

BRIEFING PAPER

The reasons why Indonesia should not (be forced to) join UPOV

Indonesia, like many other countries in the Global South, is under enormous pressure from developed countries to introduce a Plant Variety Protection (PVP) Act according to UPOV 91¹. At present, also the European Union is negotiating an agreement with Indonesia, in which it calls for UPOV 91. The reason why UPOV 91 would be the wrong system for Indonesia becomes apparent when taking into account Indonesia's specific circumstances and needs, as well as other international obligations:

Indonesia is classified by the World Bank as a lower middle-income country. Agriculture is of crucial importance to Indonesia's economy. It is the second biggest source of livelihood and employment, in particular in the country's rural areas, with around 33% of Indonesia's labor force being employed in the agricultural sector. 93% percent of Indonesia's total number of farmers are small family farms (i.e. smallholder farmers)² with an average land holding of 0.6 hectares. Indonesia's GNI per capita is US\$3,870, 8.8 times lower than the GNI per capita of the EU (US\$34,234).³

Against this background, it would be extremely worrying if Indonesia were to agree to comply with UPOV 1991 provisions. The concerns would include the following:

■ **UPOV 1991 was negotiated by developed countries for their commercial seed systems:** The demand by the commercial seed sector in Europe led to UPOV 1961 being negotiated and adopted by six countries from Western Europe. UPOV 1991 was negotiated by only 20 UPOV member countries, out of which only one (South Africa, under its Apartheid Regime) was a developing country. Hence the UPOV system was never developed considering the seed systems prevailing in and needs of developing countries. UPOV 1991 imposes a "one-size-fits-all" system, ignoring that agricultural systems of countries vary significantly. In the EU, seed is supplied predominantly through the commercial seed system, while in Indonesia the farmers' seed system (i.e. the informal seed system) characterized by their practices of saving, exchanging and selling farm-saved seed is the main pillar supporting the

agricultural sector and livelihoods in Indonesia. The saving, storage and reuse of seeds is part of the ancestral traditions that are considered local wisdom. They maintain the carrying capacity of the environment for sustainable livelihoods. UPOV 1991 provides extremely limited leeway or flexibility for governments to design a PVP regime that reflects their conditions and realities of their agricultural systems.

■ **UPOV 1991 suppresses Farmers' Rights, hindering implementation of Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).**

Indonesia is a Party to the ITPGRFA, but UPOV 1991 does not allow policy space for developing country governments such as Indonesia to maintain or enact provisions it considers necessary to implement Article 9 (Farmers' Rights) of the ITPGRFA which states it is government's responsibility to take measures to "protect and promote" Farmers' Rights. Such rights would include the Farmers' right to save, use, exchange and sell farm saved seeds, their right to the protection of tradition knowledge and the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture. Most revealing of the conflict between UPOV 1991 and the ITPGRFA is UPOV's response to Farmers' Rights provisions enacted by Parties to the International Treaty. For example, in examining the conformity of Malaysia's national PVP legislation with UPOV 1991, UPOV called on Malaysia to delete from its legislation the right of small farmers to exchange reasonable amounts of propagating material of protected variety.⁴ In the case of the Philippines, UPOV found the farmer's exception that recognised the traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act to be incompatible with the 1991 Act.⁵ A 2015 study undertaken on behalf of the German Federal Ministry for Economic Cooperation and Development concluded that "UPOV 91-based PVP laws were found to not advance the realization of Farmers' Rights; rather they are effective in the opposite direction".⁶

- **UPOV 1991 undermines implementation of the “United Nations Declaration on the right of peasants and other people working in rural areas” (UNDROP).** The Declaration among others requires States to “take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas” which include the right to save, use, exchange and sell their farm-saved seed or propagating material, right to the protection of traditional knowledge, and right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture and the right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture. In addition, in its Article 19.8 the Declaration states that “. States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.”⁷

The Declaration has been adopted by the Human Rights Council and the UN General Assembly. Its adoption was supported by Indonesia. On the other hand most EU members abstained while a few objected to its adoption and Portugal supported the declaration.⁸ In any case, every state, needs to apply international instruments adopted by the UN General Assembly in good faith, and has to give priority to human rights norms in international and national laws, as reflected in UNDROP’s Articles 2(4), 15(5) and 19(8)⁹. In line with these obligations the Geneva Academy in a report concludes that *“the EU and EU Member States shall ensure that free trade agreements to which they are party do not lead to violations of the right to seeds of European peasants or peasants in other countries. This implies that they shall, inter alia, stop promoting the 1991 Act of the UPOV Convention when negotiating free trade agreements. Instead, they shall encourage developing countries to use the possibilities offered by TRIPS to design sui generis systems of plant variety protection.”*¹⁰ Implementation of the Declaration requires Indonesia to have complete flexibility to put in place relevant measures. As such any obligation on Indonesia to follow UPOV 1991 would be inconsistent with the intent and spirit of the Declaration.

- **UPOV 1991 is inconsistent with the United Nations Declaration on Rights of Indigenous People (UNDRIP).** Article 31 of UNDRIP, declares that Indigenous peoples have rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and tradition- all cultural expression, as well as the manifestation of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna, and flora, oral tradition, literatures, designs, sports and traditional games, visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. UPOV does not recognize such rights in its 1991 Act. In fact Indonesia will not be allowed to implement mechanisms within the PVP systems that safeguards the rights of indigenous communities, hence im-

plementing UPOV would also conflict with rights of indigenous peoples under UNDRIP. To protect the rights of indigenous communities, also New Zealand has refused to join UPOV 91¹¹. A human rights impact assessment of UPOV 91¹² has concluded that traditional knowledge applied by farmers in the selection, preservation and storing of seed is the basis of local innovation and *in situ* seed conservation and “UPOV’s restrictions on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and preservation. They would also gradually lose their ability to make informed decisions about what to grow and on which type of land, how to respond to pest infestation, or how to adapt their seed system to changing climatic conditions.” The assessment further adds that “...if implemented and enforced, UPOV 91 would sever the beneficial inter-linkages between the formal and informal seed systems”, and its “restrictions on the use, exchange and sale of protected seeds could adversely affect the right to food, as seeds might become either more costly or harder to access” as well as “other human rights, by reducing the amount of household income which is available for food, healthcare or education.”

- **Facilitate bio-piracy of genetic resources:** UPOV does not recognize the principles of the Convention on Biological Diversity (CBD) and the Nagoya Protocol that access to local genetic resources should be subject to fair and equitable benefit sharing. The UPOV system does not accept disclosure requirement in PVP applications to prevent misappropriation and/or facilitate compliance with access and benefit sharing rules¹³. Further UPOV incorporates a double standard and inequities within its system. New plant varieties developed from traditional varieties may be PVP protected and commercialised, without requiring the holder of a new variety to obtain a legal access and pay fair and equitable benefit sharing to farming communities that developed traditional varieties. However if a local farmer were to use a PVP protected variety to develop a new variety that is considered to be an “essentially derived variety”, the local farmer would not be able to commercialise the new EDV variety without the consent of the PVP holder.
- **Exacerbate erosion of biodiversity:** UPOV 1991’s requirements of uniformity and stability focus efforts into the development of a limited number of standard varieties. Normally farmer varieties would not meet these criteria as they are constantly evolving. UPOV’s requirements rewards homogeneity and not agro-biodiversity. This skewed approach has resulted in genetic erosion. It is estimated that about 75% of plant genetic diversity has been lost as farmers worldwide have abandoned their local varieties for genetically uniform varieties that produce yield under certain conditions. Genetic diversity within crops is also decreasing¹⁴. According extensive protection to one type of seed system with implications for the farmer seed systems prevailing in Indonesia, makes a mockery of Article 6 of the ITPGRFA which stresses the sustainable use of plant genetic resources including by pursuing fair agricultural policies that promote the development and maintenance of diverse farming systems. The UN Secretary-

General stated in its report¹⁵ Agriculture development, food security and nutrition: “An additional challenge that has advanced to the forefront is the pressures exerted on small-scale farming stemming from the provisions of the 1991 Act of UPOV. Restrictions on seed management systems can lead to a loss of biodiversity and in turn harm the livelihoods of small-scale farmers as well as weaken the genetic base on which we all depend for our future supply of food. As smallholders rely predominantly on informal seed systems, the restriction imposed by the Act on the use of farm-saved seeds and the prohibitions on their exchange and sale cause considerable concern.”

■ **Implementation of UPOV 1991 is unnecessary for the development of a strong seed market.** It is often argued by the proponents of the UPOV system, that membership of UPOV is a prerequisite to promote breeding activities and support development of a national seed market. An analysis¹⁶ of Access to Seed Index data has shown that there is no causal relationship between the UPOV system and a dynamic seed sector. On the contrary, countries with a non-UPOV sui generis plant variety protection (PVP) legislation or even without a PVP legislation, have in some regions the most vibrant seed sector. Another paper¹⁷ analyzes specifically the effects of the introduction of Plant breeder’s rights (PBRs) in almost 80 importing countries on the value of exports of agricultural seeds and planting material from 10 exporting EU countries, including all principal traditional exporters of seeds, as well as the US. The paper finds no significant effect from UPOV membership, as an indicator of the scope and strength of IPRs affecting the plant breeding sector, on seed imports, i.e., there is no evidence that the adoption of a UPOV system of PBRs positively influences seed imports.

In short, UPOV 1991 offers an inappropriate legal framework for Indonesia. Multiple independent experts support this conclusion, and recommend that developing countries should not join or implement UPOV91.¹⁸

The former United Nations Special Rapporteur on the Right to Food in its 2009 report to the General Assembly highlights that “States – particularly developing countries where the function of traditional, farmers’ seed systems is even more important both for the prevention of genetic erosion and for the livelihoods of farming communities – should design sui generis forms of protection of plant varieties which allow these systems to flourish, even if this means adopting non-UPOV compliant legislations”. He concludes: “No State should be forced to establish a regime for the protection of intellectual property rights which goes beyond the minimum requirements of the TRIPS Agreement: free trade agreements obliging countries to join the 1991 UPOV Convention or to adopt UPOV-compliant legislation, therefore, are questionable.”¹⁹

The EU and all other trading partners must recognise that Indonesia is using its policy space to develop a plant variety protection system that is appropriate for its agricultural system, that enables Indonesia to protect its local plant genetic resources, its farmers and breeders, and to safeguard the public interest, and that will allow it to implement UNDROP and UNDRIP.

ENDNOTES

- 1 UPOV stands for "International Union for the Protection of New Varieties of Plants. UPOV 91 is the 1991 ACT of the UPOV Convention.
- 2 www.fao.org/3/i8881en/i8881EN.pdf
- 3 <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD>
- 4 UPOV doc. C(Extr.)/ 22/2 available at www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.
- 5 UPOV doc. C(Extr.)/24/2 available at www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf
- 6 The UPOV Convention, Farmers’ Rights and Human Rights – An integrated assessment of potentially conflicting legal frameworks” published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development” (June 2015) available at: www.researchgate.net/publication/280234837_The_UPOV_Convention_Farmers'_Rights_and_Human_Rights_An_Integrated_Assessment_of_Potentially_Conflicting_Legal_Frameworks. See also “International Contradictions on Farmers’ Rights” available at www.apbrebes.org/files/seeds/files/Treaty_UPOV_WIPO%20Interrelations_def_150929.pdf
- 7 For the whole Declaration text <https://digitallibrary.un.org/record/1650694>
- 8 <https://digitallibrary.un.org/record/1656160>
- 9 See Golay/Batur (2021), Practical Manual on the Right to Seeds in Europe – The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas and the Right to Seeds in Europe, www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2019.pdf
- 10 Ibid.
- 11 See www.apbrebes.org/sites/default/files/2021-10/Apbrebes_UPOV-Flexibility_EN_10-21_def.pdf, Page 19 ff.
- 12 “Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines,” October 2014. Available at www.publiceye.ch/en/publications/detail/owning-seeds-accessing-food
- 13 See for example UPOV Secretariat’s requirements for Malaysia to remove its anti-biopiracy provisions from its PVP law at www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.
- 14 See UN General Assembly Document A/64/170 titled “Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation”. <https://digitallibrary.un.org/record/663241>
- 15 Report A/70/333; August 2015; see <https://digitallibrary.un.org/record/802335?ln=en>
- 16 See www.apbrebes.org/sites/default/files/Article%20UPOV_Access%20to%20Seed%20Index_Final.pdf
- 17 See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323595
- 18 “The UPOV Convention, Farmers’ Rights and Human Rights – An integrated assessment of potentially conflicting legal frameworks” published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development” (June 2015) available at www.researchgate.net/publication/280234837_The_UPOV_Convention_Farmers'_Rights_and_Human_Rights_An_Integrated_Assessment_of_Potentially_Conflicting_Legal_Frameworks; UNDP (2008) “Towards a Balanced Sui Generis Plant Variety Regime”, available at www.undp.org/publications/toward-balanced-sui-generis-plant-variety-regime; Carlos M. Correa et al. (2015), “Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991”, APBRES, available at www.apbrebes.org/news/plant-variety-protection-developing-countries-tool-design-sui-generis-plant-variety-protection
- 19 See UN General Assembly Document A/64/170 titled “Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation”. <https://digitallibrary.un.org/record/663241>