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CHAPTER xxxx

Beyond access and benefit-sharing: lessons from the emergence and application of the principle of fair and equitable benefit-sharing in agrobiodiversity governance

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Introduction

This chapter assesses the application of the concept of fair and equitable benefit-sharing (Tsioumani 2014; Morgera 2016). First, it briefly explains the emergence of the concept in the context of the evolving principles of governance of agricultural biodiversity. Second, the chapter addresses the Multilateral System (MLS) for access to and fair and equitable benefit-sharing from the use of plant genetic resources (ABS) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which is arguably the most sophisticated ABS system in international law (Halewood et al. 2013b; Kamau and Winter 2013; Guneratne 2012; Biber-Klemm and Cottier 2006; Chiarolla 2012; Correa 1999; Helfer 2004; Raustiala and Victor 2004; Oberthur et al 2011; Oguamanam 2006; Cabrera Medaglia et al. 2013; Chiarolla et al. 2013; Morgera et al 2014). Third, it explores (lack of) benefit-sharing applications in intellectual property rights (IPR) instruments and related human rights concerns. Concluding remarks on identified complexities, contradictions and weaknesses indicate that, despite promise and good intentions, the concept of fair and equitable benefit-sharing has failed to inject fairness and justice in agricultural research and development, or promote agrobiodiversity conservation, including through ensuring the continued contribution of smallholder farmers.

1. The Evolution of the Global Governance of Plant Genetic Resources

The evolution of principles of governance of plant genetic resources can be pictured as following:

Customary exchanges and informal seed systems



Public agricultural research



1

Privatization of genetic resources via plant breeders' rights (PBRs) and patents



Common heritage approach via the International Undertaking on Plant Genetic Resources for Food and Agriculture



Nationalization of genetic resources and access regulations via the Convention on Biological Diversity (CBD)

Since the earliest crop domestications, agricultural development has been based on farmers' traditional varieties, developed through collective systems of innovation and conservation through seed saving, sharing and use (Halewood et al. 2013a). Exchanges were regulated on a customary basis, largely at the community level, and included both informal ones and more organized systems, such as seed fairs and community seed banks.

A series of historic events led to the transformation of agriculture and the global redistribution of plant genetic resources for food and agriculture (PGRFA). Colonization resulted in a vast flow of agricultural species from the Americas to Europe and from South to North. Botanic gardens and other ex situ facilities were established, mainly in the North, which stored samples of agricultural varieties coming mainly from developing countries, the centres of domestication of major agricultural crops. During the 20th century, the green revolution dramatically transformed agriculture through scientific and technological advances. Plant breeding was professionalized and the commercial seed sector emerged. These trends led to a spread of monocultures of genetically uniform high-yielding crop varieties and the erosion of agricultural biodiversity, making agricultural production vulnerable in the face of threats such as pests and extreme environmental conditions (FAO 1993). At the same time, customary farmer practices and varieties and traditional seed systems were marginalized and in cases criminalized, in favour of scientific, public or corporate-led research supported by intellectual property rights (IPRs) (Tsioumani et al. 2016; De Schutter 2009; Mooney 1998). These trends put at risk the livelihoods of smallholder farmers, in developing but also in developed countries.

The need for continued exchanges of material in the context of the green revolution and the realization of the risks of genetic erosion provided the basis for the international regulation of PGRFA and the establishment of the Consultative Group on International Agricultural Research (CGIAR) in 1971 (Tsioumani 2016; Özgediz 2012). The international agricultural research centres under the auspices of the CGIAR stored a large percentage of the world's

agricultural germplasm (Fowler et al. 2000; Pistorius 1997: 33; Fowler 1994). At the time, international law was silent with respect to the conditions for access to and use of PGRFA, both in situ and in the CGIAR system; similarly, most national legislations did not regulate access to PGRFA, either in situ or in genebanks. PGRFA were thus considered to be in the public domain, available to anyone for any purpose, without benefit-sharing or conservation obligations (Halewood et al. 2013a: 12). Still, most agricultural research at the time was conducted by public institutions, and the results of the work were shared (Rose 2004). The growing application of IPRs and the gradual privatization of agricultural research and development resulted in tensions that challenged the CGIAR practices. At the core of the tensions were perceived inequities concerning who bore the cost of conservation and who benefitted more from its use, arguably private companies in developed countries. Besides, concerns about the risk of the commodification of PGRFA intensified as a result of the case of *Diamond vs. Chakrabarty* in the US, which opened the way to the patenting of living organisms (Kevles 1994; Carolan 2010; Jasanoff 2001).

IPRs are supposed to foster and reward creativity and innovation, including to address global challenges such as food security. As explained in detail in other chapters of this book (see, in particular, the introduction and Dutfield), the IPRs mainly in use in the field of agricultural development, PBRs and patents, are widely criticized as designed to suit the needs of developed countries. They have been associated with reducing the developmental choices of developing countries, intensifying control by agrochemical companies, raising the cost of agricultural inputs, and risking the food security of vulnerable groups, including smallholder farmers (Correa 1995; Dutfield, 2000; Commission on Intellectual Property Rights 2002; Drahos and Braithwaite 2002; Drahos 1996). Farmers' varieties do not satisfy the criteria for protection and cannot be covered by either PBRs or patents, they were thus further marginalized.

Membership of the International Convention for the Protection of New Varieties of Plants (UPOV Convention), which has established PBRs, was boosted with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by the World Trade Organization (WTO) in 1994, as WTO Member States are required to provide for the protection of plant varieties either by patents or by an effective *sui generis* system¹. Although countries are free to identify a system to suit their particular agricultural and socioeconomic conditions, UPOV, as a ready-made framework, is obviously an easy choice (Correa 2015). Ratification seems to be promoted also by technical advice provided to developing countries (De Schutter 2009). Furthermore, ratification of UPOV 1991 or

adoption of complying legislation is promoted by developed countries through free trade agreements, while bilateral pressure is also exerted to introduce patent protection for plants, animals and biotechnological innovations, exceeding even the TRIPS standards (Heath and Kamperman Sanders 2007; GRAIN 2014; Correa 2009; Brennan and Kilic 2015). Developing country membership is thus constantly increasing.

Exceptions to PBRs, including the permitted use of protected varieties as the source material of further breeding (breeders' exception) and the re-use of saved seeds by farmers (farmers' privilege) have been gradually restricted in subsequent revisions of the Convention. Similar exceptions aiming to protect farmers' and breeders' activities are more limited under patent law as patents allow its holder to exercise the greatest control over the use of patented material (see Dutfield in this book).

A vast literature examines ethical considerations and fairness- and equity-related concerns posed by IPRs granted for living organisms (Nuffield Council on Bioethics 2002). These concerns are exacerbated by the (mis)application of the IPR system, dubbed as 'biopiracy'² (Mooney 1998; Aoki 1998). In addition, 'IPRs appear to slow the free flow of germplasm exchange, slow the diffusion of new knowledge, upset the balance between basic and applied research, and erode scientific integrity' (Hess 1993: 128), posing obstacles to public research. However, it was mainly the misappropriation and privatization of genetic resources and traditional knowledge that resulted in rising equity and justice-related concerns: farmers and governments in developing countries realized that the introduction of IPRs resulted in a major asymmetry, noting that 'their raw materials were to be exchanged freely while patents were to be placed upon the finished varieties' (Mooney 1983: 24), restricting their availability. This was considered as unfair and inequitable or at least morally unjust from the perspective of provider countries and farmers. It was also a major attack to the previous treatment of PGRFA and related knowledge as public goods. Following the acknowledgment of the need for some form of legal arrangement regarding access to stored germplasm, the International Undertaking on Plant Genetic Resources for Food and Agriculture was adopted in 1983. The non-binding International Undertaking attempted to apply the principle of common heritage to PGRFA, declaring that 'plant genetic resources are a heritage of mankind and consequently should be available without restriction'³. Significantly, the principle of common heritage would cover all plant genetic resources, including 'newly developed varieties'⁴. The initial strategic and legal response was thus not to restrict access or share the benefits of PGRFA but make them freely accessible to farmers and breeders around the world (Kloppenborg 2014; Aoki 2009). This – retrospectively radical – approach can be explained

in the light of the asymmetry introduced by IPRs: the main problem was not that seed companies were using PGRFA for free, but that they were restricting access to materials that, as a matter of reciprocity, ought to have been shared.

The framework established by the Undertaking sought to benefit humanity as a whole, and ‘to support major increases in agricultural production, especially in developing countries’⁵. However, distribution of the benefits was left to national governments’ responsibility⁶, and no mechanism was established to address the needs of specific fractions of humanity, (i.e. most vulnerable or less equipped for agricultural R&D). An internationally coordinated network of centers, including the pre-existing CGIAR centers, would operate under the FAO auspices and assume the responsibility to hold PGRFA collections ‘for the benefit of the international community and on the principle of unrestricted exchange’⁷. The absence of formal benefit-sharing arrangements lies in the strong belief that benefits would flow to developing countries in the form of distribution of PGRFA and related information. Noble in its intentions, the architecture seemed to ignore the global inequities regarding distribution of the infrastructures, knowledge and skills, which are necessary to make use of an open system such as the one created by the Undertaking (Louafi and Welch 2014). It further revealed the central weakness of the common heritage approach in international law: that it is largely motivated by States’ desire for access to resources rather than by genuine community interest in their protection (Brunnée 2008).

The International Undertaking did not resolve the impasse between developed and developing countries largely associated with IPRs and equity-related concerns. Eight developed countries signed it with reservations⁸, reluctant to allow the principle of common heritage to apply to modern varieties, and giving priority to IPRs. Developing countries, in turn, considered impractical the attempt to apply the principle of common heritage against IPRs. Identifying themselves as providers and thus owners of genetic resources, they pushed for application of the principle of national sovereignty over natural and genetic resources, eventually embedded in the CBD.

If IPRs created a major enclosure to the previous systems of exchange, the principle of national sovereignty over natural and genetic resources aimed to defend the rights of countries providing such resources by creating a second, *defensive enclosure*. In the words of Halewood et al., ‘if developed countries were able to exercise restrictive control over advanced biologically based technologies using intellectual property rights, developing countries could exercise their sovereign rights to regulate and restrict access to the biological and genetic resources within their borders’ (Halewood et al. 2013b: 6).

The CBD, a legally binding treaty, recognizes that the authority to determine access to genetic resources rests with national governments and is subject to national legislation. The CBD introduced the concepts of the prior informed consent of the country providing such resources and of the fair and equitable sharing of the benefits arising from their commercial or other utilization⁹, referring prominently to fair and equitable benefit-sharing as its third objective¹⁰. Benefit-sharing is thus linked to the principle of national sovereignty, and appears to have a *balancing* function against the privatization of genetic resources via IPRs.

The shift in principles can be further justified due to the growing expectations of the commercial value of biodiversity (Petit et al. 2001; Batta Bjørnstad 2004) and its potential use for development purposes (Raustiala and Victor 2004). The emergence of the biotechnology industry in the 1990s and of a market for biodiversity-based products was at the centre of these expectations. Benefit-sharing in this sense would be linked not only to the commercialization of biodiversity-based products but also to the emergence of market-based approaches to biodiversity management such as payments for ecosystem services (Morgera 2016).

In conclusion, the concept of fair and equitable benefit-sharing in the context of agricultural biodiversity use can be conceptualized as following: linked to the principle of national sovereignty, as a defensive tool to balance the injustices enshrined in the IPR system; and linked to development purposes, as a tool to benefit from the emerging biodiversity market. A third conceptualization can be found under the ITPGRFA concept of farmers' rights¹¹, which understands benefit-sharing as a tool to reward farmers and enable their continued contribution, thus linking it to conservation concerns and rural livelihoods.

Were developing countries accurate in their expectations? Adoption of the CBD was considered a victory for the developing world, but did adoption of the TRIPS Agreement mean that many of these gains were weakened (Aoki 2009)? The next section will assess its application and use at the inter-State level, on the basis of a technical analysis of the MLS.

2. Governance of Agricultural Biodiversity and Fair and Equitable Benefit-Sharing

The current picture of global governance of agricultural biodiversity, from conservation to use in R&D, is largely defined by the CBD, the ITPGRFA, and IPR-related instruments. While fair and equitable benefit-sharing is an objective of environmental treaties, the concept is not enshrined in the IPR instruments.

A. The ITPGRFA Multilateral System of Access and Benefit-Sharing

The shift in principles triggered by the CBD negotiations had an immediate influence on the FAO realm. With the adoption of the CBD, the Nairobi Final Act¹² recommended adjusting the International Undertaking in line with the CBD, providing the basis for the negotiations of the ITPGRFA.

The objectives of the ITPGRFA are the conservation and sustainable use of PGRFA and the fair and equitable sharing of the benefits arising out of their use, in harmony with the CBD, for sustainable agriculture and food security¹³. The core of the Treaty is the MLS, which facilitates access to, and exchange of, a specified list of crops in Annex I considered vital for food security and agricultural research. It also institutionalizes the sharing of the benefits arising from the utilization of these resources: the Treaty regulates both monetary and non-monetary benefit-sharing (i.e. exchange of information, access to and transfer of technology, and capacity building). In addition, facilitated access to Annex I PGRFA is recognized as a benefit in itself¹⁴ (Tsioumani 2004).

The MLS aimed to respond to the specificities of agricultural biodiversity and the ‘public good’ nature of PGRFA and basic scientific research in general (Cooper et al. 1994; Halewood et al. 2013b), for which the CBD bilateral system of exchanges was considered unsuitable (Chiarolla et al. 2013). PGRFA exchange is indispensable for the continuation of agricultural research, as well as for the adaptation of key crops to the new conditions brought about by climate change, and plant pests and diseases. Moreover, when it comes to crop genetic resources, all countries are interdependent and identification of the country of origin is often difficult, given the millennia of agricultural history¹⁵.

Collections of Annex I crops that are under the management and control of Parties and in the public domain, as well as those held by the CGIAR centers, are to be automatically included in the MLS and exchanged using the Standard Material Transfer Agreement (SMTA)¹⁶. The SMTA is a standardized private law contract between a provider and recipient (user) of material¹⁷. Other holders, including the private sector, are *encouraged* to include such material voluntarily in the system to achieve larger coverage. While providers are usually public or international genebanks, users can be organizations, private entities or individuals. In practice, mostly public-sector breeders use the MLS (López Noriega, Wambugu and Mejías 2013; ITPGRFA 2015).

Monetary benefit-sharing is currently operated through the Benefit-sharing Fund (FAO 2006). The original idea was that this fund would be replenished through user-based payments on the

basis of the SMTA provisions, following commercialization of products developed from material accessed through the MLS. The SMTA provides for mandatory payments to the Benefit-sharing Fund according to two monetary benefit-sharing options:

- a default scheme, according to which a recipient that commercializes a plant product incorporating material from the MLS that is *not available to others for further research and breeding* (i.e. it is patented) will pay 1.1% of gross sales to the Treaty's Benefit-sharing Fund, less 30% (to cover expenses), i.e. 0.77%¹⁸ (Moore and Goldberg 2010); and
- an alternative, whereby recipients pay 0.5% of gross sales on all products of the species they accessed from the MLS, regardless of whether the products incorporate the material accessed and regardless of whether or not the new products are available without restriction¹⁹.

Voluntary payments are encouraged when a recipient commercializes a plant product that incorporates material from the MLS if that product is available without restriction to others for further research and breeding²⁰. Under the direction of the Governing Body and through a project-based approach (FAO 2007), the Benefit-sharing Fund would then allocate the acquired funds to particular activities designed to support farmers and breeders in adapting crops to changing needs and demands, particularly farmers in developing countries who still conserve crop diversity in their fields. A lack of conceptual clarity is observed: Monetary benefit-sharing refers both to the *accumulation* of monetary benefits through the SMTA (user-based benefit-sharing) and to the *distribution* of monetary benefits through the Benefit-sharing Fund.

The projects funded through the Benefit-sharing Fund produce both improved genetic resources – which are to enrich the MLS – but also non-monetary benefits, such as information or training. Such non-monetary benefits are being generated and shared despite the fact that Parties' obligations to share non-monetary benefits are linked to other mechanisms and not to the Benefit-sharing Fund directly (Galluzzi et al. 2014), blurring the lines between monetary and non-monetary benefit-sharing and highlighting the close interlinkages between relevant mechanisms. The Global Information System for instance is the mechanism specifically built for information exchange (Ker et al. 2013)²¹.

It can be argued that non-monetary benefit-sharing can be used to build the capacities required for facilitated access to, and use of, PGRFA, which could potentially result in commercialization and monetary benefit-sharing (Louafi 2013). Non-monetary benefit-sharing, in the form of information exchange, technology transfer and capacity building, is thus instrumental in addressing the unequal capacities of countries and communities to benefit

from the ITPGRFA, and thus bridging the capacity, fairness and equity gap in agriculture and agrobiodiversity conservation.

A set of challenges have however arisen with regard to the ability of the MLS to generate and share monetary benefits (Frison et al 2011). As a result, no user-based payments have been realized since the Treaty's entry into force. The Benefit-sharing Fund has been operating solely on the basis of donor country voluntary contributions (ITPGRFA 2013; Tsioumani et al. 2017). The sub-sections below address legal and policy challenges related to the accumulation and the distribution of monetary benefits.

1. Accumulation of Benefits

The lengthy time-period required for research, development and commercialization partly explains the failure to generate and share commercial benefits from the SMTA (ITPGRFA 2013). There is more than that though. The first challenge concerns the relationship between benefit-sharing and IPRs. Monetary benefit-sharing takes the form of *compensation* when material is taken out of the MLS, i.e. when there is a restriction in use associated with the patenting of PGRFA. Such restrictions are arguably incompatible with the open exchange systems needed for food security and agricultural biodiversity conservation (Louafi and Welch 2014). This illustrates a *fundamental contradiction* inherent in the Treaty system: monetary benefit-sharing was designed as a central tool for revenue generation to fund the ITPGRFA goals; at the same time, monetary benefit-sharing is tied to restrictions in use, which threaten the very essence of the system and its goal of food security, by impoverishing its material base (Helfer 2003, Frison 2016). It may also be seen as an indication that Treaty drafters designed monetary benefit-sharing as a *disincentive* to patenting²², prioritizing continued unrestricted exchanges of PGRFA for research and breeding.

Three additional factors greatly impact effectiveness of the system (Frison 2016). First, coverage of the MLS is not comprehensive (e.g. soybean, sugarcane, tomato and coffee are absent). Notably, some of these crops attracted significant research effort resulting in patented material, and their inclusion could result in mandatory benefit-sharing payments according to the SMTA obligations. Second, as noted above, the MLS only covers public and CGIAR collections of Annex I PGRFA. This means that most material in the MLS is available elsewhere without adherence to the benefit-sharing terms of the SMTA. Third, many Parties to date failed to notify the Secretariat of their PGRFA included in the MLS, thus making this material inaccessible to users due to lack of awareness. That said, ratification by the US in March 2017 is expected to close one of the major loopholes and allow for more

comprehensive coverage, once the country's vast crop collections are notified to be included in the MLS.

On the user side, in practice most of the organizations that choose to take material from the MLS and incorporate it in new products do *not* restrict access to the improved material for further research and breeding purposes and are thus not obliged to share monetary benefits. Commercial users who would be more likely to trigger monetary benefit-sharing requirements have consistently chosen to access material from other sources, not the MLS (CGIAR 2015). A series of studies undertaken in the ITPGRFA framework has explored obstacles to the realization of monetary benefits and confirmed that projections of benefit flows will be 'moderate at best,' and will take even longer than expected (Moeller and Stannard 2013). Consequently, a Working Group was specifically mandated in 2013 to 'enhance the functioning of the Multilateral System' by, *inter alia*, developing measures to increase user-based payments and contributions to the Treaty's Benefit-sharing Fund, as a priority. 'Additional measures' (referring to a possible expansion of the Annex I list of crops) are also envisaged. This item remains highly controversial. Developing countries consider the generation and sharing of financial benefits on the basis of the current list a necessary prerequisite for any discussion on expanding coverage, in order to retain their possibilities to gain from their resources by striking bilateral agreements with users (Tsioumani 2014b). Research suggested upfront payments with no or low restrictions in use may be better suited to generate benefits, ensure continued exchanges and increase legal certainty (Seyoum and Welch 2013). Indeed, the Working Group is envisaging a subscription system for access to MLS-PGRFA, meaning that subscribed users would need to pay *before* access (Tsioumani 2015). The ITPGRFA Governing Body requested to develop such a subscription system and incorporate it into a revised SMTA (FAO 2016)²³.

2. Distribution of Benefits

Distribution of monetary benefits is operated through the Benefit-sharing Fund via a project-based approach. The Benefit-sharing Fund is mandated to prioritize projects that support not only the conservation and sustainable use of agricultural biodiversity, but also the livelihoods of farmers and rural communities. According to the Treaty text, benefits should flow primarily, directly and indirectly, to farmers²⁴.

Twenty-two projects were funded under the third cycle. Most of them are run by international and national agricultural research centers, two are run by NGOs, and one by an association of indigenous organizations²⁵. Channelling benefits to farmers is easier said than done, given the limited capacities of most farmer communities and organizations to reach international

funding through the complex Benefit-sharing Fund application and project execution procedures. While this project-based approach arguably combines elements of inter-state benefit-sharing regulation with implementation at the local level, its results illustrate the challenges that an international organization faces to reach directly communities on the ground, and vice versa.

An additional challenge lies in the diversity of the ITPGRFA system users. The Treaty serves a wide and diverse set of users in the entire spectrum of agricultural production, with different or contradictory needs: public research institutes, smallholder farmers, companies big and small, in developing and developed countries, actors engaged in commercial or non-commercial research, in formal and informal seed systems. The current realities of agricultural research and development characterized by high market concentration (Tsioumani et al. 2016), put at risk not only farmers' innovation but also public agricultural research. As a result, agricultural research centers in developing countries also compete for funding under the Treaty. The Treaty struggles to find and maintain a balance between modern scientific methods of identifying and developing new varieties on the basis of material in *ex situ* collections and farmers' traditional agro-ecological approaches. It remains a matter for consideration though, whether the current approach serves well the objectives of sustainable agriculture and global food security (Swiss Government 2015, Frison 2016). It has been questioned for instance whether a competitive project-based approach is appropriate to meet challenges related to distributional equity, the public value of PGRFA and the required cooperation among different States and actors to address food security concerns (Louafi 2013).

B. IPR-related Instruments and Benefit-Sharing: UPOV and the TRIPS 'CBD Amendment'

The failure of the ITPGRFA MLS to generate monetary benefits should be seen in the broader context of international law and policy governing agricultural R&D. Unlike the environmental treaties, there is no explicit requirement related to fair and equitable benefit-sharing in IPR instruments, the argument being that IP protection benefits society as a whole by promoting innovation. In the response of UPOV to the CBD Secretariat, requesting for contributions to the negotiations on access and benefit-sharing (UPOV 2003; Cabrera Medaglia 2010; Dutfield 2011), UPOV highlights the importance of access to genetic resources to ensure progress in plant breeding and 'thereby to maximize the use of genetic resources for the benefit of society.' The breeder's exemption, whereby acts done for the

purpose of breeding are not subject to any restriction, is considered to be an ‘inherent benefit-sharing principle’ (UPOV 2003). Same goes for the compulsory exception to the breeder’s right regarding acts done privately and for non-commercial purposes (which could apply to the activities of subsistence farmers) and the optional farmer’s privilege to replant farm-saved seeds from a protected variety. The Council of UPOV expressed its concern over benefit-sharing measures that could introduce barriers to progress in breeding, despite the glaring limitations that the UPOV texts place on the farmer’s privilege. In addition, the presumption that technological developments benefit society at large fails to acknowledge the well-documented fact that technologies ‘such as high-yielding crop varieties, agrochemicals and mechanization have primarily benefited the better resource groups in society and transnational corporations, rather than the most vulnerable ones’ (IAASTD 2008: 23) and ignores the question of distributing the benefits to the most vulnerable groups of society, including smallholder farmers.

Exceptions to patent holders’ rights are even more limited. They can be introduced under the TRIPS Agreement²⁶, but practice varies among WTO Member States and the WTO dispute settlement bodies interpret the provision narrowly (Yamane 2011). In addition, the TRIPS Agreement does not require disclosure of prior informed consent of the country of origin and of benefit-sharing in patent applications involving use of PGRFA. Therefore, foreign companies may obtain private rights derived from national genetic resources without having to adhere to the CBD principles (Commission on Intellectual Property Rights 2002). Although it can be argued that such access to resources may not be legitimate, enforceability of CBD principles is weak unless mandated and monitored by national legislation. In addition, the validity of the patent would be assessed on the basis of the legislation of the country that granted it, not the country that provided the genetic resource used.

Unless the TRIPS Agreement is amended to ensure respect for the CBD principles, the implementation and enforceability of such principles would remain elusive (Chouchena-Rojas et al. 2005). Importantly, such an amendment would allow access to the WTO dispute settlement system for breaches of the CBD requirements, as, unlike the CBD, TRIPS rules are enforced through mandatory adjudication and retaliatory sanctions. Several developing countries have thus called for an amendment to TRIPS by introducing requirements to disclose the origin of genetic material and evidence of prior informed consent and benefit-sharing in patent applications. The original proposal was supported by 110 WTO Member States by 2008, when a strategic alliance was made with the EU and Switzerland calling for a

procedural decision to negotiate in parallel the biodiversity amendment and geographical indications. No progress has been achieved since.

Similar calls take place under the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO). Since 2010, the IGC undertakes negotiations on new patent disclosure requirements, where the MLS could be disclosed as the source of PGRFA²⁷.

Reaching such agreement would change the course in the IPR realm.

Ample literature highlights that implementation of UPOV and TRIPS may result in contraventions to human rights (UNDP 2000; Correa and Yusuf 1998). The Sub-Commission on the Promotion and Protection of Human Rights of the former UN Commission on Human Rights declared that there are apparent conflicts between the IPR regime and international human rights law, in relation to the transfer of technology to developing countries, the consequences of plant variety rights and the patenting of genetically modified organisms for the enjoyment of the right to food, biopiracy, and the reduction of communities' control over their genetic and natural resources and cultural values, etc.²⁸ (Weissbrodt and Schoff 2003). Additionally, former UN Special Rapporteur on the Right to Food Olivier De Schutter criticized UPOV for restricting farmers' privilege, highlighting concerns arising from the strengthening of breeders' rights regarding the right to food. He further pointed to obstacles in public research caused by the intensification of IPRs, and to the need for a broad interpretation of the limitations that can be imposed to the patent rights-holder (De Schutter 2009). Former UN Special Rapporteur on cultural rights Farida Shaheed also stressed tensions between IPRs and the right to benefit from scientific progress (Shaheed 2012). Challenging the idea that IP protection benefits society as a whole, De Schutter further argued that the human rights framework requires investigating primarily *who benefits* from any technological advance, with the needs of the most vulnerable groups at the centre of attention (De Schutter 2009).

Concluding remarks

Fifteen years ago already, the Sub-Commission on Human Rights drew attention to the primacy of human rights obligations over economic policies and agreements and requested the TRIPS Council to take fully into account existing State obligations under international human rights instruments. In the meantime, the international community seems to be taking the opposite direction. The WTO dispute settlement system is being used at full speed to enforce implementation of multilateral trade agreements, often against developing countries'

efforts to provide food security for local populations; the activities of multinational companies remain largely outside the scope of international law (De Jonge 2011); while a complex web of bilateral and regional trade and investment treaties build a WTO-plus global legal order enforced through arbitration tribunals, which limit national governments' regulatory choices outside whichever guarantees of equity and legitimacy multilateralism provides (Cotula 2014). Trade and investment-oriented policies, including IPRs, are gaining a *de facto* supremacy over human rights and environmental treaties, because of their enforcement potential and the underlying power of actors and interests involved. At the same time, the dramatic extent of patent expansion and market concentration mean that enforcement of IPRs is not even needed, as 'the dominant oligopolists are in a position to dictate to farmers the very conditions of access to seed' (Kloppenborg 2014: 1229), making at the same time public research on novel technologies virtually impossible (Tsioumani et al 2016).

The concept of fair and equitable benefit-sharing was born in international biodiversity law in the early 90s with noble intent. In the meantime, however, the policy and legal landscape changed dramatically, first with the establishment of the WTO and adoption of the TRIPS Agreement and second through the intensification of neoliberal policies via bilateral and regional trade and investment agreements. Does the concept remain promising now, as it was at the times of its inception? Has it injected any fairness and justice in research and development sphere? Has it come up with a workable defence against IPRs? Entered into force almost a decade after the CBD, the ITPGRFA has developed a highly sophisticated system to operationalize benefit-sharing at the inter-state level. However, while it has introduced a complex web of technical requirements to the exchange of PGRFA, it has not succeeded in legally enforcing user-based benefit-sharing (Kloppenborg 2014) and as a result very little monetary benefits have been shared.

To be fair, the MLS is a success in many ways. It facilitated hundreds of thousands of exchanges of PGRFA, mainly to enable public agricultural research; it further provided valuable support, particularly through non-monetary benefit-sharing to build the capacities required for facilitated access to, and use of, PGRFA. It is thus instrumental in building endogenously-defined needs and capacities of countries and communities, and bridging the fairness and equity gap in agricultural research and development. These successes however have been overshadowed by expectations for monetary benefits, in the context of growing inequities due to trade policies described above.

Should genetic resources, as renewable and non-rivalrous goods, be treated more like knowledge than like non-renewable and rivalrous natural resources? Governance and management of knowledge faces similar characteristics and similar challenges: a global public good, the exchange of which would support solutions to global challenges, which however faces various IPR- and access-related restrictions. Opening a dialogue between the two sectors seems timely, particularly given the increasing 'dematerialization' of genetic resources, which risks undermining current benefit-sharing obligations and making the ITPGRFA and the Nagoya Protocol obsolete: synthetic biology techniques currently make possible the reconstruction of a genetic resource on the basis of its genetic information, which can easily be transferred electronically without physical access to the resource itself.

At this stage, sharing is in direct conflict with a political and economic system that is increasingly transforming genetic resources and knowledge into commodities. Two fundamental assumptions seem to collide. Does IP protection contribute to technological innovation and technology transfer as the TRIPS Agreement proclaims? Or does it hamper innovation as ample research suggests? Is there a way to bypass the IPR issue to promote biodiversity conservation and sustainable use, and transfer technology to that end? And does the currently highly proprietary environment allow us to even imagine the creation and protection of a global commons of plant genetic resources (Halewood 2013)?

Ostrom distinguishes common property regimes from open-access systems: whereas in open-access systems no one has the legal right to exclude anyone from using a resource, in common property regimes the members of a clearly demarcated group have a legal right to exclude non-members from using a resource (Hess and Ostrom 2007). Can ideas arising from the commons literature, particularly the knowledge commons, be applied in the field of agricultural research (Frison 2016)? While the picture of international law appears rather gloom at the moment, examples from the grassroots offer rays of hope. The seed inspires: moving away from the farmer archetype, new communities are being created, on the basis of values, not profit, and engage with exchanges of seeds and preservation of agricultural biodiversity. Inspired by the successful experience in the software realm, others partner to experiment with the open source development model. While such grassroots initiatives remain in an informal and largely unregulated sphere, their impact can be seen in the policy realm, with the CGIAR now changing its discourse to talk about research *for* development, and increasingly engaging in participatory plant breeding initiatives (Vernooy et al. 2015). Discussing and redefining the boundaries between what must remain in the public domain,

what may be managed as a commons and what can be privatized is now more than ever a critical issue for regulators and academics alike.

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¹ TRIPS Agreement Article 27(3)(b).

² Biopiracy, a term originally coined by civil society organization ETC Group, refers to the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions that seek exclusive monopoly control (patents or IP) over these resources and knowledge.

³ International Undertaking Art. 1.

⁴ Art. 2(1).

⁵ International Undertaking, Article 7(h)(ii).

⁶ International Undertaking, Preamble.

⁷ International Undertaking, Art. 7(a).

⁸ Canada, France, Germany, Japan, New Zealand, Switzerland, the United Kingdom, and the United States.

⁹ CBD Article 15.

¹⁰ CBD Article 1.

¹¹ ITPGRFA Article 9.

¹² 1992 Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, Resolution 3.

¹³ ITPGRFA Article 1.

¹⁴ ITPGRFA Articles 10-13.

¹⁵ ITPGRFA Preamble.

¹⁶ ITPGRFA Articles 11(2) and (5).

¹⁷ ITPGRFA Governing Body Resolution 2/2006 (2006).

¹⁸ SMTA Article 6(7) and Annex 2.

¹⁹ SMTA Article 6(11).

²⁰ SMTA Article 6(8).

²¹ ITPGRFA Articles 13(2)(a) and 17.

²² I am grateful to former ITPGRFA Secretary Shakeel Bhatti for drawing my attention to this point.

²³ Resolution 1/2015, *Measures to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing*.

²⁴ ITPGRFA Article 13(3).

²⁵ The list of approved projects is available at

<http://www.planttreaty.org/sites/default/files/files/Third%20Call%20for%20Proposals-%20Projects%20approved%20for%20funding-for%20web.pdf> (last visited 1 June 2016).

²⁶ Article 30 on Exceptions to Rights Conferred.

²⁷ I am grateful to Claudio Chiarolla for drawing my attention to this point.

²⁸ Sub-Commission on the Promotion and Protection of Human Rights Resolution 2000/7, UN Doc. E/CN.4/Sub.2/2000/7.

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