

# The EU's push for intellectual property rights on seeds and its impact on developing countries



For APBREBES and Both ENDS, an agreement negotiated 30 years ago by a few industrialised countries is not a basis for shaping the global agriculture of tomorrow. Times have changed. The EU should therefore stop requiring developing countries to adopt the 1991 Act of the UPOV Convention through trade agreements or any other related activities.

This policy brief is an abstract of the report 'Plant variety protection & UPOV 1991 in the European Union's Trade Policy: Rationale, effects & state of play': [www.apbrebes.org/upov\\_eu\\_trade\\_policy](http://www.apbrebes.org/upov_eu_trade_policy)

## INTRODUCTION TO THE PROBLEM

The huge diversity of plant species and varieties used in agriculture was initially created by local and indigenous communities and farmers over hundreds and thousands of years. The core of the farmer managed seed system was and is the practice to use, save and swap seeds and adopt them to their local circumstances and needs. This diversity of plants for agricultural use as well as the agrobiodiversity in broader terms is the backbone of sustainable agriculture and plays a crucial role to protect against plant diseases and to adapt to climate change. It is also our insurance for the future. This enormous contribution has also been recognised by the International Treaty on Plant Genetic Resources for Food and Agriculture.

The growing industrial commercialisation of plant breeding, however, is increasingly threatening this farmer managed seed system. A key aspect of industrial plant breeding is recognising exclusive rights to breeders, in the form of Intellectual Property Rights (IPRs) for plant varieties. In a few states plant varieties are protected by patents. In most states they are protected by so called Plant Varieties Protection (PVP) laws.

The concept of PVP laws originated in Europe in the early 20<sup>th</sup> century and was enshrined by six European countries in 1961 in the International Convention for the Protection of New Varieties of Plants (UPOV). Since then, various amendments of the UPOV act have expanded the reach of protection for beneficiaries, further limiting the rights of other breeders and farmers to use the protected variety. This tightening of plant breeders' rights laws and the inclusion of the UPOV Convention in trade policies has led to a growing concern about the prerogatives that are granted to plant breeders and the international struggle for farmers' rights on seeds, and seed freedom.

Indeed, commercial plant breeders and large seed companies are seeking increasingly exclusive monopoly rights over seeds. Their argument for strong IPR on seeds is that the more we protect the rights of breeders, the more incentive they will have to invest in the development of new plant varieties. And this, according to the logic of plant breeders,



will lead to higher quality seeds. But it is already clear that this monopoly by big companies has created an unhealthy market dominated by a few large companies and reduced agro-biodiversity. It may also reduce the availability of locally adapted seed varieties and have negative implications for promising new approaches such as those based on evolutionary plant breeding or agroecology. Ironically, most of the supposed benefits of strong IPRs have not materialised in many countries, and to make matters worse, there is also growing concern on how they affect human rights, erode traditions and knowledge, and threaten the sustainability of food production.

The flaw in the unilateral protection of plant breeders' rights in the past decades was that it increasingly hampered another system of innovation, the farmer managed seed system. Today, however, the importance of this system for food security and agrobiodiversity and the associated rights of farmers are widely recognised.

Despite these facts, the EU is heavily promoting the 1991 UPOV Act, which is the strictest plant variety protection regime, in its external trade policy. APBEBES and Both ENDS wrote a research paper to discuss the EU's efforts to have their trade partners and other countries adopt plant variety protection measures in their national laws. This is a summary of that paper and provides the reader with insight into some of the adverse consequences of this strategy. The authors of the paper argue that UPOV-91 is based on an outdated and one-sided approach and are calling on the EU to stop pushing other countries to follow this model.

### WHAT IS UPOV-91 AND WHAT IS THE PROBLEM?

UPOV-91 essentially requires farmers to abandon any practices of exchanging and selling farm-produced seeds or propagation material if these practices involve protected varieties, even if this is usually accepted by customary law. Also saving seeds and replanting on their own fields is prohibited for most plant species and restricted for others.

UPOV-91 gives exclusive rights for a limited time to create a temporary monopoly over the use of a given plant variety. These rights give breeders control over their products, but at the same time they forbid or restrict their use by others. Some consider plant variety rights a necessary tool to foster plant breeding innovation – as innovation requires investing time and money and the risks would be too big without these rights. Others disagree, arguing that plant variety rights -as granted under UPOV91- restricts farmers' traditional practices of seed saving and limits their ability to use, save, exchange, and sell protected varieties. And the latter, in turn, impedes plant improvement and agricultural biodiversity management by farmers and can negatively affect the income of the world's poorest communities.

More generally, UPOV-91 is inconsistent with international environmental obligations such as those outlined in the Convention on Biological Diversity (CBD), the International Treaty on Plant Genetic Resources for Food and Agriculture and the UN Declaration on the Rights of Peasants (UNDROP). One important element of this latter declaration is the farmers' rights to seeds.

### THE ROLE OF THE EU

The pressure on countries to provide plant variety protection under the terms of the UPOV Convention is fuelled by widespread advocacy of the Act by the UPOV organisation itself, but also by the European Union and some of its Member States, as well as by other UPOV Member states from industrialised countries. The EU does this by offering soft training tools and consultancy services, but also by taking a strong negotiating position in regional or bilateral trade and association agreement talks.

The inclusion of strong wording on UPOV protection in agreements on free trade and economic partnership is a concern, because signatory countries that do not comply with the terms of free trade agreement provisions that relate to the UPOV Convention could be subject to the arbitration and sanctions systems that are built into the trade agreements, such as dispute settlement mechanisms and monitoring mechanisms. The EU has designed this mechanism based on how the WTO deals with trade disputes. Past WTO cases make it clear that countries breaching these obligations face potentially huge fines.



## PLANT VARIETY PROTECTION IN TRADE AGREEMENTS

At the time of writing, 10 free trade agreements (FTAs) and 3 association agreements signed by the EU and its trading partners required protection of plant variety rights under the terms of the 1991 UPOV Act, while 15 association agreements formally require accession to the 1991 Act. None of the Economic Partnership Agreements signed by the EU have clauses on IPRs, except for the one signed with CARIFORUM countries.

The final text of these agreements depends to a large extent on the negotiation position of the other country or countries.

Here as example, the EU's standard initial text proposal as it was tabled by the EU in Nov 2016 in the negotiations with Mexico:

▶ 'Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants (UPOV) as lastly revised in Geneva on March 19, 1991, (the so-called "1991 UPOV ACT") including the optional exceptions to the breeder's right as referred to in Article 15 of the said Convention, and co-operate to promote and enforce these rights'

This is identical to the now finally agreed draft text that was published following the „agreement in principle“ announced by the EU and Mexico in 21 April 2018. While this is a matter of concern it should be noted that it has been recently re-confirmed by the EU that even this text still „may undergo further modifications“ and that this text is *“without prejudice to the final outcome of the agreement between the EU and Mexico“*.

Indeed there are examples that demonstrate considerably more flexibility than the initial EU negotiating position. Currently, while 5 draft agreements require protection under the 1991 UPOV Act, one of them (MERCOSUR) allows protection under the less restrictive 1978 Act of the UPOV Convention, while a leaked draft of the Free Trade Agreement's Intellectual Property Rights Chapter between the EU and India is a case in point that does not even mention the UPOV Convention:

▶ 'Article 16 Plant Variety: The parties shall cooperate to promote and reinforce the protection of plant varieties subject to their applicable laws and based on any international agreement to which both parties are signatories.'

As long as a country is not a member of UPOV-91, it should be allowed to design and implement its own seed laws. However, when the kind of protection offered by UPOV-91 is required by the terms of a trade agreement, the latter's dispute mechanisms will enter into play, allowing a country to raise the tariffs on its trading partner until the latter joins the UPOV Convention or changes its laws to comply with the Convention's 1991 Act.

## UPOV-91 IN TRADE AGREEMENTS EVEN PROBLEMATIC FOR MEMBERS

While the EU and other countries frequently use their trade negotiations to make other governments join UPOV-91 or adjust their national policy accordingly, including UPOV-91 in a trade agreement can also be highly problematic for countries that are already a member of UPOV-91, for reasons such as the following:

- If a country breaches its UPOV-91 obligations, the EU might trigger the agreement's dispute settlement mechanism.
- If a country later decides to withdraw from UPOV-91, it will not be able to do so without breaching the trade agreement. That country would need the consent of the other country or set of countries, such as the EU, to change the text of the trade agreement so it could leave UPOV-91.
- IPRs are frequently protected in international investment agreements, such as bilateral investment treaties or investment chapters in trade agreements that include controversial investor-state dispute settlement mechanisms (ISDS). It is important to ensure that foreign companies cannot use IPR clauses in trade agreements to launch direct compensation claims against states if they feel their IPR rights have been breached.

- Including a requirement to cooperate on matters related to UPOV-91 might not sound particularly concerning. However, it is important to ask to what extent a legal requirement to cooperate should give another country the leverage to interfere with how a state interprets its obligations under UPOV-91, and how it implements it in its national laws and regulations.

### A CALL FOR CHANGE

Given the adverse consequences of UPOV-91 outlined above, APBEBES and Both ENDS are calling on the EU to change its current approach to include plant variety protection obligations in their trade agreements and to stop requiring developing countries to adopt the 1991 Act of the UPOV Convention through trade agreements or any other related activities. To promote truly sustainable agriculture, agrobiodiversity and food security, governments need sufficient flexibility when drafting their national or regional seed and plant breeders' rights laws to design a legal system that both protects breeders' innovation and enshrines farmers' rights, adapted to their local conditions and needs.

All too often in the last 60 years, only the formal, industrial seed system has been promoted, leading to a one-sided and unsustainable one-size-fits-all approach. What we need today are flexible systems that take into account the specificities of every country's national agriculture and the wide range of active farmers operating within its borders. This is the only way that the global community can meet the major challenges of the future, such as the food or climate crisis. EU trade policy must take this balancing act into account. As it stands, however, the EU is exporting an outmoded system of IPRs to the countries of the South, which is exactly what we do not need.

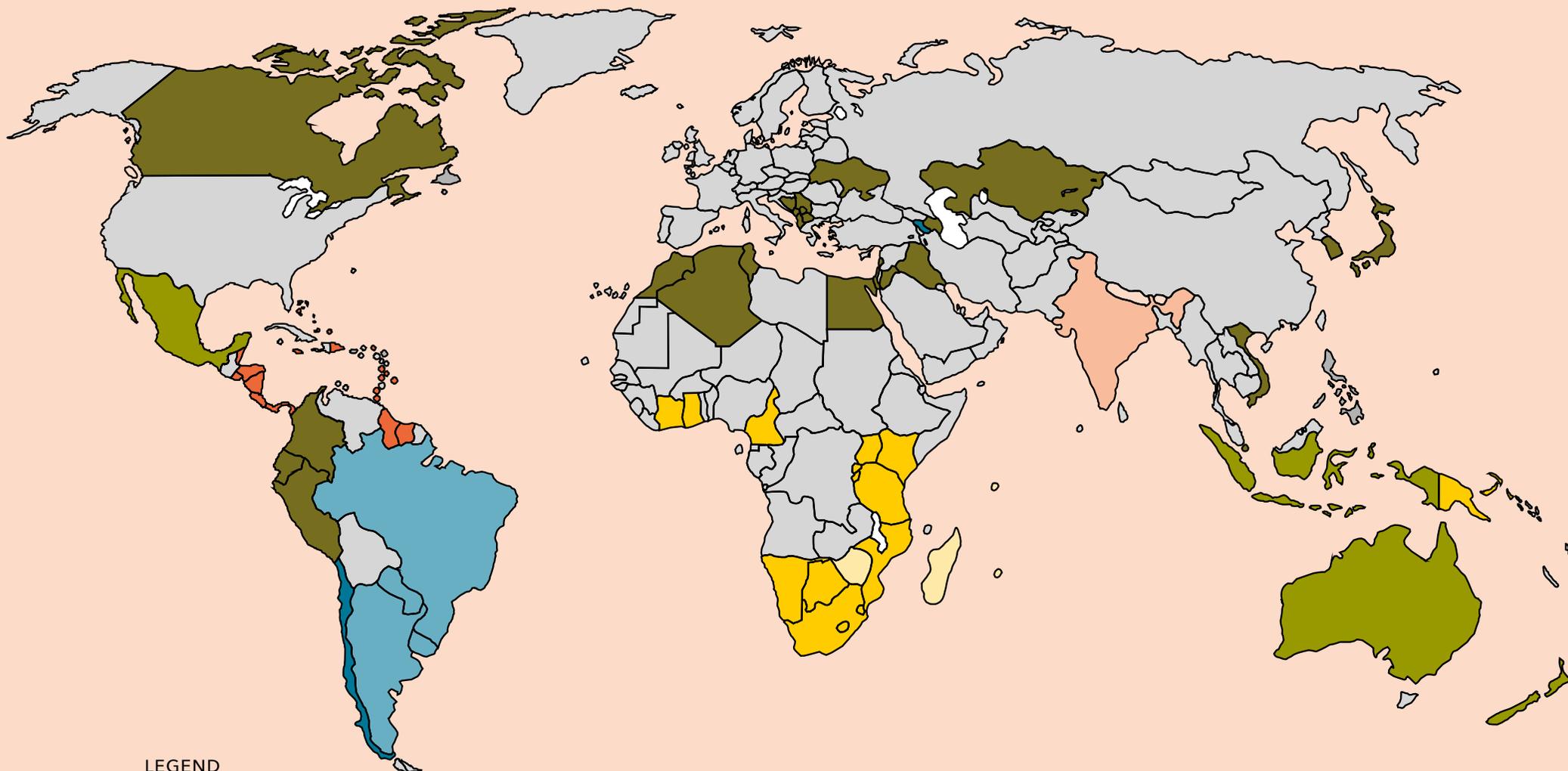
For APBEBES and Both ENDS, an agreement negotiated 30 years ago by a few industrialised countries is not a basis for shaping the global agriculture of tomorrow. Times have changed. There is increasing awareness that a sustainable seed policy needs to promote both formal and farmer-managed seed systems. To achieve this, it is urgently necessary to strengthen farmers' rights, and more particularly



the farmers' rights to seeds. This includes the right to save, use, exchange and sell farm-saved seeds, as well as the propagation material of protected varieties.

With this summary and the underlying background report, APBEBES and Both ENDS aim to contribute to the urgent discussion about UPOV and trade agreements.

WORLD MAP: *The EU's push for intellectual property rights on seeds and its impact on developing countries*



LEGEND

- 1** • FTAs with obligation to accede to the UPOV 1991 Act or 'to protect under the terms of the UPOV 1991 Act'
- 1** • The negotiations are still ongoing
- 2** • FTAs with obligation to protect either under UPOV 1978 or 1991 Act
- 2** • The negotiations are still ongoing

- 3** • FTAs with obligation to provide plant variety protection, whether UPOV or other sui generis regime
- 3** • The negotiations are still ongoing
- 4** • FTAs with no finally binding plant variety protection provisions
- 4** • The negotiations are still ongoing



**APBREBES**

c/o TWN  
Rue de Lausanne 36  
1201 Geneva  
Switzerland

**Email** [contact@apbrebes.org](mailto:contact@apbrebes.org)

**Website** [www.apbrebes.org](http://www.apbrebes.org)



**Both ENDS**

Nobelstraat 4  
3512 EN Utrecht  
The Netherlands

**Telephone** +31 85 060 50 58

**Email** [info@bothends.org](mailto:info@bothends.org)

**Website** [www.bothends.org](http://www.bothends.org)

