

UPOV 91 and trade agreements

Compromising farmers' right to save and sell seeds



A DISCUSSION PAPER

Agroecological approaches to farming are important for achieving the Sustainable Development Goals (SDGs) agreed on by the international community in 2015. Agroecological approaches and practices help the transition to more resilient, resource efficient and sustainable farming systems.¹ This is of direct relevance to the SDGs, especially SDG 1 (no poverty), 2 (zero hunger), 8 (decent work and economic growth), 12 (responsible consumption and production), 13 (climate action) and 15 (life on land).

Both ENDS has been promoting agroecological approaches for many years. We support analog forestry in Sri Lanka², Farmer Managed Natural Regeneration in the Sahel³, and evolutionary plant breeding in Iran⁴ – to mention a few. We witness that these approaches work because they build on the experience, skills and knowledge of farmers who understand the dynamics of their local environments.

However, the international convention called UPOV 91 may cause problems for the feasibility of such approaches, especially for promising new breeding techniques. We are therefore very concerned about the successful lobby and advocacy of EU seed companies to include references to UPOV 91 in EU trade agreements, such as with Canada (CETA), Indonesia (CEPA), and Japan (JEFTA). The negotiation position taken by the EU in the ongoing negotiations with MERCOSUR countries in Latin America reflects this same influence by seed companies.⁵

With this paper, we aim to facilitate an urgently needed debate on the relations between UPOV 91, national seed laws and trade agreements – and their impact on the livelihoods of subsistence farmers in the Global South.

FROM TRADITIONAL TO COMMERCIAL SEED SYSTEMS

For thousands of years, seeds were readily accessible and free to use. Farmers everywhere have been responsible for plant breeding and for the selection, and development of seeds. Farmers selected seeds that best suited the local soil, climate and food culture, and shared these seeds among each other. This resulted in a large agro-biodiversity and genepool, which has helped farmers spread risks and adjust to changing and extreme weather conditions.

This traditional seed system continues to form the basis for farmers' livelihoods as well as national food security in most countries of the Global South. It is a flexible system, based on freely saving, replanting, exchanging and selling seeds. However, this system is increasingly being challenged.

The changes towards a more formal – and commercial – seed system were triggered by the industrialisation of agriculture starting in the 20th century. First, there was a trend to cut public funding and to privatise public institutions created for agricultural research and plant breeding. Commercial plant breeders continued to develop new plant varieties. They focused on varieties that produce higher yields, can resist diseases, are more adaptable to changing climate conditions, or create better tasting food which can be stored for a longer period. Secondly, to secure and increase their profits, commercial breeders want to protect their investments in seed research from others. This has led to the creation of stronger intellectual property rights (IPR) for commercial seeds. The formal seed system thus starts with plant breeding and selection, and ends with certified seeds of verified varieties.⁶ Today, private sector seeds dominate markets globally. It was estimated that in 2007, the top four commercial companies for vegetable seeds covered seventy percent of the global market. The top eight companies covered ninety-four percent.⁷

WHAT IS UPOV?

UPOV stands for *Union Internationale pour la Protection des Obtentions Végétales*, or Union for the Protection of New Varieties of Plants. The intergovernmental organisation, based in Geneva, was founded in 1961 through the adoption of the Convention for the Protection of New Varieties of Plants. Its mission is to “provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society”.⁸ Essentially, the UPOV Convention provides a form of intellectual property protection for plant varieties.⁹ It gives right holders (breeders) the possibility to exclude others from using their invention (plant variety) for a certain period.¹⁰ While the eligibility criteria for patents on seeds are quite strict, the UPOV Convention can provide patent-like protection to seeds.

There have been three updates of the Convention, in 1972, 1978 and 1991. The first Convention of 1961 had six member countries.¹¹ Thirty years later, at the time of

the last revision, this number had only grown to twenty. However, when trade agreements started forcing countries in the Global South to join UPOV, the membership number grew significantly to 75 members today. To be eligible to join UPOV, the potential member country must implement national seed laws that fulfil the requirements stated in the Convention.

WHY IS UPOV 91 A CONCERN?

There is growing concern about the effect that UPOV 91 and consequential national seed laws have on small-scale farmers and agroecological approaches to farming. The first concern is that UPOV 91, which focuses on the formal or commercial seed system, favours commercial plant breeders' rights at the expense of farmers' rights. Secondly, UPOV 91 is incompatible with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).¹² Finally, there are also concerns that conventions such as UPOV 91 might lead to genetic erosion¹³ and may hinder innovative propagation approaches such as evolutionary plant breeding.¹⁴

HOW UPOV 91 UNDERMINES THE RIGHT TO SAVE, USE, EXCHANGE AND SELL FARM-MADE SEED

The UPOV 1991 Convention stipulates in Article 14 that farmers need to have the authorisation of the plant breeder if they want to (i) (re)produce, (ii) offer for sale, (iii) sell or otherwise market, (iv) export, (v) import or (vi) stock protected seeds for the purposes mentioned in (i) to (vi). This is called the breeder's right. Whether the breeder is willing to authorise any such use, may depend on payment from the farmer to the breeder. For most farmers in the Global South who have limited resources, such payments may be prohibitive or at least lead to higher costs of living.

Article 15(1)(i) provides an exception to the breeder's right if farmers use protected seeds for private and non-commercial use. However, UPOV uses a narrow interpretation of what is meant by 'private': farmers can use protected seeds on their own land only to feed their own family living on that land. Although member states are "free to define the farming practices that they consider to fall within the scope of this exception"¹⁵, UPOV has "consistently disapproved of provisions in national legislation that promote the freedom to save, exchange and sell seed/propagating material, even if among small-scale farmers".¹⁶

As a second restriction, Article 15(2) makes clear that it is up to the member states whether to, "within reasonable

limits and subject to the safeguarding of the *legitimate interest* of the breeder, restrict the breeder's right in relation to any variety in order 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" [italics added]. Here too, UPOV advocates a narrow interpretation, aiming at selected crops of which harvested material is commonly saved by farmers for further propagation.¹⁷ It remains unclear what 'reasonable limits' and 'legitimate interests' are, but a remuneration may be required. Even if this restriction of the breeder's right is accepted, it is still not allowed to use seeds obtained from someone else to plant the protected variety.

In the Frequently Asked Questions sections on its website, UPOV claims that member states have the flexibility to consider, "where the *legitimate interests* of the breeder are not *significantly affected*, in the *occasional case* of propagating material of protected varieties, allowing subsistence farmers to exchange this against *other vital goods* within the *local community*".¹⁸ However, it is again unclear what the precise definition is of any of the words in italics. Some argue that UPOV interprets the private and non-commercial use too narrow, as subsistence farmers will always sell or exchange part of their harvest, especially after a good season.¹⁹

UPOV 91 AND THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) was adopted in 2001 and entered into force three years later. Its objectives are, first, the conservation and sustainable use of all plant genetic resources for food and agriculture, and second, the fair and equitable sharing of benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.²⁰ The Treaty, which currently has 144 member states, was the first international *binding* instrument to recognise farmers' rights.²¹ Its preamble states that "[t]he rights recognized in this Treaty to save, use, exchange and sell farm-made seed and other propagating material (...) are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels." Part III, Article 9 of the Treaty is fully devoted to farmer's rights.

Clearly therefore, there is an incompatibility between UPOV 91 and the ITPGRFA when it comes to the right to save, use, exchange and sell farm-made seed and other propagating material. To make matters worse, enforcement

of UPOV 91 is much stricter than the enforcement of the ITPGRFA. This latter problem has also been pointed at by Olivier de Schutter, former UN Special Rapporteur on the Right to Food. He called the farmers' rights in the ITPGRFA "rights without remedies". He commented that "The provision [Article 9] remains vague, and implementation of this provision is highly uneven across the States parties. This is in sharp contrast with the enforcement, at international level, of plant breeders' rights and biotech-industry patents".²²

UPOV 91, THE WORLD TRADE ORGANIZATION AND SEED LAWS

The World Trade Organization is an intergovernmental organisation that has been regulating international trade since the mid 1990s. Its official primary purpose is "to open trade for the benefit of all".²³ All member nations of the WTO must abide by the Agreement on Trade-Related Aspects of Intellectual Property Rights, or the TRIPS agreement. When it became effective in 1995, TRIPS introduced intellectual property rules into the trading system for the first time. During the negotiations for TRIPS, developing countries managed to prevent that members would be required to grant patents on plants and animals.

TRIPS does however require all WTO members to "provide for the protection of plant varieties either by patents or by an effective *sui generis* system²⁴ or by any combination thereof". That means that individual member governments are entitled to decide which type of national IPR rules for plant varieties are most appropriate and to design their own seed laws.

When the use of a *sui generis* system is considered for the protection of plant varieties, UPOV 91 often comes into the picture. Unlike the ITPGRFA, which was not intended to specifically deal with IPR,²⁵ UPOV 91 can serve as such a *sui generis* system. UPOV member countries frequently ask, or rather put pressure on countries from the Global South to sign the UPOV 91 Convention, even though the WTO does not require Least Developed Countries to provide protection for plant varieties until 1 July 2021. Moreover, while rich countries had promised to support developing countries in meeting their WTO obligation to design national seed laws, it seems that in practice this support often comes down to suggesting that countries simply design their national seed laws in accordance with the UPOV 91 Convention.

UPOV AND OTHER TRADE AGREEMENTS

International trade agreements between countries frequently include references to UPOV 91. Often, developed countries push for this inclusion during trade negotiations. The consequences of including such a reference depend on the specific formulations. Yet, it is generally very difficult to undo the impact of this inclusion.

UPOV allows its members to terminate membership by formal announcement. One year after the announcement, the UPOV member will be released from all its obligations under the convention. However, release from the UPOV 91 obligations becomes more complicated – if not economically and politically impossible – if a reference to the Convention is included in a trade agreement. In such case, termination of UPOV membership or discontinuing to follow the Convention's rules might result in a breach of said trade agreement. In other words, if a country wants to avoid triggering a dispute settlement mechanism, and thus risking sanctions, it is *de facto* forced to continue adhering to UPOV 91 rules even after termination of UPOV membership. The only way out is to amend the trade agreement by mutual consent of all parties to that agreement. If this is not possible, the only option left is to not only terminate UPOV membership, but to also terminate the trade agreement – unless a special clause was included in the agreement that allows for the termination of only part of the agreement.

UPOV does refer to dispute settlement mechanisms. However, these mechanisms are more far-reaching in trade agreements, which commonly provide for enforceability. Normally, this is regulated in a separate chapter on State-to-State dispute settlement. If one state party to the trade agreement contends that another state party has breached its obligations under UPOV, the former state can bring a claim against the latter under such a mechanism. When the claim has been substantiated, the complaining state might be permitted to take sanctions, such as increasing the import tariffs on goods from the respondent state.

The situation becomes even more complex when that trade agreement includes an investment chapter with an Investor-to-State Dispute Settlement (ISDS) mechanism. These chapters are highly controversial: they grant individual companies from one state the exclusive right to bypass the national courts of the other state and directly sue that latter state through an ad-hoc tribunal when the company contends its rights have been violated.²⁶ This means that individual companies would be able to directly sue a state for compensation if it breaches its commitments under UPOV 91.



The recently signed Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada contains a commitment to UPOV 91 in Article 20.31:

Each Party shall co-operate to promote and reinforce the protection of plant varieties on the basis of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, done at Paris on 2 December 1961.

CETA also contains a form of ISDS, called the Investment Court System (ICS). Furthermore, it explicitly classifies plant breeders' rights as intellectual property rights, which are in turn covered by the CETA investment protection agreement. This means that ISDS can be used in case of disagreements over the application of UPOV 91 obligations.

CONCLUSION

The ITPGRFA recognises farmers' rights, including the right to save, use, exchange and sell seeds and other propagating material. These rights are extremely important for small-scale farmers around the world whose livelihoods for a large part depend on the informal seed system. These rights are similarly vital if we wish to keep promoting agroecological approaches to farming that will lead to more resilient and sustainable farming systems globally.

The UPOV Convention, however, limits these important farmers' rights in several ways. First, farmers need authorisation from plant breeders to stock or use protected

seeds unless they do so for private and non-commercial purposes. UPOV defines such purposes in a narrow way and has consistently disapproved of provisions in national legislation that promote the freedom to save, exchange and sell seed and propagating material, even if among small-scale farmers. The breeder's right, in other words, is very strong and takes precedence over farmers' rights.

Secondly, while Article 15(2) of UPOV 91 provides an optional restriction of the breeder's right, this again is defined narrowly, aiming only at selected crops where there is a common practice of farmers to save harvested material for further propagation. Thirdly, UPOV claims that the Convention allows subsistence farmers to exchange protected seeds against other vital goods within the local community. However, since subsistence farmers will try to sell or barter that part of the harvest that they do not need to use themselves to people both within and outside their local communities, this too seems like a restricting definition.

Additionally, we are concerned about enforcement. While the enforcement of UPOV is strong, this is not the case for the ITPGRFA. When references to UPOV 91 are included in trade agreements, things become even more complicated. A country can terminate its UPOV membership, but countries who do so will risk sanctions for breaching the trade agreement. In the worst-case scenario, that is when the trade agreement includes an Investor-to-State Dispute Settlement (ISDS) mechanism, the country may even be directly sued by a company for violating its UPOV 91 commitments.

In brief, the 1991 UPOV Convention has a far-reaching impact on farmers' rights to save, use, exchange and sell farm-saved seed/propagating material. Those working on the texts of trade agreements, as well as those concerned with the rights of small-scale farmers and the promotion of agroecological practices, may not be aware of the severe consequences that a simple reference to UPOV 91 in trade agreements can have.

We therefore hope that this discussion paper will contribute to a frank and forward-looking discussion on the implications of UPOV 91 and its inclusion in trade agreements for farmers in the Global South and our shared efforts to strengthen agroecological approaches in national and international policy making.

- 1 Agroecology is a conceptual framework that provides the basic ecological principles of how to study, design and manage agroecosystems that are both productive and natural resource conserving as well as culturally sensitive, socially just and environmentally viable. For more information, see: Altieri, M., 1995. *Agroecology: The Science of Sustainable Agriculture*. 2nd ed. Boulder: Westview Press.'
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- 3 Both ENDS, 2018. *Regreening*. [online] Available at: <https://www.bothends.org/en/Our-work/Alternatives/Regreening/> [Accessed 18 October 2018].
- 4 For an example of evolutionary plant breeding, see Both ENDS, 2016. *Innovative seed management Iran*. [online] Available at: <https://www.bothends.org/en/Whats-new/Publicaties/Innovative-seed-management-Iran> [Accessed 18 October 2018].
- 5 See EU, 2016. *EU proposal on Intellectual Property Rights*. [pdf] Available at: http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155070.pdf. [Accessed 18 October 2018], Article 9, p. 15.
- 6 FAO, 2018. *What are seed systems?* [online] Available at: <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/compendium/tools-guidelines/what-are-seed-systems/en/> [Accessed 18 October 2018].
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- 8 UPOV, 2011. *Mission Statement*. [online] Available at: <http://upov.int/about/en/> [Accessed 18 October 2018].
- 9 Braunschweig, T., Meienberg, F., Pionetti, C., Shashikant, S., 2014. *Owning Seeds, Accessing Food*. Zurich: The Berne Declaration, p.9.
- 10 De Jonge, B., Munyi, P., 2017. *Creating space for 'informal' seed systems in a plant variety protection system that is based on UPOV 1991*. [pdf] Available at: www.issdseed.org/sites/default/files/case/issd_africa_twg3_synthesis_paper_creating_space_for_informal_seed_systems_in_a_plant_variety_protection_system_that_is_based_on_upov_1991.pdf [Accessed 18 October 2018], p.1.
- 11 Denmark, France, Germany, the Netherlands, Sweden and the United Kingdom. Other countries that were present at the founding conference in Paris in 1961 were Belgium, Israel, Italy, South Africa, Spain and Switzerland. The industry organisations that participated in this conference included: the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), the International Association for the Protection of Intellectual Property (AIPPI), the International Community of Breeders of Asexually Reproduced Ornamental Fruit Plants (CIOFORA) and the International Federation of the Seed Trade (FIS). See: UPOV, 1974. *Actes des conférences internationales pour la protection des obtentions végétales*. [pdf] Available at: http://www.upov.int/edocs/pubdocs/fr/upov_pub_316.pdf [Accessed 18 October 2018], pp. 103, 104, 156.
- 12 See: Grain, 2015. *UPOV91 and other seed laws: a basic primer on how companies intend to control and monopolise seeds*. <https://www.grain.org/article/entries/5314-upov-91-and-other-seed-laws-a-basic-primer-on-how-companies-intend-to-control-and-monopolise-seeds> [Accessed 18 October 2018] and De Jonge, B., 2016. *Reconciling Farmers' and Plant Breeders' rights*, The Hague: Oxfam.
- 13 The loss of genetic diversity in agriculture. See: Grain, 1999. *UPOV on the war path*. [online] Available at: <http://www.grain.org/es/article/entries/257-upov-on-the-warpath> [Accessed 18 October 2018].
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24 Sui generis means 'of its own kind' and consists of a set of nationally recognised laws and ways of extending plant variety protection (PVP) other than through patents. See: Kalaskar, B. Traditional Knowledge and Sui-Generis Law. [pdf] Available at: <https://www.ijser.org/researchpaper/TRADITIONAL-KNOWLEDGE-AND-SUI-GENERIS-LAW.pdf> [Accessed 18 October 2018].

25 Correa, C., Shashikant, S., Meienberg, F., 2015. *Op. cit.*, p. 10.

26 For a more in depth discussion of the wider problems related to ISDS please see: Both ENDS, 2015. *To Change a BIT is not enough*. [online] Available at: <https://www.bothends.org/en/Whats-new/Publicaties/To-change-a-BIT-is-not-enough/> [Accessed 18 October 2018] and Both ENDS, 2016. *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*. [online] Available at: <https://www.bothends.org/en/Whats-new/Publicaties/Book-Rethinking-Bilateral-Investment-Treaties-Critical-Issues-and-Policy-Choices> [Accessed 18 October 2018].

CREDITS

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Cover photo: farmers in Iran (taken by Hamed Zolfaghari)

Photo page 5: 'Woman sifting grain' by Ray Witlin on Flickr

Text: Sander Hehanussa en Burghard Ilge (Both ENDS)

Co-readers: Nathalie van Haren, Stefan Schüller, Sinde de Strijcker (Both ENDS), GRAIN

Editor: Ellen Lammers

Design: Margo Vlamings



