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Farmers' Right to Participate in Decision-making

– implementing Article 9.2 (c) of the International Treaty on
Plant Genetic Resources for Food and Agriculture

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The Association for Plant Breeding for the Benefit of Society (APBREBES) is a network of civil society organisations from developing and industrialised countries. The purpose of APBREBES is to promote plant breeding for the benefit of society, fully implementing Farmers' Rights to plant genetic resources and promoting biodiversity.

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Citation: Chee Yoke Ling et al., Farmers' Right to Participate in Decision-making – implementing Article 9.2 (c) of the International Treaty on Plant Genetic Resources for Food and Agriculture, Working Paper, APBREBES, 2016

IMPRINT Farmers' Right to Participate in Decision-making – implementing Article 9.2 (c) of the International Treaty on Plant Genetic Resources for Food and Agriculture, Working Paper, September 2016. | **Authors** Chee Yoke Ling (Third World Network), Barbara Adams (Global Policy Forum), with contributions from Sangeeta Shashikant (Third World Network) and Laurent Gaberell (Public Eye) | **Copy Editor** Lean Ka-Min (Third World Network) | **Published by** Association for Plant Breeding for the Benefit of Society (APBREBES) and its member organizations: Public Eye, The Development Fund, Searice and Third World Network | **Layout** Karin Hutter, karinhutter.com | © APBREBES, 2016. Readers are encouraged to quote and reproduce this material for educational, non-profit purposes, provided the source is acknowledged. | **COVER PHOTO** CRSHELARE/Shutterstock.com

Executive summary

The right of farmers to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA) is recognized in Article 9.2(c) of the International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty). It is a prerequisite for the full and effective implementation of Farmers' Rights.

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

This paper clearly shows that the participation required goes beyond mere consultation. Article 9.2(c) applies to national level decision-making, which would include participation in sub-national processes i.e. at the local and community level. However, this paper also demonstrates that decision-making at the national level is impacted increasingly by regional and international developments and processes, and these in turn, can adversely affect Farmers' Rights and implementation of the Treaty. Of particular concern is decision-making related to UPOV and other intellectual property systems, bilateral, regional and plurilateral trade or intellectual property agreements as well as seed

certification and marketing laws. Since regional and international decision-making affects national decision-making with implications for Farmers' Rights, it is only logical that the right to participate should also apply to decision-making processes at the regional and international levels.

The operationalization of Article 9.2(c) at the national, regional and international levels is severely lacking. Farmers face considerable challenges in exercising their right to participate at all these levels, with the consequence that decisions including on policies and laws not only ignore their needs, but also adversely affect farmers' freedom to operate. This is evidenced for example by the formulation of seed laws, in particular plant variety protection, seed certification and marketing laws that restrict and in some cases criminalize farmers' right to freely use, save, exchange and sell farm saved seed/propagating material.

The challenges farmers face with regard to the right to participate include: the absence of legal recognition of the right to participate; the absence of appropriate mechanisms to facilitate farmers' participation; the lack of political will (often due to bias in favour of the corporate sector and/or various external pressures); and limited or no access to information and/or financial support.

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

Learning from the challenges as well as drawing from the norms, principles, good practices and mechanisms that exist within the UN system, especially within the human rights framework, this paper discusses some of the key elements that are essential for the effective operationalization of farmers' right to participate in decision-making. In a nutshell, the right to participate should include the following elements:

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

The key recommendations of this paper are below.

RECOMMENDATIONS FOR GOVERNMENTS

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

RECOMMENDATIONS AT THE TREATY LEVEL

- **Gather data and information on national, regional and international rules and practices that provide for participation of farmers in decision-making in connection with PGRFA, and document and assess their impact** on realising Farmers' Rights, including progress, obstacles and challenges.
- **Develop "guidance" for the effective implementation of Article 9.2(c)** with the full and effective participation of farmers' representatives and public interest civil society organisations. Such guidance should build on good practices, principles and elements discussed in chapters 4 and 5.
- **Establish an ombudsman facility¹ under the Treaty** and open a window for addressing gaps/obstacles in implementation of Farmers' Rights, including farmers' right to participate in decision-making.
- **Reporting on implementation of the Treaty by every Contracting Party** required by the Treaty's compliance mechanism² should specifically require the Contracting Party to provide information on measures taken to implement Farmers' Rights, including farmers' right to participate in decision-making. These country implementation reports should be presented regularly and be publicly available. Farmers' representatives should also be given an opportunity to present their perspectives on implementation of Farmers' Rights in relation to their countries, including regional and international activities and instruments that involve their countries.



Women farmers describing and ranking coping strategies to overcome seasonal food insecurity, Sufatubo, Glan, Sarangani province, The Philippines.

- **Conduct an assessment of farmers' participation in Treaty-related meetings, processes and initiatives** in consultation with farmers' representatives and public interest civil society organisations, with the intent to institutionalise and strengthen farmers' participation in such processes and initiatives. The assessment should draw on good practices in other fora such as the Committee on World Food Security (CFS) of the Food and Agriculture Organization (FAO) and the CBD.
- **Ensure adequate, predictable and timely funding to implement the right to participate** in the work of the Governing Body, including its inter-sessional work and relevant consultations and meetings that may be held. A wide range of Contracting Parties, with developed countries taking the lead, should finance a multi-donor trust fund to be administered by FAO/the Treaty (bearing in mind that the Governing Body resolutions of 2013 and 2015 made explicit linkages with FAO more broadly, specifically mentioning CFS).
- **Recognise and draw on farmers' expertise.** Representatives of farmers' organisations should be adequately represented and involved in any meeting, consultation, panel of experts, working group or equivalent body convened by the Secretariat as mandated by Contracting Parties. In ensuring this, the Secretariat should recognise and respect farmers' autonomy to self-organise and select their own representatives, and should provide the necessary financial support for the participation.
- **Enhance and support** (e.g., by ensuring financial support) **capacity-building of farmers** (especially of small-scale farmers) by farmer groups and public interest civil society organisations in respect of their rights, including the right to participate in decision-making processes; developments that may undermine Farmers' Rights; and the importance of active farmers' engagement in such relevant national, regional and international processes.

RECOMMENDATIONS FOR REGIONAL AND INTERNATIONAL ORGANISATIONS AND PROCESSES

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

1 An official appointed to investigate individuals' complaints against maladministration

2 www.fao.org/plant-treaty/areas-of-work/compliance/en

1

Context of the Treaty

The International Treaty on Plant Genetic Resources for Food and Agriculture (hereafter referred to as “the Treaty”) is the first international legally binding treaty to recognise Farmers’ Rights.

The rights that are enumerated in the Treaty are:

- The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture (PGRFA);
- The right to equitably participate in sharing benefits arising from the utilisation of PGRFA;
- The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA; and
- The right to save, use, exchange and sell farm-saved seed and other propagating material.

However, these rights are not exhaustive and national laws can recognise more rights, including those under other international instruments and customary international law that are applicable to farmers and the objectives of the Treaty.

This study focuses on the right to participate in decision-making as a prerequisite to achieving the full and meaningful implementation of the bundle of integrated Farmers’ Rights. This is consistent with the acknowledgement by international human rights instruments and mechanisms of the right of all

people to be fully involved in and to effectively influence public decision-making processes that affect them.¹

The Treaty explicitly recognises the contribution and role of farmers in the conservation and development of plant genetic resources for food and agriculture. The particular role of smallholder farmers is a reality that remains valid today, and is recognised at the global policy level.²

The vast majority of farms in developing and least developed countries are small farms, with many family farmers, mostly women, cultivating plots of less than two hectares of land. Yet, smallholder farmers manage over 80% of the world’s estimated 500 million small farms and provide over 80% of the food consumed in a large part of the developing world, contributing significantly to poverty reduction and food security.³

As much as 75% of global seed diversity in staple food crops is held and actively used by a wide range of small farmholders.⁴

This central and crucial role of smallholder farmers is also acknowledged in the United Nations Sustainable Development Goal 2 to “End hunger, achieve food security and improved nutrition and promote sustainable agriculture”,⁵ one of the 17 Goals in the 2030 Agenda for Sustainable Development adopted by heads of state and government in September 2015.

Although they are a vital part of the global agricultural community and a backbone for food security, smallholder farmers are often neglected.⁶ This is despite having their rights rec-

1 Office of the United Nations High Commissioner for Human Rights, Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights laws: best practices, experiences, challenges and ways to overcome them (A/HRC/30/26) (2015), paragraph 9.

2 See, for example: IFAD/UNEP, Smallholders, food security, and the environment (2013); FAO-CFS HLPE6, Investing in Smallholder

Agriculture for Food Security (2013); FAO, Final Report for the International Symposium on Agroecology for Food Security and Nutrition 2014 (2015).

3 IFAD/UNEP (2013), p. 10.

4 Zimmerer, K., World Crop Diversity Survives in Small Farms from Peri-Urban to Remote Rural Locations (2015), Pennsylvania State University.

5 Target 2.3 of Sustainable Development Goal 2: “By 2030, double the agricultural productivity and incomes of

small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.” Target 2.5: “By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their

related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge, as internationally agreed.” URL: sustainabledevelopment.un.org/sdg2

6 IFAD/UNEP (2013), p. 10.

ognised in the Treaty for more than 15 years. To fully and effectively implement Farmers' Rights, it is critical to effectively operationalise farmers' right to participate in decision-making processes. The availability of effective mechanisms giving smallholder farmers a voice in policy-making is imperative to address the needs and interests of smallholder farmers, to promote the conservation and sustainable use of plant genetic resources and ultimately to ensure food security.⁷

1.1 – LINKS BETWEEN THE TREATY, FAO AND THE CONVENTION ON BIOLOGICAL DIVERSITY

The Treaty is the result of the revision of the voluntary 1983 Food and Agriculture Organisation (FAO) International Undertaking on Plant Genetic Resources for Food and Agriculture⁸ following the adoption of the Convention on Biological Diversity (CBD).

The issue of Farmers' Rights was put forward at a very late stage in the negotiations leading to the CBD, the first legally binding international treaty to address the conservation of biological diversity, sustainable utilisation of components of biodiversity, and fair and equitable sharing of benefits derived from the utilisation of biodiversity.

While the Parties to the CBD committed themselves to respect, preserve and maintain traditional knowledge, innovation and practices of indigenous and local communities, and to promote their wider use,⁹ Farmers' Rights as well as several agriculture-related issues were eventually not explicitly addressed in the final CBD text.

A compromise was reached in the form of Resolution 3 ("The Relationship Between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture") of the Nairobi Conference for the Adoption of an Agreed Text of the CBD held on 22 May 1992. This recognised the question of Farmers' Rights as one of the "outstanding matters" that needed a solution.¹⁰ This call was reinforced in Agenda 21 adopted at the UN Conference on Environment and Development in Rio de Janeiro in June 1992.¹¹

The Nairobi Resolution also called for ways and means to be explored to develop complementarity and cooperation between

the CBD and the Global System for the Conservation and Sustainable Use of PGRFA (under FAO).

In November 1993, the FAO Conference responded by adopting Resolution 7/93 requesting the FAO Director-General to provide an intergovernmental forum for negotiations for the adaptation of the International Undertaking on Plant Genetic Resources for Food and Agriculture, in harmony with the CBD, the consideration of the issue of access on mutually agreed terms to plant genetic resources, including *ex situ* collections not addressed by the CBD, and the issue of the realisation of Farmers' Rights.

Thus the realisation of Farmers' Rights was one of the principal objectives of the renegotiation of the International Undertaking that resulted in the Treaty.

It should be noted that the FAO Conference had earlier adopted three Agreed Interpretations of the International Undertaking pertaining to Farmers' Rights in 1989 and 1991.¹² These Agreed Interpretations provided the elements for the negotiation text on Farmers' Rights, a subject that occupied considerable time during more than seven years of the negotiating process that led to the Treaty.

The African Group of countries led the strong move to include Farmers' Rights during the negotiations, and with the support of other developing countries, a synthesis of the Asian, African and Brazilian submissions resulted in an official submission of the draft from the developing countries on 12 December 1996,¹³ followed by a revised submission made on their behalf by China on 13 December.¹⁴ The set of rights encompassed the right to participate, including in decision-making.

The negotiations were completed during the 31st FAO Conference in November 2001 with the adoption of the Treaty by consensus, with only two abstentions: Japan and the United States. The Treaty entered into force in June 2004.¹⁵

With this background, the Treaty's objectives are thus the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, *in harmony with the CBD*, for sustainable agriculture and food security (Article 1.1 of the Treaty). These objectives are to be attained by *closely linking the Treaty to FAO and to the CBD* (Article 1.2).

7 The Treaty entered into force on 29 June 2004 and the number of Contracting Parties as of 3 June 2016 is 140, which means that when Farmers' Rights are effectively implemented the scale of the achievement will be enormous.

8 Resolution 7/93 of the Twenty-seventh Session of the FAO Conference in 1993.

9 CBD Article 8(j): "[Each Contracting Party shall, as far as possible and as appropriate:] Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and

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

10 The other outstanding matter was access to *ex situ* collections not acquired in accordance with the CBD. URL: www.cbd.int/doc/handbook/cbd-hb-09-en.pdf

11 Chapter 14, paragraph 60(a) of Agenda 21, UN Doc. A/CONF.151/4 (1992). A 1999 study on the Right to Food by the UN Commission on Human Rights also reaffirmed the need to realise Farmers' Rights.

12 FAO Conference Resolutions 4/89, 5/89 and 3/91.

13 Report of the Third Extraordinary Session of the FAO Commission on Genetic Resources for Food and Agriculture, Rome, 9–13 December 1996 (Document CGRFA-Ex3/96/Rep). The developing countries' text on Farmers' Rights is in Annex G at p. 3–4.

14 Frison, C., Lopez, F. and Esquinas-Alcazar, J.T. (editors), *Plant Genetic Resources and Food Security: Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for food and Agriculture* (2011). See pages 48 to 50 for an account of the evolution of the developing countries' submission. Among the developed countries, Sweden and Norway were very supportive while the United States and France were not.

15 *Ibid.*, p. 10.

1.2 – FOUR INTEGRAL ASPECTS OF FARMERS' RIGHTS UNDER THE TREATY

Reading Article 9 together with preambular paragraphs 7 and 8, it is apparent that there are four integral aspects to Farmers' Rights under the Treaty:

- The right to save, use, exchange and sell farm-saved seed and other propagating material;
- The right to the protection of traditional knowledge;
- The right to equitably participate in sharing benefits; and
- The right to participate in making decisions.

However, these rights are not exhaustive as Article 9.2 uses the word “including” in enumerating the rights. This means that a broader scope of Farmers' Rights, including those rights in other international instruments, can be recognised in national law. For example, Article 9.1 explicitly refers to the role of “local and indigenous communities and farmers” in the “conservation and development of plant genetic resources”, and many farmers are also indigenous people. As such, national implementation of the Treaty may also include implementation of the customary international law norms in the United Nations Declaration on the

Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in September 2007.¹⁶

Since Farmers' Rights are an integrated bundle of rights, the participation of farmers in decision-making on policies and legislation that affect them is essential to ensure that these rights are realised, and that decisions in other processes do not undermine those rights. This study argues that the implementation of the right to participate in decision-making is thus a *prerequisite* to achieving the bundle of Farmers' Rights.

The right of participation assumes even more urgency in light of the significant challenges that currently confront the realisation of Farmers' Rights, in particular those emanating from other legal instruments.

In relation to the **right to save, use, exchange and sell farm-saved seed/propagating material**, one of the most serious threats that have been identified is the 1991 Act to the International Convention for the Protection of New Varieties of Plants (UPOV 1991) or harmonised regional plant variety protection agreements and national laws modelled on UPOV 1991.¹⁷ Regulations governing seed patents, seed certification and marketing, contractual obligations and restrictions, hybrid seeds and various new technologies impacting on Farmers' Rights are also of rising concern.

FARMERS' RIGHTS IN THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

PREAMBULAR PARAGRAPH 7

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

PREAMBULAR PARAGRAPH 8

Affirming also that the rights recognised in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realisation of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels;

ARTICLE 9 – FARMERS' RIGHTS

9.1 The Contracting Parties recognise the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation

and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

- 9.2 The Contracting Parties agree that the responsibility for realising Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:
- a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
 - b) the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture; and
 - c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.
- 9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

16 UN General Assembly Resolution 61/295 dated 13 September 2007.

17 See Shashikant, S. and Meienberg, F., *International*

Contradictions on Farmers' Rights: The Interrelations Between the International Treaty, Its Article 9 on Farmers'

Rights, and Relevant Instruments of UPOV and WIPO (2015). See also *Owning Seeds, Accessing Food: A Human Rights Impact*

Assessment of UPOV 1991 (2014), published by Berne Declaration *et al.*

This right was a controversial issue at the time of the Treaty negotiations. During the negotiations one view was that farmers should be free from any restriction with regard to the use and disposition of seeds, including those protected under intellectual property rights (IPRs).¹⁸ Some others were of the view that unrestricted use of IPR-protected materials by farmers would “erode incentives to commercial breeding and create a threat to future world food security”.¹⁹

Notably, under UPOV 1978, farmers' saving, using and exchanging of seeds for non-commercial purposes are not expressly restricted and, as such, are generally accepted as permitted. However, UPOV 1991 dramatically expanded breeders' rights,²⁰ making them comparable to those granted under a patent, thereby limiting Farmers' Rights. Under UPOV 1991, the abovementioned acts are subject to the breeder's right. Article 15(2) of UPOV 1991 introduced an “optional exception”, which only allows farmers to save seeds/propagating material of the protected variety for use on the farmers' own holding, and this exception is further limited by its application to specific crops and in certain cases may be subject to payment of remuneration to the right holder.²¹ The exchange and sale of farm-saved seeds/propagating material of the protected variety between farmers is, in principle, prohibited.

Against this backdrop, Article 9.3 of the Treaty was therefore a compromise between those who sought a positive recognition of farmers' right to save, use, exchange and sell farm-saved seeds/propagating material in the revised International Undertaking and those who feared that the Treaty could limit breeders' rights in a way that would be inconsistent with UPOV 1991.²²

Nevertheless, Article 9.3 is clear in affirming that national laws can recognise farmers' right to save, use, exchange and sell farm-saved seeds/propagating material. This is also consistent with the right of World Trade Organisation (WTO) Members to protect new plant varieties with a *sui generis* national law that fully implements Farmers' Rights.²³ Yet the pressure is growing on developing countries to limit Farmers' Rights by adopting higher and broader standards of intellectual property, e.g., acceding to UPOV 1991 or legislating national and regional plant variety protection systems based on UPOV 1991.²⁴

The **protection of traditional knowledge relevant to PGRFA** as a Farmers' Right under the Treaty is a recognition of the contribution of farmers' knowledge to the conservation and improvement of PGRFA.

Traditional knowledge is the basis of local innovation and *in situ* seed conservation, and also the basis of the informal seed system, which is crucial to achieving food security in many developing countries.²⁵

With the immense challenges posed by climate change, the crucial role of traditional knowledge for agriculture and food security is gaining even more recognition. A recent study²⁶ concluded: “Drawing from the body of traditional community knowledge, particularly that of women farmers, the promotion of traditional crop varieties, food systems and cultivation practices is contributing immensely to our knowledge of climate change adaptation and, therefore, towards building climate-resilient communities.”²⁷

Accordingly, the value of indigenous peoples' knowledge and perceptions regarding food, livelihood systems, natural resources management and biodiversity conservation are key elements that must be incorporated into climate change policy at the national and international levels.²⁸

Article 7(5) of the 2015 Paris Agreement under the UN Framework Convention on Climate Change acknowledges that “[climate change] adaptation action should follow a country-driven, gender-responsive, *participatory and fully transparent approach*, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, *traditional knowledge, knowledge of indigenous peoples and local knowledge systems ...*” (emphasis added).

Despite the ever-increasing recognition of the importance of protecting traditional knowledge for the survival of humanity, instruments such as UPOV 1991 fail to recognise and acknowledge the wealth of practices that farmers use and develop at the local level, including the preservation, sustainable use and creation of agrobiodiversity. A human rights assessment of UPOV 1991 shows that the implementation of restrictions (and UPOV 1991-style laws) on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and seed preservation, including how to respond to pest infestations, and how to adapt their seed system to changing climatic conditions.²⁹

Given these challenges, farmers' participation in decision-making processes that impact on Farmers' Rights, including those related to UPOV 1991, is crucial.

On ensuring the **right to equitably participate in sharing benefits** arising from the utilisation of PGRFA and related traditional knowledge, it has to be noted that until now this right has been very poorly implemented. Very few countries that are Party to the Treaty have so far enacted a law explicitly implementing farmers' right to equitably participate in sharing benefits.³⁰ Even the benefit-sharing mechanism of the Treaty itself has failed to achieve the objective of fair and equitable benefit-sharing from the users of plant genetic resources, as incorporated in the Multilateral System (Article 13). A review of the Multilateral System is therefore ongoing.³¹

18 Moore, G. and Tymowski, W., Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture (2005), IUCN Environmental Policy and Law Paper No. 57.

19 *Ibid.*

20 Article 14(1) and 14(2), UPOV 1991.

21 Article 15(2), UPOV 1991. See also Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention.

22 Moore and Tymowski (2005), p. 75.

23 Correa, C., Plant Variety Protection in Developing Countries – A Tool for Designing a Sui Generis Plant Variety

Protection System: An Alternative to UPOV 1991 (2015).

24 See Shashikant and Meienberg (2015).

25 Shashikant and Meienberg (2015), p. 11.

26 IFAD, The Traditional Knowledge Advantage: Indigenous peoples' knowledge in climate change

adaptation and mitigation strategies (2016).

27 *Ibid.*, p. 51.

28 *Ibid.*, p. 52.

29 Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 (2014).

30 Examples include India, Thailand and Bangladesh.

The disclosure of origin and evidence of compliance with access and benefit-sharing requirements in intellectual property applications is widely seen as a crucial tool to prevent misappropriation of genetic resources and traditional knowledge.³² Disclosure is also necessary to facilitate the implementation of prior informed consent for access to genetic resources or traditional knowledge.

While some national intellectual property laws have incorporated disclosure requirements³³ and many countries are advocating for this at the WTO, the World Intellectual Property Organisation (WIPO) as well as the CBD and its Nagoya Protocol, the UPOV Council by contrast has taken the position that disclosure requirements are incompatible with the UPOV provisions.³⁴ This reduces countries' ability to effectively implement fair and equitable benefit-sharing under the Treaty, the CBD and its Nagoya Protocol, and UNDRIP.³⁵

Meanwhile misappropriation of genetic resources and traditional knowledge continues at the expense of farmers, indigenous peoples and their countries.³⁶

The **right to participate in making decisions at the national level** covers matters related to the conservation and sustainable use of PGRFA.

Articles 5 and 6 of the Treaty provide for a non-exhaustive list of measures that are relevant to the conservation³⁷ and sustainable use of PGRFA, which are clearly relevant to Article 9.2(c) of the Treaty.

Article 5 of the Treaty advocates promotion of an integrated approach to the exploration, conservation and sustainable use of PGRFA, in particular:

- Survey and inventory of PGRFA;
- Collection of PGRFA and relevant associated information on those resources that are under threat or are of potential use;
- Farmers' and local communities' efforts to manage and conserve on-farm their PGRFA;
- Efforts of indigenous and local communities in *in situ* conservation of wild crop relatives and wild plants for food production, including in protected areas; and
- Steps to minimize or, if possible, eliminate threats to PGRFA.

Article 6 elaborates on measures for sustainable use of PGRFA as including:

- Pursuing fair agricultural policies that promote the development and maintenance of diverse farming systems that en-

hance the sustainable use of agricultural biological diversity and other natural resources;

- Strengthening research which enhances and conserves biological diversity by maximising intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests;
- Promoting plant breeding efforts which, with the participation of farmers, particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas;
- Broadening the genetic base of crops and increasing the range of genetic diversity available to farmers;
- Promoting the expanded use of local and locally adapted crops, varieties and underutilised species;
- Supporting the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development; and
- Reviewing, and, as appropriate, adjusting breeding strategies and regulations concerning variety release and seed distribution.

Given that Article 9.2(c) refers to matters “related to” and thus relevant to conservation and sustainable use of PGRFA and the non-exhaustive list of measures in Articles 5 and 6, the right to participate extends to a broad spectrum of subject matter, beyond those listed above. Considering that “conservation and sustainable use” is an objective of the Treaty, Article 9.2(c) would sensibly also apply to other aspects of the Treaty such as Article 13 (“Benefit-sharing in the Multilateral System”) and Article 18 (“Financial Resources”) which in any case also refer to conservation and sustainable use of PGRFA.

Moreover, in view of the central role farmers play in the conservation and sustainable use of PGRFA and the importance of Farmers' Rights in this regard, the right to participate is intrinsic for matters related to Article 9 itself, including the implementation of Article 9.2(c) itself, in relation to the processes and mechanisms of participation.

31 The *Ad Hoc* Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing had its fifth meeting on 12–14 July 2016. See: twn.my/title2/biotk/2016/btk160801.htm

32 *Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991* (2014), p. 42.

33 Examples include Brazil, China, Costa Rica, India, Norway and Switzerland. See also Sarnoff, J. and Correa, C., *Analysis of Options for Implementing Disclosure of Origin Require-*

ments in Intellectual Property Applications (2006), UNCTAD.

34 UPOV, Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention, UPOV/INF/6/3, 24 October 2013. UPOV has required developing countries (e.g., Malaysia) to remove disclosure obligations (with regard to origin, prior informed consent and compliance with access and benefit-sharing legislation) before allowing accession to the Union. Shashikant and Meienberg (2015), p. 10.

36 Examples of documented cases: McGown, J., *Out of Africa: Mysteries of Access and Benefit Sharing* (2006), Edmonds Institute; Hammond, E., *Biopiracy Watch: A compilation of some recent cases* (Vol. 1) (2013), Third World Network; Hammond, E., *Biopiracy of Turkey's purple carrot* (2014), Third World Network; Hammond, E., *Mardi Gras Misappropriation: Sri Lankan Purple Rice Served Up at Louisiana Celebration* (2014), Third World Network; Berne Declaration *et al.*, *The Bitter Sweet Taste of Stevia* (2015).

37 The Treaty in Article 2 defines “*in situ* conservation” as “the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated plant species, in the surroundings where they have developed their distinctive properties.” It further defines “*ex situ* conservation” as the conservation of plant genetic resources for food and agriculture outside their natural habitat.

As the Treaty objectives are to be attained by closely linking the Treaty to FAO and to the CBD as provided in the Treaty itself, the right to participate in decision-making logically extends to decision-making in those arenas.

The text of Article 9.2(c) refers to “making decisions at the national level”. Thus it is applicable to all sorts of decision-making outcomes including (i) legislation, (ii) implementing regulations/rules, (iii) executive decrees, (iv) administrative decrees, (v) administrative guidelines, (vi) policies and strategies, (vii) programmes and plans, (viii) budget allocations and expenditures, and (ix) national positions in bilateral, regional and international negotiations.

Clearly the participation required goes beyond mere consultation, as discussed in Chapter 5. “National level” would also include participation in sub-national processes, i.e., at the local and community level. However, as shown in Chapter 3, increasingly decision-making at the national level is impacted by regional and international developments and processes which in turn can adversely affect Farmers' Rights and implementation of the Treaty. Of particular concern is decision-making related to UPOV, as well as bilateral, regional and plurilateral trade or intellectual property agreements, seed certification and marketing laws, as discussed in Chapter 3. Since regional and international decision-making can affect national decision-making with implications for Farmers' Rights, it is only reasonable that the right to participate should also apply to decision-making processes at the regional and international levels.

According to Article 9.2 of the Treaty, the responsibility for realising Farmers' Rights rests with national governments, and a Contracting Party should “in accordance with [its] needs and priorities”, “as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights.” Such qualifications make it even more essential that farmers and their constituent organisations actively advocate for implementing their right to participate in decision-making especially on policy and law to ensure that Farmers' Rights under the Treaty (and beyond) are protected, promoted and effectively implemented. This would be consistent with the right to participate within the wider human rights framework, as discussed in Chapter 4.

One major challenge stems from the relatively less advocacy-oriented organisation among the broader farmers' community at the global level, compared to indigenous peoples' organisations and women's organisations that have over the past 30 to 40 years engaged systematically in decision-making at the United Nations with several achievements in terms of global norms and legal commitments among governments, as well as the creation of space for participation at the national level.

However, some farmers' representatives are increasing their participation in the work of the Treaty.³⁸ The mechanisms in place for the FAO Committee on Food Security³⁹ are an important achievement for the realisation of Farmers' Rights at the international level, as elaborated in Chapter 4. There have also

been initiatives such as citizens' jury and scenario workshops on food and farming futures that offer both organising opportunities and methodologies for farmers' participation in decision-making.⁴⁰ These also contribute to building the capacity of farmers to exercise their right to participation, a key recommendation in Chapter 5.

Meanwhile, since the entry into force of the Treaty, there have been five resolutions on Farmers' Rights adopted by the Treaty's Governing Body at its biennial sessions in 2007, 2009, 2011, 2013 and 2015.⁴¹ As can be seen from the recent resolutions highlighted in Chapter 2, the Contracting Parties have gradually taken on a more action-oriented stance since 2011. However, considerable challenges remain in the implementation of the right to participate in Article 9.2(c), as can be seen from the submissions made under the Treaty by some Contracting Parties, farmers' organisations and civil society organisations (CSOs) over the years (which are analysed in Chapter 2),⁴² and from experiences at the national, regional and international levels highlighted in Chapter 3.

1.3 – OBJECTIVE AND SCOPE OF THE STUDY

As discussed above, “matters related to the conservation and sustainable use of PGRFA” for the purposes of decision-making as set out in Article 9.2(c) cover a broad spectrum. This study focuses on implementation of the right to participate in making decisions with respect to policies and laws. To illustrate the issues and challenges in implementing Article 9.2(c), this study has drawn on experiences in relation to seed laws and especially with UPOV. This is because developing countries are under considerable pressure to accede to UPOV 1991 which will affect the ability of those countries to implement the Treaty and to realise Farmers' Rights.

This chapter has discussed the context and scope of Article 9.2(c), and its importance for the realisation of the bundle of integrated Farmers' Rights. Using country and stakeholder submissions to the Treaty as well as examples and experiences at the national, regional and international levels, Chapters 2 and 3 review the status of farmers' participation in decision-making processes,

identifying some of the key issues and challenges that arise with respect to Article 9.2(c) implementation. The evidence also illustrates how implementation or non-implementation of participation rights can respectively promote or hinder the realisation of Farmers' Rights.

Chapter 4 highlights some existing principles, norms and standards expressed in the existing human rights framework, and good practices as well as mechanisms that may be considered for enhancing implementation of Article 9.2(c). Chapter 5 discusses elements that are essential for effective and meaningful implementation of Article 9.2(c), and provides some recommendations.

38 Especially La Via Campesina.
39 www.fao.org/cfs/cfs-home/about/structure/en/

40 For some examples see www.excludedvoices.org and pubs.iied.org/pdfs/14603IIED.pdf

41 www.planttreaty.org/content/GB_resolutions
42 www.planttreaty.org/sites/default/files/gb6i5e.pdf

and www.planttreaty.org/sites/default/files/gb6inf05e_Add1.pdf

2

The Treaty and Article 9.2(c) Implementation

This chapter analyses submissions made by Contracting Parties, farmers' organisations and other groups in response to calls by the Treaty Governing Body's resolutions (2007 to 2013) on sharing national knowledge, views, experiences and best practices pertaining to implementation of Farmers' Rights, and reviews outcomes of global consultations on Farmers' Rights in order to identify some of the issues with respect to implementation of farmers' right to participate in decision-making.

Farmers also face a number of challenges with regard to their participation in Treaty- related processes and initiatives. This chapter highlights some of the key challenges that should be addressed to strengthen participation of farmers in the Treaty's decision-making processes.

2.1 – SUBMISSIONS ON FARMERS' RIGHTS UNDER THE TREATY

The Governing Body has called for submissions on the knowledge, views, experiences and best practices on the implementation of Farmers' Rights since 2007.¹ To date (from the entry into force of the Treaty till July 2015), 17 Contracting Parties,² 2 farmers' organisations/movements,³ 13 CSOs and research institutions⁴ as well as 2 industry associations⁵ have made submissions to the Secretary of the Treaty in respect of their experiences in the implementation of Article 9 on Farmers' Rights.⁶

In 2015, the Treaty Secretariat reviewed the submissions.⁷ It noted, *inter alia*, that “implementation of Farmers' Rights is... considered as being related to various legislative acts, including seed law, plant variety protection laws, seed certification regulations, other regulations regarding seed distribution and trade, patent laws, bioprospecting laws or regulations, laws on the conservation and sustainable use of biodiversity, laws on the rights of indigenous peoples and traditional knowledge”.⁸

Specifically with regard to Article 9.2(c) itself, the Secretariat's review of submissions highlights the following points:

- “Countries provide for participation of farmers in the decision-making process by means of public consultation or through their relevant agricultural representative at the national level.” (§17)
- There is a need for “*more awareness raising* for farmers in respect of their rights as well as the limitations and challenges that still exist for farmers to participate in decision-making bodies.” (§18, emphasis added)
- “Opportunities for farmers to participate in decision-making processes on the conservation and sustainable use of PGRFA... are still limited and farmers are not consulted in a systematic manner nor included in the national decision making on the management of agricultural biodiversity.” (§18)
- A certain level of organisation among farmers is needed “so as to ensure their effective participation throughout decision-making and implementation processes. This would also allow

1 Governing Body Resolutions 2/2007, 6/2009, 6/2011 and 8/2013.

2 Contracting Parties: Australia, Canada, Czech Republic, Democratic People's Republic of Korea, Ecuador, France, Germany, Italy, Madagascar, Mali, Niger, Norway, Pakistan, Poland, Syrian Arab Republic, Uruguay and Zambia.

3 Farmers' organisations/

movements: Asociacion de Organizaciones de Los Cuchumatanes (ASOCUCH) and La Via Campesina.

4 CSOs and research institutions: The Berne Declaration, BioWatch, Centre for Genetic Resources (CGN), Centre for Sustainable Development (CENESTA), Community Technology Development Trust (CTDT), Development Fund,

Fridtjof Nansen Institute, Green Foundation, International Institute for Environment and Development (IIED), Let's Liberate Diversity-Coordination of the European Forum, LI-BIRD, Practical Action, and The Global Community Biodiversity Development and Conservation Network.

5 Industry: European Seed Association and the Internatio-

nal Seed Federation (ISF).

6 The submissions to date are compiled here: www.planttreaty.org/sites/default/files/gb6i5e.pdf and www.planttreaty.org/sites/default/files/gb6inf05e_Add1.pdf

7 Report and Review of Submissions on the Implementation of Article 9, Farmers' Rights (IT/GB-6/15/13), July 2015.

8 *Ibid.*, paragraph 31.

countries to determine whose participation they should seek and farmers to have control over their representatives.” (§19) This would require *strong farmers' organisations* to be established.

The Secretariat's review is a brief summary of information provided in the submissions. It does not provide any analysis, such as implications of non-implementation of Article 9.2(c), or lessons that may be learnt from the positive results when meaningful participation in decision-making takes place.

A closer examination of specific submissions reveals several interesting additional aspects.

The submissions of several developed countries suggest that no further action is needed to implement the right to participate in decision-making. Some of these countries are also resistant to boosting action at the Treaty level to concretely operationalise Farmers' Rights.

For example, Germany in its 2010 submission⁹ stated that the participation of farmers in the decision-making process concerning conservation and sustainable use of PGRFA is ensured in line with generally established participation principles, and that its rules of procedure include “relevant agriculture associations” being involved in a timely manner in the drawing up of bills. It further added that development and implementation of its National Programme on Plant Genetic Resources of Agricultural and Horticultural Crops is by a committee of 17 members from science and industry, including “representatives of agriculture”.

It is conspicuous that farmers' organisations do not feature in this section of the submission on Article 9.2(c) which concluded with the statement: “Further need for fundamental action in Germany to safeguard the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture *is thus not deemed necessary*” (emphasis added).

The Czech Republic in its submission indicated that “in general [it] accepts the Farmers' Rights concept [but] nevertheless the rights are not to [sic] relevant for Czech farmers and actually they are not applied”.¹⁰ Australia in a 2008 submission¹¹ stated: “The Australian Government cannot provide views or experiences on the development of national measures to address specifically the objectives of Article 9 of the Treaty. The rights of

Australian farmers, in the context of the objectives of Article 9, are established under a broad legislative framework that provides a comprehensive set of intellectual, property and legal rights, including common law rights.”

Canada expressed a similar position to that of Australia,¹² asserting also that “Canadian Farm groups consulted at the National level have the opportunity to raise issues and concerns on PGRFA on a wide range of national consultation(s) processes including in web-based public consultation and variety registration”.¹³

Canada was very vocal at the Sixth Session of the Governing Board (2015), stressing that the responsibility for Article 9 implementation rests with national governments and calling for information exchange, but not assistance, towards implementation of Farmers' Rights. It was opposed to the development of voluntary guidelines on the implementation of Farmers' Rights. Canada and Australia also specifically objected to a study on best practices, policies and legislation as options for national implementation of Farmers' Rights, but the countries that wanted such a study eventually prevailed.¹⁴

In contrast, Norway, a consistent and active supporter of Farmers' Rights implementation,¹⁵ was more forthcoming about the challenges facing Norwegian farmers with respect to participation.

Submissions from the Norwegian government (2012 and 2014) reveal active engagement of farmers' cooperatives and farmers' unions in policy processes at the national level. However, there was also acknowledgment in 2012 that “[while] farmers in principle have great influence in Norway, the farmers who are especially interested in genetic diversity ('biodiversity farmers') are usually in minority and will often feel that their views are not shared or understood by other farmers. As a result they often experience that their views are not heard in farmers' cooperative boardrooms and other relevant fora.”¹⁶ The submission went on to suggest that “Organisation – whether within an existing body or by creating a separate organisation or network – might be one way of facilitating a better flow of information, enabling the biodiversity farmers to become more actively involved in relevant decision-making processes.”¹⁷

Interestingly, Norway's 2014 submission reported that farmers cultivating traditional varieties have become more organised, including through loose networks and the establishment of cooperatives. Therefore, they have become more visible and it

9 www.planttreaty.org/sites/default/files/gb4i06e.pdf, p. 7.

10 www.planttreaty.org/sites/default/files/gb4i06e.pdf, p. 3.

11 IT/GB-3/09/Inf. 6 Add. 1, p. 3.

12 *Ibid.*

13 Canada's acceptance of UPOV 1991 in 2015 was preceded by strong protests from the National Farmers Union, a membership-based community of family farmers across Canada: see www.nfu.ca/issues/save-our-seed and www.apbrebes.org/news/canadas-national-farmers-union-launch-campaign-against-upov-1991

[apbrebes.org/news/canadas-national-farmers-union-launch-campaign-against-upov-1991](http://www.apbrebes.org/news/canadas-national-farmers-union-launch-campaign-against-upov-1991)

14 Shashikant, S., *Contentious negotiations over Farmers' Rights resolution* (2015), Third World Network.

15 Norway rejected membership of UPOV 1991 due to the adverse implications of UPOV 1991 on Farmers' Rights. Norway provided resources for the 2007 informal international consultation on Farmers' Rights in

Lusaka, Zambia and the 2010 Global Consultations in Addis Ababa, Ethiopia. The recommendations from these consultations contributed to the Governing Body's negotiations on the resolutions on Farmers' Rights. The Development Fund of Norway cooperates closely with local partners in Asia, Africa and Central America, providing support that focuses on farmers' rights and underlining farmers' participation in decision-making

processes. The Norway-based Fridtjof Nansen Institute conducts consultations and research studies on Farmers' Rights at the national and international levels, with funding from and participation of the Norwegian government.

16 Submission of Norway in 2012, p. 8. URL: www.planttreaty.org/sites/default/files/Norway_FR_submissions.pdf

17 *Ibid.*

has become easier for the authorities to involve them in various processes.¹⁸

Submissions of developing countries stressed on the need for support to implement Article 9. Mali indicated it had no experience in the implementation of Farmers' Rights, while Niger explained it had no specific legal provisions regarding Farmers' Rights.¹⁹ In a 2011 submission, Madagascar indicated that it needed support for implementing Farmers' Rights and in particular for ensuring the participation of farmers in policy-making.²⁰

Zambia's submission in 2008 stated that national consultations on the Treaty and Farmers' Rights in particular, including with policy-makers, called for further consultations involving all relevant stakeholders and in particular sought greater sensitisation of farmer groups and farmers to get them to express their views and make demands on what they require from the realisation of Farmers' Rights at the national level.²¹

A limited number of submissions were received from farmer organisations, thus demonstrating the need for additional measures to support their participation and involvement in the Treaty discussions (see Section 2.4 below). Nevertheless, the international peasant movement La Via Campesina, in its 2008 submission, stressed that biodiversity cannot be preserved and renewed without the recognition of Farmers' Rights, in particular their right to take part in decision-making, and requested the Treaty Governing Body to involve not only the industry but also small farmers in its decision-making process.²²

CSOs also made several references to participation in their submissions.

The International Institute for Environment and Development (IIED) in its submission²³ highlighted findings from its research in 5 developing countries over 5 years. It pointed out that farmer participation in agriculture policy- and decision-making was limited and that in some cases participation was through "general consultation rather than active participation in policy-making". The submission added that "industry and scientists tend to be by far the most influential in national decision-making, and increasingly foreign industry through Free Trade Agreements and other trade deals."

IIED concluded its submission by stating that "Farmer participation in national decision-making is far from being standard practice", and called for laws, legal reform and institutional structures "to enable farmer representatives especially traditional farmers to participate in national policy and legal processes on genetic resources and agriculture, and ensure that farmers can actually influence the outcome of decisions, and have the same voice and influence as trade and economic actors." It added that this "is also likely to require funding for

farmer information, capacity building and consultations at local level, to enable farmers to participate effectively".

The Berne Declaration in its submission²⁴ highlighted the need to strengthen the involvement of farmers and farmers' organisations in processes and discussions related to Farmers' Rights under the Treaty. It recommended, in particular, producing and disseminating farmer-friendly outreach material, organisation of regional Farmers' Rights consultations and capacity development workshops. It specifically pointed to the fact that the potential of online notifications and dissemination of information by electronic means to reach directly concerned farmers is "very limited".

The Development Fund, which supports development projects in several developing countries, noted in its submission²⁵ that "several national programs on PGRFA are being designed and managed by government institutions and they are out of reach of farming communities". It emphasised the importance of empowering communities to make decisions about conservation and use of genetic resources, adding also that since decisions regarding Farmers' Rights are being taken at the international level, farmers' participation should also be ensured at that level.

The Fridtjof Nansen Institute of Norway highlighted, in its submission of 2009,²⁶ results from its "Farmers' Rights Project". It noted that development of laws and regulations related to the management of plant genetic diversity in agriculture is clearly relevant for farmers' participation, as is implementation of laws and regulations, adding that "[i]deally, policies and programmes targeted at farmers should take farmers' situations and perspectives as points of departure, based on their participation". It also stressed the importance of farmer participation in the implementation of Farmers' Rights as "they are the ones who can best define the needs and priorities of farmers in the context of Farmers' Rights, and they are central actors in the implementation process."

The submission also highlighted two important preconditions for increased participation of farmers in decision-making. Firstly, "decision-makers need to be aware of the important role played by farmers in conserving and developing plant genetic resources for food and agriculture, in order to understand why their participation is required". Secondly, "many farmers are not in a position to participate effectively in complicated decision-making processes without prior capacity-building".

The submission concluded by stating that there are few examples of legislation on farmers' participation, although some countries in the South have extensive legislation in this regard. "All the same, actual participation in decision-making processes seems marginal, and is often confined to large-scale farmers

18 Submission of Norway in 2014, p. 3. URL: www.planttreaty.org/sites/default/files/Norway_FR_submission_2014.pdf 19 www.planttreaty.org/sites/default/files/gb3i06e.pdf

20 www.planttreaty.org/sites/default/files/Madagascar_FR_submissions.pdf

21 www.planttreaty.org/sites/default/files/gb3i06e.pdf, p. 7. Another submission was made by Zambia in 2010 that reported on a policy review study of existing national policies and laws to ascertain, *inter alia*, their

adequacy regarding Article 9 with identification of policy opportunities and gaps. URL: www.planttreaty.org/sites/default/files/gb4i06e.pdf 22 www.planttreaty.org/sites/default/files/gb3i06a1e.pdf 23 www.fao.org/3/a-be075e.pdf

24 www.planttreaty.org/sites/default/files/gb5i08e_FRs_compilation.pdf 25 www.planttreaty.org/sites/default/files/Development%20Fund%20FR_submissions.pdf 26 www.planttreaty.org/sites/default/files/gb3i06a3e.pdf

who are normally not engaged in the maintenance of plant genetic diversity." It further stated, "In the North, the participation of farmers in decision-making processes is more common, even if diversity farmers are not so often represented, but without reference to specific laws or policies. However, farmers in the North claim that their influence is now decreasing, due to their countries' commitments to regional and international organisations and agreements."

It is evident from the Treaty Secretariat's review and the abovementioned submissions that effective implementation of Article 9.2(c) appears to be the exception rather than the norm, and there is a need for enhanced action at all levels to overcome the challenges and support its implementation.

2.2 – GLOBAL CONSULTATIONS ON FARMERS' RIGHTS

In 2010, global consultations were organised, with a lead role played by the Fridtjof Nansen Institute, in response to the Treaty Governing Board's Resolution 6/2009 that called for regional workshops on Farmers' Rights.

The consultation process consisted of two phases: an e-mail-based questionnaire survey from July to September 2010,²⁷ and the Global Consultation Conference on Farmers' Rights that was hosted by the Institute of Biodiversity Conservation of Ethiopia in Addis Ababa on 23-25 November 2010. During the two phases, a total of 171 experts and stakeholders from 46 countries in Africa, Asia, the Near East, Latin America and the Caribbean, North America and Europe participated. The participants came from farmer organisations, government institutions, the seed industry, non-governmental organisations (NGOs), intergovernmental organisations (IGOs), and research and other relevant groups.

The prime concern among most of the survey respondents was the need for guidance and support from the Governing Body to develop or adjust national legislation, policies, strategies and programmes for the realisation of Farmers' Rights. In this context, the establishment of adequate bodies and implementation practices was mentioned as an issue in need of support.²⁸ The need for awareness-raising and capacity-building measures for farmers, government officials, researchers and the seed sector was also highlighted.

The survey found that both a lack of relevant laws and policies, and lack of implementation of existing laws and policies, were a barrier to the realisation of Farmers' Rights.²⁹

On Article 9.2(c), the survey identified the following gaps and needs: (i) lack of legislation, policies and mechanisms prop-

erly targeting farmers' participation and facilitating effective farmer participation; (ii) farmers had insufficient awareness of their rights, as well as insufficient capacity to actually participate; (iii) in some regions the need for farmers' organisations was mentioned, and especially in Europe and North America the issue of balanced representation of various farmer groups came up.³⁰

Many respondents from Europe expressed concern that actual participation in decision-making processes is often confined to large-scale farmers who are normally not engaged in the maintenance of plant genetic diversity.³¹ The main problems for North American respondents were the power of the agri-business corporations and the corporate concentration in this sector.

Respondents from all regions provided recommendations on how to enable farmer participation in decision-making at all levels. Awareness-raising and capacity-building were seen as important means to enable the development of such participation. The consulted farmers in Meso-America recommended creating space for the active participation of farmers under the Treaty; taking into account the opinions and situation of farmers in the decision-making process of the Governing Body; opening a space through various channels/media where farmers can express themselves and ensure the recognition of their rights; and putting pressure on governments for greater openness in decision-making processes for farmers.³²

In summary, the 2010 Global Consultations (and an earlier international consultation in 2007 in Lusaka, Zambia) reached the following conclusions/recommendations:³³

- Information-sharing among and between the Contracting Parties (Lusaka consultations);
- Guidance from the Governing Body to assist Contracting Parties in their implementation of Article 9 and related provisions (Lusaka consultations);
- Develop voluntary guidelines for this purpose in a transparent, participatory and inclusive manner, with the effective involvement of farmers' organisations and other relevant organisations (Lusaka consultations, online consultations, Addis Ababa conference);
- An *ad hoc* working group to be established to facilitate the development of such guidelines (Lusaka consultations, Addis Ababa conference).

The consultations clearly identified the need for the Governing Body to consider ways and means to guide, assist and support Contracting Parties, especially developing countries, in their implementation of Article 9, beyond collecting views and experiences and making them available.

27 Andersen, R. and Winge, T., The 2010 Global Consultations on Farmers' Rights: Results from an Email-based Survey (2011), FNI Report 2/2011, The Fridtjof Nansen Institute. There were 131 respondents from 36 countries, from farmers, the public sector,

the seed industry, non-governmental organisations (NGOs) and others. An earlier informal international consultation had also been held in Lusaka, Zambia on 18-20 September 2007 in preparation for the Second Session of the Governing

Body.

28 Andersen and Winge (2011), p. 107.

29 *Ibid.*, p. 110.

30 *Ibid.*, p. 89.

31 *Ibid.*, pp. 90–91.

32 *Ibid.*, p. 107.

33 Submission by the Fridtjof

Nansen Institute in response to Governing Body Resolution 6/2011. URL: www.planttreaty.org/sites/default/files/Fridtjof%20Nansen%20Institute%20%20FR_submissions.pdf

2.3 – TREATY GOVERNING BODY RESOLUTIONS: TRENDS AND OPPORTUNITIES

Implementation of Farmers' Rights has been on the agenda of the Treaty's Governing Body since its Second Session in 2007. However, the focus had initially been on sharing national knowledge, views, experiences and best practices.

A shift began to take place since the Fourth Session of the Governing Body in 2011 whereby more proactive and action-oriented resolutions on Farmers' Rights were adopted. For example, Resolutions 8/2013 and 5/2015 go further by inviting farmers' organisations to actively participate in "relevant inter-sessional processes" and not just the biennial Governing Body sessions. Resolution 5/2015 "[i]nvites Contracting Parties and relevant organisations to... convene regional workshops and other consultations, *including with farmers' organisations*, for the exchange of knowledge, views and experiences to promote the realisation of Farmers' Rights as set out in Article 9" (emphasis added).

The recognition of farmers' organisations as a distinct constituency in the work of the Governing Body has been acknowledged by Contracting Parties since 2007.³⁴ There is however much to be desired with respect to farmers' participation in Treaty-related processes and initiatives, as discussed below.

Moreover, some developed countries continue to resist concrete support for national implementation, as can be seen in the negotiations of the resolution on Farmers' Rights at the Sixth Session of the Governing Body in 2015 where the following key areas were contentious: development of voluntary guidelines for implementation of Farmers' Rights; study on best practices as options for national implementation of Farmers' Rights; and addressing the interrelations between Article 9 of the Treaty, UPOV and WIPO.³⁵ The final outcome was the longest Farmers' Rights resolution adopted so far (IT/GB-6/15/Res 5), and the actions called for in the resolution provide timely opportunities to engage the participation of farmers and public interest CSOs in furthering the implementation of Article 9.2(c).

The resolution calls for the gathering of information not only at the national level as in previous resolutions, but also at regional and global levels, for exchanging knowledge, views, experiences and best practices. Importantly, agreement was reached for the Secretariat to prepare a study on lessons learnt from implementing Article 9, including policies and legislation. Contracting Parties and all relevant stakeholders, *especially farmers' organisations*, are invited to submit their views and experiences *to derive examples as possible options for national implementation* of Article 9.

Therefore this mandated study is to go beyond compilation of information, to a more analytical and action-oriented remit. In addressing Article 9.2(c), the study should include decision-making at the national, regional and global levels as well as related processes in addition to the Treaty.

However, there was no consensus at the Governing Body session to develop voluntary guidelines on implementing Farmers' Rights as proposed by the African Group. Ethiopia had proposed that the draft resolution request the Secretariat "to develop voluntary guidelines on the implementation of farmers' rights at national level, through an *ad hoc* working group in a transparent, participatory and inclusive manner, with effective participation of farmers and other organisations".³⁶

Resolutions of the Governing Body's Fifth and Sixth Sessions invited Contracting Parties to consider developing *national plans* for implementing Article 9, and to *review and adjust national measures* affecting realisation of Farmers' Rights.³⁷ Both also reiterated the call for *regional workshops and other consultations* to promote the realisation of Farmers' Rights, highlighting the involvement of farmers' organisations.³⁸

The logical next step would be to develop participation mechanisms and processes at the national, regional and global levels, and to do so with the effective participation of farmers and other public interest groups.

2.4 – PARTICIPATION OF FARMERS IN TREATY-RELATED PROCESSES AND INITIATIVES

On several occasions a number of issues with regard to farmers' participation in Treaty-related processes and initiatives have been raised.

A major constraint hampering the participation of farmers, especially those from developing countries, is the lack of financial support, as farmers are generally in no position to finance their own participation in Treaty meetings. The Treaty on its part has simply no funds available to finance farmers' participation.

Opportunities to participate during the sessions of the Governing Body are also quite constrained. During the plenary sessions, farmers are only allowed to participate in the capacity of observers; as such, they can only speak after the Contracting Parties, if time is available. Their proposals, e.g., concrete drafting proposals regarding a resolution, are only taken into account if supported by a Contracting Party.

Another concern is the total absence of farmer representation in certain Treaty meetings.³⁹ In Treaty meetings open to farmer participation, such participation is often limited, for sev-

34 Governing Body Resolutions 2/2007, 6/2009, 6/2011, 8/2013 and 5/2015.

35 Shashikant (2015).

36 *Ibid.*

37 Resolution 8/2013, paragraph 6 and Resolution 5/2015, paragraph 3.

38 Resolution 8/2013, paragraph 8

and Resolution 5/2015, paragraph 6.

39 A recent example is the 2015 Consultation on the Global Information System: there were 10 participants representing governments from the different regions and seven experts, but no farmer representative

(see www.planttreaty.org/sites/default/files/COGIS1re.pdf). Another example is the 2013 meeting of the *Ad Hoc* Advisory Committee on the Funding Strategy, in which 11 government representatives participated, again with no farmer representatives (see www.planttreaty.org/sites/default/files/COGIS1re.pdf).

Interestingly, the list of participants of a closed meeting of the co-chairs of the Committee and co-leads of the working group indicates seven participants, including two industry representatives (Syngenta), and yet still no farmers.

eral reasons. Sometimes meetings are held at short notice, making it difficult for farmer organisations to organise their participation.⁴⁰ Usually there is no financial support for such participation, and the late notice makes it even more difficult to find the necessary funds. The concern of short notice also extends to other aspects such as limited time to respond to electronic consultations.⁴¹

More generally, there are no formal rules firmly establishing the right of farmers to participate in processes of the Treaty such as working groups and committees. This means that participation is on an *ad hoc* basis and very much depends on the terms of reference and rules of procedure of the relevant working group or committee, as well as the decision (resolution) taken by the Governing Body.⁴² This is in contrast to the institutionalised participation of farmer groups in the Committee on World Food Security, or of indigenous peoples and local communities in the CBD processes, as discussed in Chapter 4.

Farmers also do not have a seat in the Benefit Sharing fund under the Treaty and therefore have no say in the allocation of funds⁴³ although the fund is for implementation of the Treaty, wherein Farmers' Rights are an essential component, and Article 18.5 of the Treaty explicitly states that implementation of plans and programmes for farmers in developing countries who conserve and sustainably utilise plant genetic resources for food and agriculture should be prioritised for funding.

It is also often the case that for specific events such as high-level segments or opening addresses, or events at the regional level, the farmer representative is selected by the Treaty Secretariat rather than by the farmer organisations themselves.⁴⁴

The paucity of funds has also impacted the holding of consultations on Farmers' Rights, an important forum for exchanging information and identifying the needs of farmers and possible avenues for enhancing implementation of Farmers' Rights. There are no funds in the Treaty's core budget to finance the consultations (global or regional). The request to the Secretariat in Governing Board resolutions on Farmers' Rights to convene regional workshops is also "subject... to the availability of financial resources."⁴⁵ Consequently such consultations are usually held on an *ad hoc* basis, dependent on the availability of financial support (often limited), and on a voluntary basis by one or a few national governments. The Treaty then is limited

to being a co-organiser and sometimes only a participant in such events.

Effective participation of farmers is also hindered by lack of translation facilities. For example, while the main plenary sessions may have interpretation services, the smaller negotiating groups and meetings may not. On a number of occasions La Via Campesina has had to arrange and finance its own interpretation facilities to enable its participation.⁴⁶

The Treaty, in wanting to have a wider reach, does from time to time undertake web-based consultations. However, such a format is often not appropriate for farmers and farmer organisations in developing countries that may have only limited access to the internet.

These are some of the points that highlight how there is much to be desired with respect to farmers' participation in the decision-making processes of the Treaty and its related processes and initiatives. If the Treaty is to truly realise Farmers' Rights, in partnership with farmer organisations, it should examine how to improve farmers' involvement and engagement in its processes and initiatives in a way that enables farmers to guide the outcomes. In doing so, the Treaty may draw on good practices and standards in other fora (see discussion in Chapter 4).

40 One example is the next meeting of the *Ad Hoc* Technical Committee on Sustainable Use (ACSU) to be held on 24 October 2016: the notice only went out on 2 September. Another is the joint Treaty/UPOV symposium on interrelations between UPOV and the Treaty in the context of Farmers' Rights, scheduled for 26 October 2016; no official notification has been sent at the time of writing.

41 According to Guy Kastler from La Via Campesina, the latest consultation on Farmers' Rights

was done electronically and scheduled to last only one month. Initially La Via Campesina refused to respond due to the short duration which would not allow for internal consultations. The Secretariat then agreed to prolong the consultation period by another two months. Source: discussion between Laurent Gaberell from Public Eye and Guy Kastler from La Via Campesina on 7 September 2016.

42 For example, while Governing Body Resolution 4/2015 on

sustainable use explicitly invited inputs from farmers' organisations and the terms of reference of the ACSU provide for the participation of 10 experts, including from farmers' organisations (www.fao.org/3/a-bl143e.pdf?q=content/resolution-042015-implementation-article-6-sustainable-use-plant-genetic-resources-food-and-), this is not the case with the funding strategy (www.planttreaty.org/sites/default/files/RES2_Implementation_Funding_Strategy.pdf) or the

Global Information System (www.planttreaty.org/sites/default/files/RES3_GLIS.pdf).

43 For a list of the Panel of Experts that review proposals for funding that should be supported, see www.fao.org/plant-treaty/areas-of-work/benefit-sharing-fund/panel-of-experts/en/

44 Discussion with La Via Campesina on 7 September 2016.

45 See Resolutions 6/2009 (paragraph 3) and 6/2011 (paragraph 4).

46 Discussion with La Via Campesina on 7 September 2016.

3

Challenges in Farmers' Participation

SELECTED NATIONAL, REGIONAL AND INTERNATIONAL EXPERIENCES

This chapter looks at the challenges farmers face at the national, regional and international levels in advocating for Farmers' Rights and the on-the-ground realities within which farmers asserting their right to participate operate. Understanding the challenges is a crucial step to identifying components that are imperative for Article 9.2(c) implementation.

The cases that have been selected reflect the pressures faced by many developing countries to adopt seed laws that affect Farmers' Rights, especially to accede to UPOV 1991 and/or to enact national and regional laws based on UPOV 1991, including through trade agreements. The cases provide a snapshot of the challenges in operationalising Article 9.2(c) applicable also to many other developing and developed countries in relation to participation in policy- and law-making, including on plant variety protection (PVP) and seed registration and marketing.

3.1 – NATIONAL EXPERIENCES

A) COLOMBIA

Colombia, a member of the Andean Community,¹ signed the Treaty in 2002, but has yet to ratify it. It has also been a member of UPOV 1978 since 1996.

In 1992, a draft plant breeders' rights bill modelled on UPOV 1991 was tabled in the Colombian Congress, written by proponents of a strong intellectual property regime without any involvement of farmers or CSOs. Once alerted, CSOs pushed for amendments that included rights for farmers and local communities and these were accepted by the Senate.²

However, concerned about the precedent it might set for other Latin American countries, industry and UPOV that had prepared the initial draft advocated for an Andean pact based on UPOV 1991, resulting in Decision No. 345 (Establishing the Common Regime on the Protection of the Rights of Breeders of New Plant Varieties) in 1993.³ On this decision Velez notes: "This decision legally binds all Andean Pact [now Andean Community] countries to establish UPOV-like plant breeders' rights legislation. No mention of farmers and local communities as innovators, no worry about genetic erosion ... With a stroke of the pen – and without any public discussion at the national levels – the Andean Countries were neatly brought into no-nonsense UPOV spheres."

Nevertheless, as a result of intense lobbying by NGOs and others in 1993, Decision No. 345 also required member countries, before 31 December 1993, to approve common provisions governing access to biogenetic resources and guaranteeing the biosecurity of the region, pursuant to the provisions of the Convention on Biological Diversity.

A wide coalition of NGOs, indigenous peoples' representatives, farmer groups, black and local community leaders, lawyers and people from several state universities formed an *Ad Hoc* Working Group in 1994 to closely monitor and influence developments in relation to common provisions governing access to biogenetic resources. At the governmental level, a Colombian proposal was drafted after extensive national and local consultations, and included a *sui generis* Special Access Regime dealing with the genetic resources of local communities.

In 1996, changing direction, Colombia decided to accede to UPOV 1978 instead of pursuing a *sui generis* option.⁴ Soon after, Colombia entered into a Trade Promotion Agreement (TPA)

1 Colombia, Venezuela, Ecuador, Peru and Bolivia are members of the Acuerdo de Cartagena, a Latin American trade zone. Decisions of the Commission of

the Andean Community are legally binding on its members. 2 Velez, G. and GRAIN, *Biodiversity Sell-Out in the Andean Pact?* (1995), GRAIN.

3 www.wipo.int/wipolex/en/details.jsp?id=9417. At the same time, Decision No. 344 (Establishing a Common Regime in Industrial Property) was also

passed; see www.wipo.int/wipolex/en/text.jsp?file_id=223745#tab2

with the US that entered into force on 15 May 2012.⁵ The TPA was negotiated without any public participation and required accession to UPOV 1991 by 1 January 2008 or the date of entry into force of the agreement, whichever was later.

On 15 April 2012, President Juan Manuel Santos signed into law the bill approving Colombia's accession to UPOV 1991, and transmitted the law and the UPOV Convention for review by the Constitutional Court.⁶

On 5 December 2012, the majority of the Constitutional Court ruled that Law No. 1052 violated the Constitution because indigenous and Afro-Colombian ethnic groups who would be directly affected by the law were not consulted prior to its enactment.⁷ The court concluded that there should have been a prior consultation with indigenous and Afro-Colombian groups regarding the effect of Law 1518 because UPOV 1991 "directly regulates substantial matters that concern those communities." The court opined that much of the intellectual property involved in improving and diversifying plant varieties consists of "ancestral knowledge of these peoples." In the court's judgment, "the imposition of... restrictions on new plant varieties as enshrined in UPOV 1991 could limit the natural development of the biodiversity which is a product of the conditions of the ethnic, cultural, and ecosystems inhabited by such peoples."⁸

To date, Colombia has not acceded to UPOV 1991.

The case of Colombia shows a shift in policy from a *sui generis* direction favourable to farmers and the safeguarding of traditional knowledge and local genetic resources – when farmer and civil society organisations were engaged in the policy-making process – to the UPOV option as forces supportive of the latter gained more influence in decision-making. In this case, the Constitutional Court presented indigenous communities, many of whom are farmers, an avenue to raise their concerns and to balance the failure of the executive arm of government to consult indigenous peoples and farmers.

Nevertheless, the final decision on policy and law still remains with the executive and legislative parts of government, and thus meaningful participation mechanisms and processes that allow for effective influencing of decision-making remain crucial. Judicial awareness and independence can then safe-

guard those rights and provide the needed system of checks and balances.

B) GUATEMALA

Guatemala is a party to the Treaty. In 2005, when Guatemala signed the US-Dominican Republic-Central America Free Trade Agreement (US-DR-CAFTA), it was legally obliged to become a member of UPOV 1991.

In 2014, the Congress of Guatemala legislated a PVP law to pave the way for accession to UPOV 1991. The law *inter alia* criminalised the use, exchange and sale of farm-saved seed of a PVP-protected variety and made it punishable with one to four years in prison and a fine of between 1,000 and 10,000 quetzals (US\$130– 1,300).⁹ The law was drafted with the support of the UPOV Secretariat and without any consultation with farmers, indigenous groups and other parts of civil society that would be affected by the law.¹⁰

This controversial PVP law triggered mass protests in the country, with indigenous and small-scale farmers in Guatemala referring to it as the "Monsanto law". A large part of Guatemala's population, of whom more than half are indigenous people, depend on agriculture for their livelihoods and food security. Some 80% of seed production comes from small farmers who produce most of the country's staple food. Therefore, the PVP law was seen as a violation of the rights of indigenous peoples as well as a threat to food security.

The matter was taken to the Constitutional Court, which on 29 August 2014 ruled to suspend the law based on demands of different farmers' organisations and CSOs. On 5 September 2014, the Congress of Guatemala repealed the PVP law, stalling Guatemala's accession to UPOV 1991.

A broad civil society alliance mobilised through the indigenous national platform Mesa Nacional Indígena played an instrumental role in convincing the Constitutional Court, government and Congress that the PVP law was detrimental to the country and its peoples. The Guatemalan experience shows that a broad alliance with active participation of farmers and indigenous peoples can succeed in ensuring Farmers' Rights against

4 In 1996, Colombia's Constitutional Court had considered the effect of Colombia's accession to UPOV 1978. The Court found that it was necessary to protect traditional farming and production practices of minority groups, such as indigenous peoples and Afro-Colombian communities. The disruption of such practices can harm minority communities by causing cultural disintegration, malnutrition, and diminished health and well-being, and can threaten the very survival of those minority populations: Sentencia C-262/96 (Corte Constitucional de Colombia 1996). See aiph.org/new/colombian-court-strikes-down-law-approving-1991-upov-convention/

5 Due to an extended dispute within the US Congress over domestic concerns with the TPA and protests over Colombia's labour standards, ratification by the US Congress was delayed.

6 Article 241 of Colombia's Constitution requires its Constitutional Court to approve the ratification of international treaties like UPOV 1991. It states: "Decide in definitive manner on the constitutionality of international treaties and the laws approving them. For this purpose, the government will submit them to the Court within the six days subsequent to their

sanction by law. Any citizen may intervene to defend or challenge their constitutionality. Should the Court declare them constitutional, the government may engage in a diplomatic exchange of notes; in the contrary case the laws will not be ratified. When one or several provisions of a multilateral treaty are declared invalid by the Constitutional Court, the President of the Republic alone may ratify it, under reserve of the offending provision."

7 aiph.org/aiph_new/colombian-court-strikes-down-law-approving-1991-upov-convention/ See Sentencia C-1051/12 (Corte Constitucional de

Colombia), 5 December 2012. URL: www.corteconstitucional.gov.co/comunicados/No.%2050%20comunicado%2005%20y%2006%20de%20diciemb re%20de%202012.php

8 *Ibid.*

9 GRAIN, *Seed laws that criminalise farmers: additional country experiences* (2015).

10 Extracts from a translation of an article published in Norway titled "Social mobilisation crowned with victory". The original article is here: www.utviklingsfondet.no/nyheter/sosial_mobilisering_kronet_med_seier

the dictates of a free trade agreement and powerful seed industry interests.¹¹

C) PERU

Peru, a member of the Andean Community, became a party to the Treaty in 2003.

The 1996 PVP regulations in Peru came about following the adoption of Andean Community Decision No. 345 that established a common PVP regime based largely on UPOV 1991 (but not fully compliant with it). According to a Human Rights Impact Assessment (HRIA) study, this move was more the result of international pressures (WTO membership, and active lobbying by UPOV Secretariat officials) than of specific national economic and technological needs and requirements from Andean countries and their breeding sectors. No social or economic analysis was undertaken prior to adopting the regional PVP system.¹²

Decision No. 345 also called for the development of an Andean regime on access to genetic resources and benefit-sharing (ABS) and on biosafety, a victory claimed by CSOs in their pushback against Decision No. 345 (as discussed above).

This resulted in the 1996 Peruvian PVP regulations incorporating disclosure requirements based on the 1996 Andean Community Decision No. 391 (Establishing the Common Regime on Access to Genetic Resources).¹³ Article 15(e) of the regulations required applications for plant breeders' rights to contain "*the geographical origin of the raw plant material of the new variety to be protected*, including, as the case may be, the document that proves the legal origin of the genetic resources, issued by the Competent National Authority as regards access to genetic resources" (emphasis added). Disclosure of origin and legal provenance is a well-recognised tool to fight illegal utilisation of genetic resources and traditional knowledge and to promote fair and equitable benefit-sharing.

When it entered into the US-Peru Free Trade Agreement (FTA) in 2006, Peru was obligated to join UPOV 1991 by 2008. Prior to the domestic implementation of the FTA, Peru saw a lively national debate about its likely impacts, mobilised mostly by civil society. The public debate and criticisms did not, however, translate into a transparent and participatory process, and

many civil society groups criticised the lack of participation and transparency in the FTA negotiations.¹⁴

In 2011 Peru amended its 1996 regulations and removed Article 15(e) from its legislation in order to become a member of UPOV 1991 on 8 August 2011.¹⁵

According to Peruvian officials, the new draft regulations were posted on the website of the PVP Office for comments, but none were received. The above HRIA study concluded: "Web-posting, the conventional way of making official documents available for comment, appears inadequate as a mode of consultation here as communities in the Andean and Amazonian regions have limited access to the Internet, and the texts are not made available in indigenous languages (only Spanish is used)."¹⁶ It added: "Leading human rights scholars have noted that procedures of 'participation are [...] of limited practical significance where membership in a particular cultural community has the effect of excluding citizens from [...] influence'.¹⁷

Without disclosure requirements, the ability of Peru to fulfil its obligations under the Treaty, the CBD and its Nagoya Protocol is reduced. As a country with a large population of indigenous peoples and a government that recognises the rights of those peoples, Peru's ability to meet its commitments under UN-DRIP is also affected.

The lack of public participation, especially the participation of farmers (of whom many are indigenous people and women), in the negotiation and subsequent implementation of FTAs (see also Section 3.3 below) has contributed to the current situation where the realisation of Farmers' Rights is considerably weakened.

D) GHANA

Ghana became a party to the Treaty in 2002.

In 2013, civil society groups under the umbrella of Food Sovereignty Ghana (FSG) launched a national campaign against the Plant Breeders' Bill¹⁸ that would have enabled the government to accede to UPOV 1991.¹⁹ Farmers' organisations, faith-based groups and CSOs expressed serious concerns over the lack of public consultation and the content of the Bill (in particular, the undermining of Farmers' Rights) and over Ghana's intention to join UPOV 1991.

11 *Ibid.*

12 Owning Seeds, Accessing Food (2014), p. 38.

13 Supreme Decree No. 008-96-ITINCI, 3 May 1996, Regulations for the Protection of Plant Breeders' Rights. Disclosure requirements are also contained in the Andean Community Decision No. 486 of 2000 (Establishing the Common Industrial Property Regime) that covers traditional knowledge as well.

14 Owning Seeds, Accessing Food (2014), p. 38. A small number of CSOs and academics were invited to information meetings

on the FTA negotiations but CSO presence was the exception rather than the rule.

15 Owning Seeds, Accessing Food (2014), p. 42: "Already in 2003 the UPOV Council wrote that 'With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, [...] the UPOV Convention requires that the breeder's right should not be subject to any further or different conditions than

[distinctness, uniformity, stability and novelty] in order to obtain protection' (UPOV, 2003). Furthermore, informed sources who choose to stay anonymous have reported that UPOV staff have advised countries (for example, Malaysia and Egypt) considering UPOV ratification to delete the disclosure requirement in their national PVP laws to bring them into conformity with UPOV." In light of this position, Article 15(e) of the Peruvian PVP regulations would most likely not have been accepted if Peru had asked the UPOV Council to advise it in

respect of the conformity of its laws with UPOV 1991.

16 Owning Seeds, Accessing Food (2014), p. 39.

17 Owning Seeds, Accessing Food (2014), p. 39, quoting Marks, S. and Clapham, A., *International Human Rights Lexicon* (2005), Oxford University Press, Oxford.

18 www.parliament.gh/publications/36/560

19 www.apbrebes.org/news/massive-protests-ghana-over-upov-style-plant-breeders-bill. See also www.apbrebes.org/news/ghana-csos-continue-protest-against-plant-breeders-bill?pk_campaign=NL9

Civil society sent a petition to parliamentarians calling for specific changes to the Bill that would, *inter alia*, require PVP applications to include disclosure of origin, be compliant with access and benefit-sharing principles and allow farmers to save, use, sow, re-sow, exchange, share or sell farm-saved seed of a protected variety.²⁰

FSG was then invited to a meeting on 4 December 2013 with the Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs to discuss issues raised in the petition. However, the Bill remained unchanged.

The public campaign escalated in early 2014 when farmer, religious, political and civil society organisations and labour unions took to the streets of the capital, Accra, on 28 January to demonstrate against the adoption of the Bill.

A letter dated 20 February 2014 from 51 NGOs and networks from around the world, titled "Ghana's Plant Breeders Bill Lacks Legitimacy! It Must Be Revised",²¹ was sent to the Speaker of the House, Edward Korbly Doe Adjaho, the Chairperson of the Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs, Alban Kingsford Sumana Bagbin, and all Members of Parliament. It urged Parliament to refrain from adopting a Bill that, in its current form, lacked credibility and legitimacy and did not benefit Ghana. The signatories called for extensive consultations involving all stakeholders, including the farming communities and civil society, to be initiated urgently with the aim of developing balanced and equitable legislation with appropriate safeguards to protect the interests of smallholder farmers and public interests.

The mobilisation delayed the passing of the Bill as public debate continued. On 11 November 2014 when Parliament met, the Speaker suggested that the Bill be further considered due to the public outcry, and that more consultations be undertaken.²²

Three years since its launch, the national campaign has continued. Farmers' and civil society organisations including FSG have been pressing the government to reject UPOV 1991 and withdraw the Plant Breeders' Bill as well as to honour its obligations under the Treaty and the CBD by using the flexibility provided under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to legislate a *sui generis* PVP law that is appropriate for Ghana.

In a radio interview on 16 March 2016, the Vice-Chairperson of the Parliamentary Select Committee on Constitutional, Legal and Parliamentary Affairs, George Loh, reportedly said: "We have done extensive consultations. We even did two consultations carried live on television with all stakeholders. So, nobody can pretend that we haven't spoken to people... If after consultations, you do stand where you are, fine! We have consulted."²³

FSG expressed its surprise at this claim and questioned how a 4 December 2013 meeting could be considered as part of the

"further consultations" called for by the Speaker on 11 November 2014, almost a year later.²⁴

Subsequently in April 2016, it was reported that Ghana's Parliament announced that it would provide "organisations and the general public the unique opportunity to have their say in the passage of any law" through a Bill Symposium Series. FSG responded by making a public call for Parliament to completely withdraw the Plant Breeders' Bill and replace it with a *sui generis* PVP system suitable to the country's conditions.²⁵

FSG also reiterated its call for the publication of the consultation report. It noted that "it is almost three years now since these consultations begun. We are also aware that a lot of petitions have been presented to Parliament. It does no one any good to ignore all these and organise a one-day symposium to replace such valuable and detailed work already presented to Parliament over the years... None of the demands by Ghana's civil society and faith-based organisations have been included. For there to be a meaningful symposium, it would be professional to publish first the report on all the consultations, together with the proposed changes as a result of these consultations, so the symposium could serve as our final comments on this report. Otherwise, this symposium appears to be yet another convenient excuse to avoid accounting for the consultations so far and hiding under a symposium to pursue the same agenda (of passing the controversial law)."²⁶

Ghana's experience shows that even when there is concerted and organised protest and advocacy sustained over many years, supported by social and legal research and analysis, the absence of meaningful participatory mechanisms and processes results in "consultations" that are more "lip service" than actual participation in decision-making.

However, it is encouraging that the Ghanaian people's mobilisation involves a broad alliance, including farmers' organisations, faith-based and civil society organisations, and continues to make demands that are in line with Ghana's rights under the Treaty, the CBD and the WTO-TRIPS Agreement.

E) KENYA²⁷

Kenya joined UPOV 1978 in 1999 and recently ratified UPOV 1991. It became a party to the Treaty in 2003.

In 2012, Kenya amended its seeds and PVP legislation to bring it into compliance with UPOV 1991. The amendments, which came into force in 2013, had a significant impact on Farmers' Rights. For example, while prior to the amendments, the legislation did not contain any provision restricting farmers from saving, reusing and exchanging farm-saved seed/planting materials of a protected variety, the 2012 amendments introduced UPOV 1991 requirements, with the consequence that farmers' right to freely use, sell and exchange farm-saved seed of a protected variety was restricted.

20 foodsovereigntyghana.org/petition-to-parliament-on-the-plant-breeders-bill-2013/

21 www.twn.my/title2/biotk/2014/btk140211.htm

22 www.parliament.gh/publications/30/906

23 foodsovereigntyghana.org/publish-report-on-consultations-over-plant-breeders-bill/

24 *Ibid.*

25 foodsovereigntyghana.org/replace-plant-breeders-bill-with-a-sui-generis-pvp-system/

26 *Ibid.*

27 The discussion on Kenya is extracted from *Owning Seeds, Accessing Food* (2014), pp. 37-38.

A study on Kenya and its PVP system reported, "Other than the Seed Trade Association of Kenya (STAK) and Kenya Plant Health Inspectorate Service (KEPHIS), no association (including farmers' associations) reported having been consulted or contributing to the process leading to the enactment, and 'neither the Ministry of Agriculture nor KEPHIS allude to having engaged in consultations with farmers'."²⁸ The study also found a lack of information and participation related to regional (African) efforts to harmonise seed legislation and plant breeders' rights laws based on UPOV 1991²⁹ (see discussion in Section 3.2(a) below).

Proponents of the adoption of the UPOV 1991-consistent amendments in Kenya were mainly driven by the rationale of boosting trade in agricultural products at the regional and international levels, pointing to the success of the Kenyan flower industry as the best example to justify this reasoning.³⁰ However, the flower industry has been booming since 1988 (i.e., even before PVP was introduced) and continued to boom under the previous law.³¹

THE PHILIPPINES³²

The Philippines became a Contracting Party to the Treaty in 2006.

It is a legal requirement in the Philippines to hold public consultations on new legislation, and the abovementioned HRIA study reported that consultations on the Philippine PVP Act had been held. One government official interviewed mentioned extensive consultations involving multiple sectors and including indigenous peoples' interests. However, other informants indicated that consultations had only been conducted at a very late stage of the process (after the drafting process and after the bill had been filed in Congress).

There was no evidence that the government mandated any assessments of the likely impacts of revised PVP legislation. Compliance with the WTO's TRIPS Agreement was cited as the main reason for the enactment of the PVP law. One NGO representative noted that "key personalities from the public research institutions and the International Rice Research Institute (IRRI) actively lobbied Congress and used their influence to ensure the enactment of the law. The Department of Agriculture's policy and planning office also actively pushed for the bill." Interestingly, there was little involvement of the Philippines' seed industry in the lobbying stage – probably due to the lack of a robust domestic seed industry.

Several informants for the HRIA study mentioned a "push" from USAID (US Agency for International Development)-fund-

ed think-tank AGILE, and all those spoken to for the study agreed that AGILE was a major player, and "was there inside the bicameral conference committee advising the bicameral panel".

However, a farmers' exception provision on saving, re-using, exchanging and selling of farm-saved seeds was included in the law that was finally enacted, testifying to civil society's and farmers' groups' involvement, albeit at a late stage in the process. An earlier version of the PVP bill also had strong provisions in favour of indigenous people and traditional knowledge protection, but those were taken out of the final act because a separate Indigenous Peoples' Rights Act had been enacted at that time.

The HRIA study concludes that the inclusion of exceptions to breeders' rights in order to better protect Farmers' Rights was probably not a coincidence. This is because the process in the Philippines was the only one (among the three countries examined in the study, the other two being Kenya and Peru) where adherence to UPOV 1991 was not an implicit goal of the reform of the PVP law. If it had been the implicit goal, there would have been almost no room for manoeuvre, because the law would have to be in compliance with UPOV 1991. In such a case, even if stakeholders were consulted, they would not have had a big impact, as UPOV 1991 does not provide much flexibility in national implementation.

3.2. – REGIONAL EXPERIENCES

A) ARUSHA PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS 2015

On 6 July 2015, in Arusha, Tanzania, a Diplomatic Conference held under the auspices of the African Regional Intellectual Property Organization (ARIPO)³³ adopted a harmonised regional legal framework for the protection of plant breeders' rights, the Arusha Protocol for the Protection of New Varieties of Plants (Arusha Protocol).

This was greeted with chagrin by farmers' organisations and CSOs in the region grouped under the Alliance for Food Sovereignty in Africa (AFSA).³⁴ AFSA has, since late 2012, sought to actively engage with the ARIPO Secretariat and member states.

For farmers and civil society, the Arusha Protocol raises significant concerns as it is modelled on UPOV 1991, a regime designed to accommodate the interests of the large-scale commercial farming sector in industrialised countries. Such a regime is considered to be inappropriate for the ARIPO region as 13 of the 19 ARIPO member states are categorised by the UN as least de-

28 Owing Seeds, Accessing Food (2014), p. 37.

29 *Ibid.*

30 Owing Seeds, Accessing Food (2014), pp. 37–38.

31 *Ibid.*

32 The Philippine discussion is extracted from the Owing Seeds, Accessing Food HRIA

report (2014), p. 39. The HRIA project contacted a range of actors who had been involved in 2001-2002 in the drafting and/or enactment of the Philippine Plant Variety Protection Act and its implementing instruments. These included key officials from the Department of Agriculture,

the Institute of Plant Breeding at the University of the Philippines Los Baños, staff of the NGO SEARICE, and technical consultants of the Agriculture Committees of the House of Representatives and the Senate.

33 The ARIPO members are Botswana, Gambia, Ghana,

Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, São Tome and Príncipe, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

veloped countries and agriculture in the region is largely dependent on small-scale farmers who rely heavily on informal systems for access to seeds, irrespective of the varieties the farmers cultivate.³⁵

Farmers and civil society are also concerned that the Protocol severely restricts the ability of farmers to freely use, save, exchange and sell farm-saved seeds/propagating materials of a protected variety, lacks safeguards to prevent misappropriation of genetic resources, and adversely impacts the sovereign rights of member states as the Protocol is about adopting a centralised system for the grant and administration of plant breeders' rights, meaning that issues which are usually in the hands of national governments would be determined centrally by the ARIPO Secretariat.

The whole process of developing the Protocol has been extensively criticised for being dominated by foreign interests and for failing to adequately inform and include small farmers' groups from across the ARIPO region.

In January 2016, AFSA issued an open letter³⁶ to all UPOV members expressing its outrage at the "deliberate" exclusion of African civil society and representatives of smallholder farmers from key negotiation processes leading to the adoption of the Arusha Protocol. This letter came in response to an ARIPO representative, Emmanuel Sackey, informing the 49th session of the UPOV Council that CSOs had been able to participate in the whole process of developing the Protocol.

AFSA's letter stated that its numerous direct requests to the ARIPO Director-General and even to the Tanzanian government, the host of the Diplomatic Conference to adopt the Protocol, to allow AFSA to participate "were pointedly ignored". However, at the same time, "the ARIPO Secretariat facilitated the participation of representatives of foreign entities and the seed industry, including the World Intellectual Property Organization (WIPO), the EU Community Plant Variety Office (CPVO), the French National Seeds and Seedlings Association (GNIS), the United States Patent and Trademark Office (USPTO) and the International Union for the Protection of New Varieties of Plants (UPOV)".

The letter also documented the multiple submissions³⁷ AFSA had sent to the ARIPO Secretariat expressing concerns over the content of the Protocol and its process, the lack of in-

formation from the ARIPO Secretariat, the efforts that AFSA had made to seek participation in regional meetings and workshops, the limited representation allowed on some occasions with costs to be borne by civil society, and the exclusion of farmers and CSOs from some of the key meetings including the Diplomatic Conference that adopted the Protocol.³⁸

Notably, AFSA asserted in the letter that ARIPO's written response to the abovementioned detailed concerns raised by organisations from the sub-Saharan region, although made available to ARIPO members, was never officially communicated to the signatories that had raised the concerns. Nevertheless, on gaining a copy of this response, AFSA sent to the ARIPO Director-General a detailed reply, countering with evidence key points of ARIPO's response.³⁹

AFSA further noted that the "ARIPO Secretariat has never bothered to make the process transparent, open or inclusive and neither has it shared any information concerning the process", stressing that "the process for developing this legal framework is driven by foreign entities with vested interests and not by the needs and interests of the people in the region."

AFSA considered the actions of ARIPO to be a "violation" of Article 9.2(c) of the Treaty, given that the Arusha Protocol has major implications at the national level for the ARIPO members that are also members of the Treaty. It added that the lack of effective public consultation may also be inconsistent with the constitutions of several ARIPO countries which require prior public consultation.

International organisations such as UPOV and WIPO had intentionally enabled the non-fulfilment of Article 9.2(c) of the Treaty, AFSA argued in its letter, while expressing disappointment with the role the CPVO played in supporting this process, considering that members of the European Union are also members of the Treaty.

This case shows clearly that regional lawmaking has significant national implications. The Arusha Protocol sets centralised standards in relation to the substantive and procedural aspects of PVP that will bind national governments that ratify the Protocol.

There was no information available at the national level as well on the ARIPO discussions, nor was there any inclusive public discussion. For example, the HRIA study of Kenya in relation to PVP found that organisations in Kenya (an ARIPO

34 AFSA Press Release, *ARIPO Sells Out African Farmers, Seals Secret Deal on Plant Variety Protection*, 8 July 2015. AFSA is a pan-African platform comprising civil society networks and farmer organisations working towards food sovereignty in Africa, representing smallholder farmers, pastoralists, hunter/gatherers, indigenous peoples, citizens and environmentalists. Members of AFSA include networks and farmer organisations working in Africa including the African Biodiversity Network (ABN), Coalition for the Protection of African Genetic

Heritage (COPAGEN), Comparing and Supporting Endogenous Development (COMPAS) Africa, Friends of the Earth- Africa, Indigenous Peoples of Africa Coordinating Committee (IPACC), Participatory Ecological Land Use Management (PELUM) Association, Eastern and Southern African Small Scale Farmers' Forum (ESAFF), La Via Campesina Africa, FAHAMU, World Neighbours, Network of Farmers' and Agricultural Producers' Organizations of West Africa (ROPFA), Fellowship of Christian Councils and Churches in West Africa (FECCIWA),

African Centre for Biosafety, Rural Women Forum, Ground Swell Africa, Tanzanian Biodiversity Organizations, ANORAF Togo and Plate forme Sous Régionale des Organisations Paysannes d'Afrique Centrale (PROPAC).

35 More than 80% of all seed in Africa is still produced and disseminated through "informal" seed systems: Smale, M., Byerlee, D. and Jayne, T., *Maize revolutions in sub-Saharan Africa* (2011), Policy Research Working Paper 5659, World Bank Development Research Group, p. 7.

36 AFSA open letter to members of UPOV, 28 January 2016. URL: afsafrica.org/open-letter-to-members-of-the-international-union-for-the-protection-of-new-varieties-of-plants-upov-2/

37 See acbio.org.za/wp-content/uploads/2015/02/CSOconcern-sonARIPO-PVPframework1.pdf and acbio.org.za/wp-content/uploads/2015/02/AFSA-Submission-ARIPO-PVP-Protocol.pdf

38 *Ibid.*

39 See acbio.org.za/wp-content/uploads/2015/02/AFSA-letter-ARIPO-March2014-.pdf

member) such as the Kenya National Federation of Agricultural Producers (KENFAP) were not aware of, involved in or consulted in the ARIPO process.⁴⁰

B) COMESA SEED TRADE HARMONISATION REGULATIONS 2014

On 24 February 2014, the Council of Ministers of the Common Market for Eastern and Southern Africa (COMESA) approved the COMESA Seed Trade Harmonisation Regulations. The Regulations allow for the expedited registration of seeds to enable the creation of a seed free trade zone within the COMESA region.

However, civil society attempts to engage came late in the process, which had already started in 2008 when the COMESA Council of Ministers declared that COMESA should urgently rationalise and harmonise seed regulations and policies in its 19 member states within two years. The seed industry and formal seed sector were very much involved. However, CSOs were not aware of the COMESA proceedings until 2013, by which time the process was already at a very advanced stage. After much persuasion and persistence, a group of concerned CSOs managed to gain access for a representative to meetings in Harare and Lusaka. At first they were told that they were not invited to consultations because they had no knowledge about seed laws and issues concerning seed variety release, certification and so forth. When attending the first meeting in Harare, the CSO representative, who made a presentation raising concerns especially over impacts on smallholder farmers, was even ridiculed by many of the government officials present.⁴¹

At a USAID-supported regional workshop conducted in March 2013, CSOs and smallholder farmers through AFSA expressed serious concerns over the substance and process of the COMESA initiative.⁴² One concern voiced in their statement was that "seed trade" is not defined in the Regulations as being restricted to only the commercial seed sector, raising concerns that they do not provide any safeguards that small farmers will be allowed to freely use, save, sell, barter and exchange traditional varieties of seed. This lack of safeguards would open the door for the criminalising of the customary practices of small farmers to exchange, sell and other use of traditional seed [sic] within the COMESA region".⁴³ Thus they sought the inclusion of an appropriate safeguard in the text.⁴⁴

On the process, their statement described it as "flawed", because "there is no evidence to demonstrate the involvement of and consultation with the citizens in COMESA countries, par-

ticularly small-scale farmers. It is our view that a technical group from COMESA countries in collaboration with the African Seed Trade Association (AFSTA) and Alliance for Commodity Trade in Eastern and Southern Africa (ACTESA) and funded by USAID, deliberated on the issues and drafted regulations that are now said to be ready for submission to COMESA member state governments for endorsement during May/June 2013, when they will become binding on all member states of the COMESA region. The Regulations have far-reaching implications for millions of small farmers in the COMESA region. Their exclusion from the process renders it deeply flawed and inadequate."

Following the approval of the Regulations, national implementation is now the focus. The COMESA Seed Harmonisation Implementation Plan 2014-2020 (COM-SHIP) was developed by the COMESA Secretariat and ACTESA to guide and support member states in implementing the Regulations. The Executive Summary of COM-SHIP notes that "COMESA, with support from its Specialised Agency, the Alliance for Commodity Trade in Eastern and Southern Africa (ACTESA), and in conjunction with the African Seed Trade Association (AFSTA) led the baseline analysis development, stakeholder engagement and review and finalisation of the COMESA Seed Trade Harmonisation Regulations."⁴⁵ AFSTA is a continent-wide umbrella body representing the private seed industry.

It further adds that COM-SHIP "was developed from the ground up with extensive involvement of national governments and local and regional industry stakeholders".⁴⁶

Thus, in addition to PVP laws based on UPOV 1991, smallholder farmers in Africa also have to face challenges to their rights posed by seed laws, with little or no participation in decision-making on those seed laws when regional harmonisation takes place which limits the options for national policies and laws.

C) SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) DRAFT PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS⁴⁷

Another regional harmonisation effort that triggered smallholder farmer and CSO concerns was the draft SADC Protocol for the Protection of New Varieties of Plants modelled on UPOV 1991.

The first civil society submission was made on 2 April 2013 by 33 signatories from the SADC region, 18 from other African countries and 32 from outside Africa.⁴⁸ They comprised farmer and civil society organisations and networks (national to global),

40 *Owning Seeds, Accessing Food* (2014), p. 37.

41 Email communication dated 8 July 2016 with Mariam Mayet, Director of the African Centre for Biodiversity (ACB). ACB is one of the most active research and advocacy organisations in Africa working on Farmers' Rights and seed sovereignty. It is also a member of AFSA.

42 AFSA Press Release, *Comesa*

Approval of Seed Trade Regulations Spells Disaster for Small Farmers and Food Sovereignty in Africa (2013).

43 *Civil Society and Small Holder Farmer Statement at the Awareness Creation on COMESA Seed Trade Harmonisation Regulations for the COMESA Region (27-28 March 2013, Lusaka, Zambia)*.

44 "These Regulations shall apply to

seed varieties developed and released by the commercial/formal seed sector, including those released for commercial use by public institutions and the private sector. Nothing in these Regulations shall preclude, prohibit or inhibit farmers from sharing, exchanging, saving and replanting their traditional seeds for the conservation and development of plant

genetic resources."

45 *COMESA Seed Harmonisation Implementation Plan (2014-2020)*.

46 *Ibid*.

47 This account draws from an AFSA Briefing Paper, *AFSA Makes Small Gains for Farmers' Rights in Draft PVP Protocol* (June 2014).

48 *Civil Society Submission on SADC's Draft Protocol on Plant Breeder's Rights* (2013).

scientists and researchers. Strong concern was expressed that the proposed legal framework was “a restrictive and inflexible legal regime that grants extremely strong intellectual property rights to commercial breeders and that it undermines farmers’ rights.” It was pointed out that there were provisions “that diverge from positions and commitments of SADC members undertaken regionally and internationally around issues concerning community and farmers’ rights as well as plant breeders’ rights.”

The letter stated that most of the SADC members have ratified the Treaty.⁴⁹ In addition, the Council of Ministers of the Organisation of African Unity (predecessor to the African Union) had adopted an African Model Law on “The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources”, and recommended that its members adopt the Model Law. One of the aims of this Model Law is to provide an effective *sui generis* option for plant variety protection relevant to African nations. However, the letter pointed out, “the draft Protocol has simply ignored the Model Law, including critical aspects that are intended to preserve and promote farmers’ rights, crop diversity, and mechanisms to deal with biopiracy and benefit sharing.”

Serious concerns were also raised about the lack of consultation with smallholders and civil society regarding the modelling of the draft Protocol on UPOV 1991 and their exclusion from the drafting of said Protocol. These concerns were heard and addressed by the SADC Secretariat in that some AFSA members (including smallholder farmer representatives)⁵⁰ were invited to participate in an SADC Regional Workshop on 13-14 March 2014 in Johannesburg, South Africa to review the draft Protocol. The seed industry in Africa was well represented at the workshop,⁵¹ as were several farmer unions/associations.⁵²

The proceedings took the form of line-by-line discussions between AFSA members and representatives of the SADC member states on the draft Protocol. The discussions were extremely contentious and often hostile. AFSA members made numerous interventions throughout the proceedings.⁵³ AFSA members repeatedly placed on record their serious objections to the draft Protocol being based on UPOV 1991.

After highly contentious and difficult discussions, AFSA members were able to persuade SADC member states to amend

the provision on “farmers’ exception” and to introduce “disclosure of origin”.

The original text on an exception for farmers⁵⁴ modelled on Article 15(2) of UPOV 1991, was totally unacceptable to AFSA members. They engaged the SADC member states for almost seven hours on this provision alone. They made several recommendations for a substitute clause, some of which were also supported by the FAO representative present. Continued interventions by AFSA members eventually prompted representatives from Botswana and South Africa to support the inclusion of an alternative clause; they worked with AFSA members to draft the following compromise clause on exception to plant breeders’ rights: “acts done by a farmer to save, sow, re-sow or exchange for non-commercial purposes his or her farm produce, including seed of a protected variety, within reasonable limits and subject to the legitimate interests of the holder of the breeder’s right. The reasonable limits and the means of safeguarding the legitimate interests of the holder of the breeder’s right shall be prescribed.”

While this was an improvement on the original clause, a great deal will depend on how “non-commercial purposes”, “reasonable limits” and “safeguarding the legitimate interests of the holder of the breeder’s right” are further elaborated in the implementing regulations if the Protocol does come into being.

SADC member states also agreed to include, as part of the application requirements for plant breeders’ rights, a declaration to the effect that the genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired. This came after much discussion and following a positive intervention from the SADC Secretariat that “we cannot exploit farmers”.⁵⁵

While some space was opened up at the tail end through the participation of AFSA members at the 2014 workshop, the AFSA objections still remain with regard to the draft Protocol being based on UPOV 1991.

Following the March 2014 workshop, a SADC meeting was held a few days before the July 2015 Diplomatic Conference that adopted the Arusha Protocol on PVP discussed above. Some AFSA members were invited but not allowed to make any inputs except through the SADC member states.⁵⁶

49 There are 15 SADC members: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Except for Botswana, Mozambique and South Africa, the other 12 are Treaty Contracting Parties.

50 These included: African Centre for Biosafety (ACB), Zimbabwe Small-scale Organic Farmers Forum (ZIMSOFF), Eastern and Southern Africa Farmers Forum (ESAFF), Centre for Environmental Policy and Advocacy (CEPA), Tanzania Alliance for

Biodiversity (TABIO), Community Development Technology Trust (CTDT) and the Food Sovereignty Campaign/Surplus People’s Project (SPP).

51 Seed Traders Association of Malawi, National Seed Trade Association Angola, Pannar South Africa, Tanzania Seed Trade Association, Zambia Seed Trade Association, Seed Co Zimbabwe and the South African National Seed Organisation.

52 Southern African Commercial Agriculture Union (SACAU), Lesotho National Farmers Union, Small Farmers Welfare Fund Mauritius, Seychelles Farmers Association and Zimbabwean

National Farmers’ Union.

53 SADC, Record of Proceedings of a SADC Regional Workshop to Review the Draft Protocol for the Protection of New Varieties of Plants (Plant Breeders’ Rights) in Southern African Development Community Region. Johannesburg, 13-14 March 2014. Cited in AFSA Briefing Paper (June 2014).

54 The draft Article 28(d) read: “acts done by subsistence farmers for the use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings the protected variety or varieties covered by Article 27(3) (a)(i) or

(ii) to this Protocol.”

55 This account draws from an AFSA Briefing Paper, “AFSA Makes Small Gains for Farmers’ Rights in Draft PVP Protocol” (June 2014).

56 Email communication dated 8 July 2016 with Mariam Mayet, Director of the African Centre for Biodiversity, who was a participant. The SADC Secretariat denied that they had given an opinion to the meeting that CSOs were free to participate in the proceedings. A considerable part of the discussion was on coherency issues between the Protocol and the memorandum of understanding in relation to the SADC Seed Centre.

It is interesting to note that the SADC Treaty obliges member states to treat all the farmers in the region equitably and that SADC is obliged to conduct meaningful consultation⁵⁷ with smallholder farmers to discuss issues of national and regional importance to these farmers, including creating an enabling environment for the protection of farmers' varieties and providing extension support for farmers' seed systems to enable them to flourish.

3.3 – INTERNATIONAL EXPERIENCES

A) INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)

UPOV is a system for the protection of plant varieties, with a mission to encourage development of new varieties of plants “for the benefit of society”. It claims that farmers are one set of beneficiaries of the system. Yet documentation of the contradictions between UPOV and the Treaty shows that apart from the right to participate in decision-making, UPOV's activities are also undermining other farmers' rights.⁵⁸ Available evidence thus suggests that UPOV has been enabling non-fulfilment of Farmers' Rights, including the right to participate in decision-making.

Technical assistance

UPOV is known to support processes that are not participatory or inclusive of farmers or their representatives. For example, the UPOV Secretariat provided extensive technical assistance to the ARIPO Secretariat in the development of the controversial Arusha Protocol (discussed above). The UPOV Secretariat prepared the drafts of the Protocol,⁵⁹ participated as experts in various ARIPO meetings, funded the participation of resource persons in the ARIPO meetings, and co-organised regional workshops and other meetings on the same matter with the ARIPO Secretariat.⁶⁰

Clearly UPOV was in a position to ensure that ARIPO should engage meaningfully with concerned farmer and civil society organisations and to facilitate an open, inclusive and ev-

idence-based discussion on whether UPOV 1991 is an appropriate framework for the region, given that ARIPO members are also Parties to the Treaty. Instead, the UPOV Secretariat continued to support the ARIPO Secretariat in keeping farmer and civil society organisations out of the ARIPO process while accommodating the participation of foreign entities.

It is noteworthy that a document titled “UPOV's training and assistance strategy” (2015)⁶¹ makes no mention of the Treaty or the need to consider Farmers' Rights.

Participation in UPOV governing bodies and access to documents

Historically, UPOV has operated within a closed circle of governments (mainly developed countries) and representatives of the seed industry, with documents in a restricted area accessible only to country representatives.⁶² It has been rather averse to participation of farmers as well as CSOs advocating for Farmers' Rights.

On 21 October 2009, the UPOV Consultative Committee rejected an application for observer status in UPOV bodies made by the Association for Plant Breeding for the Benefit of Society (APBREBES) and the European Coordination Via Campesina (ECVC) comprising 24 farmers' and agricultural workers' unions from across Europe. ECVC is a member of La Via Campesina, the biggest international movement of peasants, small- and medium-sized producers, landless, rural women, indigenous people, rural youth and agricultural workers.

The observer status was sought to enable organisations working on PVP and Farmers' Rights to follow UPOV's inter-governmental discussions on an equal footing with the seed industry which is heavily represented in UPOV.

In a press release, APBREBES and La Via Campesina disputed the reasons given by UPOV for the rejection. They argued that their competence was beyond question⁶³ and the rejection was a violation of UPOV's rules on granting observer status.⁶⁴ According to the statement, “It is truly remarkable that UPOV asserts that other observers, such as the International Association for the Protection of Intellectual Property (AIPPI) has more competence on these issues than one of the world's biggest farmer organisations! In addition, it is widely known that mem-

57 The SADC Treaty principles include human rights and equity: Treaty of the Southern African Development Community, Article 4. See also Article 6(2) on non-discrimination. Article 23(1) obliges SADC “to seek to involve fully, the people of the Region and key stakeholders (including private sector, civil society, NGOs and workers and employers organisations) in the process of regional integration”.

58 Shashikant and Meienberg (2015).

59 ARIPO Document ARIPO/CM/XIII/8 dated 30 September 2011 prepared for the 13th session of the Council of Ministers in Ghana states: “Following the decision of

the Council of Ministers, the ARIPO Secretariat requested technical assistance from UPOV in the preparation of policy and legislative frameworks on the protection of new varieties of plants. As a result of the request, UPOV prepared draft legislative framework for the Organisation.” 60 ARIPO's report to the 14th session of the Council of Ministers (ARIPO/CM/XIV/8) states: “The Secretariat also in cooperation with UPOV organised an expert meeting to review the substantive articles of the legal instrument ... In July, 2013, a regional consultative workshop was organised by

ARIPO in collaboration with UPOV and United States Patent and Trademark Office (USPTO) to bring together experts from the IP [intellectual property] Offices and Ministries of Agriculture to critically examine the substantive articles of the legal texts in order to submit a revised text for consideration by the Fourteenth Session of the Council of Ministers.” The ARIPO Secretariat also organised, “in cooperation” with UPOV and “with the assistance” of the USPTO, a regional workshop on the Draft ARIPO Protocol for the Protection of New Varieties of Plants on

29–31 October 2014 in Zimbabwe (ARIPO/HRE/2014/INF/1).

61 UPOV document CC/90/7. Access to this document requires a password.

62 www.apbrebes.org/content/transparency-and-governance

63 www.apbrebes.org/press-release/upov-denies-participation-farmers-and-civil-society-organizations

64 UPOV Rules Governing the Granting of Observer Status to States, Intergovernmental Organisations and International Non-Governmental Organisations in UPOV Bodies (2005, revised in 2012).

ber organisations of APBREBES have been active on issues such as plant breeding and intellectual property rights related to seeds and plants for many years and this competence is clearly stated in its statutes.⁶⁵

More than 80 farmer and other NGOs signed an open letter addressed to the UPOV Secretariat in support of APBREBES and ECVC's application for observer status.⁶⁶ Lars Peder Brekk, then Norwegian Minister for Agriculture and Food, and Manfred Bötsch, then Director of the Swiss Federal Office for Agriculture, also sent their respective letters of support.

In October 2010 observer status was eventually granted to APBREBES and ECVC allowing participation in some UPOV bodies⁶⁷ but not the Consultative Committee, the main decision-making body restricted to UPOV member states.

In 2011 APBREBES made the following recommendations under the call "50 Years of UPOV – Time to Change": (i) all documents should be publicly available; (ii) the Consultative Committee of UPOV should be open for all observers; and (iii) observers should join its work with a view to achieving a balanced representation of the different stakeholders and interests.⁶⁸

APBREBES noted that UPOV's work method is outdated, and serious concern was expressed that UPOV was negotiating rules and regulations on breeders' rights behind closed doors, when such laws have detrimental impacts on farmers' rights to farm-saved seeds and the conservation and sustainable use of agricultural biodiversity.⁶⁹

In 2012, the rules governing the granting of observer status for participation in UPOV bodies were revised, and a new rule was added that effectively limits farmers' participation. The rule states: "In the case of an international non-governmental organisation with different coordination entities, observer status will be granted to only one coordination per organisation."⁷⁰

In a press release, APBREBES said, "This strange article is not found in the rules of any other international organisation. It is clearly aimed at targeting farmer groups such as La Via Campesina which has 'regional coordination entities' as part of its structure. The European Coordination of La Via Campesina (ECVC) presently has observer status at UPOV. But the new rule will pre-

vent other coordination entities such as Latin American Coordination of Countryside Organisations (CLOC-Via Campesina) from obtaining observer status although La Via Campesina is the biggest and most important organisation of farmers worldwide."⁷¹

APBREBES members expressed "disappointment" that the formulation of rules excluded their participation and the revision did not lead to rules that were consistent with international principles of good governance, including transparency and participation. "On the contrary, these rules make UPOV less inclusive" and "further exacerbate the current imbalance in the representation of stakeholder groups", according to APBREBES, which added that the new rules "are in sharp contrast to practices in other international bodies such as WIPO, the Convention on Biological Diversity and the FAO Seed Treaty, which encourage participation of a broad spectrum of stakeholders".⁷²

Double standards were also pointed out, i.e., UPOV is willing to accept over-representation by the seed industry, with corporations such as Monsanto or Syngenta being represented several times,⁷³ but is reluctant to accept the low possibility of multiple representation of a farmer organisation that comprises national and regional members.⁷⁴ More recently, UPOV granted the World Farmers' Union observer status. Even so, representation of the various stakeholder groups is far from balanced as the seed industry and its advocates⁷⁵ still account for the majority of observers in UPOV and remain the dominant voice in UPOV meetings.

While revising the rules for observer status, the UPOV Council also agreed to make publicly available documents considered by the Administrative and Legal Committee, which were previously password-protected and accessible only to member states. However, documents of the Consultative Committee (the main decision-making body) continue to be password-protected.⁷⁶

Therefore APBREBES began obtaining the Consultative Committee documents through the national freedom-of-information legislation of some UPOV member states, and publishing them on its website.⁷⁷ Meanwhile CSOs and farmers' organisations continue to call for all meeting documents to be made public.

65 www.apbrebes.org/press-release/upov-denies-participation-farmers-and-civil-society-organizations

66 www.twn.my/announcement/Open_letter_UPOV_with_signatories.pdf

67 The UPOV Council, the Administrative and Legal Committee, the Technical Committee and the Technical Working Parties.

68 www.apbrebes.org/press-release/50-years-upov. APBREBES argued that these changes would be in line with the general trend among many intergovernmental organisations over the last decade to gradually expand transparency and participatory mechanisms.

Further, UPOV needs to also put in place mechanisms to ensure that all its activities and decisions are assessed with regard to their impact on the right to food, Farmers' Rights, biodiversity and development in general. The recommendations were based on a report commissioned by two APBREBES members, The Berne Declaration (now called Public Eye) and Development Fund, "Observer Status and Access to Documents: Comparative Analysis across Selected International Organizations", to provide inputs to the working group to look at rules concerning observers that was established by the UPOV Council at the same time

as observer status was granted to APBREBES and ECVC.

69 *Ibid.*

70 See paragraph 3(4) of UPOV Rules Governing the Granting of Observer Status to States, Intergovernmental Organisations and International Non-Governmental Organisations in UPOV Bodies (2005, revised in 2012). 71 APBREBES, *UPOV Creates Barriers to Farmers Participation* (2012).

72 *Ibid.*

73 For example, Syngenta is represented in UPOV by CropLife, the International Seed Federation, the European Seed Association, the International Community of Breeders of Asexually Reproduced Ornamen-

tal and Fruit-Tree Varieties, the African Seed Trade Association and the Asian and Pacific Seed Association.

74 APBREBES (2012).

75 For example, the International Association for the Protection of Intellectual Property, International Seed Federation and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties.

76 IP Watch, UPOV Council to Formalise Access to Documents; Civil Society Seeks Greater Participation, October 2012.

77 www.apbrebes.org/UPOV-Restricted-Area

This case illustrates the hurdles faced by farmers' organisations and CSOs that seek to be in a treaty process that impacts so significantly on Farmers' Rights.

B) WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

WIPO is an influential provider of technical assistance to developing countries on the subject of intellectual property. As a UN specialised agency,⁷⁸ it would be reasonable to expect WIPO to take special measures to facilitate the realisation of Farmers' Rights, in particular the right to participate in decision-making, to the extent that such rights intersect with intellectual property. However, evidence suggests otherwise. WIPO's actions and activities have been found to not support Article 9.2(c) of the Treaty, or even to ignore it.⁷⁹

One area in which WIPO renders technical assistance is the development of national intellectual property strategies, which presumably would guide development of national laws, policies and practices. To this end, WIPO has developed a set of tools on the Methodology for the Development of National Intellectual Property Strategies. These are: the Process (Tool 1), Baseline Questionnaire (Tool 2), and Benchmarking Indicators (Tool 3).⁸⁰

Tool 1 gives guidance on the process that should be employed in developing national intellectual property strategies, and there is no mention of involving farmers in such a process.

Tools 2 and 3 each contain an entire chapter on PVP. Cluster 5 of Tool 2 raises questions that should be considered with regard to PVP in the development of a national intellectual property strategy. While there is a question on whether a country is a member of UPOV, there is no such question in relation to the Treaty. The Questionnaire includes questions about the status of the private sector, the government's policy in relation to plant breeding, and partnerships between breeders, research organisations and industry, but is silent on farmers, their rights and role in the agricultural system, government policy in relation to PGRFA or partnerships with farmers.

Chapter 6 of Tool 3 on "Plant Variety Rights and Seed Industries" essentially champions UPOV as the legal framework for the protection of plant varieties. There is no mention of Farmers' Rights or that under the WTO-TRIPS Agreement countries have full freedom to adopt alternative *sui generis* systems of protection that incorporate Farmers' Rights.⁸¹ In fact, the same chapter contains a list of plant breeding and seed associations, but no information is available on farmers' groups and the CSOs working with them.

Apart from the tools, the various technical assistance missions of WIPO are also about promoting UPOV 1991 at the expense of Farmers' Rights.

In 2013, WIPO co-organised a regional workshop in Malawi

with ARIPO, the US Patent and Trademark Office and UPOV.⁸² The topic of the workshop was the ARIPO Legal Framework for the Protection of New Varieties of Plants. In 2014, WIPO co-organised another regional workshop in Harare, with ARIPO and UPOV.⁸³ These meetings were part of the process of developing the Arusha Protocol for the ARIPO region that triggered widespread criticism for its exclusion of farmers and lack of transparency, as discussed above. WIPO did not require ARIPO to ensure compliance with Article 9.2(c) of the Treaty prior to supporting its activities.

In May 2012, WIPO hosted a workshop in Geneva on Intellectual Property, Innovation and Food Security, focused on East Africa, particularly Tanzania. Following the workshop, Tanzanian CSOs and others raised concerns in a letter dated 18 July 2012 addressed to the WIPO Director-General. The letter said that, among other things, "The program and participants list suggest that participants representing the interests of the industry in particular the multinational corporations heavily dominated the workshop." It added that the "program and participants list shows hardly any representation of civil society organisations that champion farmers' rights or even key national farmer organisations such as the Tanzania based Eastern and Southern Africa Farmers Forum (ESAFF), and MVIWATA (representing farmers associations in Tanzania). In addition, the program fails to reflect the full range of views that exist on the topic of [intellectual property] and food security such as critical views about the [intellectual property] system relating to the adverse impacts on food security or agro-biodiversity."⁸⁴

With the above examples, one can conclude that like UPOV, WIPO is enabling the non-fulfilment of Farmers' Rights, including the right to participate in decision-making. This is unsurprising considering that UPOV (although not a UN agency) is hosted by WIPO and the Director-General of WIPO also heads UPOV as its Secretary-General. WIPO's lack of recognition of Treaty members' obligations in relation to Farmers' Rights is of particular concern given its role and influence as a provider of technical assistance.

C) TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPPA)

The US-led TPPA, which covers 12 countries,⁸⁵ is a highly contentious trade agreement. It has 30 chapters and many annexes, totalling more than 6,300 pages, with parties also adopting bilateral side-letters, many with the US.

In March 2010 at the start of the TPPA negotiations, the 12 governments had agreed to keep an extraordinary range of information secret for 4 years after the entry into force of the TPPA or, if no agreement enters into force, for 4 years after the last round of negotiations.⁸⁶ The thick shield of secrecy around more than 6 years of intense negotiations drew vocal protests in

78 WIPO was established in 1967 under the Convention Establishing the World Intellectual Property Organization and subsequently became a specialised agency of the UN in

1974.

79 Shashikant and Meienberg (2015), p. 19.

80 www.wipo.int/ipstrategies/en/

81 An option exercised by countries such as India, Malaysia and

Thailand.

82 Shashikant and Meienberg (2015), p. 17.

83 www.wipo.int/tad/en/activity-details.jsp?id=7426

84 Shashikant and Meienberg

(2015).

85 Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

many of the 12 countries concerned, including among CSOs, farmers' organisations, patient groups, unions, small and medium-sized domestic firms, parliamentarians and judges. UN human rights rapporteurs, including the Special Rapporteur on the right to food,⁸⁷ added strong voices of concern over the TPPA provisions and lack of transparency in the negotiations.

Over the years, only leaked versions of some TPPA chapters, including on intellectual property and investment, allowed for details to be seen. The outcry in many countries reflected widespread concerns over the scope of the TPPA that practically covers every aspect of a country's development space and will affect its entire population.

The TPPA negotiations concluded in Atlanta (US) on 5 October 2015⁸⁸ and the text was officially released on 5 November, the first time the public had access to the treaty contents.

The TPPA requires all⁸⁹ Parties that have not done so, to join UPOV 1991.⁹⁰ Joining UPOV 1991 would mean a country such as Malaysia having to abandon its current *sui generis* PVP law.⁹¹ As Malaysia is a Party to the CBD and the Treaty, its PVP law is distinct from UPOV 1991, containing provisions aimed at protecting Farmers' Rights and promoting the objectives of the CBD, that will need to be deleted if the country joins UPOV 1991.⁹² A concerted national CSO campaign against the TPPA and public debate in Malaysia led to a 4-year transition period⁹³ before it is required to join UPOV 1991, in the event that the country ratifies the TPPA.

TPPA countries must also allow patents on "inventions that are derived from plants",⁹⁴ and allow the extension of the patent duration beyond the 20 years required by the WTO if there are delays in the examination and granting of patents.⁹⁵

These obligations go beyond the requirements of the WTO-TRIPS Agreement and are intended to expand the scope of intellectual property protection in favour of the multinational seed industry. The policy space for governments to implement Farm-

ers' Rights is greatly affected and the consequences for farmers, especially small farmers, are significant: further limits on their freedom to operate, higher costs of seeds and inputs, increased misappropriation of local genetic resources, among others.

Yet the decisions on the TPPA were made in secrecy. From the leaked versions of the intellectual property chapter, it could be seen that several developing countries had attempted to include provisions such as requirements to disclose country of origin and evidence of compliance with national access and benefit-sharing legislation in patent applications. However, since the US is not a CBD Party, such proposals were rejected.

Public pressure pushed the governments of several TPPA countries to conduct some consultations at the national level.⁹⁶ However, these were without access to the text, which made the consultations largely meaningless in terms of influencing decisions on negotiating positions and compromises. Farmers' organisations in the various countries were even more excluded as the "consultations" often took place with those that were more organised and had greater access to the national media.

In Malaysia, one of the most vocal CSOs that consistently called for the government to withdraw from the TPPA negotiations was invited by the government to be a "cleared advisor", but a non-disclosure document had to be signed. In rejecting the invitation, the organisation stated that "as a CSO committed to being the conscience of the people and nation, there would be a conflict of interest if we become a cleared advisor sworn to secrecy".⁹⁷

In the US, more than 130 Democratic members of Congress had protested against the secrecy of the negotiations in a letter⁹⁸ to the US Trade Representative in June 2013. In contrast, industry, especially in the US, had good access, and in fact shaped the demands of the US in the TPPA and other similar negotiations.⁹⁹

Nevertheless, civil society activism continues in many TPPA countries to urge non-ratification.¹⁰⁰

86 All negotiating parties agreed that the negotiating texts, proposals of each government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, were provided and would be held in confidence, unless each participant involved in a communication subsequently agrees to its release. See Kelsey, J., *The TPP: Treaty making, parliamentary democracy, regulatory sovereignty and the rule of law*, *Third World Resurgence*, No. 303/304 (Nov/Dec 2015).

87 Smith, S., *Potential Human Rights Impact of the TPP* (2015), Third World Network report. See also: *UN Expert Urges TPP Countries Not to Sign the TPP Without Committing to Human Rights and Development*, 26 February 2016.

88 All 12 countries signed the agreement on 4 February 2016 in New Zealand, which is the formal depositary for the TPPA. Protests continued in several countries including in New Zealand at the venue of the signing ceremony. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPPA will come into force within two years if all original signatories notify that they have completed their domestic processes, or after two years and 60 days if at least six, including the US and Japan and several other larger countries, have done so.

89 New Zealand obtained some form of exception to comply with the Treaty of Waitangi that safeguards Maori rights.

90 TPPA Article 18.7.2(d). New Zealand has an attempted

exception where it can implement a *sui generis* system of protecting plant varieties instead of joining UPOV 1991 as long as it gives effect to UPOV 1991 (Annex 18A). This Annex has an attempted exception for measures to protect indigenous plant species under the Treaty of Waitangi (Paragraph 2). What this actually means for New Zealand's policy choice remains to be seen.

91 Protection of New Plant Varieties Act 2004 (Act 634).

92 www.upov.int/meetings/en/details.jsp?meeting_id=7163

93 The 4 years run from the date the TPPA enters into force for Malaysia.

94 TPPA Article 18.37.4.

95 TPPA Article 18.46.4.

96 For example, in Malaysia the Ministry of International Trade and Industry, which coordinated the country's participation in the TPPA negotiations, held

several consultations and "town hall" meetings. In Australia, New Zealand and the US, where there was a high level of civil society activism, meetings were also held with the negotiators.

97 Rejection letter dated 4 December 2014 provided by the Consumers' Association of Penang, Malaysia, which had received an invitation from the Minister of International Trade and Industry to provide input to assist the government on its stand in the TPPA negotiations.

98 delaura.house.gov/index.php?option=com_content&view=article&id=997:delaura-miller-push-for-more-transparency-congressional-consultation-in-trade-negotiations&Itemid=21

99 IP Watch, *Confidential USTR Emails Show Close Industry Involvement in TPP Negotiations*.

The TPPA experience illustrates the urgent need for farmers, especially smallholder farmers who constitute a crucial part of the population in many developing countries, to be directly engaged in demanding their rights and to join the struggle against secrecy and exclusion in decision-making on so-called trade agreements that in effect intrude into every policy sphere of a country.

This is reinforced by a 2015 statement by 10 UN Special Rapporteurs on human rights and Independent Experts, including Hilal Helver, Special Rapporteur on the right to food, that expressed "concern about the secret nature of drawing up and negotiating many [trade and investment] agreements and the potential adverse impact of these agreements on human rights".¹⁰¹ They recommended that "All current negotiations of bilateral and multilateral trade and investment agreements should be conducted transparently with consultation and participation of all relevant stakeholders" and "All draft treaty texts should be published so that Parliamentarians and civil society have sufficient time to review them and to weigh the pros and cons in a democratic manner."¹⁰²

3.4 – CONCLUSIONS

It is evident that lack of farmers' participation in decision-making undermines Farmers' Rights as a whole. The cases discussed above show that without participation of farmers in decision-making, laws and policies are unlikely to reflect the needs and interests of farmers, in particular smallholder farmers. In fact, in such a scenario the laws and policies tend to jeopardise Farmers' Rights, especially the right to freely use, save, exchange and sell seeds/propagating materials. This can undermine the overall implementation of the Treaty and, more widely, family and community-based farming systems and the right to food. In instances where farmers have engaged in the policy processes, opportunities and space for implementing Farmers' Rights have been created.

The above cases also show that farmers face multiple challenges in their struggle to realise Farmers' Rights. These challenges may be summarised as follows:

- **Lack of recognition in law of the right to participate** makes it difficult for farmers to legally assert their right to participate, to challenge decisions that have been taken without due participation, and to seek redress. As seen in the experiences above, participation of farmers is neither mandatory nor guaranteed. It is very much dependent on the discretion and even whims of the relevant authority, including regional secretariats.
- **Lack of participatory mechanisms** is a major challenge, as evidenced by the cases mentioned above. Even where the right to participate is legally recognised in national constitutions or legislations, adequate participatory mechanisms that enable the

most vulnerable and marginalised communities to communicate their views are needed. Participatory mechanisms should ensure openness and meaningful and evidence-based engagement rather than being *pro forma* or "paying lip service" to the notion of participation, as seen in the experience of Ghana.

- **Limited or no access to information** makes it difficult for farmers to assert their right to participate or to effectively engage in policy processes, as evidenced particularly by the experiences relating to Kenya, the Arusha Protocol, the COMESA Seed Trade Harmonisation Regulations and the TPPA.
- **Increasingly, regional and international processes are formulating policies impacting Farmers' Rights.** The experiences of Colombia, Guatemala and Peru illustrate that national efforts to promote Farmers' Rights may be undermined by regional and international developments such as the Andean Community Decision No. 345 on PVP and North-South free trade arrangements. The regional experiences in Africa suggest that a significant number of policies affecting farmers are increasingly being formulated at the regional level. Activities of intergovernmental organisations such as UPOV and WIPO also have major implications for Farmers' Rights.
- **Lack of political will and, related to that, special interests prevailing over smallholder farmers' and national interest.** National governments, regional entities and secretariats of some international agreements usually/often ignore farmer participation when they decide to promote, often aggressively, legislation that is biased in favour of formal sector breeding and corporate interests. These policy measures are not based on evidence or in farmers' interests or even in the national interest. Instead, they are strongly promoted by special interests, including those of external donors, agribusiness, and the secretariats of UPOV and WIPO. The lack of participation worsens the unequal power relations to the detriment of Farmers' Rights.
- **Perception that farmers are incapable of engaging in policy-making processes.** As shown in the cases above, farmers are willing and able to engage in policy discussions where governments and regional and international secretariats are open to alternative views and perspectives. CSOs and research institutions also have an important role, working with farmers to promote knowledge-building and awareness among decision-makers on Farmers' Rights as well as to provide intellectual contributions and pertinent evidence-based analysis to policy-makers and legislators for decision-making related to PGRFA.

Taking account of these challenges, Chapter 4 addresses in greater detail the scope and elements critical to effectively operationalising Article 9.2(c) with the aim of ensuring that laws and policies reflect the needs and interests of farmers especially smallholder farmers, given their important role in safeguarding the sustainability of our food systems.

100 See, for example: Latin America: Civil society campaigns against Trans-Pacific Partnership, IPS report, 20 June 2016; Khor, M., TPPA could be discarded due to US political dynamics.

101 UN experts voice concern over adverse impact of free trade and investment agreements on human rights (2 June 2015).

102 They also recommended that *ex ante* and *ex post* human rights

impact assessments should be conducted with regard to such existing and proposed agreements, stressing that, "Given the breadth and scope of the agreements currently under

negotiation, robust safeguards must be embedded to ensure full protection and enjoyment of human rights." *Ibid.*

4

Some Existing Norms and Good Practices in Participation

Although the principle of Farmers' Rights has for the first time been legally recognised under the Treaty, in particular through Article 9, the wider set of rights of farmers are also respected, promoted and protected by principles, norms and standards of human rights, including explicitly the right to participation in decision-making. Other international instruments and UN processes also reinforce this participation right of farmers.

This chapter reviews some of the principles, norms and standards expressed in the existing human right framework, highlighting elements that are critical for the operationalisation of Article 9.2(c) and good practices as well as mechanisms that may be utilised for strengthening the right of participation. It also explores the wider UN system, lessons that may be learned and entry points within the UN system that may be useful to further reinforce farmers' right to participate.

4.1 – THE HUMAN RIGHTS FRAMEWORK FOR THE RIGHT TO PARTICIPATE

The right to participate in decision-making processes is a well-established right within the human rights framework. Specific provisions in relevant human rights instruments and interpretations and understandings of those provisions can inform implementation of Article 9.2(c). Some human rights instruments have mechanisms that may be utilised to strengthen farmers' right to participate in decision-making processes. It is in this context that this section discusses relevant human rights instruments.

A) INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Universal Declaration of Human Rights (UDHR), which is the most universally accepted standard of human rights, recognises everyone's right to take part in the government of the country, while the International Covenant on Civil and Political Rights (ICCPR) recognises as a human right the right of public participation in the conduct of public affairs.¹ The ICCPR was adopted in 1966 and currently has 168 State Parties.

In its authoritative interpretation of the right to take part in the conduct of public affairs, the UN Human Rights Committee clarified that "the conduct of public affairs, referred to in paragraph (a) [Article 25 of the ICCPR], is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at *international, national, regional and local levels*" (§5, emphasis added).²

It also added that "citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or *through their capacity to organise themselves*. This participation is supported by ensuring *freedom of expression, assembly and association*" (§8, emphasis added). The Human Rights Committee further stressed that "the right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25 [of the ICCPR]" (§26).

The Human Rights Committee requires that *positive measures* be adopted to ensure the full, effective and equal enjoyment of participatory rights, including through inclusive, meaningful and non-discriminatory processes and mechanisms. States also

1 Article 21 of the UDHR and Article 25 of the ICCPR.

2 UN Human Rights Committee,

CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote),

The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public

Service, 12 July 1996.

should guarantee full and effective *access to justice* and redress mechanisms to people who have been unduly deprived of their right to participate in political and public affairs (§12, 26, 27).

A 2015 report of the Office of the United Nations High Commissioner for Human Rights on “Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them”³ (hereafter referred to as the “OHCHR report”) identifies challenges to the right to political and public participation and ways to overcome those challenges.

The OHCHR report starts by making clear that “international human rights instruments and mechanisms acknowledge the right of all people to be fully involved in and to effectively influence public decision-making processes that affect them” (§9).

The OHCHR report stresses “some individuals or groups are often denied the opportunity to participate in the conduct of public affairs because of *socioeconomic inequalities*. Individuals and groups concerned are confronted with a vicious circle: the greater the inequality, the less the participation; the less the participation, the greater the inequality” (§19, emphasis added). In relation to the right to participation, the report adds that “people living in poverty experience discrimination not only on the grounds of poverty itself, but also due to membership in other disadvantaged groups” (§23).

This is certainly true in the case of smallholder farmers, who are often sidelined in decision-making processes. Today 50% of the world’s hungry are smallholder farmers who depend mainly or partly on agriculture for their livelihoods.⁴

The OHCHR report emphasises that the general right to participate in political and public affairs must be supported with processes to ensure that all segments of society are able to influence agenda-setting and decision-making. “Pro forma participatory processes only reinforce existing power structures and the feeling of exclusion” (§21).

The OHCHR report highlights certain principles that participatory mechanisms and processes should conform to, “to ensure full and effective participation in political and public affairs on an equal basis”.⁵ These are:

- “Full and effective participation in political and public affairs is best ensured when it rests on a *solid legal basis*” (§40, emphasis added). “It is equally important that the right to participation be enforceable by law and that the denial of participation be open to challenge through the courts at low cost” (§45).
- All stakeholders must have *access to information* in a timely, complete and transparent manner, which implies that State authorities must make every effort to ensure easy, prompt, effective and practical access to information of interest to the public.⁶ “The right to information is best guaranteed

when it is made available in a manner accessible to the most disadvantaged, taking into account the constraints they suffer, including illiteracy, language barriers and the ‘digital divide’” (§41).

- Participation mechanisms and processes should be sufficiently resourced, *non-discriminatory*, inclusive and designed so that concerned groups, even the most marginalised, have the opportunity to voice their opinions.⁷
- Public participation rights encompass the right to be consulted at each phase of legislative drafting and policy-making; to voice opinions and criticism; and to *submit proposals* aimed at improving the functioning and inclusivity of all State bodies.⁸
- Participation requires a *long-term and genuine commitment* to engage in processes of intensive dialogue regarding the development of policies, programmes and measures in all relevant contexts.⁹ “Participation shows best results when meaningful decisions, including those on resource allocation, are tabled for consideration and discussion” (§43).
- “Participation mechanisms are most effective when they are *premised on empowerment* and aimed at building the capacity, social capital, confidence, rights awareness and knowledge of individuals. This includes strengthening skills and capacity of the public and of officials, and devoting resources to long-term, sustainable participatory mechanisms” (§44, emphasis added).

The right to participation may also be advanced in the context of equality and group rights, meant to ensure equal and full participation of a designated group in society. For example, the OHCHR report outlined this in the context of indigenous peoples, women and persons with disabilities. Farmers clearly constitute such a designated group.

These elements are essential for the operationalisation of Article 9.2(c). Interestingly, the ICCPR also offers opportunities for supporting implementation of farmers’ right to participate in decision-making.

A body of independent experts (the Human Rights Committee) reviews and monitors implementation of the ICCPR by its State Parties. All States Parties are obliged to submit regular reports to the Committee on how the rights recognised in the ICCPR are being implemented, including information on the State’s constitutional and legal framework and the legal and practical measures taken to implement the Covenant. This is to be done usually every three to six years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of “concluding observations”.

NGOs can engage in the reporting process before, during and after the review of their country, including through the submission of written information (reports) or oral statements.¹⁰

3 Document A/HRC/30/26 dated 23 July 2015.

4 Final study of the Human Rights Council Advisory Committee on the advancement of the

rights of peasants and other people working in rural areas (A/HRC/19/75), paragraph 9.
5 A/HRC/30/26, paragraph 9. These principles are contained in

several documents cited in the report.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*, paragraph 10.

9 *Ibid.*, paragraph 11.

10 ccprcentre.org/files/media/NGO_Guidelines_English1.pdf

Farmer organisations could consider using this mechanism to support implementation of Article 9.2(c) in the legal framework of their country by relying on the human right to participate in the conduct of public affairs.

In addition to this reporting procedure, the first Optional Protocol to the ICCPR gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States Parties to the Protocol.¹¹ If the Committee finds a violation in a particular case, the State Party is requested to remedy that violation.¹²

B) INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The right to participation is also recognised and further developed in the context of the right to food, which is derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR was adopted in 1966 and currently has 164 State Parties.

The authoritative interpretation of the right to food within the UN human rights system is General Comment No. 12¹³ issued by the UN Committee on Economic, Social and Cultural Rights in 1999, which is the treaty body that monitors the implementation of the ICESCR. General Comment No. 12 is explicit on the importance of participation in securing the right to food: "The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, *people's participation*, decentralisation, legislative capacity and the independence of the judiciary" (§ 23, emphasis added).

The Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security,¹⁴ adopted in 2004 by the

FAO Council, clearly articulate the essential-ness of participation and provide some guidance on how to implement it:

"States should ensure that relevant institutions provide for full and transparent participation of the private sector and of civil society, in particular representatives of the groups most affected by food insecurity" (§5.4).

"States are encouraged to cooperate with all stakeholders, including regional and international consumer organisations, in addressing food safety issues, and consider their *participation in national and international fora* where policies with impact on food production, processing, distribution, storage and marketing are discussed" (§9.9, emphasis added).

"Indicators could enable States to implement legal, policy and administrative measures, detect discriminatory practices and outcomes, and ascertain the extent of political and social participation in the process of realising that right" (§17.4).

Olivier De Schutter, the United Nations Special Rapporteur on the right to food (2008-2014), also emphasised the importance of the right to participate in decision-making for the implementation of the right to food – in particular farmers' right to participate – and provided extensive guidance on how to operationalise it.

In its 2009 report to the UN General Assembly,¹⁵ the Special Rapporteur on the right to food stressed, "Farmers should be actively involved in the *design of legislation covering the certification and trade of seeds or the conservation of plant genetic resources*, as well as of *plant variety protection laws and laws regarding patents* [as well as] for *legislation or policies relating to the rest of agriculture* (as opposed to the stewardship of plant genetic resources), since choices made in that area can significantly alter the structure of incentives for farmers who conserve genetic resources" (§53, emphasis added).

The Special Rapporteur added in a background report:¹⁶ "In order to be effective, *such participation presupposes capacity-building*, which in turn may call for *information being provided to farmers' organisations* and for the preparation of *impact assessments* accompanying proposals for all important changes in legislation or policies" (p. 27, emphasis added).

Similarly to the ICCPR, the ICESCR offers opportunities for supporting implementation of farmers' right to participate in decision-making through its reporting procedures as well as individual complaint mechanism.¹⁷

In addition, the Special Rapporteur on the right to food can intervene directly with governments on specific allegations of violations of human rights that come within its mandate. Farmer organisations could also consider using this mechanism to support implementation of Article 9.2(c) by relying on the right to food and the interpretation of the Committee on Economic, Social and Cultural Rights (General Comment 12), the FAO Voluntary Guidelines and the work of the Special Rapporteur that have all stressed the importance of participation in securing the right to food.

C) UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Over the last two decades, the rights of indigenous peoples have been articulated in a number of instruments and processes, and the astute and dedicated activism of indigenous peoples has

11 The Optional Protocol to the ICCPR has been ratified by 115 State Parties.

12 Office of the United Nations High Commissioner for Human Rights, Civil and Political Rights: The Human Rights Committee (2005), Fact Sheet No. 15 (Rev.1).

13 www.fao.org/fileadmin/templates/righttofood/

documents/RTF_publications/EN/General_Comment_12_EN.pdf

14 www.fao.org/3/a-y7937e.pdf

15 Olivier De Schutter, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation (2009), Report of the Special Rapporteur on the Right to Food.

16 Background document to the report "Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation" (A/64/170) presented by prof. Olivier De Schutter, Special Rapporteur on the right to food, at the 64th session of the UN General Assembly (October 2009).

17 However, it should be noted that the Optional Protocol to the ICESCR entered into force in 2013 and has for the time being only been ratified by 21 State Parties – and individual complaints can therefore only be brought against those 21 countries.

turned these “paper rights” into rights against which they can make claims. These rights include the right to participate in decision-making.

Starting from advocacy through the more traditional human rights processes, indigenous peoples have succeeded in creating the UN Permanent Forum on Indigenous Issues (UNPFII) and in getting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in September 2007.

Provisions on participation in UNDRIP are particularly relevant for the implementation of Article 9.2(c) of the Treaty since in Article 9.1 not only farmers but also “local and indigenous communities” are included. Therefore the national implementation of Farmers’ Rights under the Treaty would also require implementation of the customary international law norms in UNDRIP. Participation norms and procedures can be distilled from, *inter alia*, Articles 5, 18, 19, 27 and 41 of UNDRIP, and should inform implementation of Treaty Article 9.2(c).

The right of indigenous peoples to participate in decision-making is recognised in Articles 5 and 18 of UNDRIP. Article 18 further recognises “the right of indigenous peoples to participate in decision-making in matters which would affect their rights, *through representatives chosen by themselves in accordance with their own procedures*, as well as to maintain and develop their own indigenous decision-making institutions” (emphasis added).

Such direct representation through their own processes of selection on an independent basis results in an “unfiltered voice” of indigenous peoples that is very crucial. A prerequisite is a high degree of self-organisation that has the confidence of indigenous peoples that seek to exercise their rights.

Article 19 focuses on *free, prior and informed consent* of indigenous peoples before States adopt and implement legislative or administrative measures that may affect them. This puts an obligation on States to consult and cooperate in good faith with the indigenous peoples concerned.

Article 27 obligates States to use a “fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems” when recognising and adjudicating the rights of indigenous peoples pertaining to their lands, territories and resources.

Another important aspect of the right to participate that is incorporated in UNDRIP is in Article 41, which establishes that the *UN system and other intergovernmental organisations* shall contribute to the full realisation of the provisions of the Declaration, including through “ways and means of ensuring participation of indigenous peoples on issues affecting them”. Specific reference is made to the mobilisation, *inter alia*, of *financial cooperation and technical assistance*. Trust funds with voluntary contributions from governments have been set up in several UN fora to enable participation of indigenous peoples’

representatives, for example in the UN Permanent Forum on Indigenous Issues.

The articles highlight key aspects that are critical for implementation of Article 9.2(c) of the Treaty. It is also apparent that the effective operationalisation of the right to participate requires measures to be put in place not only at the national level but also at the regional and international levels and especially by UN agencies and other intergovernmental organisations.

UNDRIP-related policies and mechanisms also present opportunities for farmers from indigenous communities to raise their concerns. For example, UNDRIP-related processes may be used to challenge PVP laws and policies developed without the participation of such communities. The UNPFII as well as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) serve as advisory expert mechanisms and could also be used to create awareness and advocate for the right to participate.¹⁸

In addition, there is a Special Rapporteur on the rights of indigenous peoples, similar to the Special Rapporteur on the right to food, that can intervene directly with governments on specific allegations of violations of human rights that come within its mandate. Farmers’ organisations could use this mechanism to support implementation of Treaty Article 9.2(c) by relying on the participatory rights recognised in UNDRIP.

D) CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

While the International Bill of Rights¹⁹ references women’s rights more than once, these have been made concrete in terms of their impact on women’s lives through specific articulations. As with the experience of indigenous peoples, advancing women’s human rights has required repeated strategies, declarations and agreements, not only one.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the UN General Assembly. Described as an international bill of rights for women, it was instituted on 3 September 1981 and has been ratified by 189 States.

CEDAW has been the basis of nationalising and securing national legislation and modalities for women’s empowerment at the national level. For the purposes of participation, Article 7(b) requires States to take measures to ensure women’s participation in the formulation and implementation of government policy. CEDAW also has a specific article on the participation of rural women that requires States to enable them to participate in the elaboration and implementation of development planning (Article 14.2(a)).

The Committee on the Elimination of Discrimination Against Women released in March 2016 General Recommenda-

18 They meet usually once a year and indigenous peoples’ organisations as well as civil society organisations are able to participate, including by making statements. Those

bodies issue thematic expert reports that can then inform implementation of the rights of indigenous peoples. The 2011 EMRIP report was on indigenous peoples and the right to

participate in decision-making. 19 The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant

on Economic, Social and Cultural Rights (ICESCR) constitute the International Bill of Rights.

tion 34 on the rights of rural women. This represents the most authoritative interpretation on how State Parties to CEDAW shall implement their obligations related to the rights of rural women. Of particular relevance for our purpose is paragraph 54(b) which recommends to State Parties to “Ensure that rural women and their organisations can influence *policy formulation, implementation and monitoring at all levels and in all areas that affect them*” (emphasis added). The Committee also recommends States to ensure rural women and their representatives are able “to participate directly in the assessment, analysis, planning, design, budgeting, financing, implementation, monitoring and evaluation of all agricultural and rural development strategies” (§54(d)).

Similar to the ICCPR and the ICESCR, CEDAW has a reporting procedure and a complaint mechanism²⁰ that could be used to support implementation of Article 9.2(c), at least when it comes to the right of women farmers to participate in decision-making. However, unlike the ICCPR and the ICESCR that only accept complaints from individuals, the CEDAW complaint mechanism also accepts communication from groups submitting claims of violations of rights protected under the Convention.

As with indigenous peoples, activists' strategies were not limited to processes that were “about women”. Since women and indigenous peoples constitute the majority of smallholder farmers who are the major agents in securing the right to food, CEDAW and related women's rights processes and mechanisms can be powerful tools for Farmers' Rights realisation, the starting point being the activation of the right to participate in national and regional laws.

E) HUMAN RIGHTS COUNCIL

Another opportunity for supporting implementation of Article 9.2(c) within the human rights framework is the Universal Periodic Review (UPR), a new mechanism of reporting and review for each of the 193 UN Member States of their human rights obligations and commitments. This mechanism has formalised the reporting process on a country-by-country basis and covers the full spectrum of UN human rights instruments. The review takes the form of an interactive dialogue between the State under review and the member and observer States of the UN Human Rights Council (HRC). In addition to submitting reports for the country reviews, NGOs/CSOs can attend the UPR Working Group sessions and make statements at the regular session of the Council when the outcomes of the State reviews are considered. The process results in the formulation of recommendations that the State under review can decide to accept and implement. Implementation of agreed recommendations is then subject to a follow-up process. As the right to participate in decision-making is recognised in several human rights treaties (ICCPR, ICESCR, CEDAW, UNDRIP

etc.), farmer organisations could certainly use the UPR mechanism to support implementation of Article 9.2(c), in particular its operationalisation through a legal framework at the national level.

The HRC is also a channel to develop new norms on Farmers' Rights. Through a dedicated intergovernmental open-ended working group, it is currently drafting a new UN declaration on the rights of peasants and other people working in rural areas.²¹ The decision to launch such a process was taken by the HRC following a 2012 study by its Advisory Committee (A/HRC/19/75) which recognised that despite the existing human rights framework, peasants and other people living in rural areas are victims of multiple discrimination and systematic violations of their human rights, and recommended, among others, that a new international instrument be developed to better protect and promote their rights. Violations of participatory rights as well as of the right to freedom of association figured prominently in the Advisory Committee study as justification for the new instrument.

The draft declaration proposed by the Advisory Committee (see annex of A/HRC/19/75) included an article on freedoms of association, opinion and expression (Article 12) and provisions on the right to participate in decision-making (Article 2.4).

Those provisions have been further developed and reinforced in the current draft as of March 2016 (A/HRC/WG.15/3/2). It now has a specific article on “Right to participation and information” (Article 12) which recognises, with regard to peasants and other people working in rural areas, “the right to *active, free, effective, meaningful and informed participation, directly and/or through their representative organisations, in the elaboration, implementation and assessment of policies, programmes and projects that may affect their lives, land and livelihoods*” (emphasis added).

Article 12 of the draft declaration also establishes the obligation of States to “facilitate, on a voluntary basis, the creation and activities of *strong and independent organisations of peasants and other people working in rural areas as an effective means of ensuring the[ir] participation*” (emphasis added). It also places on States the obligation to “ensure that peasants and other people working in rural areas have access to information relating to policies, programmes and projects that may affect them, in a language and form and through means that ensure the effective participation of peasants and other people working in rural areas” (emphasis added).

A right to participation is also recognised in the context of a right to food sovereignty, which “entails peoples' right to participate in decision-making and to define their own food and agriculture systems” (Article 5.4).

Specifically related to seeds and biodiversity, the draft declaration recognises, in relation to peasants and other people working in rural areas, a right similar to Treaty Article 9.2(c): the right “to participate in decision-making on matters related

20 The Optional Protocol came into force in 2000 and has been ratified by 107 State Parties.

21 The working group has already held three meetings (in 2013, 2015 and 2016), and negotiations

are continuing on a draft declaration.

to the conservation and sustainable use of agricultural biodiversity" (Article 23.8).

Importantly, and similarly to UNDRIP, the draft declaration (in Article 30.2) elaborates on the responsibilities of the UN and of other international organisations, and requests them to establish "ways and means of ensuring the participation of peasants and other people working in rural areas on issues affecting them".

The adoption of this declaration could provide major impetus and guidance for the implementation of the right to participate in decision-making under the Treaty. Importantly also, the development of this declaration is an example of good practice with respect to the participation of farmer organisations. The proposal initially came from La Via Campesina, the international peasant movement. Representatives of peasants and other peoples working in rural areas were able to participate extensively in the work of the Advisory Committee that led to the 2012 study and the first draft declaration, including through written submissions. From the start, the HRC invited civil society and representatives of peasants and other people working in rural areas to contribute actively and constructively to the work of the working group (A/HRC/RES/21/19).

The latest resolution of the HRC requested the OHCHR "to ensure the participation in the annual sessions of the working group of up to five expert panelists, including representatives of peasants and other people working in rural areas, civil society and grass-roots organisations from developing countries, in order to contribute to the analysis and interactive dialogues" (A/HRC/RES/30/13). This resulted in a strong participation of farmer organisations in the sessions of the working group and their proposals have so far been well taken into account.

4.2 – MULTIPLE ENTRY POINTS, INCLUDING THROUGH THE WIDER UN SYSTEM

The strategic approach to realising rights cannot be described as a linear one, nor one that is automatic. Turning "paper rights" into actionable ones is a continuous process with advances and setbacks and requires not only vigilance but assessment and re-assessment of entry points, capacities, alliances etc.

In addition to the human rights framework discussed above in Section 4.1, the interpretation and implementation of farmers' right to participate can be further informed and rein-

forced through a number of other UN instruments, entities and processes.

A) RIO DECLARATION, AGENDA 21 AND THE AARHUS CONVENTION

The 1992 UN Conference on Environment and Development in Rio de Janeiro explicitly recognised farmers as one of nine major groups whose participation is essential to achieving sustainable development. This recognition in Agenda 21, the blueprint adopted in 1992, of the vital participation of major groups has been further elaborated through the annual reviews of Agenda 21, and is central in the outcome of the 2012 Rio Summit on Sustainable Development and the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs).

The major-groups configuration continues to frame participation in many parts of the UN system, including the High-level Political Forum for Sustainable Development (HLPF)²² established to review and monitor the implementation of the 2030 Agenda and the SDGs. As one of the major groups, farmers can advocate for strengthened participatory mechanisms in other relevant processes, including implementation of Article 9.2(c), as an essential component of achieving SDG 2 and its targets which are explicit on the fundamental role of small-scale farmers.²³

The 1992 Rio Conference also adopted the Rio Declaration on Environment and Development detailing a number of principles that have set the standard for participation and been incorporated into other conventions. Principle 10 under the Declaration states the importance of participation, including access to information:

"Environmental issues are best handled with *participation of all concerned citizens, at the relevant level*. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including ... the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial and administrative proceedings*, including redress and remedy, shall be provided" (emphasis added).

22 In mandating the functioning of the HLPF in UN resolution A/67/290, Member States detailed the rights of participation of major groups, including farmers, as follows: "15. [Decides, in this regard, that, while retaining the intergovernmental character of the forum,] the representatives of the major groups and other relevant stakeholders shall be allowed: (a) To attend all official meetings of the forum; (b) To have access to all official information and

documents; (c) To intervene in official meetings; (d) To submit documents and present written and oral contributions; (e) To make recommendations; (f) To organise side events and round tables, in cooperation with Member States and the Secretariat."

23 SDG 2 – "End hunger, achieve food security and improved nutrition and promote sustainable agriculture" – is to be met by achieving, *inter alia*, Target 2.3 ("By 2030, double the

agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment") and Target 2.5 ("By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and

domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge, as internationally agreed").

The UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention) spells out that these rights include the following elements:

- the right of everyone to receive environmental information that is held by public authorities, including information on policies or measures taken
- the entitlement of “applicants” to obtain information within one month of the request and without having to say why they require it
- the obligation of public authorities to actively disseminate environmental information in their possession
- the right to participate in environmental decision-making
- the obligation of public authorities to make arrangements to enable the public affected to comment on proposals, plans and programmes
- the need for public comments to be taken into account in decision-making, and information to be provided on the final decisions and the reasons for it
- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

These standards set benchmarks relevant to the participation of farmers, especially as farmers are “concerned citizens” impacted by environmental issues.

B) UN FOOD AND AGRICULTURE ORGANIZATION

Several FAO instruments recognise a right to participation in the context of the right to food and food security, most recently in the Voluntary Guidelines for National Seed Policy Formulation (2015). These guidelines contain a number of relevant provisions that can strengthen and inform implementation of Article 9.2(c):

“The effectiveness of a seed policy depends on the capacity of government to manage the policymaking process, as well as the *full participation of seed sector stakeholders... including small farmers*” (p. 3, emphasis added).

“Increasingly also, the civil society and *farmer-based organisations* are playing pivotal roles in crop improvement and therefore should be *part of the seed policy formulation*” (p. 14, emphasis added).

Moreover, FAO offers examples of good practices for the participation of farmers in decision-making. In 2013 it adopted a revised Strategy for Partnership with Civil Society Organisations.²⁴ It is premised on the recognition of the importance of the participation of civil society and aims at strengthening and providing guidance for FAO’s partnerships. In particular, “this Strategy promotes that the views of small farmers, fishers, women, youth and others are brought to the policy, normative and technical discussions convened by FAO”.

The strategy has specific objectives regarding engagement at the decentralised level and the global level. At decentralised level, the objectives of the strategy include: to assist in undertaking mapping exercises and identifying key local CSOs; to foster collaboration and partnerships during different stages of programme and project development; to capitalise on the outreach capacities of CSOs, as well as their detailed knowledge of grassroots realities and regional contexts; and to support national and regional consultative and multistakeholder mechanisms with wide representation of different civil society constituencies for policy discussion, implementation and monitoring of programmes.

At the global level, the strategy aims at engaging a broad and equitable range of CSOs in partnership with FAO, ensuring balanced geographic representation; ensuring that the views of the poor and marginalised are brought to FAO policy discussions through their CSOs; encouraging inclusive processes for policy dialogue, technical management and sharing of expertise and knowledge; and improving FAO’s knowledge and capacity to work in partnership with CSOs.

Within the framework of this strategy, an agreement was signed by FAO in May 2014 with the International Planning Committee for Food Sovereignty (IPC).²⁵ The IPC is the world’s largest alliance of small-scale food producers, peasant family farmers, artisanal fisherfolks, pastoralists, nomads, indigenous peoples and indigenous organisations, the landless, urban producers, alternative consumer movements, rural workers and grassroots organisations, whose aim is to advance the food sovereignty agenda at the global and regional level.²⁶

The FAO-IPC agreement contains a number of provisions aimed at ensuring and promoting the participation of small-scale food producers in policy-making and implementation.

In the area of policy dialogue, “FAO will encourage, guide and facilitate at different levels the establishment of fora for policy dialogue and debates so that the needs and interests of small-scale food producers, rural workers’ associations, grassroots/community-based organisations and social movements can be voiced and taken into account in policy formulation and adoption, for the implementation of policies at national, regional and international level.”

“Steps will be taken to reinforce the participation of IPC and other civil society organisations and social movements in future sessions of the FAO technical committees and other governing bodies, in particular its regional conferences.”

24 www.fao.org/docrep/018/i3443e/i3443e.pdf

25 [www.foodsovereignty.org/the-ipc-and-fao-establish-com-mon-priority-themes-for-a-](http://www.foodsovereignty.org/the-ipc-and-fao-establish-com-mon-priority-themes-for-a-collaborative-work-in-the-fight-against-hunger-and-food-insecurity/)

[collaborative-work-in-the-fight-against-hunger-and-food-insecurity/](http://www.foodsovereignty.org/the-ipc-and-fao-establish-com-mon-priority-themes-for-a-collaborative-work-in-the-fight-against-hunger-and-food-insecurity/) Its members include La Via Campesina (LVC), World

Forum of Fisher Peoples (WFFP), World Forum of Fish Harvesters & Fish Workers (WFF), World Alliance of Mobile Indigenous People (WAMIP) and the

International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF).

In the area of normative activities, "FAO will support the involvement of IPC and other civil society organisations and social movements... in the implementation of guidelines, codes of conduct, global conventions, international treaties and regulatory frameworks in areas related to FAO's mandate".

Interestingly, the FAO-IPC agreement resulted in the establishment of a fund to finance the participation of smallholder organisations and other food producers' organisations in policy dialogue, and support initiatives by smallholder organisations.

This agreement resulted in an enhanced participation of IPC members in the activities of FAO. And importantly it resulted in the IPC being recognised as the legitimate partner for FAO to engage small-scale food producers in its activities and discussions.

C) COMMITTEE ON WORLD FOOD SECURITY

The Committee on World Food Security (CFS) also offers examples of good practices for promoting participation of farmers in decision-making. CFS was established in 1974 as an intergovernmental body to serve as a UN forum for review and follow-up of policies concerning world food security including production and physical and economic access to food. It underwent a reform process during 2009 to make it more effective in the promotion of policies that reduce food insecurity. The vision of the reformed CFS is to be "the most inclusive international and intergovernmental platform for all stakeholders to work together to ensure food security and nutrition for all."²⁷

A key plank of the reformed CFS is the inclusion as one of five categories in its Advisory Group of "civil society and non-governmental organisations particularly organisations representing smallholder family farmers, fisherfolk, herders, landless, urban poor, agricultural and food workers, women, youth, consumers and indigenous peoples".²⁸ Civil society representatives are able to fully take part in the discussions and enjoy the same rights as governments, except when it comes to adopting decisions (voting).

A Civil Society Mechanism was created in 2010 to organise the relations with CFS. The CSM does not have formal members but participating organisations. They all belong to one of the 11 constituencies listed above. The CSM has a Coordination Committee (CC)²⁹ that takes all relevant political decisions within the CSM on internal and external issues. The CSM operates on the basis of an *Ad Hoc* Policy Working Group that relates to ongoing CFS processes. The CSM also has a Secretariat as well as a Finance and Administrative Working Group. CSM activities are mainly financed by voluntary donations of national governments.

The CSM is a facilitation mechanism. It performs this function by widely sharing information on the work of CFS and organising civil society consultations on CFS policy issues; facilitating the development and communication of common policy positions and lobby strategies; facilitating the identification of CSO spokespersons in CFS inter-sessional meetings and CFS plenary sessions; facilitating the participation of a broad range of CSOs in CFS events and processes, whilst ensuring a balance across civil society constituencies, sub-regions and gender; and prioritising the voices of the people most affected by food and nutrition insecurity (e.g., smallholder producers, fisherfolk, pastoralists, indigenous, urban poor, migrants, agricultural workers etc.).³⁰

This new structure, a first for the UN system, recognises that the participation of representatives of small-scale food producers and other CSOs is essential for achieving food security, and provides innovative mechanisms to facilitate and promote it.

D) INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT

The International Fund for Agricultural Development (IFAD) is a specialised UN agency and was established as an international financial institution in 1977 as one of the major outcomes of the 1974 World Food Conference. It is the first international financial institution to adopt Free Prior Informed Consent (FPIC) as an operational principle in its policy documents.³¹ This represents an important precedent for other intergovernmental bodies as well as a valuable illustration of coherence across international agreements.

IFAD's exclusive focus is on rural people and their largely agriculture-based livelihoods. It has a clear published policy on Reaching the Rural Poor, in which its approach to "policy dialogue and policy development" is to "seek to make a more systematic and coordinated use of the experience and lessons learned from its projects and programmes to promote inclusion of rural poverty and smallholder agricultural development into the international development agenda and in national development priorities, and to foster policy processes that address the needs of rural poor people."³² Accordingly, "IFAD will support the direct involvement of poor people and their organisations in the formulation and implementation of national policies and strategies that have an impact on their livelihoods. The systematic participation of smallholder farmers' and rural people's organisations in designing, managing, monitoring, supervising and evaluating IFAD-supported operations will be considered a stepping stone for their broader involvement in national policy decision-making processes."³³

27 www.fao.org/cfs/en/

28 The other four categories are: UN agencies and other UN bodies; international agricultural research institutions; international and regional financial institutions such as the World Bank, the International

Monetary Fund, regional development banks and the World Trade Organization; and private sector associations and philanthropic foundations.
29 The CC consists of 41 members from the 11 constituencies and 17 sub-regions.

30 sustainabledevelopment.un.org/content/documents/6981civilsociety.pdf

31 Policies on Improving Access to Land and Tenure Security (2008) and Engagement with Indigenous Peoples (2009); Policy on Environment and Natural

Resource Management (2011) and in IFAD's Social, Environmental and Climate Assessment Procedures (2014).

32 IFAD, *Targeting: Reaching the Rural Poor – Policy* (2008), p. 23.

33 *Ibid.*

E) CONVENTION ON BIOLOGICAL DIVERSITY

The role and contribution of indigenous peoples and local communities with regard to conservation and sustainable use of biological resources is explicitly recognised in the CBD.³⁴ Since the CBD's entry into force, its Conference of the Parties (COP) has adopted decisions, and good practices have evolved, that are exemplary in implementing participation rights. The CBD mechanisms for the full and effective participation of indigenous and local communities range from financial support that enables indigenous peoples and local communities to attend the meetings, to logistical support as well as participation in formal and informal groups (such as contact groups and Friends of the Chair groups). The CBD practices are seen now as a good practice model for the rest of the UN system.³⁵

The establishment of the *Ad Hoc* Open-ended Working Group on Article 8(j) and Related Provisions was an important start. The current practice is that representatives of indigenous peoples and local communities are invited to designate seven "Friends of the Bureau" to participate in Bureau³⁶ meetings as well as to act as co-chairs of possible contact groups. The International Indigenous Forum on Biodiversity (IIFB), which is the platform for the engagement of indigenous peoples at the CBD, proposes the seven persons based on internally agreed criteria and procedures.

Representatives of indigenous peoples and local communities are thus at the table with government delegations participating in decision-making on matters that directly affect them, and most significantly co-chairing the Working Group and contact groups.

The CBD Secretariat also administers a Voluntary Fund to facilitate the participation of indigenous and local communities in the work of the Convention as set out in the annex to decision VIII/5.D of the COP, and in accordance with the selection criteria established in section B of the annex.

Nominations to receive financial assistance are submitted following a self-selection process established by the IIFB. Organisations and networks other than the IIFB may also submit nominations. The Bureau of the COP assisted by the CBD Secretariat then considers and approves the representatives to be funded to attend the relevant meetings of the CBD. If more funds are available following the first round of selection, additional funded participants may be added. The list of beneficiaries of financial assistance is sent to the CBD mailing list and posted on its website.

CONCLUSION

It can be seen from this review that the right of farmers to participate in decision-making in Article 9.2(c) is clearly supported and reinforced by many instruments and agreements, particularly within the human rights framework. There are provisions and mechanisms in those instruments that can be used to inform, guide and strengthen implementation of Article 9.2(c).

Lessons drawn from these instruments and their use as well as experiences and good practices in other fora, including within the wider UN system, thus provide a wealth of experience and expertise to support the implementation of Article 9.2(c).

34 Article 8(j) on the traditional knowledge, practices and innovations of indigenous and local communities is the key provision. The Preamble of the Convention also recognises "the vital role that women play in the conservation and

sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation."

35 www.cbd.int/traditional/general.shtml

36 In UN treaties, Parties nominate through their UN recognised groupings their respective representatives to constitute the Bureau of the Conference of the Parties (COP). The Bureau supports the COP through the provision of advice and guidance

regarding the ongoing work under the treaty, the organisation of its sessions and the operation of the secretariat, especially at times when the COP is not in session.

5

Implementing Article 9.2(c) – Elements and Recommendations

In this chapter, we explore the meaning of the right of farmers to participate in decision-making as formulated in Article 9.2(c) of the Treaty and identify elements critical for its meaningful and effective operationalisation. This chapter is mainly based on elements drawn from submissions to the Treaty on Farmers' Rights (Chapter 2) and other international instruments, in particular the human rights framework (Chapter 4). It also takes into account the experiences at the national, regional and international levels and challenges identified with respect to farmers' participation in decision-making processes. Based on these, a number of recommendations are made in this chapter.

5.1 – ELEMENTS FOR IMPLEMENTING ARTICLE 9.2 (C)

Treaty Article 9.2(c) has three components that will be analysed separately: (a) the right to participate in making decisions, (b) at the national level, (c) on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

A) "PARTICIPATE IN MAKING DECISIONS..."

Chapter 1 established that Article 9.2(c) applies to all types of decision-making processes (e.g., administrative, legislative) and outcomes (e.g., policies, legislations, regulations, budgets, strategies etc.) *related to* the conservation and sustainable use of PGRFA.

A number of elements regarding a meaningful and effective implementation of farmers' participation in making decisions can be drawn from the human rights framework, including from (but not limited to) the right to participate in public affairs as recognised in the ICCPR and its further elaboration by the

Human Rights Council and the OHCHR, as well as from other international instruments discussed in Chapter 4.

One key element is that this right of farmers should have a *solid legal basis* and be enforceable by law. It should also be supported by inclusive, independent, impartial, transparent and non-discriminatory processes and mechanisms designed to engage farmers including from the community level, allowing sufficient time and opportunity to provide feedback and proposals.

It is important for such processes and mechanisms for participation to pay special attention to participation by disadvantaged groups, in particular small-scale farmers, as too often participation processes are taken over by the interests of a few large-scale industrial farmers. Indicators *inter alia* to assess the level of participation especially of small-scale farmers and detect discriminatory practices would also be important.

Effective and meaningful participation in decision-making is not just about consultations through written submissions and online surveys, or even a few face-to-face meetings, that purport to seek views and inputs which have little or no bearing on the outcomes and decisions. As noted by the OHCHR, *pro forma* participatory processes only reinforce existing power structures and the feeling of exclusion.¹ Effective and meaningful participation is about active participation, not only consultation. A fundamental principle of public participation rights is that such rights encompass the right to be consulted at each phase of legislative drafting and policy-making; to voice opinions and criticism; and to submit proposals.² This means that comments and inputs need to be taken into account in making decisions. It entails a long-term and genuine commitment to engage in processes of intensive dialogue regarding the development of policies, programmes and measures,³ which in the context of the Treaty is particularly relevant given its long-term, even inter-generational objectives.

1 OHCHR, A/HRC/30/26, paragraph 21.

2 *Ibid.*, paragraph 10.

3 *Ibid.*, paragraph 11.

Such participation is, however, distinct from the actual taking of a decision, which remains the prerogative of the State. Therefore, essential to the right to participation is also the right to seek a review of a decision and redress/remedies if such decision results in adverse effects on the individual or group concerned, thereby violating their rights.⁴ Access to justice with appropriate administrative and judicial procedures and mechanisms and the right to participate are thus inextricably linked.

The right to participate in decision-making presupposes *access to information*. Generally there are two important aspects to "information", i.e., information over process (e.g., the timeline and phases of the decision-making process, how and to whom to submit comments and/or proposals) and substance (the actual content of the instruments, documents, the evidence etc.). Access in both these aspects is imperative for realising the right to participate.

It is a participation principle that the relevant authorities (States, regional and international organisations) must make every effort to ensure easy, prompt, effective and practical access to information of interest to the public.⁵ They should be proactive in making widely available information in their possession that is important for effective engagement in the decision-making process. Information should also be provided on the final decision.

All information needs to be full, updated and understandable as well as be free of charge.⁶ The relevant authorities should also put in place appropriate mechanisms for concerned persons to request for information without having to say why they require it and for the requested information to be available within one month of the request.⁷

Moreover information must be accessible, i.e., available in local languages and formats that are reachable for farmers from indigenous and local communities. For example, information may not reach farmers in the rural areas with limited access to the internet, if information is made available only through electronic means.

Another key element of the right to participate in making decisions is the right to *freedom of association*, including the right to form and join organisations and associations, and farmers being able to choose their own representatives according to their own procedures.

Implementation of Article 9.2(c) is also premised on empowerment of farmers. Awareness-raising and capacity-building of farmers in respect of their rights, including the right to participate in decision-making processes, and issues at stake is crucial. Such awareness-raising and capacity-building may be

done by exchanges between farmer groups. Support from, and collaboration with, public interest CSOs can contribute to the advocacy capacity-building of farmers as well as forge joint advocacy engagement at the national, regional and international levels.

Facilitating participation requires funding and *financial support* and the relevant authorities should allocate a sufficient budget, for example, to finance travel of farmer representatives to participate in meetings etc. At the international level, the establishment of voluntary trust funds with contributions from governments as highlighted in Chapter 4 is a good practice.

B) "... AT THE NATIONAL LEVEL ..."

Human rights instruments are quite clear that the human right to participate in decision-making encompasses not only the national level but also the local, regional and international levels (see General Recommendations of the Committee on Human Rights and the Committee on Economic, Social and Cultural Rights highlighted in Chapter 4). In other words, as pointed out by CEDAW, the right to participate applies to decisions taken at "all levels".

Similarly with respect to Article 9.2(c), there are two aspects to national-level decision-making. Firstly, *decision-making at the national level would also include decisions taken at the sub-national and local levels* on matters related to the conservation and sustainable use of PGRFA. Secondly, it should also apply to regional, sub-regional, plurilateral and international decision-making processes, as such processes impact national decision-making.

Since the Treaty entered into force, there has been a trend of increasing decision-making at the regional, sub-regional and international levels that has far-reaching impacts on national decision-making, in particular on the policy space to implement Farmers' Rights. As can be seen in Chapter 3, the lack of farmer/public consultation and participation in regional arrangements (e.g., Arusha Protocol) and plurilateral/international arrangements (e.g., the TPPA) has led to plant variety protection laws and treaties based on UPOV 1991, which in turn threatens Farmers' Rights. The lack of respect and implementation by regional and international organisations of the right to participate that is well-acknowledged within the broader human rights framework, is a major constraint to the effective operationalisation of Article 9.2(c), as illustrated in Chapter 3.⁸

Today, with the right to food established by the international community and ambitious targets in the UN Sustainable De-

4 Article 2.3 of the International Covenant on Civil and Political Rights: "Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by

persons acting in an official capacity; To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the

State, and to develop the possibilities of judicial remedy; To ensure that the competent authorities shall enforce such remedies when granted."

5 OHCHR, A/HRC/30/26, paragraph 9.

6 *Ibid.*, paragraph 73.

7 See Chapter 4 on the Aarhus Convention.

8 See, for example, the experiences in relation to the Arusha Protocol for the Protection of New Varieties of Plants for the ARIPO region, the COMESA Seed Trade Harmonisation Regulations, UPOV and WIPO.

velopment Goals⁹ adopted in September 2015, it is imperative for regional, sub-regional, plurilateral and international decision-making processes to be coherent with well-established principles and standards of participation within the Treaty, human rights framework and beyond, as discussed in Chapter 4. This is fundamental to the realisation of Farmers' Rights. Contradictions and the lack of coherence such as those identified between UPOV 1991 and norm-setting and technical assistance by WIPO on the one hand, and the Treaty on the other hand, can only undermine Farmers' Rights, and consequently affect realisation of the right to food as well as the UN SDGs.¹⁰

Therefore farmers' participation is needed for decision-making related to the negotiating positions of national governments in supra-national processes that create commitments and obligations, and for decision-making in these supra-national processes themselves. As seen in Chapters 2 and 3, where there is effective and meaningful participation such as in the CBD and in some countries, the outcomes support and implement the rights of farmers. In contrast, where participation is perfunctory or absent, as seen in the experiences related to UPOV 1991, WIPO and free trade agreements, the outcomes undermine and even contradict Farmers' Rights.

C) "... ON MATTERS RELATED TO THE CONSERVATION AND SUSTAINABLE USE OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE"

The right to participate applies to a wide range of subject matter, given the broad scope of "conservation and sustainable use of PGRFA" as discussed in Chapter 1. It is a prerequisite to implementation of Article 9 itself, as well as covering Treaty provisions that relate to the conservation and sustainable use of PGRFA, including Treaty Article 5 (Conservation, Exploration, Collection, Characterisation, Evaluation and Documentation of Plant Genetic Resources for Food and Agriculture), Article 6 (Sustainable Use of Plant Genetic Resources), Article 13 (Benefit-sharing in the Multilateral System) and Article 18 (Financial Resources). In short, it is relevant to all roles of farmers "related to conservation and sustainable use of PGRFA".¹¹

The human rights framework also provides useful guidance on the right of farmers to participate in making decisions. From the recommendations of the Special Rapporteur on the right to food, the right of farmers to participate in decision-making should be interpreted as including matters related to: certification and trade of seeds; PVP and patent laws; as well as the rest of agriculture.¹² Applying the UNDRIP and CEDAW principles,¹³ farmers' right to participate in decision-making would extend to all matters that affect them, their rights or their livelihoods. FAO is also clear that farmers should be able to participate in seed policy formulation.

5.2 – RECOMMENDATIONS

Many actors have responsibilities, implicitly and explicitly, in the implementation of Article 9.2(c). Below are some recommendations for strengthening implementation of Article 9.2(c), and of Farmers' Rights in general.

5.2.1 – RECOMMENDATIONS FOR GOVERNMENTS

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

5.2.2 – RECOMMENDATIONS AT THE TREATY LEVEL

- a) **Gather data and information on national, regional and international rules and practices that provide for participation of farmers in decision-making in connection with PGRFA, and document and assess their impact** on realising Farmers' Rights, including progress, obstacles and challenges.
- b) **Develop "guidance" for the effective implementation of Article 9.2(c)** with the full and effective participation of farmers' representatives and public interest civil society organisations. Such guidance should build on good practices, principles and elements discussed in Chapter 4 and this chapter.

9 sustainabledevelopment.un.org/sdg2

10 See Shashikant and Meienberg (2015).

11 Email communication dated 24 May 2016 with Lim Eng Siang,

who was in the national delegation of Malaysia and a key negotiator of the Treaty. The authors thank him for his insights into the history and context of Article 9, as well as its

implementation.

12 De Schutter (2009).

13 Many of the indigenous peoples and women are farmers.

14 An official appointed to investigate individuals'

complaints against maladministration.

15 www.fao.org/plant-treaty/areas-of-work/compliance/en/

- c) **Establish an ombudsman facility¹⁴ under the Treaty** and open a window for addressing gaps/obstacles in implementation of Farmers' Rights, including the farmers' right to participate in decision-making.
- d) **Reporting on implementation of the Treaty by every Contracting Party** required by the Treaty's compliance mechanism¹⁵ should specifically require the Contracting Party to provide information **on measures taken to implement Farmers' Rights, including farmers' right to participate in decision-making.** These country implementation reports should be presented regularly and be publicly available. Farmers' representatives should also be given an opportunity to present their perspectives on implementation of Farmers' Rights in relation to their countries, including regional and international activities and instruments that involve their countries.
- e) **Conduct an assessment of farmers' participation in Treaty-related meetings, processes and initiatives** in consultation with farmers' representatives and public interest civil society organisations, with the intent to institutionalise and strengthen farmers' participation in such processes and initiatives. The assessment should draw on good practices in other forums such as CFS and the CBD.
- f) **Ensure adequate, predictable and timely funding to implement the right to participate** in the work of the Governing Body, including its inter-sessional work and relevant consultations and meetings that may be held. A wide range of Contracting Parties, with developed countries taking the lead, should finance a multi-donor trust fund to be administered by FAO/the Treaty (bearing in mind that the Governing Body resolutions of 2013 and 2015 made explicit linkages with FAO more broadly, specifically mentioning CFS).
- g) **Recognise and draw on farmers' expertise.** Representatives of farmers' organisations should be adequately represented and involved in any meeting, consultation, panel of experts, working group or equivalent body convened by the Secretariat as mandated by Contracting Parties. In ensuring this, the Secretariat should recognise and respect farmers' autonomy to self-organise and select their own representatives and should provide the necessary financial support for the participation.
- h) **Enhance and support (e.g., by ensuring financial support) capacity-building of farmers** (especially of small-scale farmers) by farmer groups and public interest civil society organisations in respect of their rights, including the right to participate in decision-making processes; developments that may undermine Farmers' Rights; and the importance of active farmers' engagement in such relevant national, regional and international processes.

5.2.3 – RECOMMENDATIONS FOR REGIONAL AND INTERNATIONAL ORGANISATIONS AND PROCESSES

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

