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UPOV's War against the Rights of Farmers

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Summary

This policy brief shows how UPOV, with the support of some of its Member States, is fighting against farmers' rights to seed worldwide.

UPOV does this mainly through pressure, misleading information, and biased advice in the development of national legislation. It is supported by individual Member States, which drive countries of the South into its arms through free trade agreements and development cooperation. The World Bank and WIPO also push countries towards UPOV.

UPOV has never taken farmers' rights and needs seriously. It is, therefore, not surprising that UPOV represents the interests of seed companies and of the countries where these companies are based.

A framework like UPOV 91, which was negotiated over 30 years ago by a few industrialised countries and is at odds with recent developments on farmers' rights and the protection of agrobiodiversity should not be imposed on other countries. We must rather strengthen farmers' rights to overcome the global food and biodiversity crisis.

1
Background

The right to seeds, such as the right to save, use, exchange, and sell seeds, and intellectual property rights related to seeds, are governed by various international treaties. These agreements have different histories and objectives.

1.1 UPOV

1.1.1 Establishment

The name UPOV is derived from the French acronym for **U**nion pour la **P**rotection des **O**btentions **V**égétales. The initiative for the creation of UPOV came from European breeding companies, which in 1956 called for a conference to define the basic principles of plant variety protection[1]. When UPOV was established, and the first Convention was adopted in 1961, only 12 European countries[2] were present, in addition to the host country, France. Three seed industry associations (ASSINSEL, CIOPORA and FIS) and the International Association for the Protection of Intellectual Property (AIPPI) were the only non-governmental organisations (NGOs) invited as observers. The UPOV Convention was renegotiated in 1978 and 1991, with breeders' rights being strengthened at the expense of farmers' rights. In 1991, 30 years after its establishment, UPOV had 20 Member States[3]: 19 industrialised countries and the apartheid government of South Africa. These 20 countries negotiated the 1991 Act, which is still in force today. The 1991 UPOV Convention entered into force in 1998 after being ratified by five states. Since then, only the 1991 Act can be ratified. Today, UPOV has 79 members, 17 of which are bound by the less restrictive 1978 Act while the 1991 Act binds 60 states and two organisations.

The UPOV Convention of 1991, which is still in force today, was negotiated by only 19 industrialised countries and the apartheid government of South Africa. The Global South was not at the negotiating table. Their circumstances and needs have not been taken into account.

1.1.2 Impact of UPOV 1991 on the Farmers' Right to Save, Use, Exchange and Sell Seed

The scope of plant breeders' rights is established in Art. 14 and 15 (Exceptions) of the UPOV Convention[4]. According to Art. 14. 1, the following acts in respect of the propagating material of the protected variety require the authorisation of the breeder: '(i) production or reproduction (multiplication), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing, (vii) stocking for any of the purposes mentioned in (i) to (vi), above.'

Art. 15.1 contains an exception for private and non-commercial use, but this is so narrowly defined in the Explanatory Notes[5] that it has hardly any effect on the everyday life of subsistence farmers: 'The propagation of a variety by a farmer exclusively for the production of a food crop, to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes.' Hardly any farmers consume all their crops, do not exchange seeds with neighbours, or sell any goods on local markets.

Article 15.2 defines an optional exception that Member States can choose to implement. The exception allows Member States to restrict plant breeders' rights within reasonable limits and 'subject to the safeguarding of the legitimate interests of the breeder.' Article 15.2 allows 'to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety.' This article is also interpreted very narrowly by UPOV[6]. This exception only applies to particular species 'where the product of the harvest is used for propagating purposes, for example small-grained cereals where the harvested grain can equally be used as seed i.e. propagating material.' It excludes 'agricultural or horticultural sectors, such as fruit, ornamentals and vegetables, where it has not been a common practice for the harvested material to be used as propagating material.' And for those crops with the optional exception, it should be 'limited to certain crops or species, the area of the crop concerned, or to the maximum percentage of the harvested crop which the farmer may use for further propagation.' The interests of the breeders should be taken into account by demanding remuneration for the reproduction of seeds. The article also does not allow farmers to exchange or sell seeds.

UPOV 91 prohibits the exchange and sale of protected varieties by farmers and severely restricts the farmers' right to save seeds.

1.2 CONVENTION ON BIOLOGICAL DIVERSITY (CBD) AND ITS NAGOYA PROTOCOL

1.2.1 Establishment

The Convention on Biological Diversity was negotiated by all United Nations Member States and adopted in 1992 at the Nairobi Conference. All countries were invited to the conference, and over 100 attended. Today, the CBD has 196 Parties. The Parties to the CBD negotiated the Nagoya Protocol, which was adopted in 2010 and now has 141 Parties.

1.2.2 Relevance of the CBD and its Nagoya Protocol on the Farmers' Right to Save, Use, Exchange and Sell Seeds

The CBD and its Nagoya Protocol have several interlinkages with farmers' rights. These are based on the following articles:

Art. 8 of the CBD on In-Situ Conservation

'Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;'

Art. 10 of the CBD on Sustainable Use of Components of Biological Diversity

'Each Contracting Party shall, as far as possible and as appropriate:

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;'

The same obligations were confirmed and clarified in the Nagoya Protocol. Inter alia with the following articles:

Art. 5 of the Nagoya Protocol on Fair and Equitable Benefit-sharing

'5. Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. [...].'

Art. 12 of the Nagoya Protocol on Traditional Knowledge Associated with Genetic Resources

'4. Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.'

The CBD and the Nagoya Protocol recognise the critical role that Indigenous peoples and local communities – including small farmers – play in the conservation and sustainable use of genetic resources, including crops. They, therefore, oblige member countries to protect and promote the customary use and exchange of genetic resources and their associated traditional knowledge.

> The obligations under the CBD mean that small farmers must retain the right to use and exchange seeds freely, as this is an important basis for the conservation and sustainable use of agrobiodiversity.

Furthermore, the Contracting Parties must ensure benefit-sharing when genetic resources and associated traditional knowledge – including seed diversity resulting from the work of farmers – are used. Various states have done this by introducing a disclosure requirement for the registration of intellectual property rights. However, in a communication to the CBD[7] in 2003, the UPOV Council clarified that the disclosure of origin could not be accepted 'as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability and a suitable denomination and does not allow any further or different conditions for protection.' This position required Peru to delete a relevant article from its law when it joined UPOV 91 due to the free trade agreement with the United States[8].

> UPOV reduces countries' ability to effectively implement their obligations for fair and equitable benefit-sharing under the CBD and its Nagoya Protocol.

1.3 WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

1.3.1 Establishment

TRIPS was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) between 1989 and 1990 and is administered by the World Trade Organization. GATT's Contracting Parties (123) participated in the negotiations. The agreement came into effect on 1 January 1995. Developing countries had a timeframe of five years for its implementation.

1.3.2 Relevance of the TRIPS Agreement on the Farmers' Right to Save, Use, Exchange and Sell Seed

Art. 27.3 (b) states that '[...]Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.'

Article 27.3(b) of the TRIPS Agreement expressly allows WTO Members to provide for the protection of plant varieties by an effective sui generis system. This means that countries have full flexibility to implement a legal Plant Variety Protection (PVP) framework that suits their agricultural conditions. In addition,

the WTO grants members that are least developed countries (LDCs) a transition period until 1 July 2034. During this time, LDCs do not need to implement TRIPS' provisions, except for Articles 3, 4 and 5. This transition period was granted in view of the vulnerabilities and constraints that LDCs face. This transition period may be extended.

UPOV has gained many new members since the TRIPS entered into force, with some ratifying before 1999[9] so that they could still join the more flexible 1978 Act. However, various other countries have developed their own adapted PVP system in order to fulfil the TRIPS obligations and have not joined UPOV.

The TRIPS Agreement gives WTO Member States complete flexibility to introduce their own system for the protection of plant varieties. UPOV is not mentioned in the TRIPS Agreement.

1.4 INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE (PLANT TREATY)

1.4.1 Establishment

The Plant Treaty was negotiated under the UN's Food and Agriculture Organisation (FAO) by the Commission on Genetic Resources for Food and Agriculture (CGRFA). As of January 2023, 179 countries and the European Union are Members of the Commission. The Treaty was approved by the FAO (181 Member Parties, 1 Member Organisation at this time) on 3rd November 2001.

1.4.2 Relevance of the Plant Treaty on the Farmers' Right to Save, Use, Exchange and Sell Seeds

In its preamble, the Treaty affirms that 'the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels; '

In Article 9.1 on Farmers' Rights, 'the Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, [...] 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.'

Art. 9.2 states that each Contracting Parties should take measures to protect and promote Farmers' Rights, including: the protection of traditional knowledge relevant to plant genetic resources for food, the right to equitably participate in sharing benefits and 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. Art 9.3 clarifies 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.'

The *Options for encouraging, guiding and promoting the realization of Farmers' Rights as set out in Article 9 of the International Treaty*[10] published by the FAO in 2023, illustrates how these rights could be implemented. Option 10B states that 'Contracting Parties may consider reviewing and, as appropriate, adjusting intellectual property laws and related procedures, for example, by including provisions to safeguard rights that farmers have to save, use, exchange and/or sell farm-saved seed. They may also include requirements in intellectual property laws and related procedures for disclosure of origin to enable fair and equitable sharing of benefits arising from the use of PGRFA [Plant Genetic Resource for Food and Agriculture]; or they may adjust the scope of protection, thereby defining conditions under which farmers may save, use, exchange and/or sell seed of protected varieties, subject to national law, and as appropriate.'

The Treaty affirms that the farmers' rights to save, use, exchange and sell farm-saved seed and other propagating material, are fundamental to the realization of farmers' rights. The Options for encouraging, guiding, and promoting the realization of Farmers' Rights point out that the realization of these rights may include the review and, as appropriate, adjustment of intellectual property laws (including PVP laws) by for example including provisions to safeguard rights that farmers have to save, use, exchange and/or sell farm-saved seed.

The obvious contradiction between the Plant Treaty and UPOV was analysed in detail by S. Shashikant and F. Meienberg[11]. In 2019, the Centre for International Sustainable Development Law (CISDL) published a Comparative Study[12] of the Nagoya Protocol, the Plant Treaty and the UPOV Convention, in which the authors conclude that 'The closest links between UPOV and the CBD and Nagoya Protocol for advancing ABS are the farmer's privilege and breeder's exemption. Sui generis PVP systems adopted outside of the UPOV Convention framework – as permitted by TRIPS – may provide a way to better balance rights and obligations relating to the Nagoya Protocol, Plant Treaty, and PVP.' They further state that 'it may be necessary to consider amending UPOV to strike a better balance between the three treaties in a way that attracts greater membership.'

1.5 UNITED NATIONS DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS (UNDROP)

1.5.1 Establishment

UNDROP was adopted by the United Nations General Assembly in 2018. The resolution was passed by a vote of 121-8, with 54 members abstaining. The negotiations, based on earlier work by La Via Campesina, were initiated by the UN Human Rights Council in 2009.

1.5.2 Relevance of the Plant Treaty on the Farmers' Right to Save, Use, Exchange and Sell Seeds

In Article 19 1. UNDROP reaffirms Farmers' rights as set out in Art. 9.2 of the Plant Treaty, albeit with small differences: The right to the protection of traditional knowledge, the right to equitably participate in sharing the benefits 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. The somewhat vague wording of Art. 9.3 of the Treaty was cleared of any ambiguity in the UNDROP Art. 19.1 (d): Peasants have the right to seeds, including: '(d) The right to save, use, exchange and sell their farm-saved seed or propagating material.'

Article 19 clarifies further that states have a clear responsibility and they shall take measures to respect, protect and fulfil the right to seeds of peasants. For example, they need to ensure that seed policies, PVP 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 (Art. 19.8).

> UNDROP anchors the peasants' right to save, use, exchange and sell their farm-saved seeds or propagating material and requires states to ensure that this right is also respected in national PVP laws.

The tensions between the right to seed and intellectual property in international law (including UPOV), were elaborated in a research brief published by the Geneva Academy *The Right to Seeds and Intellectual Property Rights*[13] The author, Christophe Golay, clarifies that the right to seeds is part of the broader human rights system and he concludes that 'in accordance with the priority to be given to human rights norms in international and national laws, reflected in the UNDROP, states shall ensure that their laws and policies, as well as the international agreements to which they are party, including on intellectual property, do not lead to violations, but to a better protection of peasants' right to seeds.'

The relationship between human rights, farmers' rights and the UPOV Convention was already established by a study funded by the German Federal Ministry for Economic Cooperation and Development (BMZ) and published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) *The UPOV Convention, Farmers' Rights and Human Rights. An Integrated Assessment of Potentially Conflicting Legal Frameworks*[14]. The authors made the following recommendations so that states can fulfil their human rights obligations and their obligations under the Plant Treaty:

Recommendation 1: If developing countries have not yet joined UPOV under either the 1978 or the 1991 Acts of the UPOV Convention, they should consider opting for an alternative sui generis system of PVP that allows for more flexibility to meet the obligations of different treaties.

Recommendation 2: If developing countries joined UPOV under the 1978 Act of the UPOV Convention, they should rather consider staying with it and not 'upgrade' to the 1991 Act of the Convention, in order to maintain the policy space, they may need to fully implement ITPGRFA.

Recommendation 3: Developing countries, prior to establishing national PVP laws, should clarify the legal requirements for a process involving rights holders and other stakeholders, e.g. farmers, Indigenous peoples and civil society organisations, and implement the process of developing their national PVP laws accordingly.'

1.6 CONCLUSION

The rights to seeds and their use are governed by various international treaties. The oldest of these is the UPOV Convention, the 1991 Act, which was negotiated by a few industrialised countries and unilaterally supports the rights of breeders. The TRIPS Agreement, which was negotiated simultaneously and had a broader representation of states, took a much more flexible position on the issue of PVP. In the following years, the Convention on Biological Diversity, the Plant Treaty and UNDROP provided a countervailing force that strengthened farmers' rights. These new agreements are part of the United Nations system and were negotiated by a much larger number of states. When states develop a new PVP legislation today, they must also consider their obligations under these new agreements (provided they are party to the agreement). A copy-paste application of the UPOV Convention, which does not yet take into account these new developments and is in contradiction with farmers' rights, seems inappropriate in this context and inconsistent with other international obligations.

2

How Plant Breeders' Rights and Farmers' Rights are Balanced in the National Implementation of Plant Variety Protection Laws – the Status Quo

After the entry into force of the TRIPS Agreement (1 January 1995), developing countries had five years to implement the obligation to protect plant varieties (Art. 65 TRIPS Agreement). The least developed countries were exempted from this obligation (for a limited period – see above). The countries of the South followed two different strategies to fulfil their obligations:

2.1 STATES RUSHED TO ACCEDE TO THE CONVENTION UNDER THE 1978 ACT WHILE IT WAS STILL POSSIBLE.

The 1991 Act came into force on 24 April 1998, one month after at least five states had deposited their instruments of ratification or accession. In accordance with Article 37(3) of the 1991 Act, no instrument of accession to the 1978 Act could be deposited after the entry into force of the 1991 Act. However, in 1997, the UPOV Council decided that under certain circumstances, states could deposit their instrument of accession to the 1978 Act within one year of entry into force of the 1991 Act, that is, by April 24, 1999[15].

The following countries chose this strategy (the year of accession is given in brackets): Argentina (1994), Bolivia (1999), Brazil (1999), Chile (1996), China (1999), Colombia (1996), Ecuador (1997), Kenya (1999), Mexico (1997), Panama (1999), Paraguay (1997), Trinidad and Tobago (1998), and Uruguay (1994). Interestingly, all these countries, except Kenya and Panama, have not yet accessed UPOV 91. Some industrialised countries like New Zealand and Norway did the same. As Karine Peschard shows in her study, the most controversial aspect by far for their reluctance to accede is the impact of UPOV 1991 on farmers' rights and farmers' seed systems. The study found that countries that have not acceded to the 1991 Act have sought to avoid exacerbating existing conflicts with other national and international legal norms[16].

2.2 OTHER COUNTRIES HAVE DEVELOPED THEIR OWN PVP SYSTEM ADAPTED TO THEIR NEEDS AND CIRCUMSTANCES, TAKING INTO ACCOUNT OTHER INTERNATIONAL OBLIGATIONS.

These countries include Pakistan, India, Bangladesh, Thailand, Cambodia, Indonesia, Malaysia, Philippines, Ethiopia, Zambia and Zimbabwe. All these countries protect farmers' rights in a way that would not be allowed under UPOV 91. In addition, some of them have special provisions regarding benefit sharing, disclosure of origin and the protection of plant varieties developed by farmers that do not meet the UPOV-defined Distinctness, Uniformity and Stability (DUS) criteria[17]. With the adoption of its Plant Variety Protection and Farmers' Rights Act in 2001, India has played a leading role.

Many countries have developed a PVP law that balances breeders' and farmers' rights in a way that would not be permitted under UPOV 91. They are trying to meet international obligations on farmers' rights as well as for the conservation of biodiversity, the sustainable use of genetic resources, and the fair and equitable sharing of the benefits arising from their exploitation. They have used the flexibility available to them under the TRIPS Agreement to adapt the law to their own national circumstances and needs. For example, to strengthen the farmer-managed seed system, which plays a crucial role in the supply of seeds in many countries of the Global South.

3

The Pressure of UPOV on Developing Countries to Weaken the Protection of Farmers' Rights in their Laws

3.1 UPOV'S STRATEGY

The fact that many countries have, for good reasons, chosen a PVP sui generis system different from that of UPOV 91 is a thorn in the side of UPOV. Together with some of its member countries, the organisation is trying to pressure the countries of the South to replace sui generis laws with UPOV 91-compatible laws.

In its Strategic Business Plan 2023-2027[18], UPOV described how it intends to proceed.

In the 2nd Pillar of the Business Plan, they intend to 'Provide guidance and assistance and facilitate cooperation for implementing the UPOV system'. In the words of UPOV this means to explain 'how the UPOV system encourages the development of new varieties of plants, how new varieties provide benefits for society and the role of the UPOV system in relation to agriculture and economic development in the rural sector. A particular objective is to raise awareness of the benefits of plant variety protection according to the UPOV Convention and UPOV membership for States and intergovernmental organizations that are not members of the Union'

It is obvious that on the basis of these assertions, UPOV cannot develop documents which would provide Member States with information on a neutral and scientific level to enable them to design an adapted PVP legislation. Rather, the strategy reflects the intention to distribute promotional material for the UPOV system. The aim is to provide information on how UPOV is the only system that encourages the development of new varieties of plants for the benefit of society and to show that a UPOV membership brings only benefits to states. Their strategy declares: 'The focus will be on the development of information concerning the benefits of plant variety protection and UPOV membership.' The main focus is therefore not on how to promote innovation in plant breeding, but simply to persuade other countries to become UPOV members. The possibility that there could be different systems of PVP, which would also encourage breeding, but at the same time cover farmers' rights and other national needs, and thus be more beneficial to those countries, simply does not exist in UPOV's world. These facts, as well as developments at the international level over the last 30 years, are simply ignored by UPOV.

3.2 QUESTIONABLE ADVERTISING MATERIAL

It is unsurprising that such a strategy leads to some absurd results. A good example of this is a study about socio-economic benefits of UPOV membership in Vietnam[19], which was initiated and financed by UPOV, and which has been repeatedly cited and disseminated by UPOV since 2017. The non-governmental organisations Searice, Fastenopfer and APBREBES have shown[20] that the statements made in the study do not stand up to scientific scrutiny. The NGOs reveal that the UPOV paper claims that annual yield increases in rice, maize and sweet potato attributable to developments in plant-breeding activities were 1.7%, 2.1%, and 3.1% respectively, in the 10 years after Vietnam became a member of UPOV. The UPOV paper further claims that 74 million people could be fed with the additional sweet potatoes produced, and tries to establish a link between yield increases in these three crops and Vietnam's UPOV membership. But these claims have been found to be baseless, as for sweet potatoes, the crop with the highest yield increase reported in the UPOV paper, not a single application for plant variety protection (PVP) had been filed with Vietnam's Plant Variety Protection Office (PVPO).

Nevertheless, the data has repeatedly been disseminated. For example, in 2020, at a webinar organised by IPKey South-

East Asia (see below) by UPOV's Legal Counsel and Director of Training and Assistance, in a presentation[21] on the Benefits of Plant Variety Protection and UPOV 1991 Membership. During the webinar, UPOV spread the message that in the 10 years following Vietnam's accession to UPOV, sweet potato yields had increased by 27%, while at the same time concealing the fact that not a single plant variety right had been granted for sweet potatoes. This disinformation is taken up and further multiplied. In Indonesia, for example, simulations[22] were carried out using the figures from Vietnam to show how sweet potato yields would increase in Indonesia after joining UPOV.

Meanwhile, UPOV is aware that its data is flawed, but it is still being blatantly disseminated. The organisation has simply changed its communication: in a presentation[23] by UPOV Vice Secretary-General at an event in August 2024 for Southeast Asian countries organised by IPkey, the Vietnam study was again cited as proof of the effectiveness of the UPOV system. However, the increases in sweet potato yields were simply no longer mentioned. UPOV only presented the yield gains for rice and maize and concealed that their study showed the highest yield gains for sweet potatoes. Because no plant variety rights have been applied for sweet potatoes, this does not fit into their narrative regarding the effectiveness of the UPOV system and is now simply swept under the carpet. You cannot fool your audience more obviously than that.

Another communication tool of UPOV is the answers to Frequently Asked Questions (FAQs) on the UPOV website[24]. In various cases these FAQs are misleading. The benefits of new plant varieties are repeatedly mentioned (seemingly as an argument in favour of UPOV). But these benefits are not UPOV-specific, as new plant varieties are bred or selected also under other systems of plant variety protection, under different IP Rights or without any IP protection at all. Various FAQs give the misleading impression that the benefits of new varieties and plant breeding are bound to the UPOV System, which is not true.

UPOV's communication is not a scientifically based analysis of the advantages and disadvantages of their plant variety protection system, but rather consists of one-sided advertising messages that mislead the public.

3.3 DICTATING NATIONAL PLANT VARIETY LAWS

When states express an interest in becoming UPOV members based on biased information (see above) and/or further pressure (see Chapter 4), another pillar of the UPOV strategy comes into play.

Pillar 1.2 of their strategy is the development of legislation on PVP in accordance with the 1991 Act of the UPOV Convention. According to that Convention, any state or intergovernmental organisation wishing to become a UPOV member needs to obtain positive advice from the UPOV Council on the conformity of its laws with the provisions of the UPOV Convention, prior to depositing its instrument of accession. UPOV's strategy emphasizes that a key part of UPOV's work is to provide guidance for states/intergovernmental organisations wishing to draft a law in accordance with the 1991 Act of the UPOV Convention.

A study[25] published by the South Centre and APBREBES in 2023, which compared UPOV's accession procedures with other agreements, shows that no other instrument requires new members to incorporate an agreement so rigidly into their national legislation. Neither the accession to the various treaties on intellectual property administered by the World Intellectual Property Organization (WIPO), the accession to the World Trade Organization (WTO), nor to other conventions under the UN concerning genetic resources (such as the CBD or the Plant Treaty) are anywhere near as rigid as UPOV on this issue. This inflexible system deprives new Member States of the opportunity to develop PVP laws adapted to their agricultural system, level of development, and needs. The publishers of the study explain[26] that if a new member wants to ratify the 1991 Act, its legislation is analysed word by word, and if it does not conform to the UPOV Act, an amendment of the law is required. The result is that the UPOV Secretariat has more power of definition in the development of a PVP law than an elected national parliament.

The following examples are intended to show how such an examination is carried out and what kind of articles are usually objected to. The law has not yet been adapted to UPOV 91 in all four countries discussed below. However, the pressure to do so continues to increase in all these countries.

3.3.1 The Philippines

The Philippines requested UPOV in 2006 to examine the 'Philippine Plant Variety Protection Act of 2002'. The examination[27] by the Office of the Union was discussed at the UPOV Council in March 2007. Section 43 of the Law contains provisions concerning the exceptions to PVP. UPOV found the farmers' exception in Section 43(d) of the PVP legislation incompatible with the 1991 Act. Section 43(d) states: 'The Certificate of Plant Variety Protection shall not extend to: [...] d) The traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act, except when a sale is for the purpose of reproduction under a commercial marketing agreement. The Board shall determine the condition under which this exception shall apply, taking into consideration the nature of the plant cultivated, grown or sown. This provision shall also extend to the exchange and sell of seeds among and between said small farmers: Provided, [t]hat the small farmers may exchange or sell seeds for reproduction and replanting in their own land.' In its comments, UPOV noted, among other things, that 'The exchange and sale of seeds among and between the said small farmers in their own land, as provided in the third sentence of Section 43(d) of the Law, go beyond the exception of Article15(2) of 1991 Act.' The exception in the Philippines law allowing farmers to save seeds was also found to be incompatible with the UPOV Convention and UPOV called for the Section to be amended. They also criticised Section 43(a, and stated that in order to comply with Article 15(1)(i) of the 1991 Act, the following should be added under of the Law: 'Acts done **privately and** for non-commercial purposes.'

These are only examples concerning the farmers' rights to use, save, exchange and sell seeds – but the criticism was more comprehensive. UPOV also criticised an article in the Philippines PVP Law, which clarifies that the interpretation of the provisions of the PVP Act shall not negate the effectivity and appli-

cation of other Acts like the ones on Indigenous People's Rights or for the conservation and protection of wildlife resources. An article establishing a Gene Trust Fund for the management and operation of gene banks also came into question. UPOV commented as follows: 'Since measures concerning the conservation of genetic resources pursue different objectives and require a different administrative structure than the legislation dealing with the grant of breeders' rights, it would be appropriate to include those measures in a different piece of legislation, although such legislation should be compatible and mutually supportive.' An NGO representative from the Philippines found this advice extremely lopsided and arrogant, stating that not only is UPOV asking that this article be removed, but it also demands that it should be placed in another piece of legislation that should be UPOV-compatible and mutually supportive.'[28]

The UPOV Council decided that the law incorporates the majority of the provisions of the 1991 Act, but it still needs some clarifications and amendments, as provided in the examination by UPOV, in order to conform with the 1991 Act. Fortunately for Filipino farmers, the Philippines never made these changes and kept the provisions to protect farmers' rights in the law.

3.3.2 Malaysia

The Malaysian PVP law adopts many of the provisions of UPOV 1991, but it also includes provisions to accommodate aspects of farmers' rights. As a result, Malaysia is continuously under pressure to dismantle the provisions on farmers' rights and join UPOV 1991. In 2005, under pressure to become a member of UPOV 1991, Malaysia submitted its legislation to the UPOV Council for assessment of conformity with UPOV 1991. In its examination,[29] the Secretariat recommended significant changes to the entire text. The current Malaysian law incorporates inter alia the following limitations of breeder's rights:

'31.(1) The breeder's right shall not extend to

(d) any act of propagation by small farmers using the harvested material of the registered plant variety planted on their own holdings;
(e) any exchange of reasonable amounts of propagating materials among small farmers; and
(f) the sale of farm-saved seeds in situations where a small farmer cannot make use of the farm-saved seeds on his own holding due to natural disaster or emergency or any other factor beyond the control of the small farmer, if the amount sold is not more than what is required in his own holding.'

UPOV's examination recommended that with respect to Section 31(1)(d), the exception under Article 15(2) of the 1991 Act 'within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder' should be implemented, which would restrict the ability of farmers to reuse their own seeds or propagation material. Regarding Section 31(1)(e), UPOV recommended its deletion 'as the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act.' For Section 31(1)(f) UPOV recommended moving the paragraph to 'Sections 36 and 37 concerning compulsory licenses, as the situation described seems to fall within cases of restriction to the breeder's right for reasons of public interest.'

The UPOV's proposals prevent even a very limited consideration of farmers' rights. Such suggestions become utterly absurd in light of the government's subsequent definition of small farmers as those with a cultivated area of no more than 0.2 hectares[30]. UPOV's proposal to regulate Section 31(1)(f) as a kind of compulsory licence is wholly divorced from reality. It is inconceivable and impossible for a smallholder to fight for a compulsory licence from the government or in court after a natural

disaster just to sell a bag of seeds to his neighbour. Such a proposal can only be made by bureaucrats who have no knowledge of the situation on the ground and want to squeeze national law into the UPOV framework, whether it makes sense or not.

Malaysia has not implemented the UPOV recommendations and has kept the limited exceptions for small farmers in the law for the time being.

3.3.3 Zimbabwe

In the two previous cases, UPOV examined already adopted national laws in a formal procedure in which the Council concluded that these laws needed to be substantially amended if the country was to become a UPOV member. In recent years, however, more and more efforts have been made to avoid such negative assessments. Instead, there is now a lively exchange between states and the UPOV Secretariat before the formal examination by the Council takes place and before the law is adopted at the national level. In this manner, where possible, only laws that conform with UPOV are examined by the UPOV Council. This was the case for Zimbabwe, whose draft law was examined and approved by the UPOV Council in March 2020. The council concluded that the 'Draft Act incorporates the substantive provisions of the 1991 Act. On that basis, once the draft Act is adopted with no changes and the Act is in force, Zimbabwe would be in a position "to give effect" to the provisions of the 1991 Act, as required by its Article 30(2).'[31] This means that no changes may be made to the law during further consideration at the national level (consultations, parliament decision), as otherwise, the recognition by the UPOV Council that the law is UPOV compliant would be lost.

Interestingly, this draft law, which was examined by UPOV and on which observers such as those from the seed industry could also comment as part of the UPOV process, had not previously been discussed at the national level. Neither farmers' organisations nor NGOs were consulted during its preparation. A comparison between the existing PVP Act[32] in Zimbabwe and the draft Act, which was considered UPOV-compliant, shows that in this case, too, the existing articles on the protection of the farmer's right to save, use, exchange and sell seeds and propagating material has been extremely cut down in the draft law.

- **Article 17 (3) (b)** in the current law allows farmers to sell, to a limited extent, the plant and material harvested from it, also if this is used for the propagation of new plants. This possibility does not exist anymore in the draft law.
- **Article 17 (3) (c)** in the current law allows a farmer who cultivates less than ten hectares of land the free use of farm-saved seeds and propagating material from any prescribed plant on his/her land. The draft law denies this right for all fruits, ornamentals and vegetables. In addition, this right could be further limited in the regulations to safeguard the legitimate interest of the breeder (e.g. to make the use of farm-saved seeds subject to royalty payments).
- **Article 17 (3) (d**) of the current law allows a farmer farming primarily on communal or resettlement land to multiply and exchange seeds and propagating material with any other such farmer. This right has been deleted in the draft law. In addition, the donation of plants and seeds to specific organisations is no longer possible.

The importance of providing for the right of farmers to save their own seeds cannot be overstated. In some African countries, for instance, farm-saved seeds account for about 80 per cent or more of farmers' total seed requirements. The draft law does not permit small-scale farmers to freely exchange or sell

farm-saved seeds or propagating material, thus undermining farmers' managed seed systems.

After the draft law was approved by the UPOV Council, the process in Zimbabwe seems to have come to a standstill. The necessary consultations have not yet taken place, nor has the parliamentary process begun. There is still hope that no UPOV-compatible law will be introduced and that fundamental farmers' rights will continue to be respected in Zimbabwe in the future.

3.3.4 Zambia

In Zambia, the legislative process is at a different stage. Here, too, a lively exchange between the government and UPOV has already happened, and a draft law has been developed that is now undergoing public consultation.

This spring, the Zambian government sent a new draft of the plant variety protection law to stakeholders in a Word document showing the author as the UPOV Secretariat in Geneva. The document still contained comments and recommendations from UPOV, such as 'As discussed during the bilateral meeting, [...] we recommend to amend Section 8 [on the farmers' privilege],' or 'The current wording [in] appears to go beyond of what is generally considered to fall under situations of public interest [...].' The actual wording is not based on an analysis of the existing situation in the country, its interests, needs, and national circumstances, but was dictated by UPOV's staff in Geneva, in line with the 1991 Act of the UPOV Convention. This is evidenced by the fact that the government has consistently failed to provide stakeholders with the assessment/evaluation that necessitated these legislative changes.

The current Plant Breeder's Rights Act was enacted in 2007. According to Article 8 of the current PVP Act[33], a farmer in Zambia may continue to propagate protected seeds and then sow them again or exchange them with other farmers. The sale of protected seeds by farmers is also permitted under certain conditions. In this way, the existing law takes into account the most critical needs and the prevailing conditions in Zambia. The public interest is also protected in Article 12 of the existing law, where possible limitations to plant breeders' rights are formulated. 'A plant breeder's rights on a new variety may be subject to restriction with the objective of protecting food security, health, biological diversity and any other requirement of the farming community for propagating material of a particular variety.' The article further clarifies that such restrictions may be imposed, for example if food security or public nutritional or health needs are adversely affected, when a high proportion of the plant variety offered for sale is being imported or when it is considered important to promote the public interest for socio-economic reasons and for developing Indigenous and other technologies.

The draft law, prepared in collaboration with UPOV, deletes all these parts promoting farmers' rights and the broad definition of public interest.

In the draft proposal, the possibility of using farm-saved seed is restricted, as it is only allowed for a limited list of crops and as long as it is 'within reasonable limits and subject to the safeguarding of the holder of the breeder's right.' Taking into account the breeders' interests could also mean, for example, that farmers have to pay a fee for farm-saved seeds. The exchange of protected seeds by farmers and a limited possibility to sell seeds, which are allowed under the current law, are prohibited under the draft proposal.

The draft proposal also restricts the possibility of granting compulsory licences. For example, it would no longer be possible to restrict breeders' rights to protect biodiversity, to meet farmers' needs or for socio-economic reasons. For a country like Zambia, it makes sense to issue a compulsory licence if the seeds are only imported (and not produced in the country) or if the protected variety is not available to farmers at all. However, the draft law no longer allows for such compulsory licences.

Shortly after the government's proposal for a new Plant Breeders' Rights Bill was presented in April, the Zambia Alliance for Agroecology & Biodiversity (ZAAB), a broad network of farmers' organisations, NGOs and the Rural Women's Assembly, issued an initial press release[34] rejecting the new proposed Bill in its entirety. In a second press release[35], ZAAB stated that 'the new Bill based on UPOV 1991 standards is completely an ill-suited PVP model for the Zambian context. [...]. The standards undermine the possibility of addressing our diverse development needs by serving multinational over local breeders' and farmers' interests, and limiting capacity to adapt to climate change.' Those organisations oppose the adoption of the new Bill, particularly because the current PBR Act adequately protects plant breeders' rights and includes important provisions for flexibilities relevant to farmer seed systems.

> In all the countries where UPOV is providing advice on the development or revision of PVP legislation, it consistently recommends that farmers' rights, in particular the right to save seeds, be severely restricted and that the right to exchange or sell seeds be prohibited altogether. The only point of reference is the 1991 UPOV Convention. No attention is paid to national circumstances, experiences, needs and human rights.

3.4 UPOV'S PARTICIPATION IN THE NEGOTIATIONS OF THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE (ITPGRFA)

These activities of UPOV are not to be equated with the above – but they do show, by way of example, how UPOV acts more like a lobby group than a multilateral organisation.

UPOV was represented in the Ad Hoc Technical Experts Group on Farmers' Rights (AHTEG, 2018 – 2020)[36] of the ITPGRFA with a member of the UPOV Secretariat. Experts from several UPOV Member States were also present. The objectives of the expert group were to produce an inventory of national measures that may be adopted, best practices and lessons learned from the realization of Farmers' Rights and based on the inventory, develop options for encouraging, guiding and promoting the realization of Farmers' Rights[37]. It was astonishing to observe how the UPOV Secretariat took a strong stance on the issues discussed, with a constant tendency to weaken farmers'

rights. We observe that this marks a major departure from the traditional role of other secretariats of multilateral organisations that tend to play a neutral role in international negotiations. In this case, the UPOV Secretariat picked out a submission from a UPOV member on national PVP laws and proposed integrating it into the Options Paper being discussed. Submissions of other UPOV members on the same topic were overlooked. In another instance, at the end of a meeting of an expert group, the UPOV Secretariat's representative opposed a proposal by the co-Chairs and the Treaty Secretariat to revise the Options Paper for the next meeting, despite the support of the majority of experts, several of them from the UPOV Member States. We never observed such a situation in other international fora. Further, the basis of the mandate under which the UPOV Secretariat was making interventions in the expert group was unclear. The Consultative Committee of UPOV, at its 2020 Meeting, responded to this situation by clarifying that the interventions and contributions made by the Secretariat need to reflect the UPOV Convention[38].

3.5 HOW FARMERS AND THEIR INTERESTS ARE TREATED WITHIN UPOV

3.5.1 Participation

The European Coordination Via Campesina (ECVC, then known as CPE) was the first smallholder organisation to apply for observer status with UPOV. ECVC is a member of La Via Campesina, the biggest international peasant's movement. The application was rejected on 21st October 2009 by UPOV's Consultative Committee. This rejection was a scandal in itself, but even more shocking was the reason for the rejection. Mr. Jördens, then UPOV's Vice Secretary-General read a statement made by La Via Campesina at the Governing Body of the Plant Treaty in Tunis that year, which called for the suspension of intellectual property rights on seeds in connection with the current global food crisis, which Jördens claimed was against the UPOV Convention and thus unacceptable. The arguments put forward by Mr. Jördens show that the UPOV Secretariat was against having a variety of views presented in the Organisation's discussions[39]. It was only thanks to the strong support from individual member countries that ECVC (together with APBREBES) was granted observer status a year later[40].

However, it seems that UPOV was still afraid of smallholder participation in their negotiations. As the only multilateral organisation worldwide, UPOV has included in their rules governing the granting of observer status, an article that was specifically written to prevent the wider participation of smallholders: 'In the case of an international NGO with different coordination entities, observer status will be granted to only one coordination per organization'[41]. This strange article is clearly aimed at targeting farmer groups such as La Via Campesina, which has 'regional coordination entities' as part of its structure. In a press release, APBREBES commented that 'If the Council is worried about over-representation, it should have a look at the seed industry. Today companies like Monsanto or Syngenta are represented several times. Syngenta, for example, is represented in UPOV by CropLife, the International Seed Federation, the European Seed Association, CIOPORA, the African Seed and Trade Association and the Asian and Pacific Seed Association. It seems that this current multiple representation of multinational seed companies does not pose any problem to UPOV, but the small and only potential possibility of a double representation of a farmer organisation has inspired UPOV to adopt a new rule to prevent this.'[42]

3.5.2 Working Group on Guidance Concerning Smallholder Farmers in relation to Private and Non-Commercial Use

Many experts from industry, academia and NGOs have been saying for years that a new, broader interpretation of private and non-commercial use could mitigate some of the negative impacts of UPOV on smallholders. The provisions of Article 15.1 (i) of the 1991 Act of UPOV state 'Exceptions to the Breeder's Right (1) The breeder's right shall not extend to (i) acts done privately and for non-commercial purposes.' UPOV's current interpretation of the exception's scope is extremely restrictive and narrow. The *Explanatory Notes on the Exceptions to the Breeder's Right under the 1991 Act the UPOV Convention* (UPOV/EXN/EXC)[43] states that: '[...] Non-private acts, even where for non-commercial purposes, may be outside the scope of the exception [...]. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes.' The interpretation applied by UPOV does not address the needs and realities of subsistence or smallholder farmers, who, in their daily lives, exchange seeds/propagating material with neighbours and sell their products and seeds at the local market. Oxfam and the Breeders Associations Plantum and Euroseeds published a project report in October 2019. The report's core part was a flowchart describing which use of self-produced seeds should fall under the private and non-commercial use exception. The project team agreed on an interpretation that allows smallholders to exchange seeds among themselves or sell them on the local market in certain cases. After an intervention by the Netherlands, the Consultative Committee of UPOV picked up the ball in 2019 and later agreed to establish a Working Group to develop guidance concerning smallholder farmers in relation to private and non-commercial use. The basis for the negotiations was meant to be the flowchart in the abovementioned project report. However, due to a stern opposition to any softening of the interpretation of private and non-commercial use, especially by Japan, which was supported in its stance by parts of the seed industry and a few other countries, the Working Group was not able to fulfil its mandate after several years of negotiations[44]. APBREBES commented on this as follows: 'The discussions in the Working Group show that UPOV seems to be unwilling or unable to balance its own system – to better meet the needs of smallholder farmers and reduce the negative impact on the farmer-managed seed system. A new interpretation of private and non-commercial in a revised Explanatory Note would have been an opportunity. It appears that UPOV does not see the need to seize it. This is a clear message to the world.'[45] In autumn 2024, the Working Group was even suspended for at least two years [46].

4

How Individual UPOV Member States and Institutions are Pushing Other States into the Arms of UPOV

The fact that states turn to UPOV results from countless concerted activities that exert pressure on non-UPOV member countries. States that benefit from a globalised UPOV system are particularly active in this regard: Europe, especially the Netherlands, but also Germany, France, and Switzerland, as well as the United States of America and Japan. It is precisely companies in these states that apply for the most plant variety rights abroad as non-residents.

The top six countries in which breeders apply for plant variety rights abroad (2023)[47]

Country	Applications filed as non-resident
Netherlands	1222
United States of America	1221
Switzerland	539
France	483
Germany	425
Japan	189

Breeders from these six countries have applied for a total of 4,079 plant variety rights as non-residents in other UPOV countries. This represents 77% of all applications as non-residents. Therefore, these countries, or rather their companies, have the most to gain from the globalisation of UPOV.

4.1 FREE TRADE AGREEMENTS

Free trade agreements (FTAs) have become the tool of choice for industrialised countries, working with corporate lobbies to push governments of the global South to adopt new rules that restrict farmers from saving, exchanging and breeding seeds[48]. Countries following this strategy are Australia, the European Free Trade Association (Switzerland, Norway, Liechtenstein and Iceland), the European Union, Japan, Switzerland, the United Kingdom and the USA. The inclusion of strong wording on UPOV protection in free trade and economic partnerships agreements is a concern: 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 built into trade agreements, such as dispute settlement mechanisms and monitoring mechanisms[49].

The European Union plays a leading role: 10 Free Trade Agreements (FTAs) and 3 Association Agreements signed by the EU and its trading partners require the protection of plant variety rights under the terms of the 1991 UPOV Act, while 15 Association Agreements formally require accession to the 1991 Act[50]. When Both Ends and Aprebes published a report about the EU's trade policy and UPOV, they stated that '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.'[51]

A special case concerns the European Free Trade Association (EFTA), which, like the UK and the USA, is also one of the leading actors in demanding membership of UPOV or plant variety protection laws in line with UPOV in their free trade agreements. Ironically, the EFTA members Switzerland, Norway and Liechtenstein have chosen not to comply with the requirements of UPOV91 in their own national laws. In 2005, the Norwegian government turned down a proposal for a UPOV 91 membership and decided to keep the customary rights of farmers to save and use farm-saved seeds and propagating material. The Swiss Plant Variety Protection Act allows for the use of farm-saved propagation material for multiple crops, such as wheat or potatoes, without any limit or royalty payment. This was a crucial request

of farmers when the law was negotiated in parliament. Thus, although Switzerland ratified UPOV 91, it is not in line with its requirements. Such a law would prevent any candidate country from joining UPOV. Liechtenstein has no plant variety protection law at all and is not a member of UPOV. It has thus not respected the free trade agreements it has signed over the past 20 years[52]. Nevertheless, EFTA is pushing other countries to join UPOV 91 in Free Trade Agreements.

Above all, the USA, the European Union, the EFTA states, the UK and Japan are trying to force trade partners to join UPOV using free trade agreements. It is particularly problematic that the affected farmers are not heard in these negotiations, which clearly violates the farmers' right to participate[53].

4.2 EAST ASIA PLANT VARIETY PROTECTION FORUM (EAPVP)[54]

The EAPVP Forum was initiated by Japan. In October 2007, Japan hosted a Workshop on the Cooperation and Harmonization in Plant Variety Protection in the Asian Region, which mooted the idea of a harmonised PVP system for the region that was in line with UPOV. The forum focuses on countries in the South East Asian (SEA) region plus China, Japan and Korea. The first annual meeting of the EAPVP forum took place in July 2008 in Japan.

The Forum has 13 member countries. In addition to Japan, South Korea, China, Vietnam and Singapore, which are already members of UPOV, the Forum intends to push the following states towards UPOV membership: Thailand, Brunei Darussalam, Malaysia, Cambodia, Myanmar, Indonesia, Lao PDR, and the Philippines[55]. In addition to member countries, the annual meetings are always attended by the same guests from the UPOV Secretariat, CPVO (European Union), Naktuinbouw (Netherlands), the US Department of Agriculture, the US Patent and Trademark Office, GNIS/SEMAE (France), the Dutch Ministry of Agriculture, Nature and Food Quality and the Asia and Pacific Seed Association (APSA – also representing seed companies)[56].

During the 12th annual meeting of the EAPVP forum in 2019, a 10-year strategic plan (2018-2027)[57] was adopted wherein it establishes the 'Long-term direction' of the Forum to be:

'Establish effective PVP systems consistent with the UPOV Convention among Forum members towards achieving all Forum members' membership of UPOV, as a basis for further PVP harmonization and cooperation in the region in order to contribute to developing sustainable agriculture and achieving food security'.

Japan is the principal funder and host of the Forum, with substantial support from the UPOV Secretariat. The Japan Association for Techno-innovation in Agriculture, Forestry, and Fisheries (JATAFF[58]) hosts the East Asia Plant Variety Protection Forum office.

Japan's implementing Strategy (2018-2027)[59] presented at the EAPVP Forum highlights several of its particular interests, i.e. the stagnation in the number of applications for PVP in Japan, the concern over the use of its varieties in foreign markets, as well as loss of competitiveness in such markets. Hence, to strengthen Japan's international competitiveness in the agricultural and food industry, the implementing strategy sets out its objective to 'improve the protection of PBR in the foreign countries in order to provide breeders effective and efficient PVP system as well as to enhance Japan's innovation.'

A key concern with the EAPVP Forum is the bypassing of national democratic processes. The majority of Southeast Asian countries have unique non-UPOV PVP systems. Several delicately balance the national objectives and interests of the different actors that are involved in plant breeding while taking into account the rights and obligations of the state under international law. By participating in a forum that aims to push countries into accepting UPOV 1991, PVP offices are sidelining their national PVP laws, which have emerged through democratic processes. This participation undermines the role of these processes, particularly the Parliament, in national decision-making.

Through the East Asia Plant Variety Protection Forum (EAPVP), Japan, which initiated the forum, and other developed countries attending the meetings, are attempting to introduce UPOV-based plant variety protection rights throughout the region, thereby restricting farmers' rights.

4.3 FURTHER ACTIVITIES BY NORTHERN COUNTRIES TO IMPOSE UPOV ON DEVELOPING COUNTRIES

4.3.1 IP Key Southeast Asia[60]

(IP Key SEA) is an EU project launched in April 2018, initiated by the European Commission's Directorate General for Trade, and implemented by the EU Intellectual Property Office (EUIPO). IP Key SEA supports trade talks with the EU and organises IP dialogues with ASEAN partners. The project explicitly aims to promote European standards for IPR legislation, protection, and enforcement and aims to support the European seed industry for trading with or investing in Southeast Asia. In this context, specific events to facilitate the accession of ASEAN countries to UPOV 1991 are organised[61]. In parallel, IP Key Latin America carries out activities dedicated to the promotion of plant variety protection under the UPOV 1991 Act[62]. The IP Key Program in China is also active and raises awareness about PVP[63]. UPOV has always played a very active role in these events. In the 2022/2023 biennium, it had nine preparatory meetings to prepare eight IP Key events (physical or virtual seminars), mainly together with the Community Plant Variety Office of the European Union (CPVO), sometimes also with the seed industry (CIOPORA, International Seed Federation, Plantum)[64].

4.3.2 National organisations,

such as the French interprofessional organisation for seeds, GNIS, now SEMAE, the French national official organisation for variety evaluation and seed quality testing GEVES, its Dutch equivalent "Naktuinbouw", the German Sortenschutzamt and

the Dutch Government have all carried out activities advocating for an implementation of UPOV 1991 standards outside of the EU's borders. GNIS and Naktuinbouw have been active, among others, in the East Asian Plant Variety Protection Forum for many years, participated in seminars of IP Key in Asia, promoted the UPOV System in Francophone Africa and Anglophone Africa (only GNIS) and in Iran (only GNIS). The German Bundessortenamt also promoted the UPOV system in Mongolia[65].

In recent years, the Netherlands has become more active. One example is the Collaborative Seed Programme (CSP) under the Nigeria-Netherlands Seed Partnership (NNSP) financed by the Ministry of Foreign Affairs of the Netherlands (overall budget € 3,536,850). One topic of the Programme is to facilitate the implementation and wide adoption of the PVP Act, and build country PVP capacity and develop an operational PVP system in accordance with the UPOV System that supports the growth of the seed sector[66]. CSP operates under the umbrella of the Seed-NL Partnership, which is a public-private partnership with several other activities pushing for the implementation of UPOV 91. To strengthen their effort, they have created a so-called «PVP Toolbox»[67], which 'should contribute to the creation, maintenance and/or improvement of a UPOV PVP System in a country or region'. The program, managed by Naktuinbouw, has an extensive range of tools, such as awareness missions in the Netherlands for groups of decision-makers, help in the establishment of an Office for Plant Breeders' Rights in a country, Internships at Naktuinbouw, tailor-made training in the country or awareness programs for farmers and traders. However, this support is conditioned to factors such as taking the UPOV system as a basis for the PVP system.[68] This very one-sided and undifferentiated stance of the Netherlands is astonishing. Not so long ago, the Dutch Minister of Agriculture made the following statement in a letter[69] to the Dutch parliament: 'Following on the agreements made under TRIPS developing countries are encouraged to put in place an efficient system for the protection of varieties. In this respect I believe that UPOV 1991 cannot be applied to all developing countries but that a differentiated approach is desired.' It appears that this approach has now been discarded. For the implementation of the PVP Toolbox Naktuinbouw works together with the Ministry of Agriculture, Nature and Food Quality, the Board of Plant Varieties, and other Dutch and international seed sector experts and organisations, including the CPVO and UPOV. Every year a total budget of a maximum of 230,000 Euros is available to fund projects supporting the implementation of a PBR system[70]. Activities in previous years included[71]:

- Start cooperation between the Netherlands and Ethiopia on Plant Breeders' Rights
- Plant Breeders' Rights course in Mexico (UPOV 91) and a seminar on EDV
- Plant Breeders' Rights course in Kazakhstan and seminar on the benefits of UPOV membership

- Project "Options to interpret the notion of private and non-commercial use as included in Article 15.1.I of the UPOV 1991 Convention" (→ see chapter 3.5.2.)

However, the Netherlands initiates even more activities. The Dutch government granted the Philippines a two-year Knowledge Transfer Project (KTP). And, as part of this project, a seminar was organised in August 2022 with the aim 'to foster a holistic understanding of PBR within the stakeholder community, as well as the benefits in acceding to the International Union for the Protection of New Varieties of Plants (UPOV).'[72] Naktuinbouw celebrated the outcome of the seminar[73], which was heavily criticised by farmers' rights and agroecology groups for 'failure to provide space for experts and even farmer leaders to present the negative impacts of joining UPOV.' Their statement mentions that in a 'consultation organized by SEARICE in October 2023, more than a hundred farmer leaders from different provinces of the Philippines expressed resistance and rejection of the UPOV system.'[74]

Various States, but above all the Netherlands, have developed programmes and activities to implement UPOV in the countries of the South, thereby weakening farmers' rights in these countries.

4.4 INFLUENCE OF THE WORLD BANK

In 2006, the World Bank published various reports in which it advocated for a differentiated approach to the introduction of PVP. 'Several sui generis models are available, including the UPOV Conventions, but even reliance on a model requires a number of choices. The most important parameters to determine are related to seed saving, seed exchange, the scope of protection, the breadth of coverage, and the relation of PVP and patents to the concerns of Farmers' Rights. These parameters deserve careful consideration before a decision is made on the use of a particular model for national legislation.'[75] The authors suggested that the 'Bank can support opportunities for national (or, where relevant, regional) forums that promote debate and discussion about the shape of PVP legislation and its implementation. Although the Bank cannot offer specific blueprints, it can encourage stakeholders to take into account both poverty reduction strategies and the trade dimension of IPRS.' 'The framing of PVP legislation must be an open process that considers the interests of all stakeholders.'[76] Another World Bank Paper states that 'The five-country study concluded that there is no reason for developing countries to adopt overly restrictive plant variety protection systems; adoption of such systems to acquire trade benefits reduces options for broader support of rural development objectives. The report stressed that opportunities exist to create a useful balance within the minimum requirements offered by the TRIPS Agreement. Important elements are the right of farmers to save, use, exchange, and/or sell seed; the right to use protected materials for further breeding; and protection against the appropriation of farmers' varieties for commercial purposes.'[77]

Today, the World Bank policy is the exact opposite of its previous approach: the imposition of UPOV 91 through its projects – without analysing the needs of the country and without any consultation with the stakeholders concerned. An article[78] by the Bretton Woods Project shows the World Bank's influence and support for the introduction of UPOV 91 in Zambia. The Plant Breeders' Act' amendment is an indicator in the World Bank's $300 million Zambia Growth Opportunities Program (ZAMGRO[79]). It includes a double check to ensure that Zambia has complied: 'Before Cabinet approval, the WB will verify the revised Act to confirm their content.' It further notes, 'Verification of the completion of the Plant Breeders Rights Act will be done against Zambia joining the Union for the Protection of New Varieties of Plants (UPOV), which review confirms that the Act meets expected standards.'[80]

In contrast to its previous position, the World Bank imposes UPOV 91 on a country like Zambia – without conducting a national needs assessment or a broad consultation.

4.5 INFLUENCE BY THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

Under an agreement concluded between the World Intellectual Property Organization (WIPO) and UPOV, the Director General of WIPO is the Secretary-General of UPOV, and WIPO provides administrative and financial services to UPOV[81].

An area where WIPO provides technical assistance is the development of a national IP strategy, which presumably would guide the development of national laws, policies and practices. To this end, WIPO has developed a set of tools on the *Methodology for the Development of National Intellectual Property Strategies. One of these tools, Plant Variety Rights and Seed Industries,* provides an incomplete and misleading view of PVP protection. Essentially, it champions UPOV as the legal framework for the protection of PVP[82].

Apart from tools, WIPO's various technical assistance missions are also about promoting UPOV 1991[83]. WIPO's technical assistance on PVP is therefore inconsistent with the spirit and intent of the WIPO Development Agenda, which aims to incorporate the development dimension into WIPO's work.

In other WIPO communication channels, such as the UPOV website[84] or the UPOV Magazine[85], only UPOV is unilaterally promoted as the PVP right.

By unilaterally promoting the UPOV system in its various activities, WIPO is not fulfilling its responsibility as a UN organisation to also promote development and human rights.

5
The Right Way to Develop a Plant Variety Protection Law

We have seen in the previous chapters that the UPOV 91 standard always assumes that the exact same legislation (UPOV 91) should be used for entirely different countries with very different agricultural systems. Therefore, it is assumed that there is no need to analyse the national circumstances and investigate existing needs. Various studies and commentators have already shown that this one-size-fits-all approach is not the right one[86].

The way in which plant variety rights are defined also has a significant impact on the farmer-managed and informal seed system as it restricts the further use of protected seeds by farmers. The importance of the farmer seed system for food security was emphasised by the FAO in its *Voluntary Guide for National Seed Policy Formulation* (2015)[87]: 'In most developing countries, the informal sector is the main source of seed. The ability to easily access, exchange and use seeds underpins the informal sector. It is a crucial practice for facilitating access to seeds.' Therefore, 'the seed policy should address the respective roles of the formal (public and private) and informal sectors in meeting its objectives, ways in which each could be improved, as well as the need for coordination between both components of the seed system.'[88] The introduction of a plant variety protection law in line with UPOV 91 completely ignores the farmer-managed seed system, removes critical aspects that have supported it, and thus unilaterally supports the commercial seed system at the expense of farmers and food security.

FAO, in its Guidance, suggested following steps to formulate a seed policy[89]:

1. Assess the current status of the seed sector.
2. Define the context through problem analysis and identification of key policy issues.
3. Set the objectives.
4. Evaluate and choose policy options.
5. Assemble information.
6. Convene a national 'Seed Forum'.
7. Draft the National Seed Policy. [...]

It is obvious that such an integrative process only makes sense if the outcome of the process is not predetermined. And it is obvious that such a process will lead to different – nationally adapted – results. Therefore, the idea of imposing a predefined plant variety protection law on other countries is the wrong approach from the outset. It is not only in contradiction with national sovereignty but also with the right to participate as enshrined in the FAO Treaty and the UNDROP Such laws will have little recognition and respect by those most affected.

This Guidance is also the line of argument taken by the United Nations Conference on Trade and Development (UNCTAD) when they include the population's needs in their analysis. For example, in a report[90] on the implications of AfCFTA, UNCTAD argues that non-UPOV African countries need policy space. Such countries, it states, need to adopt sui generis PVP rules that align with domestic priorities and multilateral environmental agreements such as the CBD and its Nagoya Protocol, and the rights of farmers included as provided for in the ITPGRFA and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP). [...]' It further declares, 'There is a need to ensure that intellectual property as a tool for sustainable development in Africa is used in a way which leads to long-term food security and access to food, the protection and dissemination of traditional knowledge on plant genetic resources, and the sharing of benefits resulting from biodiversity, rather than focusing on the needs of professional plant breeders.'

And this is precisely the position taken by the United Nations Development Programme (UNDP) when it recommends in its Guidelines to establish a National PVP Law[91], and that plant variety protection legislation should be developed through an inclusive process:

'There is no 'one-size-fits-all' approach towards establishing a balanced sui generis PVP regime, given the range of stakeholders involved. In addition to creating a PVP law, policy-makers should establish and enforce effective seed laws, gene funds where applicable, access and benefit sharing mechanisms (which must include effective contract law and responsible business practices) all of which combined and harmonized with a sui generis PVP law should make for a balanced plant variety rights regime. This would mean taking into consideration the concerns of various stakeholders to create a customized national law. In order to establish a balanced sui generis PVP regime, countries

may benefit from what can be described as an 'inclusive' process towards establishing the law instead of adapting an established 'model' law into national PVP regimes.'

The position that a one-size-fits-all approach, as celebrated by UPOV, is not the right way forward was also affirmed in the G20 Agriculture Ministers Declaration (September 2024): 'Recognizing that there is no "one-size-fits-all" solution to the challenges of agriculture and food systems, due to the diversity and complexity of global agricultural and food production conditions, we support targeted policies, which, in combination with other cross-cutting strategies, deliver economic prosperity, environmental stewardship, positive health outcomes and social equity.'[92]

What it means to strike a balance between different interests and implement a targeted policy was demonstrated in a reply that Indonesia sent to the UN Special Rapporteur on the Right to Food: Indonesia made clear that it considers the preservation of an appropriate balance between the rights and obligations of farmers and breeders with utmost care and attention. Therefore 'Indonesia maintains its position not to accede to the UPOV 1991 to ensure policy space to protect smallholder farmers' seed systems and plant genetic resources.'[93]

UN organisations such as FAO, UNDP and UNCTAD take the clear position that plant variety protection legislation should be designed in an inclusive process that takes into account the needs of both the farmer-managed seed system and the formal seed system. The one-size-fits-all approach propagated by UPOV should, therefore, be rejected. Plant variety protection rights need to be adapted to the requirements and circumstances of the country, take other international obligations into account and protect human rights.

6
Conclusion

The majority of countries in the South have clauses in their laws that allow farmers, at least to some extent, to exercise their rights, in particular, to save and, in some cases, also to exchange and sell seeds in a way that would not be possible under a law in conformity with UPOV 91. These include states that still adhere to UPOV 78, states that have developed their own sui generis law, or states that do not protect plant varieties. This protection of farmers' rights is a central component of the farmer-managed seed system (FMSS), which in many countries is a central pillar of the seed supply and, thus, also of food security. At the same time, the FMSS is also central to agrobiodiversity conservation and sustainable use.

These existing laws are a thorn in UPOV's side. UPOV has been waging a systematic campaign for years to have these laws amended and farmers' rights abolished. It does this with misleading information, communication that resembles an advertising campaign and one-sided advice when countries want to draft or review plant variety protection laws. Individual UPOV members play a decisive role in driving the countries of the South into the arms of UPOV. In particular, countries with seed multinationals that profit from seed exports use free trade agreements to force countries of the South to become UPOV members. Countries are also being pressurised to join UPOV and give up their farmers' rights through bilateral "aid", countless propaganda events and the East Asia Plant Variety Protection Forum. It is mainly Japan, the Netherlands, and the EU that are active here; they are all the primary beneficiaries of a globally harmonised system.

However, UPOV 91, which was negotiated in 1991 by 19 industrialised countries and apartheid South Africa, is not an export article. Firstly, the interests and circumstances of the South were in no way taken into account in the negotiations, and secondly, the world has changed since 1991. Since then, the Convention on Biological Diversity, the FAO Plant Treaty, the Nagoya Protocol and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas have been adopted at the UN level. These are all agreements that are negotiated at a global level and are supported by more countries than UPOV. These agreements aim to protect (agro)biodiversity, preserve traditional knowledge and strengthen farmers' rights. When developing plant variety rights today, it is imperative to take these new facts and obligations into account. The demand to introduce a plant variety protection right in accordance with UPOV 91 is backward-looking and no longer appropriate for this era. It is more reminiscent of colonial times, when industrialised countries imposed laws on their colonies that only served the colonisers.

It is well known how a modern plant variety protection law should be developed. The first step is to analyse the national seed sector and its context. Both the farmer-managed seed system and the formal sector must be included in the considerations. This is because a plant variety protection right should promote both systems, while also protecting human rights and implementing the above-mentioned international agreements and declarations. Farmers must be involved at all stages of the process, in accordance with their right to participate. Those who proceed this way will obtain a law corresponding to national circumstances and needs. This procedure is in stark contrast to the one-size-fits-all approach propagated by UPOV. UPOV wants to impose the same rules – its rules – on all countries. It is obvious that this primarily helps the seed industry but is to the detriment of the countries of the South and their populations.

Abbreviations

AfCFTA	African Continental Free Trade Area
CBD	Convention on Biological Diversity
CGRFA	FAO Commission on Genetic Resources for Food and Agriculture
EAPVP	East Asia Plant Variety Protection Forum
EFTA	European Free Trade Association
EU	European Union
FAO	United Nations Food and Agriculture Organization
FMSS	Farmer-Managed Seed System
FTA	Free Trade Agreement
G20	The Group of 20 (most industrialised countries)
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty)
Nagoya Protocol	The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization
PVP	Plant Variety Protection
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNDROP	United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas
UPOV	Union pour la Protection des Obtentions Végétales (International Union for the Protection of New Varieties of Plants)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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The Association for Plant Breeding for the Benefit of Society (APBREBES) is a network of civil society organizations from developing and industrialized countries. The purpose of APBREBES is to promote plant breeding for the benefit of society, fully implementing Farmers' Rights to plant genetic resources and promoting biodiversity.

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