In the Chapter which deals with UPOV it was found that, though UPOV 1991 on the one hand puts a lot of restrictions on the farmers’ right to save, use, exchange and re-use the PGR (seed) of the plant breeders, it allows a space as an exception to farmers in the national legislations on the other. There it was also found that, even if such legislation allows the farmers to use the seed, due to the genetic use restriction technologies used in the PGR, it will not be possible for the farmers to re-use the seed, and thus there is also no need of saving the seeds or exchanging them. UPOV is silent in this aspect, and it is for the State legislations to do the needed here.

In the Chapter dealing with CBD it was found that, during the plant breeders’ access to the PGR and TK of the farmers, two new concepts were developed namely, the PIC and fair and equitable benefit sharing. Both these were however not raised to the level of rights, but only as formalities to be complied with. However, the State parties are left with creating rights in this aspect, without prejudice to the objectives of the CBD. The benefit sharing envisaged under the CBD, rather its Protocol called the Nagoya Protocol is to the effect that a share of the benefit arising out of utilization of PGR of farmers (the word used there are, indigenous people and local communities) is to be given to them for the purpose of preserving the PGR and TK. The benefit sharing principle there does not talk at all about rewarding
the farmers for their efforts in maintaining these resources, in the form of *life support to them*.

While on the one hand the plant breeders make money, and also get a property right for their efforts to develop a new variety, the farmers are not given either. They are asked to continue to maintain the PGR and TK for making it available to the needed. When a variety is developed by the breeder, he creates it in such a manner that the propagating material is not used by the farmer even if a national law allows him to use it, or reuse it. Since the genetic material or the propagating material of a farmers’ variety can be used without further processing, they cannot prevent the breeder from using it or reusing it. But, as in the case of breeders’ right which creates almost a monopoly, the farmers are given compensation. This means that no incentive (especially monetary) is given to them to continue to be farmers as food producers, and as professionals, which is available to the plant breeders.

As food producers, what they require is their freedom to use, save, exchange and re-use seeds of their choice, especially when they are *seeds which give them good yield*. This is possible only when they have an unbridled right to use, save, exchange and re-use the seeds of even the protected variety. So, it is a very crucial question as to how ITPGRFA addresses these issues. The incentive the plant breeder or the corporate has in investing money in plant breeding is the return of their investment with profit, which is in a monetary term. Contrast to this, the incentive to the farmers (if any) is not at all in monetary terms. In fact, if the plant breeding, and thus more production (as is claimed by the plant breeders) is to take place, farmers should also be in a position to make money at least nearer to
the plant breeders, if they must remain as farmers. This is not seen in the benefit sharing of CBD.

However, as in the case of a plant breeder, it is not easy to identify the farmers who conserved a particular PGR or TK as it has become a matter of common knowledge. They have become so common that identification of even a community becomes impossible. This was the major difficulty faced by the negotiators of Farmers’ Rights in the FAO Resolutions in connection with the IUPGRFA as was seen in the first Chapter. There, one of the suggestions was to raise an international fund for supporting the farmers of the country of origin. It was also a major suggestion that it is not the farmers, or even community of farmers that are to be rewarded, but it is the peoples of the country of origin that are to be rewarded. All these happened because of the international level of dealing with the issue of identifying the farmers who are responsible for the conservation of a particular PGR or TK. With such a background, when IUPGRFA was transformed into ITPGRFA, the concern was not any individual farmer, or community of farmers, but the country of origin. Rather, there was not even a concept of rewarding the preservers. But to help farmers all around the world who handle the PGRFA. Thus, the benefit sharing system of ITPGRFA is very much different from that in the CBD thus. In fact, it is structured like that as a practical solution to the problem of identifying a particular farmer, or group of farmers as contributor of a particular PGR or TK. As was seen in the discussion relating to the FR in the first Chapter, the definition of Farmers Rights goes to suggest that they are the rights of the farmers arising from their past, present and future conservation and preservation of genetic diversity. Thus, they were to be given the right
to continue to use, and preserve even the PGR of the varieties of new technologies also. From this, it is clear that the farmers’ right to use, save, exchange, and even sell the seeds of the varieties which got PBR is also possible to form part of the FR. This means that ITPGRFA which defines the FR, contains in it, both the aspects of the central theme of this thesis.

Thus the ITPGRFA is a Treaty which deals with both the aspects of the central theme of this thesis called the farmers’ access to PGR of plant breeders, and the plant breeders’ access to PGR and TK of farmers. So, this Chapter examines both aspects of the theme. The questions answered are (1) what is the nature of rights given to the farmers while plant breeders are given access to their PGR and TK? and (2) what is the nature of rights given to farmers while they seek access to the PGR of the plant breeders? (right to use, save, exchange and re-use the seeds). To begin with, there is a need to give a very brief outline of the history of ITPGRFA. In fact the IUPGRFA is the predecessor of ITPGRFA. But the IUPGRFA and the FAO Resolutions on IUPGRFA have bearing on CBD and thus, those parts are discussed in the chapter dealing with CBD. The following history is thus only the history of the making of ITPGRFA.

The Nairobi Conference, 1992 which adopted the CBD¹, recognized the need to seek solutions to problems of the farmers’ rights in the context of matters concerning plant genetic resources for food and agriculture, within the Global System for the Conservation and Sustainable use of Plant Genetic Resources for Food and Agriculture, established by the FAO. This call was reinforced in Agenda 21 adopted by United Nations Centre for Environment and

¹ This conference was convened by the United Nations Environment Programme (UNEP).
Development (UNCED) which called for the strengthening of FAO Global System, its adjustment in line with the outcome of the negotiations on CBD, as well as for the realization of farmers’ rights. Reacting to this invitation, the FAO adopted Resolution 7/93 in its 27th Session. This Resolution called for negotiation, through the FAO Commission on Plant Genetic Resources for Food and Agriculture to revise the IUPGRFA in tune with CBD. After seven years of difficult negotiation procedure, the ITPGRFA was adopted by the FAO on its thirty first session on third November 2001, and was entered into force on 29 June 2004. In fact, the original IUPGRFA was based on the principle of considering the PGR as the “common heritage of mankind”, and the CBD was based on the principle of “permanent sovereignty of all nations over their natural wealth”. This was the most remarkable distinction between the IUPGRFA and the CBD. However, as was mentioned earlier, FAO Resolution 3/91 changed the common heritage into permanent sovereignty. However, the main document remained with common heritage principle. Also, there was no mention about the farmers’ right in the IU, though it was included in Resolution 5/89. So, the ITPGRFA was expected to include the amendments made to IUPGRFA in it.

The IUPGRFA envisaged “an international network of base collections in gene banks, under the auspices of the jurisdiction of FAO, that have assumed the responsibility to hold, for the benefit of the international community and on the principle of unrestricted exchange, base or active collections of the plant genetic resources of particular species”. This means that unlike in the case of CBD, which

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prescribes for bilateral agreement, IUPGRFA talks of a common pool in which plant genetic resources are collected from different parts of the world, which is collected from there, and even the dealings between the provider countries, and the recipient/recipient countries take place in this common centre. IUPGRFA never talks of plant genetic resources for food and agriculture, but only of plant genetic resources. Farmers’ rights or IPR like the breeders rights were not the concern of IUPGRFA, as it was concerned only with the sharing and exchange of plant genetic resources for their preservation and development. IUPGRFA also does not use the term traditional knowledge. But then the result was that, unrestricted access was to be allowed to plant genetic resources, without any safeguards or rights attached the farmers who conserved it.

4.1 Plant breeders’ access to PGR and TK of the farmers

The access and benefit sharing envisaged under the ITPGRFA is entirely different from that under the CBD. One of the main objectives of CBD is to conserve and preserve PGR. But the main objectives of ITPGRFA are” 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 Convention on Biological Diversity, for sustainable agriculture and food security.” So, conserving the PGRFA for further research and plant breeding is of paramount importance. This is mainly because in many biological rich countries, many the wild relatives and cultivars are on the verge of extinction mainly due to the abandonment of the same by the farmers as they prefer high yielding

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3 ITPGRFA, Article 1.1.
new varieties\textsuperscript{4}. It is in such contexts that the countries think of preserving these PGR through \textit{ex-situ} preservation. In a bilateral system like that under the CBD researchers or plant breeders of a country will have to bargain with individual countries. This is costly and time consuming. It is to overcome these problems, that the ITPGRFA created an innovative system called the Multilateral System of Access and Benefit Sharing (MLS).

Under this system, countries are in a position to access to all the PGRFA included in this system as per the rules of ITPGRFA. The Treaty's truly innovative solution to access and benefit-sharing is its declaration that 64 of our most important crops - crops that together account for 80 percent of all human consumption - will comprise a pool of genetic resources that are accessible to everyone. On ratifying the Treaty, countries agree to make their genetic diversity and related information about the crops stored in their gene banks available to all through the (MLS). This gives scientific institutions and private sector plant breeders the opportunity to work with, and potentially to improve, the materials stored in gene banks or even crops growing in fields. By facilitating research, innovation and exchange of information without restrictions, this cuts down on the costly and time consuming need for breeders to negotiate contracts with individual gene banks. The Multilateral System sets up opportunities for developed countries with technical know-how to use their laboratories to build on what the farmers in developing countries have accomplished in their fields\textsuperscript{5}.

\textsuperscript{4} Country Report on State of Plant Genetic Resources for Food and Agriculture, 2006 (India).
\textsuperscript{5} Available at \url{http://www.planttreaty.org/content/what-multilateral-system}. Visited on 02-10-2011.
These are considered as the benefits of the ITPGRFA by the Treaty makers. As is clear from the objective of the Treaty itself, one thing is clear that, the aim is to make available as far as possible the PGRFA to all at a minimum cost and expeditiously. In this context one must seriously think of the benefits that farmers are going to get out of such a system. Though the word ‘farmers’ rights” occur in this Treaty, given the objective, and the scheme of MLS raises doubt as to, to what extent farmers will be taken care of. The complaint of the developing countries against CBD is that it acts as a facilitator of access to the developed countries of the resources of developing countries. Same is possible with ITPGRFA with more intensity. Because under the MLS access is easier than that under the bilateral system. Now, while examining the rights or privileges given to the farmers during the plant breeders’ access to their PGR and TK, there are two main components as in the CBD. They are, rights during access, (in CBD it is the PIC), and benefit sharing. So, what are to be examined are, in what way farmers will be benefited by the access and benefit sharing under the MLS. In order to answer this question, a brief outline about the MLS is necessary.

**4.2 Rights (if any) during access-The multilateral system**

The MLS is established to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis. Unlike in the CBD which is bilateral system of access and benefit sharing, where the dealings are between State Parties and the recipient (indigenous or local people along with the State in some cases), in the multilateral system (MLS), access to the plant genetic resources for food and
agriculture is allowed from a common pool. The common pool is the place where all contracting parties keep the plant genetic material for food and agriculture, to which access is allowed to other countries and natural persons\textsuperscript{6}. The plant genetic resources are identified in the Annex to the Treaty. Member countries shall include all plant genetic resources under their control and in the public domain which are in the Annex I (almost all major food crops including rice, wheat, maize, sorghum, and pea, vegetables like carrot, beans, and potato, and fruits like apple and banana are included. Legume and grass forages (cattle feed) are also included) in the MLS\textsuperscript{7}. This means that only plant genetic resources which are owned by the State are to be compulsorily included in the multilateral system.

This is because, the rights of private individuals who own plant genetic resources which are protected under the property laws will have to be respected by the State. Thus, the States are required to encourage natural and legal persons within their jurisdiction who hold plant genetic materials included in the Annex I to include those plant genetic resources also in the MLS. At the same time, natural and legal persons can have access to the plant genetic resources in the Annex. Thus, even though these private individuals do not include their plant genetic resources in the MLS, they can have access to them. In order to make it \textit{quid pro quo}, the Treaty takes a coercive measure to disallow those persons to have access to the plant genetic resources in the multilateral who have not yet included their plant genetic

\textsuperscript{6}Id., Articles 10, 11 and 12.

\textsuperscript{7}Id., Article 11.2: “The Multilateral System, as identified in Article 11.1, shall include all plant genetic resources for food and agriculture listed in Annex I that are under the management and control of the Contracting Parties and in the public domain. With a view to achieving the fullest possible coverage of the Multilateral System, the Contracting Parties invite all other holders of the plant genetic resources for food and agriculture listed in Annex I to include these plant genetic resources for food and agriculture”
resources in the multilateral system. The relevant provisions are reproduced below.

“In furtherance of the objectives of conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use, as stated in Article 1, the Multilateral System shall cover the plant genetic resources for food and agriculture listed in Annex I, established according to criteria of food security and interdependence.

The Multilateral System, as identified in Article 11.1, shall include all plant genetic resources for food and agriculture listed in Annex I that are under the management and control of the Contracting Parties and in the public domain. With a view to achieving the fullest possible coverage of the Multilateral System, the Contracting Parties invite all other holders of the plant genetic resources for food and agriculture listed in Annex I to include these plant genetic resources for food and agriculture in the Multilateral System.

Contracting Parties also agree to take appropriate measures to encourage natural and legal persons within their jurisdiction who hold plant genetic resources for food and agriculture listed in Annex I to include such plant genetic resources for food and agriculture in the Multilateral System.

This means that all the PGRFA in the national gene banks or such other institutions (ex-situ collections) under the control and management of the State will have to be included in the MLS. Then giving access shall be according to this Treaty. The following are the

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8 Id., Article 11.4
9 ITPGRFA, Article 11
principles to be adopted while giving access as per the Standard Material Transfer Agreement (SMTA).

“Access shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses. Access will have to be given expeditiously with minimum cost. Passport data to be made available, subject to national legislation. Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System. Access to plant genetic resources for food and agriculture found in in situ conditions will have to be provided according to national legislation.”

Here, as far as farmers are concerned, if their PGR and TK are included in the MLS, then access will be according to the SMTA. The privilege which is given to them in the CBD called the PIC will then be absent. Even regarding the in situ preservation, where the access will have to be as per the national legislation, unless the national legislation is creating a strong case of PIC of the farmers, this right will be absent in the MLS. However, including the PGRFA in the MLS is only with those PGRFA which are under the control and management of the State, and in public domain. This provision can be interpreted in two ways. One is, presuming that the PGRFA developed by farmers which have no property protection can be considered as being in public domain. The other is, since as per CBD, the indigenous and local community (here farmers) are to be consulted, and their approval and involvement is necessary before
allowing access to the PGR and TK held by them, before a country can include these PGRFA into the MLS, the farmers’ approval will be necessary. So, it is necessary that as per CBD the country identifies all the PGRFA, and those who hold them. In such legislation, if protection is given to the farmers, then access will be subject to that legislation.

Assume that no such identification is done by the State. Then even the varieties developed by the farmers will be in the public domain. If it belongs to the public domain, the State can include them in the MLS, without even asking their permission, as the concept of PIC aspect as is seen in the CBD is absent here. However, it is because of the inherent distinction between the concepts of CBD and ITPGRFA. CBD presumes that there are certain communities like the indigenous people and local community, who conserved and preserved certain PGRFA and TK, and in the absence of that, the State is considered as the custodian of the same. ITPGRFA presumes that the identification of any such community is almost impossible and that a bilateral agreement between even two States is not possible. Thus it goes for the global benefit sharing. Recognition to FR in this system will quite naturally be very minimum. But, the aim of ITPGRFA is not the protection of FR, but increased food production. So, making available maximum number of PGRFA available for research purposes, or for further development is the aim. So, the future increased production is in the hands of researchers and plant breeders. Hence the PBR (and researchers’ rights) is going to be of more concern. Farmers are not the central concern of the Treaty. Their rights happened to be recognized only because they are very crucial in the conservation and preservation of the raw materials for future
research. So, to expect much from such a document is a futility. But, the great significance of ITPGRFA is that, it lays down a foundation for further growth of FR.

However, almost all the rights which plant breeders can claim seem to be very safe under the Treaty. One of the conditions for access to PGRFA in the MLS which have implications for farmers is that, access is allowed for breeding purpose, *inter alia.*\(^{10}\) While thus the farmers’ variety can be accessed for breeding purpose, another condition which says that

*Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System* seem to suggest that plant varieties developed by using the PGR of farmers’ varieties shall not be protected by PBR.

But this is not the position with respect to the PBR. The plant breeders do not claim PBR in the form in which they receive the plant genetic resource. They use either the traditional knowledge related to it, or the germplasm as a basis for developing another variety, and the PBR is claimed on the new variety. Plant genetic resources from the multilateral system may be the source of origin or of knowledge leading to inventions that may become the subject of intellectual property protection. The prohibition on intellectual property rights thus may conflict with Art. 27.3 of the TRIPS Agreement, because the ITPGRFA prohibition is not limited to exclusions from patent protection and TRIPS requires at least *sui*

\(^{10}\) *Id.*, Article 12.3
As the ITPGRFA in its Preamble says that “Nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties at national and international levels”, and it post-dates TRIPS (unlike CBD), the ITPGRFA should control the interpretation in the event of conflict. So, it cannot be said that PBR cannot be allowed for varieties developed by using the PGRFA in the multilateral system. In this situation, the Public Interest Intellectual Property Advocates (PIIPA) in a legal analysis brings in a solution by suggesting that the disclosure of the origin and the associated traditional knowledge should be made in the application for UPOV certificate.

However, even if this is accepted, farmers are not given access to the protected variety, or its propagating materials in the MLS. But they may be able to have a share of the benefit arising out of the utilization of the PGR developed by them. So, regarding access, the farmers’ variety is freely available for breeding, and the breeders’ varieties which are developed from the former are sealed in the intellectual property box. So, regarding access to the PGR of the farmers, whatever safeguards are given to them in the CBD will be ensured only if the State identifies the PGRFA held by the farmers. Then, it is upto the farmers to decide whether to include them in the

11 TRIPS, Art. 27.3(b) (Parties may exclude from patent protection “(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.”). Another potential conflict is the requirement to assure benefit sharing in regard to commercialization of inventions resulting from source materials provided by the multilateral system, which may be thought to discriminate by field of technology in the enjoyment of patent rights in violation of Art. 27.1 of TRIPS.
MLS. However, one problem here is, in countries where the varieties developed by farmers are not conserved by them and they are on the verge of extinct, the States conserve them in *ex-situ* conditions like in gene banks. Then these varieties are to be mandatorily included in the MLS. There the farmers do not have any role to play. So, it should be concluded that during access to the PGR and TK of the farmers, there is no express right, or privilege to the farmer in the ITPGRFA. This is precisely because farmers are not under any compulsion to include them in the MLS. But, this privilege is available to them only when they are fixed as the custodians of the PGRFA. Otherwise without even asking them their variety will be included in the MLS. So, this part is left with the State parties.

We saw that in the CBD that there was a new development of recognition of farmers’ right over their PGR in a very remote way at least, in the form called the benefit sharing. Under the ITPGRFA in the MLS also there is a benefit sharing scheme which is in a substantially different way from that in the CBD. So, the only thing left is to ask the question whether the benefit sharing provisions are going to really give atleast a very small percentage of the benefit to the custodians of the plant genetic resources.

### 4.3 Benefit sharing

Unlike the benefit sharing system under the CBD, benefit sharing under ITPGRFA involves no direct payment to those whose PGRFA is utilized. In fact the benefit is shared according to a Standard Material Transfer Agreement (SMTA)\(^\text{12}\), and the benefit is to

\(^{12}\) ITGPGRFA, Article 12.4 stipulates the governing body (GB) of ITGPGR to adopt a Standard Material Transfer Agreement. Accordingly, in its first session held at Madrid (Spain) in 2006, the GB adopted a SMAT. This agreement is given in Annex G.
be paid to the MLS first. It is only from there that the benefits are shared to the stakeholders like farmers. The funding is to be done by the developed countries for the activities. However, the benefit sharing scheme does not look at monetary benefit sharing as important at all. It considers that, sharing of the PGRFA itself is the benefit. In fact, the money accrued to the benefit sharing fund is to flow to the farmers of the world, for enabling them to conserve and preserve the PGRFA. So, this is more like a system of tax, where the persons or countries who contributed their PGRFA need not get anything back. Also, if the country or person who received PGRFA from the MLS and commercializes the product made out of it, and makes available the PGRFA or the product, without restriction to the MLS, that country or the person is not under an obligation to contribute to the benefit sharing fund. The following provisions of the Treaty are quoted for easy understanding.

“The Contracting Parties recognize that facilitated access to plant genetic resources for food and agriculture which are included in the Multilateral System constitutes itself a major benefit of the Multilateral System and agree that benefits accruing there from shall be shared fairly and equitably…”

“The Contracting Parties agree that the standard Material Transfer Agreement …. Shall include a requirement that a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism … an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to
others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment\textsuperscript{13}.”

In fact, from the benefit sharing fund, money is given to farmers of various countries by inviting applications for benefit sharing. From among the applications, countries and farmers are selected for giving the share. This may be in the form of projects. The Governing Body of the International Treaty opened the first call for proposals under the Benefit-sharing Fund in December 2008. Eleven small scale projects (5 from Latin America and the Caribbean, 4 from Africa, 1 from Asia and 1 from Near East) were approved to be funded through the Fund. The decision was taken by the Bureau of the Third Session of the Governing Body of the Treaty which met in Tunis on 31 May 2009 to appraise the eligible project proposals, on the basis of recommendations made by a Panel of Experts. The projects duration was of two years, starting from November 2009 until October 2011\textsuperscript{14}. The place identified in Asia was Kerala in India and the project helped the conservation, dissemination, and popularization of location specific farmers developed varieties by establishing village level enterprises.

The women who participated in self-help groups established by the Treaty Benefit sharing Fund Project in Kerala, India, have improved their family nutrition and food security through producing high-yielding and drought-resistant local varieties of cassava identified by the project. But that is just part of the story. The self help group members have quadrupled their incomes through developing new products for the market such as cassava bread and

\textsuperscript{13} ITPGRFA, Article 13.
\textsuperscript{14} Available at http://www.planttreaty.org/content/projects-2009-2011. Visited on 19-10-2011.
cakes, and they have shared planting materials with other farmers, thus contributing to conserving their agricultural heritage. Two groups of crops were included in the project: food crops such as cassava, yam and ash gourd, which are important for nutrition and food security, spices such as pepper, cardamom and nutmeg, which are important for economic development. The women as well as other local farmers had the benefit of project activities that ranged from identifying isolated farms that still cultivated local crops, to training in cultivation and propagation techniques and support in distributing planting materials of locally adapted varieties\textsuperscript{15}.

The second call for proposal for benefit sharing\textsuperscript{16} approved 17 projects\textsuperscript{17} in 2011 July, two being in India\textsuperscript{18}. The projects in India are, “Using rice genetic diversity to support farmers’ adaptation to climate change for sustainable food production and improved livelihoods in India” and “Seeds for life-action with farmers in Uttar Pradesh-IGP region to enhance food security in the context of climate change”. A perusal to the projects which are approved shows that the benefit sharing fund is utilized for conservation of PGRFA and for food security, and to some extent the improved livelihood of the farmers.

\textsuperscript{15} For details see, \url{http://www.planttreaty.org/content/conservation-dissemination-and-popularization-location-specific-farmer-developed-varieties-e}. Visited on 19-10-2011.


\textsuperscript{17} Other countries who obtained projects are, Ethiopia, Tunisia, Malawi, Bhutan, Zambia, Jordan, Peru, Indonesia, Guatemala, Nepal, Philippines, Brazil, DPR Korea, Costa Rica, and Tunisia.

However, these projects cannot be of much help to the farmers, as they are happening only once in a while. Rather, due to the basic premise from which the benefit sharing fund is created, creating any right for farmers is not the intention of the ITPGRFA, as it proceeds from the assumption that identification of any such group is impossible. So, entailing a right is also not considered as possible. As was argued in the Chapter on CBD, the benefit sharing should be able to give incentive to the farmers to conserve them, in the form of monetary consideration itself. In other words, the farmers should have a better livelihood out of this benefit sharing fund. This is not possible in the present scheme at all. But, it seems that among the other priorities, FR was never a big deal for the makers of ITPGRFA towards its materialization, and that was the reason why this benefit sharing scheme happened to be in this manner. Because the enthusiasm which was seen during its making is not at all reflected in its materialization. FR is not really defined, or the concepts clarified. It has not grown from its position in the FAO Resolution in 1991. Except devoting an Article for Farmers’ Rights, nothing is seen in the Treaty.

Also, there are many politics that try to impede the working of even the present benefit sharing fund itself. It is quite obvious that the mighty plant breeders and the seed industries (like pro Mais the association of French seed companies), as well as rich countries are interested only in the accessibility part of the Treaty, and they complained about the restrictions on the access under the CBD, and asked the Treaty to remove it in the third session of the GB of ITPGR held at Tunis (Tunisia) in 2009 June. One of the main agendas of this session was the implementation of farmers’ rights given in Article 9.
In fact, the farmers’ rights’ fate is such that developed countries managed to push this agenda from the second session (held at Rome in 2007) to the third session, to avoid discussing on it\textsuperscript{19}.

On the very first day of the Tunis meeting, the FAO published a triumphal communiqué announcing the start of the benefit-sharing mechanism. The evening before the meeting, the benefit-sharing fund had decided to allocate US$550,000 to a dozen projects “to reward farmers in poor countries for having saved and propagated plant varieties likely to be able to safeguard world food security over the course of the coming decades”. What should we make of this? First, no peasant organization will receive anything. Only official institutions and universities will receive grants. Moreover, despite more than 100,000 resource exchange contracts signed during the last ten years, the fund has collected very little money for the purpose of benefit-sharing since it was set up. Norway, Italy, Spain and Switzerland have directly contributed their own capital to “help get it started”. But the big transnational seed companies that still use patents on varieties – the only type of IPR through which industry agrees to contribute to the fund – are based mainly in the United States, which has not signed the Treaty. In addition, PBR accompanied by patents on genes or processes of biotechnology are becoming more common, and industry believes that there is no reason why it should contribute to the fund if it uses this kind of IPR\textsuperscript{20}.


\textsuperscript{20} Ibid.
Even with regard to the funding strategy for the benefit sharing discussions in the third session, the developed countries were reluctant to contribute to the benefit sharing fund. Because they are interested to see that this Treaty is alive only for the purpose of getting access. However, even in the context of discussions on Farmers Rights in the third session, no meaningful discussion on how to implement these rights, especially the rights to protection of traditional knowledge is seen. Instead, the Session stressed on the views and experiences of the member countries on the implementation of farmers’ rights\(^{21}\). However, regarding the right to access to the plant genetic materials in the multilateral system, the same is not left to the discretion of the national legislation as in the case of CBD. In fact, benefit sharing can become meaningful only when there is a strong material transfer agreement (MTA), with all necessary conditions to protect the interest of the farmers, or the country which includes its PGRFA in the multilateral system. But the MTA as adopted by the first session of the GB of ITPGRFA, there is no scope for a strong pro-farmer stand. But this is a space for the farmers’ right to get very many rights associated his right to remain sovereign as a farmer.

So, the net result is that, in the benefit sharing area, the plant breeders can avoid paying benefit even to the multilateral system (then least to the farmer) if he makes available the plant genetic resource of the variety he bred, to the multilateral system for further access. Usually the plant genetic material of these hybrid or genetically modified varieties are not going to be of much use to the farmers, as the access can be solely for the purpose of research,


167
training for food and agriculture and breeding. Thus, on the one hand, the breeder gets access to the plant genetic material developed or conserved by the farmer, and he utilizes it and makes money. No share of the benefit need to be paid to the farmer. This very clearly shows the reason why this Treaty is partial to the breeder. The words “farmers’ rights” are just ornamental as it stands now, with respect to all the rights - traditional as well as new generation. This is made more clear in the third session of the GB by at least two instances. One is, when Brazil presented the first article of a draft statement which requires member countries to evaluate, and if necessary, correct national measures likely to interfere with the farmers’ rights, Canada vehemently opposed it, and after a long negotiation, this article was watered down and was made non-binding. Similarly, Canada succeeded in making the organization of the Treaty’s regional workshops, which involve the participation of farmers’ organizations and NGOs, conditional on the availability of funds – which are always dependent on the goodwill of the rich countries!. This shows the way in which the farmers’ rights are treated by the developed countries.

Thus, to conclude on the second aspect of the main theme called the plant breeders’ access to the PGR and TK of the farmers, it could be said that before including a PGRFA in the MLS, the country has enough space to take care of the rights of the farmers who conserved them and preserved them and ITPGRFA is silent on that aspect. Regarding benefit sharing, there is every possibility that a country will not get the share of the benefit out of commercial utilization of a product using the PGRFA which they contributed to the MLS. But, even if a country has not contributed anything to the
system also, they will get some benefits in the form of projects. But, given the efforts of the farmers in conserving the PGR, and their crucial role in food production, they should not be considered as mere machines that conserve PGR and produce food. While the plant breeders are directly benefited for their efforts, farmers are so remotely given pittance. This is the situation in the benefit sharing scheme of the ITPGRFA. The discussion now goes forward towards the first aspect of the main theme called the farmers’ access to the PGR of the plant breeders. However, as was pointed out earlier, the ITPGRFA considers this benefit sharing scheme as a practical solution to overcome the difficulty in identifying farmers who conserved and preserved PGRFA or TK.

But, had there been strong arguments from the bio rich countries, while opting for this kind of a benefit sharing scheme, that, unless and until it is impossible to identify such farmers, those PGRFA should remain as the property of the farmers, this scheme would surely have been different. Because, then the States would be under a compulsion to find out those who conserved, preserved or developed a particular PGRFA or TK. Then benefit sharing could have been made an obligation, and not charity of the scheme. It is important now to recall that during the initial discussions on FR, one of the major themes was to make benefit sharing an obligation (see discussions in the first Chapter). That part and many other important parts which took a major position in the discussions seem to have been kept in abeyance later. But, one thing that is positive about this Treaty is that, even if any farmer community from a country do not contribute anything to the MLS also, they are likely to get something under the benefit sharing scheme. So, for countries like India, it is
better not to include any farmers’ variety (where the conservers are identifiable) in the MLS. But, as a return to the inclusion of those which are under the control of the State, Indian farmers will get something in return, though in a very minimal level.

Now, we will proceed to the second question, which is the first part of the central theme called, what are the steps taken by the ITPGRFA regarding the farmers’ right to use, save, etc. of the seeds of the protected variety?

**4.4 Farmers’ Access to the PGR of the plant breeders**

In fact the ITPGRFA is the first main international document which recognizes farmers’ rights, among which the right to save, use, exchange and even sell the farm save seed is a prominent right. Article 9 of the Treaty says:

“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.”

Regarding the right to save, use, exchange, and sell the farm saved seed or the propagating material, the Treaty is not clear as to whether these rights are recognized. While on the one hand the Treaty says, “Affirming also that the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material,”, the Treaty in the context of recognizing farmers’ rights says only that “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.”

This means that though the Preamble seems to recognize this right, the main Article leaves this right to be subject to national law. But, the national legislations will face many difficulties in implementing these rights in the background of the MLS. The Treaty Says 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”. This means that, the farmers’ rights should be in such a manner that they can conserve, improve and make available these resources in future also. They are also to test the quality of the seeds developed by the plant breeders, and to reject or to accept them. So, the right to save, use, exchange and re-use the seed of the plant breeders will also become a part of the farmers’ rights even as per the ITPGRFA. One thing to be noted here is that, while under UPOV, when a country is given an option to give the farmer the right to use, save and re-use the seeds of protected variety, ITPGRFA mandates the States to give these rights, plus the right to sell the seed also. Thus, a country which is party to both UPOV and ITPGRFA, will be left with no option but to give the right to use, save, exchange, and sell the farmers, even though it is only an optional exception under UPOV 1991. Then when a country goes for such a legislation, it will go against UPOV, as the UPOV does not permit the right to sell the seeds of the protected variety. Thus, there is a need for harmonization of both these international documents.

Another problem is that, while a country has such a legislation, and another legislation for benefit sharing, can these both work in MLS? Suppose that a country A included a farmers’ PGRFA in the MLS. A plant breeder from another country B accesses this PGRFA and the associated TK and develops a new variety, and registers the variety to get PBR in country A. He wants his variety to be protected by PBR, and is contributing to the benefit sharing fund. Can the country B’s legislation use the exceptional clause against the plant breeder who contributed to the benefit sharing fund? The answer is no. Because the MLS works on the principle that the farmers are entitled to benefit sharing due to their efforts in conserving the
PGRFA. Their right to use, save, exchange and re-use the plant breeders’ PGRFA is also based on the same reason that, the plant breeders developed the new variety based on the PGRFA developed by the farmers. So, either of this is enough to reward the farmers. Another reason why MLS considers that either of these rights and not both will be given is that, the main aim of ITPGRFA is not to compensate the farmers, or to reward their efforts. The aim is the conservation and preservation of PGRFA. So, when the PGRFA or the protected variety is made available to the MLS, its conservation is ensured. If it is not included, then a share of the money shall be used to support the farmers to conserve and preserve their PGRFA.

If that is the case, in the case of benefit sharing also this will happen in a country. A person who accessed the PGRFA of a country makes available the new varieties’ PGRFA available to the MLS. He then registers his variety in that country and gets PBR. Is he bound by the benefit sharing obligations of the country? No. Because once he made available his PGRFA or the product to the MLS, he is not under an obligation to pay anything. Even assuming that he is not making his PGRFA without restrictions to the MLS, and pays to the benefit sharing fund, is he bound by the benefit sharing scheme of the country? No. Because, he is now bound only by the benefit sharing scheme of the MLS, and by paying there, he is freed of his obligations. Thus, for such a plant breeder, the farmers’ rights in the country’s legislation will remain redundant.

This is because, in the international level, when UPOV gives a space for farmers’ access to the PGR of the plant breeders, it does not talk about the benefit sharing. The CBD which talks about benefit sharing does not talk about access to the PGR of the plant breeders. The
ITPGRFA which talks about both opts only for either of these two. Thus, if a national legislation gives both these (rights?) to the farmers, any one of the right will conflict with the international law. However, a country which is not a party to the ITPGRFA, if makes a legislation which gives exception to the farmers under UPOV, and another legislation (in pursuant to CBD) which stipulates benefit sharing, both these can be given to the farmers. But even there, while coming to the mutually agreed terms, it is doubtful whether the plant breeders will accept both. However, as this study is on Indian position, India being a party to ITPGRFA, the above mentioned problem is sure to happen here.

As the right to use, save, exchange and sell the seeds is left to the national States, the States will have to legislate keeping their other obligations. So, a country which is party to UPOV, while making a legislation using the exceptional clause there, can give only right to use, save, and re-use the seed. ITPGRFA, if gives this right as a right which is to be respected by the States, the State legislation will have to give only a lesser right to the farmers in this regard. However, if ITPGRFA leaves this to the national legislation that legislation can restrict the right to sell. This right can even be neglected, if ITPGRFA is not considering this as a right, but leaves it to the State legislation. As was seen above, ITPGRFA is not very clear about the nature of its recognition of this right. So, a country which is party to UPOV can even forgo the farmers’ right to use, or re-use the seed (let alone right to sell), saying that it is making its legislation in tune with UPOV, without going for the optional exception. As ITPGRFA only leaves this matter to the State legislation, such a stand cannot be said to be a violation of ITPGRFA mandate. Thus, even though this right is not
respected, ITPGRFA will not be said to be violated. This shows that apart from being there as a highlighted right, farmers rights are not of much importance in this Treaty, unless, the law makers of the States are sensitive to the issues of farmers.

It is true that it is a herculean task, given the international as well national scenario in which the politics and the economy of the plant breeders and the seed industries are involved, to incorporate such provisions in the ITPGRFA. This is because, ITPGRFA for the plant breeders is just a means to have a single window access to the PGRFA shattered in various biological rich countries with poor technological development. Due to this poor technological background, much documentation does not take place. In such a situation, identification of the PGRFA, and their holders become almost impossible. In fact, the breeders need not search for these resources anywhere as the MLS makes it possible that the plant genetic resources are brought before them by the conservers. So, it is very clear that in ITPGRFA, the only interest of the seed industries is to have access, and the rest are all to be torpedoed, or made redundant, especially the benefit sharing. So, strong voice from biologically rich countries representing their farmers is the only solution for making this part of the farmers’ rights meaningful.

4.5 Conclusion on the International Law

The net result of these three documents as far as FR is concerned can be summarized as follows.

The UPOV is the model *sui generis* law envisaged under the TRIPS for the protection of PBR. Quite naturally, this document is mainly for the protection of PBR, almost in tune with a patent right. So, only a limited space is allowed for FR, the right to use, save and
re-use the seeds for small farmers, which is also an optional exception. The UPOV especially the 1991, gives an exclusive right to the plant breeders over the entire plant, especially on the propagating material like seeds. This right however can be given to the plant breeders without affecting the farmers right to use these seeds for present as well as future use, without being forced to depend on the plant breeders if the option given to the nations to exempt farmers privileges from the purview of these rights. But, many countries ignore this freedom, and farmers are not given any such exception legally, rather they go for informal arrangements. However, even if a country is willing to give this exception to farmers, there are two hurdles.

One is, the international politics of the seed industries who are going to be widely affected by this privilege being given to the farmers. It is quite obvious that if farmers are given the right to use, re-use, save and exchange the protected seed, the monopoly of the seed industries come to an end. So, indirectly, and directly UPOV influences the developing countries in their law making, to see that such privileges are not given to farmers. The second hurdle is, even if such an exception is allowed, the hybrid or the genetically modified varieties are in itself not capable of being re-used (and thus there is no meaning in saving it, or exchanging it ) for further propagation. This is the crux of the breeders’ right becoming a monopoly where the laws as they stand today are of no use to the farmers. Thus, the farmers’ traditional right to use, save, re-use and exchange seeds remains almost suspended.

This one-sided affair has led to further problems to the farmers, and further monetary benefits to the plant breeders. Now, the
plant breeders can develop new varieties without fearing any competitor, which is an incentive for going for further breeding, as PBRs are easy to obtain, given the low level of creativity needed, than the patent, and more beneficial than the patent. It is in this very favourable climate to the plant breeders that the CBD comes with facilitated access to plant genetic resources in the name of conservation of plant genetic resources. It is in this context that the new generation rights like the right to be informed and consent asked before access is allowed, right to protection of traditional knowledge, and the right to get a share of the benefit arising from the utilization of the farmers’ traditional knowledge or the plant genetic resources arise. In CBD, the farmers’ plant genetic materials, and the related traditional knowledge are thus easy to be accessed, with the two limitations called the prior informed consent, and the benefit sharing condition. Though these two act as safeguards to farmers, the actual strength of these depend upon the State parties, in their legislation. So, these new generation rights are also at the mercy of the State, as no right of the farmer is asserted in CBD. This is thus a good space to be used by the States for the protection of FR. In fact these two can be developed into assertive rights by the State Parties, as CBD has laid down the seed for its development into a right.

ITPGRFA though recognizes FR, functions on the basis that particular farmers who are responsible for conservation and preservation of certain PGR or TK cannot be identified. So, benefit sharing is not *quid pro quo*. PGRFA from all over the world is received in the MLS and share of the benefit is given to farmers all over the world, irrespective of who conserved what. Thus, the very basis of CBD and ITPGRFA differs very much. So, while access is
given to the plant breeders to the PGR and TK of the farmers, the very concept of PIC is insignificant in the case of ITPGRFA. Right to use, save, re-use, exchange, and sell the seed, PIC and benefit sharing are the recognition of some kinds of the farmers’ efforts. But, as against the property rights given to the plant breeders, this could be said to be only residuary rights. These are not enough to balance the rights of the farmers against the PBR. But to advocate for any particular property right for farmers is also difficult in the context ITPGRFA due to this reason. But, it suggests that in the national level if such identification is possible, that should be recognized through legislations.

But if they could not be identified, the farmers will be the losers. This is because, there is no PIC needed to include a plant genetic material in the multilateral system in the case of State owned plant genetic resources for food and agriculture, or those in the public domain. Most of the traditional knowledge, being in the public domain, then can be included in the multilateral system without the consent of the knowledge holders. Also, the private persons are encouraged to include the plant genetic materials under their control in the multilateral system. But the associated traditional knowledge may be with someone else. For example, the plant genetic resource may be with the landlord, and the traditional knowledge may be held by the agricultural labourers. Here the landlord can include the PGRFA in the multilateral system, without the consent of the TK holders. This means, that the farmers’ TK is not protected. Thus, though this Treaty recognizes right to protection of TK, its framework is in such a manner that this right cannot be protected even by the national legislations, taking into consideration the conditions for access to the PGRFA in the MLS.
As was discussed, the benefit sharing provisions are also in such a manner, (and the member countries attitude) that the plant breeder is not under an obligation to share the benefits arising out of utilisation of the plant genetic resources taken from the multilateral system, if the protected varieties’ PGRFA are available for research and training purposes as per ITPGRFA. Thus, the new generation rights which are at least recognized (enforcement not very sure) in CBD are also absent in ITPGRFA, in its present form.

Also, the discussions that take place in the sessions of the GB of the ITPGRFA, especially the third session, reflect on the matter how the developed countries are bent upon to torpedo every attempt to protect the FR, including national legislations, and funding strategy relating to the benefit sharing. This strongly suggests that the aim of the seed companies are to see that ITPGRFA is alive only for the purpose of giving access to the plant genetic resources for food and agriculture, and they are least bothered about the rest of the Treaty. The entire programmes of the Treaty especially the in situ conservation and realization of the farmers’ rights are to be implemented with the money paid by the developed countries. They are all unwilling to spare any amount, showing that their policy is, “Rich countries favour multilateralism when it means sharing what belongs to the poor, but refuse to take part when it comes to their own money”.22

In fact the implementation of the Treaty depends on the outcome of the sessions of the Governing Body, where only the actual politics of the developed countries and the seed corporations really

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find a place. The result of these sessions are so far disappointing to the farmers, as all the possible space for farmers right to develop was shut by the developed countries. Thus, the ITPGRFA though leaves a space in the SMTA, and in the FR provision (Article 9) for the protection of FR, it can work only to the advantages of the breeders in its present form. Putting the essence of all these international laws, the outcome is the domination of the provisions of UPOV which means domination of the PBR. Even in the other two documents, where the PBR is not even mentioned, but FR is even highlighted, the domination is still that of the plant breeders as is obvious from the discussions on these documents.

However, that is not the end of FR. Proper safeguards in UPOV for the farmers as against the hybrid and biotechnology used to develop the variety, the strong national measures to implement the safeguards laid down in CBD and Nagoya Protocol, proper amendments as suggested in ITPGRFA, with a strong pro-farmer SMTA, and effective national measures to implement the farmers right in ITPGRFA are the ways to fight the FR. The merit of all these documents is that, they have laid down a strong basis for FR, by recognizing them. To make it more solid rests with the international as well as national strategies in the developing countries and the farmers’ organizations like GRAIN, and Gene Campaign. Developing countries also needs to have an in depth study (with all available documents) about the problems caused (and will cause) to the farmers due to the international laws dealing with Plant Breeders’ Rights, and the politics played by the seed companies as well as developing companies in order to be aware of the grave problems the country will face in future along with the farmers. They will also have to find out the possible
space in the international law where the FR can be made strong and enforceable. This alone will help them in strongly raising their voice in the international bodies like the GB of ITPGRFA, and to suggest legal as well as other measures to protect their farmers.

So, to conclude, one thing that can be projected is that, while PBR and FR are coined as counter rights, PBR is a strong, solid, clear exclusive property right and FR is yet to be conceptualized. These discussions point to the fact that the State has enough roles to play for creating FR as it is not yet done in the international level. So, with this background we move to the state of affairs in India in this matter. So, the next analysis is, in the backdrop of these international laws, what are the legal measures India has taken by being a party to CBD, and ITPGR, and TRIPS, and not being a party to UPOV. By being a party to TRIPS, she has enacted the Protection of Plant Varieties and Farmers’ Rights Act (PPVFRA) and by being a party to CBD, the Biological Diversity Act (BDA). While the BDA deals with the second part of the central theme called the plant breeders’ access to the farmers’ PGR and TK, PPVFRA deals with both part of the central theme in a peculiar way. PPVFRA is also the legislation for protecting the FR as is given in the ITPGRFA. So, the next Chapter examines the BDA which deals with the plant breeders’ access to the farmers’ PGR and TK. In that Chapter, the question examined is to what extent India has used the space left by CBD for recognizing the efforts of the farmers for the conservation, preservation and development of their PGR and TK, while access is given to the plant breeders?