

**A GLOBAL INSTRUMENT ON
AGROBIODIVERSITY:
THE INTERNATIONAL TREATY ON
PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

**by
Ali Mekouar**

***FAO LEGAL PAPERS
ONLINE #24***

January 2002

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**A GLOBAL INSTRUMENT ON AGROBIODIVERSITY:
THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE¹**

Mohamed Ali Mekouar²

On 3 November 2001, the *International Treaty on Plant Genetic Resources for Food and Agriculture* (the “Treaty”)³ was adopted by the FAO Conference at its 31st session in Rome, by Resolution 3/2001 (text in the Annex), with 116 favourable votes, no dissenting votes, and two abstentions⁴.

The Treaty is a new, legally-binding instrument which seeks to ensure the conservation and sustainable management of plant genetic resources for food and agriculture, as well as the fair and equitable sharing of the benefits arising from their use (Article 1.1). Being at the crossroads between agriculture, commerce and the environment, the Treaty also aims at promoting synergy among these areas (Preamble).

Once in force, the Treaty will succeed the International Undertaking on Plant Genetic Resources (the “Undertaking”), a soft-law instrument adopted by the FAO Conference in 1983, the first international agreement to deal with sustainable management of plant genetic resources at the global level⁵. Secretariat functions for the Undertaking have been performed by FAO’s Commission on Genetic Resources for Food and Agriculture (the “Commission”), an intergovernmental forum that was created in 1983 to facilitate policy dialogue and technical discussions on genetic resources of relevance to food and agriculture⁶.

¹ Posted with permission from *Environmental Policy and Law*, for which this text was initially written.

² FAO Legal Office (Rome). This text does not necessarily reflect the views of FAO. Insights and inputs by José Esquíñas-Alacázar and Clive Stannard are gratefully acknowledged.

³ Full text at: <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGRRe.pdf>.

⁴ The two abstaining countries were Japan and the USA (Verbatim Record, Thirty-first Session, Fourth Plenary Meeting, 3 November 2001, C 2001/PV/4, at: <http://internal.fao.org/bodies/conf/C2001/conf.htm>).

⁵ The Undertaking was adopted by Resolution 8/83 (<ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/iutextE.pdf>) of the FAO Conference (Twenty-second Session of the FAO Conference, Rome, 5-23 November 1983, C 83/REP, paras. 275-285). The Undertaking’s objective is to “ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated and made available for plant breeding and scientific purposes” (Article 1). Three FAO Conference Resolutions containing agreed interpretations were subsequently adopted and annexed to the Undertaking. As of December 2001, 113 countries had adhered to the Undertaking.

⁶ The Commission was established by Resolution 9/83 (<ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/Res/C9-83E.pdf>) of the FAO Conference (Twenty-second Session of the FAO Conference, Rome, 5-23 November 1983, C 83/REP, paras. 286-287). Initially the Commission’s mandate was limited to *plant* genetic resources. In 1995, its mandate was broadened by Resolution 3/95 of the FAO Conference to cover all components of agrobiodiversity (Twenty-eighth Session of the FAO Conference, Rome, 20-31 October 1995, C 95/REP, paras. 65-69; Hundred and Tenth Session of the FAO Council, Rome, 2-3 November 1995, CL 110/REP, paras. 13-14). As of December 2001, 161 countries and the European Community were members of the Commission.

THE ROAD TO THE TREATY

Unlike some recent biodiversity or environment-related conventions, the negotiations of which were swiftly completed in a matter of two or three years⁷, the present Treaty's gestation was not an easy one. It is the result of a laborious and lengthy, hard-fought seven-year negotiating process, which began in November 1994 at the 1st extraordinary session of the Commission, and continued through June 2001 at three regular and five extraordinary sessions⁸. The negotiations also included an informal expert meeting⁹ and six intersessional meetings of the Chairman's Contact Group¹⁰. The process was eventually concluded only a couple of days before the Treaty's formal adoption within an open-ended working group which met in Rome, during the 121st session of the FAO Council, from 30 October to 1 November 2001¹¹.

The adoption of the Treaty fulfils the request in Resolution 7/93 of the FAO Conference, that the Director-General of FAO provide a negotiation forum for "the adaptation of the International Undertaking on Plant Genetic Resources, in harmony with the Convention on Biological Diversity", and for "consideration of the issue of access on mutually agreed terms to plant genetic resources, including *ex situ* collections not addressed by the Convention"¹².

This move was partly in response to biodiversity-related developments that had occurred about the same time. In particular, when the Agreed Text of the Convention on Biological Diversity (CBD) was adopted in Nairobi in May 1992, Resolution 3 of the Final Act stated that access to *ex situ* collections not acquired in accordance with the CBD, as well as Farmers' Rights, were outstanding matters for which solutions should be sought within the FAO Global System on Plant Genetic Resources –that is, primarily under the Undertaking¹³. Similarly, a month later at UNCED in Rio de Janeiro, Agenda 21 had called for the

⁷ Such as the 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the 2000 Protocol on Biosafety, and the 2001 Convention on Persistent Organic Pollutants.

⁸ The extraordinary sessions were: (i) First Extraordinary Session (Rome, 7-11 November 1994); (ii) Second Extraordinary Session (Rome, 22-27 April 1996); (iii) Third Extraordinary Session (Rome, 9-13 December 1996); (iv) Fourth Extraordinary Session (Rome, 1-5 December 1997); (v) Fifth Extraordinary Session (Rome, 8-12 June 1998); (vi) Sixth Extraordinary Session (Rome, 25-30 June 2001). The regular sessions were: (i) Sixth Regular Session (Rome, 19-30 June 1995); (ii) Seventh Regular Session (Rome, 15-23 May 1997); (iii) Eighth Regular Session (Rome, 19-23 April 1999). Reports at: www.fao.org/ag/cgrfa/docs.htm.

⁹ Montreux, 19-22 January 1999. Report at: <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/8-13-e.pdf>.

¹⁰ The Contact Group comprised 40 countries and the European Community. Its meetings were: (i) First Intersessional Meeting (Rome, 20-24 September 1999); (ii) Second Intersessional Meeting (Rome, 3-7 April 2000); (iii) Third Intersessional Meeting (Tehran, 26-31 August 2000); (iv) Fourth Intersessional Meeting (Neuchâtel, 12-17 November 2000); (v) Fifth Intersessional Meeting (Rome, 5-10 February 2001); (vi) Sixth Intersessional Meeting (Spoleto, 22-28 April 2001). Reports at: www.fao.org/ag/cgrfa/meetings.htm.

¹¹ Report at: www.fao.org/ag/cgrfa/docswg.htm and <http://internal.fao.org/bodies/conf/C2001/conf.htm>.

¹² Twenty-seventh Session of the FAO Conference, Rome, 6-24 November 1993, C 93/REP, paras. 105-108.

¹³ Operative para. 4 of Resolution 3 entitled: "The interrelationship between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture", Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, Nairobi, 22 May 1992.

strengthening of the Global System, including through steps to realize farmers' rights, and the "adjustment" of FAO's system on plant genetic resources in line with the CBD¹⁴.

Prior to this, between 1989 and 1991, the original text of the Undertaking had already been the subject of a series of "agreed interpretations", which aimed to find an equitable balance between the interests of developing and developed countries, and between the rights of farmers (informal innovators of farmers' varieties) and the rights of breeders (formal innovators of commercial varieties and breeders' lines). This process helped attract a broader acceptance of the Undertaking over the years, through the following decisions of the FAO Conference:

- Resolution 4/89, which simultaneously: (a) recognized farmers' rights; and (b) stated that UPOV-based plant breeder's rights were compatible with the Undertaking¹⁵;
- Resolution 5/89, which conceptualized the notion of Farmers' Rights¹⁶; and
- Resolution 3/91, which: (a) recognized the sovereign rights of nations over their plant genetic resources; and (b) set out that farmers' rights should be implemented through an international fund for plant genetic resources¹⁷.

The three resolutions were then incorporated into the text of the Undertaking as Annexes 1, 2 and 3. This gradual evolution resulted in key shifts in the Undertaking's conceptual grounds, particularly as regards the recognition of: (i) its compatibility with plant breeder's rights as provided for by UPOV; (ii) the need to realize Farmers' Rights; and (iii) State sovereignty over plant genetic resources. These moves helped address some of the concerns that have been voiced by a number of countries, both developed and developing¹⁸. At the same time,

¹⁴ Para. 14.60-f of Chapter 14 –“Promoting Sustainable Agriculture and Rural Development”– of Agenda 21.

¹⁵ Adopted on 29 November 1989, text at: <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/Res/C4-89E.pdf>.

¹⁶ Adopted on 29 November 1989, text at: <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/Res/C5-89E.pdf>. Farmers' rights, under Resolution 5/89, mean "rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions...". For an analysis of the concept of farmers' rights, see: M.S. Swaminathan Research Foundation. *Agrobiodiversity and Farmers' Rights*. Proceedings of a Technical Consultation on an Implementation Framework for Farmers' Rights. Madras, January 1996.

¹⁷ Adopted on 25 November 1991, text at: <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/Res/C3-91E.pdf>.

¹⁸ The Undertaking was originally founded on "the universally accepted principle that plant genetic resources are a *heritage of mankind* and consequently should be available without restriction" (Article 1). Some developed countries, concerned that such heritage-based approach could undermine the rights of plant breeders, had adhered to the Undertaking with reservations. Those countries which recorded their reservations in 1983 were: Canada, France, Germany, Japan, New Zealand, Switzerland, UK, and USA (Twenty-second Session of the FAO Conference, Rome, 5-23 November 1983, C 83/REP, paras. 275-285). Hence, the explicit recognition by Resolution 4/89 of *plant breeders' rights*. This, however, was counterbalanced by the simultaneous recognition of *farmers' rights*, stemming from "the enormous contribution that farmers of all regions have made to the conservation and development of plant genetic resources, which constitute the basis of plant production throughout the world", a position that was largely advocated by developing countries.

they contributed to paving the way for the revision of the Undertaking in a manner consistent with related legal instruments¹⁹.

THE CORE OF THE TREATY

As finally approved, the Treaty –while articulating the specific nature and needs of the agriculture sector– reflects some of the major principles of contemporary international environmental and biodiversity law, as enunciated, for example, in the Rio Declaration or in the CBD. The *Sovereign rights of States* over their plant genetic resources is one of those principles. It is clearly affirmed in the very first preambular paragraph of Resolution 3/2001 by which the Treaty was adopted, as well as in the second-to-last paragraph of the Preamble and in Article 10 of the Treaty itself (particularly in relation to access rights)²⁰. The Treaty and the CBD are therefore in full harmony in this regard.

The principle that plant genetic resources should be *conserved and used in a sustainable way* is also unequivocally stated in the Treaty’s text²¹. Article 6, more specifically, spells out the type of actions that should be taken to promote sustainability in this context. They include the following measures: (i) encouraging farming systems that enhance the sustainable use of agrobiodiversity and other natural resources; (ii) maximizing intra- and inter-specific variation for the benefit of farmers, especially those who apply ecological principles in maintaining soil fertility and combating diseases, weeds and pests; (iii) broadening the genetic base of crops and increasing the range of genetic diversity available to farmers; and (iv) promoting increased world food production compatible with sustainable development.

Access to information related to plant genetic resources is another principle that is treated by various provisions of the Treaty. According to Article 13.2-a, for instance, non-confidential information regarding catalogues, inventories, technologies, results of research, *etc.* on plant genetic resources is to be made available to contracting parties through the global information system provided for in Article 17. This system is to be developed by Treaty members, in collaboration with the CBD’s Clearing-House Mechanism, in order to facilitate information exchange “on scientific, technical and environmental matters related to plant genetic resources for food and agriculture”, with a view to contributing to the sharing of benefits therefrom.

¹⁹ Resolution 3/91 provided: (i) on the one hand, that “breeders’ lines and farmers’ breeding material should only be available at the discretion of their developers during the period of development”, echoing to some extent the 1991 amendment to the UPOV Convention; (ii) on the other hand, that “nations have sovereign rights over their plant genetic resources”, and that “the concept of mankind’s heritage, as applied in the International Undertaking on Plant Genetic Resources, is subject to the sovereignty of the states over their plant genetic resources”. This reflected an obvious move from a heritage-based approach to a sovereignty-based approach, a position that had already prevailed at the time in the draft text of the CBD, and which was later repeatedly confirmed in various UNCED and post-UNCED legal documents. Resolution 3/91 has therefore clearly contributed to closing the gaps between the Undertaking and related conventions, in particular with the then soon-to-be CBD.

²⁰ Conversely, no reference is made in the Treaty to the “heritage of mankind”, a concept which was central to the Undertaking. Instead, the notion that plant genetic resources are a “common concern of all countries” is used in the Preamble, in line with similar language in the CBD’s Preamble (“Affirming that the conservation of biological diversity is a common concern of humankind”).

²¹ The term “sustainable” appears no less than 24 times in the Treaty, and “sustainably” twice.

It is in light of the above principles –among others, such as *participation in decision-making* on plant genetic resources²²–, that other substantive provisions of the Treaty should be read. Some of these are groundbreaking. First and foremost, *Farmers’ Rights* have now been formally endorsed by a legally binding instrument at the global level (Article 9, text in box below)²³. This important landmark in contemporary treaty law represents a major step towards wider acknowledgement and genuine implementation of the rights conferred to informal innovators (“traditional farmers”), on equal footing with the rights already granted to formal innovators (“modern breeders”) by existing conventions, and reaffirmed by this Treaty²⁴.

Article 9 - Farmers’ Rights

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

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

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

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

The Scope of the Treaty is all plant genetic resources for food and agriculture (Article 3). Within this broader framework, another key element of the Treaty is the provision for a *Multilateral System of Facilitated Access and Benefit-Sharing* for plant genetic resources, to which the whole of Part IV –Articles 10 through 14– is devoted. The system aims to provide facilitated access to an agreed list of over 60 plant genera, including 35 crops and 29 forages, established on the basis of interdependence and their importance for food security (Article 11). The currently agreed list is appended to the main body of the Treaty as Annex I²⁵.

²² There is provision for participation of interested stakeholders in decisions regarding plant genetic resources in the 8th para. of the Preamble and in Articles 6.2-c and 9.2-c.

²³ Article 9, as well as the relevant preambular paragraphs (7 and 8), largely borrowed from, and built upon, the aforementioned Resolutions 4/89, 5/89 and 3/91 (footnotes 14, 15 and 16), whereby the notion of farmers’ rights was conceptualized under the Undertaking.

²⁴ In para. 6 of the Preamble and Articles 6.2-c and 7.2-b, in particular.

²⁵ During the Treaty’s negotiation, the list of crops was the subject of heated debates between the proponents of a long list (particularly EU countries) and the advocates of a short one (developing countries, the historic holders of plant genetic resources), with very diverging proposals that ranged from 9 to 287 crops (Earth Negotiations Bulletin. *Negotiations on the International Treaty on Plant Genetic Resources for Food and Agriculture: 30 October - 3 November 2001*, Vol. 9, No. 213, 5 November 2001, at www.iisd.ca/biodiv/iu-wg/). The eventual consensus list was a balanced one, covering most crops which are considered essential to world food security (Verbatim Record, Thirty-first Session, Fourth Plenary Meeting, 3 November 2001, C 2001/PV/4, at: <http://internal.fao.org/bodies/conf/C2001/conf.htm>).

Contracting parties agree to provide facilitated access to each other in accordance with the conditions specified in Article 12.3²⁶.

By pooling these resources in this way, and dealing with them through multilateral arrangements, countries forego the possibility of bilateral arrangements. This being the case, the benefits resulting from their use –including commercial use– do not return to the country of origin, but are to be shared in a fair and equitable manner through multilateral mechanisms. Additionally, they should flow primarily to farmers in all countries, especially in developing countries and countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture (Article 13).

The Treaty makes provision for benefits accruing from the use –including commercial– of the material accessed under the Multilateral System to be shared fairly and equitably, through a variety of actions (Article 13). These include partnerships and collaboration with the private and public sectors of countries in development and in transition. There will be increased opportunities for developing joint strategies for the conservation and sustainable use of plant genetic resources; the facilitation of research partnerships and the pooling of resources to exploit plant genetic resources; access to relevant research and technologies; and access by germplasm providers to information and training.

But it is the provisions of the Treaty regarding the sharing of the monetary benefits arising from the commercial use that is the real conceptual break-through. For the first time, someone who obtains a commercial profit from the use of genetic resources administered multilaterally will be obliged, by a standard Material Transfer Agreement, to share these profits fairly and equitably, and pay a royalty to the multilateral mechanism, to be used by the Governing Body of the Treaty as part of its funding strategy for benefit-sharing (Article 13.2-d).

The Treaty distinguishes between mandatory and voluntary payment. Payment is mandatory on the commercialisation of a product that is a plant genetic resource and that incorporates material accessed from the Multilateral System, when this product is not available without restriction to others for further research and breeding. It is voluntary when it is.

The Governing Body shall, at its first meeting, determine the level, form and manner of the payment, in line with commercial practice, and that it may establish different levels of payment for various categories of recipients commercialising such products, and from time to time review the levels of payment. The Governing Body also may assess, within a period of five years from the entry into force of the Treaty, whether mandatory payment shall also apply in cases where commercial products are available without restriction for further research and breeding (Article 13.2-d-ii).

²⁶ Article 12.3-d, stating that recipients “shall not claim any intellectual property or other rights that limit the facilitated access to plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System”, involved one of the most contentious issues during the negotiations. Some countries, including Australia, Canada, Japan, and USA, were concerned that this provision could impinge on their IPR laws and policies. However, the EU viewed Article 12.3-d as consistent with IPRs (Verbatim Record, Thirty-first Session, Fourth Plenary Meeting, 3 November 2001, C 2001/PV/4, at: <http://internal.fao.org/bodies/conf/C2001/conf.htm>).

The Contracting Parties shall also consider modalities of a strategy of voluntary benefit-sharing contributions by food processing industries that benefit from plant genetic resources (Article 13.6).

Such monetary benefit-sharing is part of a larger whole. The Treaty establishes a funding strategy which will mobilise funding for priority activities, plans and programmes, in particular in developing countries and countries with economies in transition (Article 18). Moreover, the Contracting Parties explicitly agree to take the necessary measures within relevant international mechanisms, funds and bodies to ensure that due attention is given to the effective allocation of predictable and agreed resources, taking into account the priorities established in the rolling Global Plan of Action for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture.²⁷

Last but not least, the Treaty for the first time provides an agreed international framework for the *ex situ* collections of plant genetic resources held in trust by the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR)²⁸ and relevant other international organizations. The signature of agreements between IARCs and other such organizations and the Treaty's governing body is foreseen for the purposes of making the collections' material available within the context of the Multilateral System and under the terms and conditions set out in Article 15.

Other Treaty provisions not touched upon above include those related to: (i) the promotion of international networks for cooperation on plant genetic resources (Article 16); (ii) the institutional arrangements to be put in place for the operation of the Treaty (Articles 19 and 20)²⁹; and (iii) compliance, dispute settlement³⁰, amendments, reservations, termination, and other final provisions (Articles 21 to 35).

THE WAY AHEAD

The Treaty will enter into force three months after its ratification by 40 Contracting Parties (Article 28)³¹. In the interim, various institutional and financial arrangements, described in

²⁷ This Plan was adopted by 150 countries in 1996 at the Leipzig International Technical Conference on Plant Genetic Resources for Food and Agriculture (available at <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/GS/gpaE.pdf>).

²⁸ In 1989, the International network of *ex situ* collections was created under the auspices of FAO in collaboration with CGIAR (*Progress Report on the International network of ex situ collections under the Auspices of FAO*, CGRFA-8/99/7, Rome, FAO, 1999, at: <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/8-7-e.pdf>). In 1994, 12 centres of CGIAR signed agreements with FAO whereby they placed most of their collections (some 500,000 collections) in that Network and agreed to hold the designated germplasm in trust for the benefit of the international community, and not to claim ownership or seek intellectual property rights over the germplasm and related information (<ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/Gs/CGtextF.PDF>).

²⁹ The Treaty's Governing Body, made of all contracting parties, shall elect its Chairperson and Vice-chairpersons, who will form the Bureau. The Secretary of the Governing Body shall be appointed by the Director-General of FAO.

³⁰ Article 22 on settlement of disputes is complemented by Annex II to the Treaty, which lays down the procedural rules for settling disputes through arbitration or conciliation.

³¹ It shall remain open for signature, at FAO, from 3 November 2001 to 4 November 2002 to FAO members and to States not members of FAO which are members of the UN, of its specialized agencies or of IAEA (Article 25). Depository functions will be performed by the Director-General of FAO (Article 34).

Resolution 3/2001, should be made to prepare for the Treaty's future implementation. They mainly consist of the following:

- the Interim Committee for the Treaty will be FAO's Commission on Genetic Resources for Food and Agriculture;
- States that are members of FAO, the UN, specialized agencies of the UN or IAEA are invited to participate in the Interim Committee's work;
- at its first meeting, which should take place in 2002, the Interim Committee will adopt its rules of procedure;
- the Interim Committee will further prepare, for consideration by the Treaty's governing body: (i) draft rules of procedure, draft financial rules and a budget proposal for the Treaty; (ii) a draft standard agreement for facilitated access, with proposed terms for commercial benefit sharing; (iii) draft agreements on *ex situ* collections; and (iv) proposed procedures to promote compliance;
- an Expert Group of technical and legal experts on plant genetic resources exchange will be established to formulate recommendations on the terms of the standard agreement for facilitated access; and
- the Interim Committee will initiate the establishment of cooperation with relevant treaty bodies and international organizations, including the CBD's CoP.

These tasks and others will surely keep negotiators and experts busy for quite some time. Progress in these matters will be indispensable if the Treaty is to attract, before long, the required number of ratifications to become effective, as called for by Resolution 3/2001³². To this end, mobilizing appropriate resources will be essential, as well as creating synergies and strengthening cooperation among all those active in the area of agrobiodiversity³³.

Contracting parties will also have to prepare for compliance with the Treaty, particularly in terms of building the capacities and acquiring the tools necessary to exercise their rights and fulfil their obligations. Among the chief measures to be taken in this respect are the policy and legal ones. Domestic policies and laws relating to agrobiodiversity will need to be designed or adjusted to meet the Treaty's requirements, as explicitly stated in Articles 4 and 6³⁴.

New legislation will be specially wanted in such novel areas as Farmers' Rights (Article 9.2), where the process of conceptualizing and writing laws has started only very recently. India is the first country to have passed a pioneering law in this area: the Protection of Plant Varieties and Farmers' Rights Act No. 53 of 31 August 2001³⁵. The 2000 OAU model law on

³² Para. 3 of Resolution 3/2001 invites States to sign the Treaty and "to deposit instruments of ratification, acceptance, approval or accession, *at the earliest opportunity*".

³³ In this regard, paras. 13 and 15 of Resolution 3/2001 invite CBD's CoP and IARCs to cooperate with the Interim Committee and, in the future, with the Treaty's governing body.

³⁴ It should be noted that, under Article 21, mechanisms to promote compliance with the Treaty include *legal assistance* to countries in development and in transition.

³⁵ S. Sahai. "India's Plant Varieties Protection and Farmers' Rights Act" (2000), at: www.ciroap.org/food/PVP_SUNS.PDF.

biological resources³⁶ is another illustration of emerging efforts towards the formal sanction of Farmer's Rights by national legislators³⁷. Some of the relevant provisions of both texts, abstracted in the table below, are clearly inspired by, if not modelled after, the concept of Farmers' Rights as developed under the Undertaking and reaffirmed by the Treaty.

Farmers' Rights are crucial to food security in providing an incentive for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.³⁸ Making those rights a reality, under the Treaty and other relevant legal instruments, at the national level as well as between nations, will represent a challenge for the years to come –and one of the manifold tasks to be promptly and steadily tackled in implementing the Treaty.

Moreover, the terms of the standard Material Transfer Agreement, by which commercial benefits will be fairly and equitably shared, will be a major conceptual task, and new national implementing legislation will also be required.

For a short while, however, “negotiators and the world community can rest on their laurels” as the newly born Treaty has “become the latest innovation to address the intersection of international environmental, agricultural and trade law”³⁹. It is a Treaty which, notwithstanding its distinctiveness⁴⁰, may be viewed as belonging to the wider family of modern biodiversity-inspired international legal instruments⁴¹.

³⁶ “African model legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources”, Part V - Farmers' Rights (www.grain.org/publications/oau-model-law-en.cfm).

³⁷ General references to farmers' rights may be found in a few other texts, such as Costa Rica's 1998 *Ley de biodiversidad*, which provides: (i) “El Estado reconoce la existencia y validez de las formas de conocimiento e innovación y la necesidad de protegerlas, mediante el uso de los mecanismos legales apropiados para cada caso específico” (Artículo 77.); and (ii) “El Estado otorgará la protección indicada en el artículo anterior, entre otras formas, mediante [...] *derechos de los agricultores* (Artículo 78.). Another example is Bangladesh's draft Plant Varieties Act of 1998 (www.grain.org/publications/bangladesh-pvp-1998.cfm), whose Article 22 deals with farmers' rights.

³⁸ J. Esquínas-Alacázar. “Agricultural Biological Diversity and Farmer's Rights”, *World Conference on Bioethics*, Gijón, Spain, June 2000; “Plant Genetic Resources: A Base for Food Security”. CERES, No. 118, Vol. 20/4, 1987.

³⁹ Earth Negotiations Bulletin. *Negotiations on the International Treaty on Plant Genetic Resources for Food and Agriculture: 30 October - 3 November 2001*, Vol. 9, No. 213, 5 November 2001 (www.iisd.ca/biodiv/iu-wg/).

⁴⁰ The first para. of the Treaty's Preamble emphasizes “the special nature of plant genetic resources for food and agriculture, their *distinctive* features and problems needing *distinctive* solutions”.

⁴¹ In addition to the explicit references to CBD made in several clauses of Resolution 3/2001 and of the Treaty, Article 1.2 clearly states that the Treaty's objectives “will be attained by *closely linking* this Treaty to [...] the Convention on Biological Diversity”.

Farmers' Rights in two recent texts

African Model Legislation (2000)	India's Act (2001)
<p>Recognition of Farmers' Rights 24(1) Farmers' Rights are recognized as stemming from the enormous contributions that local farming communities, especially their women members, of all regions of the world, particularly those in the centres of origin or diversity of crops and other agrobiodiversity, have made in the conservation, development and sustainable use of plant and animal genetic resources that constitute the basis of breeding for food and agriculture production; and</p> <p>(2) For farmers to continue making these achievements, therefore, Farmers' Rights have to be recognized and protected.</p> <p>Application of the Law on Farmers' Varieties 25(1) Farmers' varieties and breeds are recognized and shall be protected under the rules of practice as found in, and recognized by, the customary practices and laws of the concerned local farming communities, whether such laws are written or not.</p> <p>(2) A variety with specific attributes identified by a community shall be granted intellectual protection through a variety certificate which does not have to meet the criteria of distinction, uniformity and stability. This variety certificate entitles the community to have the exclusive rights to multiply, cultivate, use or sell the variety, or to license its use without prejudice to the Farmers' Rights set out in this law.</p> <p>Farmers' Rights 26(1) Farmers' Rights shall, with due regard for gender equity, include the right to:</p> <ol style="list-style-type: none"> a) the protection of their traditional knowledge relevant to plant and animal genetic resources; b) obtain an equitable share of benefits arising from the use of plant and animal genetic resources; c) participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources; d) save, use, exchange and sell farm-saved seed/propagating material of farmers' varieties; e) use a new breeders' variety protected under this law to develop farmers' varieties, including material obtained from genebanks or plant genetic resource centres; and f) collectively save, use, multiply and process farm-saved seed of protected varieties. <p>(2) Notwithstanding sub-paragraphs c) and d), the farmer shall not sell farm-saved seed/propagating material of a breeder's protected variety in the seed industry on a commercial scale.</p> <p>(3) Breeders' Rights on a new variety shall be subject to restriction with the objective of protecting food security, health, biological diversity and any other requirements of the farming community for propagation material of a particular variety.</p> <p>Certification of Farmers' Varieties 27(1) Any product derived from the sustainable use a biological resource shall be granted a certificate or label of recognition.</p> <p>(2) A certificate of fair trade shall be granted to a product derived from a biological resource or knowledge or technology, when a significant part of the benefits derived from the product goes back to the local community.</p>	<p>Preamble Whereas it is considered necessary to recognise and protect the rights of the farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties.</p> <p>Definitions 2(k) "farmer" means any person who-</p> <ol style="list-style-type: none"> (i) cultivates crops either by cultivating the land himself; or (ii) cultivates crops by directly supervising the cultivation of land through any other person; or (iii) conserves and preserves, severally or jointly, with any person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties. <p>(l) "farmers' variety" means a variety which-</p> <ol style="list-style-type: none"> (i) has been traditionally cultivated and evolved by the farmers in their fields; or (ii) is a wild relative or land race of a variety about which the farmers possess the common knowledge. <p>Establishment of Authority 3(1) The Central Government shall... establish an Authority to be known as the Protection of Plant Varieties and farmers' Rights Authority...</p> <p>General Functions of Authority 8...It shall be the duty of the Authority to promote... new varieties of plants and protect the rights of the farmers and breeders..., ensuring that seeds of the varieties registered under this Act are available to the farmers...</p> <p>Chapter VI – Farmers Rights 39(1) Notwithstanding anything contained in this Act, a farmer-</p> <ol style="list-style-type: none"> (i) Who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety under this Act, (ii) the farmers' variety shall be entitled for registration... (iii) Who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the National Gene Fund; <p>Provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act,</p> <ol style="list-style-type: none"> (iv) shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act; <p>Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.</p>

ANNEX

RESOLUTION 3/2001 OF THE FAO CONFERENCE

Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture and Interim Arrangements for its Implementation

THE CONFERENCE,

Recognizing the sovereign rights of States over their own plant genetic resources for food and agriculture;

Acknowledging the interdependence of all countries with respect to plant genetic resources for food and agriculture;

Recognizing the importance of realizing Farmers' Rights as set out in the International Treaty on Plant Genetic Resources for Food and Agriculture and of increasing cooperation in the field of technical assistance in accordance with the relevant Articles of this Treaty;

Recognizing the integral contributions of plant breeders, including farmers, to global food security through their research and development of new crop varieties, and the role of intellectual property rights in promoting innovation and investment in plant genetic resource conservation, breeding and sustainable use;

Recognizing that the International Undertaking on Plant Genetic Resources, as adopted by the FAO Conference by Resolution 8/83, and as modified by the agreed interpretations in its Resolutions 4/89, 5/89 and 3/91, represents the first international instrument dealing with the conservation and sustainable use of plant genetic resources for food and agriculture;

Recalling Resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, which recognized the need to seek solutions to outstanding matters concerning plant genetic resources within the FAO, in particular, on access to *ex situ* collections not acquired in accordance with the Convention on Biological Diversity, and the question of Farmers' Rights;

Recalling Resolution 7/93 of the Twenty-seventh Session of the FAO Conference, which called for negotiations, through the FAO Commission on Genetic Resources for Food and Agriculture, to revise the International Undertaking on Plant Genetic Resources, in harmony with the Convention on Biological Diversity;

Recalling that the Plan of Action of the World Food Summit underlined the need to promote an integrated approach to the conservation and sustainable utilization of plant genetic resources for food and agriculture;

Recalling that both the FAO Conference at its Thirtieth Session and the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity confirmed that negotiations would proceed on the basis that the revision of the International Undertaking on Plant Genetic Resources would take the form of a legally-binding instrument, closely linked to the FAO and the Convention on Biological Diversity;

Recalling that the Conference of the Parties to the Convention on Biological Diversity at its Fifth Meeting recognized the potential contribution that the revised International Undertaking on Plant Genetic Resources, in harmony with the Convention on Biological Diversity, would have to assist in the implementation of its Programme of Work on Agricultural Biological Diversity, and that the

revised International Undertaking was envisaged to play a crucial role in the implementation of the Convention on Biological Diversity;

Noting with appreciation the work undertaken by the FAO and its Commission on Genetic Resources for Food and Agriculture in supporting States and Regional Economic Integration Organizations throughout the negotiations for the revision of the International Undertaking on Plant Genetic Resources and in preparation for its effective implementation;

Noting with appreciation the many expressions of support by the Conference of the Parties to the Convention on Biological Diversity for the FAO and its Commission on Genetic Resources for Food and Agriculture in this work;

Recalling that the Hundred and Nineteenth Session of the FAO Council requested that the negotiations be completed in time for the revised International Undertaking on Plant Genetic Resources to be sent to this Session of the Conference;

Having considered the observations contained in the Report of the Seventy-second Session of the Committee on Constitutional and Legal Matters;

Having examined the text of the International Treaty on Plant Genetic Resources for Food and Agriculture endorsed by the Council at its Hundred and Twenty-first Session;

Noting further that preparations were required for effective implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture, once it had entered into force;

1. **Adopts** the International Treaty on Plant Genetic Resources for Food and Agriculture, which is contained in Appendix E [omitted];
2. **Requests** the Director-General of the FAO to open the International Treaty on Plant Genetic Resources for Food and Agriculture for signature, after the adoption of this Resolution, during this Session of the FAO Conference and at the FAO Headquarters in Rome from 3 November 2001 until 4 November 2002;
3. **Invites** Members of the FAO and States that are not Members of the FAO, but are Members of the United Nations and any of its Specialized Agencies or the International Atomic Energy Agency to sign the International Treaty on Plant Genetic Resources for Food and Agriculture, and to deposit instruments of ratification, acceptance, approval or accession, at the earliest opportunity;
4. **Notes** with satisfaction that the International Treaty on Plant Genetic Resources for Food and Agriculture, as now adopted by the FAO Conference, on entry into force, will establish a new and binding framework for cooperation in the area of plant genetic resources for food and agriculture;
5. **Also notes** with satisfaction that the International Treaty on Plant Genetic Resources for Food and Agriculture will facilitate implementation of the Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture agreed at the Fourth International Technical Conference on Plant Genetic Resources for Food and Agriculture, held in Leipzig in 1996;
6. **Decides** that the Commission on Genetic Resources for Food and Agriculture shall act as the Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture;
7. **Invites** Members of the FAO and States that are not Members of the FAO, but are Members of the United Nations and any of its Specialized Agencies or the International Atomic Energy Agency to participate in the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee;

8. **Requests** the Director-General of the FAO to convene the first meeting of the Interim Committee in 2002, and at the request of the Interim Committee subsequent meetings as necessary, in the framework of meetings of the Commission on Genetic Resources for Food and Agriculture, subject to the availability of necessary resources.

The Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee shall:

- a) **Adopt** at its first session its Rules of Procedure,
 - b) **Prepare**, for consideration at the first Session of the Governing Body, draft Rules of Procedure, draft Financial Rules, and a proposal for a Budget of the International Treaty on Plant Genetic Resources for Food and Agriculture;
 - c) **Also prepare**, for consideration at the first Session of the Governing Body, taking into account, as appropriate, the recommendations of the Expert Group to be established pursuant to this Resolution, a draft standard Material Transfer Agreement (MTA) provided for in Article 12.4 for facilitated access, which shall include, *inter alia*, recommended terms for commercial benefit-sharing under Article 13.2d(ii) of the Treaty;
 - d) **Prepare**, for consideration at the first Session of the Governing Body, proposed procedures to promote compliance in accordance with Article 21;
 - e) **Consult** with the International Agricultural Research Centres and other relevant international institutions on the agreements to be signed with the Governing Body, in accordance with Article 15 of the International Treaty on Plant Genetic Resources for Food and Agriculture, and prepare draft agreements for the consideration of the Governing Body at its first Session;
 - f) **Perform** such other functions as may be necessary to prepare for the effective implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture upon its entry into force;
9. **Further decides** to establish an Expert Group to develop and propose recommendations, which may be considered by the Interim Committee, on the terms of the standard MTA. Such Group shall be composed of experts with technical or legal expertise with respect to the exchange of plant genetic resources for food and agriculture and relevant commercial practice. Terms of Reference for the Expert Group shall be agreed at the first meeting of the Interim Committee;
 10. **Further requests** the Director-General of the FAO to ensure that appropriate resources, including human resources, are available to the Secretariat of the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee;
 11. **Requests** the Director-General of the FAO to invite the Executive Secretary of the Convention on Biological Diversity to convey this Resolution to the Conference of the Parties to the Convention on Biological Diversity;
 12. **Requests** the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee to initiate the establishment of cooperation with the Conference of the Parties to the Convention on Biological Diversity and, as appropriate, with other relevant international organizations and treaty bodies, in particular in relation to the provisions of Article 18.4a of the International Treaty on Plant Genetic Resources for Food and Agriculture;
 13. **Invites** the Conference of Parties to the Convention on Biological Diversity to establish and maintain cooperation with the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee and, upon the entry into force of the International Treaty on Plant Genetic Resources for Food and Agriculture, with the Governing Body;

14. **Invites** Members of the FAO and States that are not Members of the FAO, but are Members of the United Nations and any of its Specialized Agencies, and Regional Economic Integration Organizations, to contribute, through the FAO, to the functioning of the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee;
15. **Invites** the International Agricultural Research Centres of the Consultative Group on International Agricultural Research, in particular the International Plant Genetic Resources Institute, and other relevant international organizations and treaty bodies, to assist the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee in its work.