directives 2008/62/EC, 2009/145/EC and 2010/60/EC.
54. European Commission (2013). COM/2013/0262 final – 2013/0137. Proposal for a Regulation of the European Parliament and of the Council on the production and making available on the market of plant reproductive material (plant reproductive material law).
55. Prip and Fauchald (2016) argue that criticism of a proposal that could be seen as providing less prescriptiveness with regard to conservation varieties indicates that the existing seed legislation has received limited attention and that the proposed single regulation was an eye-opener for many on how restrictive conservation varieties are regulated in the EU.
56. See Annex 2 to the Commission Work Programme 2015 'A New Start', COM(2014) 910 final, p. 10, no. 47.
57. EU Commission website (2021) Plant and forest reproductive material (revised rules).
58. European Commission (2021), SWD(2021) 90 final. Commission Staff Working Document. Study on the Union's options to update the existing legislation on the production and marketing of plant reproductive material.
59. European Commission (2023). COM(2023) 414 final. Proposal for a Regulation of the European Parliament and of

the Council on the production and marketing of plant reproductive material in the Union.

60. United Nations (2020). A/HRC/46/33. Vision report of the Special Rapporteur on the right to food.
61. United Nations (2010). A/64/170. Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation. Report of the Special Rapporteur on the right to food, Olivier de Schutter.
62. Report of the Special Rapporteur on the right to food, Olivier de Schutter (2010). United Nations A/64/170 at 79–80.
63. Report of the Special Rapporteur on the right to food, Olivier de Schutter (2010). United Nations A/64/170 at 85.
64. Report of the Special Rapporteur on the right to food, Olivier de Schutter (2010). United Nations A/64/170 at 89–90.
65. The articles generally refer not only to peasants, but to 'peasants and other people working in rural areas'.

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Annex

UNDROP articles specifically relevant to Farmers' Rights.⁶⁵

Right to save, use, exchange and sell farm-saved seed/propagating material

Art. 5.1.: Right of peasants to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions and to participate in the management of these resources.

Article 19.1(d). Right of peasants to save, use, exchange and sell their farm-saved seed or propagating material.

Article 19.2: Right of peasants to maintain, control, protect and develop their own seeds and traditional knowledge.

Article 19.3: Duty of States to take measures to respect, protect and fulfill the right to seeds of peasants.

Article 19.5: Duty of States to recognize the rights of peasants to rely either on their own seeds or on other locally available seeds, and to decide on the crops and species that they wish to grow.

Article 19.8: Duty of States to ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants.

Protection of traditional knowledge

Article 19.1(a). Right of peasants to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture.

Article 20.2: Duty of States to States to take measures to promote and protect the traditional knowledge, innovation and practices of peasants relevant to the conservation and sustainable use of biological diversity.

Article 26.1: Right of peasants to enjoy their own culture, including the right to maintain, express, control, protect and develop their traditional and local knowledge, such as ways of life, methods of production or technology, or customs and tradition.

Article 26.3: Duty of States to respect, and take measures to recognize and protect, the rights of peasants relating to their traditional knowledge, and eliminate discrimination against the traditional knowledge, practices, and technologies.

Right to benefit sharing

Article 11.1: Right of peasants to seek, receive, develop and impart information, including about factors that may affect the production, processing, marketing and distribution of their products.

Article 11.3: Duty of States to take measures to promote the access of peasants and other people working in rural areas to a fair, impartial and appropriate system of evaluation and certification of the quality of their products at the local, national and international levels, and to promote their participation in its formulation.

Article 19.1(b). Right of peasants to participate equitably in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture.

Article 19.4: Duty of States to ensure that seeds of sufficient quality and quantity are available to peasants at the most suitable time for planting, and at an affordable price.

Article 19.6: Duty of States to support peasant seed systems and promote the use of peasant seeds and agrobiodiversity.

Right to participate in decision-making

Article 2.3: Duty of States to consult and cooperate in good faith with peasants who could be affected by decisions, before those decisions are made, and taking into consideration existing power imbalances.

Article 10.1: Right of peasants to active and free participation in the preparation and implementation of policies, programs and projects that may affect their lives, land and livelihoods.

Article 10.2: Duty of States to promote the participation of peasants in decision-making processes that may affect their lives, land and livelihoods.

Article 11.2: Duty of States to take measures to ensure that peasants have access to relevant, transparent, timely and adequate information so as to promote their empowerment and to ensure their effective participation in decision-making in matters that may affect their lives, land and livelihoods.

Article 19.1(c) Right of peasants to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture-

Article 19.7: Duty of States to ensure that agricultural research and development integrates the needs of peasants, and to ensure their active participation in the definition of priorities and the undertaking of research and development, taking into account their experience, and increase investment in research and the development of orphan crops and seeds that respond to their needs.