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Plant variety protection & UPOV 1991 in the European Union's Trade Policy: Rationale, effects & state of play

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About this Research Paper

This research paper aims to identify the extent of the offensive efforts carried out by the European Union (“EU”) in the trade policy pursued by European Commission officials around the globe, advocating the adoption of formalised and strong plant variety protection in trade partners’ national laws. The paper will primarily look at how the European Union trade negotiations advocate for the establishment of national plant variety protection (“PVP”) regimes that uphold the terms of the 1991 Act of the International Union for the Protection of New Varieties of Plants (“UPOV”) Convention in the legal orders of its trade partners, highlighting the practical consequences of this strategy. Although this practice is also prevalent in the trade policy of other countries and regional entities, such as the European Free Trade Association (EFTA, regrouping Iceland, Liechtenstein, Norway, and Switzerland), the United States and others, this paper’s focus will remain on the Agreements signed and negotiated by the EU. The analysis is also limited to the level of plant variety protection required in provisions of the different trade and association agreements negotiated and/or signed by the EU, not delving deeper into the enforcement of those agreements, for instance through the specific dispute settlement mechanisms provided by them.

After describing the general principles behind the UPOV system, the paper analyses the arguments brought forward by the EU institutions and other stakeholders to justify the integration of UPOV 1991 in free trade agreements (“FTAs”), confronting them to counterarguments on the detrimental effects of the Convention on local seed systems, as well as issues linked to policy coherence (SECTION 1). It then renders a detailed review of the state of play of the negotiations of different trade and association agreements that are currently in force or under negotiation, with specific regards to the level of plant variety protection required in their provisions (SECTION 2). As the European promotion of the UPOV 1991 Act has been carried out through soft-law measures, such as policy support, trainings and capacity-building events not directly linked to free trade agreements, the research will then provide a non-exhaustive yet representative set of examples of such promotion efforts (SECTION 3). The paper is accompanied by a thematic bibliography, which outlines sources used with regards to the reach of UPOV protection and the role of UPOV in foreign trade policy (ANNEX 1), as well as a summary table which recalls the state of play regarding UPOV protection in EU trade, association, and partnership agreements (ANNEX 2).

To promote truly sustainable agriculture, agrobiodiversity, and food security, governments need sufficient flexibility when drafting their national or regional seed and plant breeders’ rights laws to design a legal system that both protects breeders’ innovation and enshrines farmers’ rights, adapted to their local conditions, and needs. APBRES and Both ENDS therefore call for the EU to change their current approach to include plant variety protection obligations in their trade agreements and to stop requiring developing countries to adopt the 1991 Act of the UPOV Convention through trade agreements or any other related activities.

Summary of Findings

All States that are members of the World Trade Organization and its Agreement on Trade Related Intellectual Property Rights (“TRIPS”) – except Least Developed countries – currently ought to “provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof”. The *sui generis* system refers to plant variety protection, of which the different acts of the International Convention for the Protection of New Varieties of Plants (“UPOV Convention”) are just examples of. Still, many countries are led to believe that adherence to the 1991 Act of the UPOV Convention is the only option they have when they establish such an “effective *sui generis* system”, which is demonstrably wrong. This pressure is fuelled by widespread advocacy of the UPOV organisation itself, but also by the European Union (“EU”) and some of its Member States, whether through soft training tools, consultancy services, or through strong negotiating stances in regional or bilateral trade and association agreement talks. Disregarding the flexibilities recognised to States by the TRIPS Agreement, along with their national context of agricultural production and plant breeding, the EU’s trade policy is grounded on a drive to impose the most stringent plant variety protection, which extends the reach of exclusive property rights to the use, multiplication, exchange, and sale of protected varieties, and profoundly affects national farmer seed systems.

The EU negotiates trade agreements using different terminology, from “free trade agreements”, to “partnership” or “cooperation” agreements, which all aim to establish rules to facilitate the trade of certain goods, services and recently also investments between Parties, at varying levels. Plant variety protection (“PVP”) is usually dealt with in the agreements’ chapter dedicated to Intellectual Property Rights (“IPR”), when it exists, and subject to the specific dispute settlement mechanisms provided for in the Agreements.

At the time of writing, all six “**Free Trade Agreements**” (“FTAs”) that have been ratified by the EU and are fully or partially in force, or are currently only provisionally applied, include binding provisions on the promotion of UPOV 1991, with varying degrees of obligations with regards to the actual level of protection that needs to be conferred to new plant varieties: Canada (CETA), Japan (JEFTA), Singapore, Vietnam, South Korea and the Agreements signed with some members of the Andean Community. While some provisions include a strong direct obligation to protect plant varieties under the 1991 Act of the UPOV Convention, other Agreements use the qualifier of cooperation, to ensure protection and enforcement of the rights conferred by the 1991 Act.

“**Partnership or Cooperation Agreements**”, which are generally viewed as a first step towards a more comprehensive trade deal present a more varied picture. Economic Partnership Agree-

ments that have been signed with most of the countries and regional associations of the African continent, as well as Pacific States, do not address intellectual property rights at all. Some of these Agreements nonetheless envisage such discussions in the future through so-called “rendezvous clauses”, which have been activated with Comoros, Madagascar, Mauritius, Seychelles, and Zimbabwe at the time of writing. The CARIFORUM EPA directly addresses plant variety protection, albeit quite loosely compared to other applicable FTA’s. Partnership and Cooperation Agreements signed with Armenia, Kazakhstan and Iraq contain complete IPR Chapters and address plant variety rights, in a similar fashion to FTA’s.

Next to these different trade agreements, the EU has also signed numerous **Association or Stabilisation Agreements**, which traditionally cover larger ranges of topics reaching farther than trade or investment facilitation, concluded with countries that have strong historical ties with the EU and enforced through soft-law mechanisms of diplomacy. All these Agreements contain provisions with regards to intellectual property rights in general, and very strong stances on plant variety protection, as their main unconcealed goal is legislative alignment with applicable EU law. Amongst these Association Agreements, the ones signed with six Western Balkan States, seven States of the Euro- Mediterranean region, as well as those signed with Azerbaijan and Ukraine require accession to the 1991 Act of the UPOV Convention. While some Agreements put the obligation to provide strong plant variety protection to both signatories, like the one signed with Algeria, or focus on implementation, like the one signed with Israel, which was already an UPOV Member before the Agreement’s signature, all EU Association Agreements unilaterally require ratification of UPOV 1991. Other Association Agreements signed with countries arguably geographically farther from the EU, *i.e.*, Chile and the Central American countries of Nicaragua, Honduras, Panama, El Salvador, and Costa Rica, remain more lenient and flexible, outside of pure legislative alignment. They indeed either leave the possibility to signatories to be bound by the terms of the 1978 of the UPOV Convention, or simply require an “effective *sui generis* plant variety protection”, potentially outside of the UPOV System.

For all these trade instruments, the initial **EU proposal always starts from a strong obligation to ensure plant variety protection under UPOV 1991**. However, the different examples cited in this paper show that the terms of the Parties’ commitment to ensure plant variety protection standards may change through successful stakeholder engagement and awareness of public authorities, as epitomised by the latest draft provision of the Trade Agreement negotiated with India, which gives ample margin of manoeuvre to the Signatories to protect plant varieties under their own national laws outside of the stringent realm of UPOV.

The forceful EU practice to include UPOV 1991 protection in FTAs raises **concerns**, in a context where there is growing evidence and literature highlighting the detrimental effects of UPOV 1991-compliant plant variety protection on farmer and local seed systems, the complete lack of regard for policy coherence stemming from environmental law and the human and indigenous rights framework, as well as the false promises of strengthening the local seed industry or the increase of seed imports in countries with strict plant variety protection laws. The inclusion of strong wording on UPOV protection in FTAs poses additional concerns due to the general architecture and compliance obligations that are usually present in the Agreements. Indeed,

signatory countries that do not comply with the terms of the FTA provisions that relate to the UPOV Convention, could be subject to arbitration and sanctions systems that are built into the FTA itself, including to a certain extent, the controversial investment settlement dispute mechanisms.

It is therefore paramount that all stakeholders are made aware of the underlying rationale of UPOV 1991 and its potential adverse effects. All countries need the full flexibility when drafting their seed and plant breeders' rights laws to promote a truly sustainable agriculture, agricultural biodiversity, and food security. No trade agreement should prevent them from designing a legal system that both protects breeders' innovation and enshrines farmers' rights to support the farmer seed system and its capacity for innovation, adapted to local conditions and needs.

APBEBES and Both ENDS therefore call for the EU to stop requiring developing countries to adopt the 1991 Act of the UPOV Convention through trade agreements or any other activities.

1

What is UPOV & its 1991 Act?

1.1 Fundamentals of Plant Variety Protection and the different UPOV Acts

Plant variety protection is a **bundle of exclusive rights awarded to its beneficiary for a limited time to create a temporary artificial monopoly over the use of the plant variety**. Some consider this artificial monopoly as a necessary tool to foster plant breeding innovation, others disagree¹. Plant variety rights give breeders control over their products by forbidding or restricting others from using, saving, exchanging, or selling protected varieties for the purposes of agricultural production, without the authorisation from the title holders².

These exclusive rights are given to **new, uniform, stable and distinct plant varieties, which excludes all traditional farmers' varieties, landraces and other types of diverse seed "populations"** that are found in farmer or local seed systems. At the same time, plant variety rights severely restrict the traditional practices of seed saving and prohibit the exchange and selling of protected varieties that are common in these seed systems. Yet, the existence and support of farmer and local seed systems is essential for food security and sovereignty worldwide, so much so that they have been upheld in the human rights' framework³.

As a type of intellectual property right, plant variety protection titles are granted through a specific law, negotiated at national or supra-national level. These laws determine the exact scope of protection awarded to titleholders, the conditions to be fulfilled to be granted the title, the margin of manoeuvre left to the subsequent users of the varieties, whether farmers or breeders, and procedural considerations. The concept of plant variety protection, also known as plant breeders' rights, has originated in different national laws in Europe in the early 20th century⁴, and was sanctified with the establishment of the **International Union for the Protection of New Varieties of Plants (known as "UPOV"**, the French acronym for the "Union Internationale

pour la Protection des Obtentions Végétales") through an international Convention adopted by six countries from Western Europe on December 2, 1961 in a Diplomatic Conference in Paris⁵. The UPOV Convention has since then been amended in 1972, 1978, and more comprehensively in 1991, with extremely detailed provisions. Each new Act has changed the bundle of rights awarded to titleholders, expanding the reach of protection, and further limiting the rights of other breeders and farmers to use the protected variety. In all UPOV Acts, plant varieties must be novel, distinct, uniform, and stable (the 'DUS criteria') to be eligible for protection. Furthermore, a variety is considered novel only if it has not been sold within a specific timeframe, solely in relation to its commercialisation on the formal market, notwithstanding whether it previously existed or not.

Before the entry into force of the 1991 Act of the UPOV Convention on 24th April 1998, countries had been free to **choose to adhere either to the 1978 or the 1991 Act of the Convention**. Many countries used this possibility. Today, countries like Argentina, Bolivia, Brazil, Chile, China, Colombia, Ecuador, Italy, Mexico, New Zealand, Nicaragua, Norway, Paraguay, Portugal, South Africa, Trinidad and Tobago, and Uruguay are all bound by the terms of 1978 Act⁶. In the European Union, Italy and Portugal have not ratified the 1991 Act of the Convention and remain bound by its 1978 Act, and Cyprus, Greece, Malta, and Luxembourg are not members of UPOV at all. However, plant variety protection titles awarded in the EU by the Community Variety Protection Office ("CPVO") under EU Regulation 2100/94⁸, which has direct effect in Member States, conform to the terms of the 1991 Act and cover these countries' national territories.

The **1991 UPOV Act is the farthest-reaching bundle of exclusive rights in plant variety protection**, granting breed-

ers control over more acts, and over more 'products', through the explicit inclusion of harvested material into the text and the creation of the concept of essentially-derived varieties. Under UPOV 1991, breeders and farmers (or any other person) producing or reproducing, conditioning for the purpose of propagation, selling, marketing, exporting, importing, or stocking the protected variety itself, but also varieties that are not clearly distinguishable from the protected variety, those whose production requires repeated use of the protected variety, or those that have been "essentially derived" from the protection variety, would all need the rightsholder's authorisation to do so. The 1991 Act considerably restricts farmers' traditional practices of seed saving by expanding the scope of protection to a considerably longer list of actions, removing the possibility for States to allow farmers to exchange, let alone sell seeds saved from protected varieties. Contrary to the past UPOV Acts, the scope of protection was indeed extended in 1991 to the "production or reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or other marketing, and stocking with protected [or essentially derived] varieties"⁹. This protection was extended to the harvested material obtained through the unauthorized use of seeds of the protected variety¹⁰. As a comparison, in the 1978 version of the Convention, the protection only extended to "the production for purposes of commercial marketing, the offering for sale, [and] the marketing" of protected varieties¹¹, and has thus not covered the use and the exchange of saved seeds.

However, the UPOV 1991 Act also provides for an optional exception that can be used by a State, "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" to "restrict the breeder's right 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 or an essentially derived variety"¹². This is the so-called "**farmers' privilege**" that may be guaranteed in national plant variety protection laws. Under the optional farmers' privilege, the sale and exchange of seed is prohibited by principle, and even where seed saving is allowed, it must consider the legitimate interest of the breeder. As a result, the use of seeds/propagation material is only allowed for certain crops and usually subject to royalty payments to the breeder, even though small farmers are often exempted from these payments. Additionally, "**acts done privately and for non-commercial purposes**" are a compulsory exception to breeders' rights recognised in conformity with the 1991 Act and can in theory be loosely defined in national laws. The interpretation of this exception by UPOV is nonetheless extremely narrow¹³. Indeed, UPOV bodies reject national draft laws that make room for local seed systems and traditional practices of seed exchange within farmers communities, as they have for instance done in the case of national provisions guaranteeing farmers' rights in the Malaysian national system¹⁴. Article 34(3) of the 1991 Act requires a new Member to present its legislation to the UPOV Council "to advise it in respect of the conformity of its laws with the provisions of this Convention." Only if the decision is positive (in conformity) can the country become a Member of UPOV 1991. To assess conformity, the UPOV Secretariat peruses the country's legislation, rejecting any clause that, in its view, is inconsistent

with its understanding of the 1991 Act, for example in the case of Malaysia.

Another major exception to the exclusivity of plant variety protection relates to **further research and breeding** efforts, which are completely allowed under the earlier Acts of the Convention and only partially allowed under the 1991 Act, since they would require an authorisation from the initial breeder if they lead to the development of an "essentially derived variety".

1.1.1 UNDERLYING ARGUMENTS OF UPOV 1991 PROMOTION

The protection awarded to new, uniform, stable and distinct plant varieties, and their essentially derived varieties under the UPOV Convention **impacts local farmer seed systems by limiting the possibility of farmers to use, save, exchange, and sell protected varieties**, and restricting further plant improvement and agricultural biodiversity management by farmers. According to the European Commission and the UPOV itself, its membership would lead to "(a) increased breeding activities, (b) greater availability of improved varieties, (c) more new varieties, (d) diversification of the types of breeders (e.g., private breeders, researchers), (e) supporting the development of a new industry sectors, and (f) improved access to foreign plant varieties and enhanced domestic breeding programmes"¹⁵.

At its core, the heavy promotion of the 1991 UPOV Act in European trade policy is clearly driven by strong European seed industry interest. In a European Commission Staff Working Document¹⁶ reporting on the protection and enforcement of intellectual property rights in third countries dated as of 8th January 2020, the Commission recognises that "as far as the protection and enforcement of plant variety rights are concerned, EU breeders face problems which can be grouped as follows: lack of effective plant variety rights legislation (in accordance with the 1991 Act of the UPOV Convention); absence of UPOV membership; difficulties in implementing effective administrative proceedings by designated national authorities; and lack of an effective system for the collection and enforcement of royalties at both judicial and administrative levels"¹⁷. The report goes on to state that "plant variety rights are frequently infringed. Prevalent examples include unauthorised exports/imports, packaging of harvested crops (e.g., grain, ware potatoes) for sale as propagating material, non-authorised use of farm-saved seeds and the sale of a protected variety under another name. Plant variety rights infringements endanger agricultural productivity, delay the introduction of improved varieties, reduce investments in plant breeding, compromises the quality of seeds, plants and fresh produce, provoke phytosanitary risks derived from clandestine activities and may be connected with criminal activities such as tax evasion, fraud, corruption and even labour exploitation". According to the European Commission perspective, one of the benefits of the inclusion of UPOV 1991 into the Comprehensive Economic and Trade Agreement with Canada is that "innovative plant varieties that can lead, for example, to better yields will be protected and are therefore likely to be introduced more quickly onto the Canadian market to the benefit of farmers and consumers"¹⁸.

However, the EU's arguments regarding the benefits of the UPOV System seem to be **based on false foundations**. The EU

Commission for instance cites a study conducted by Noleppa on the impact of UPOV membership, estimating the impact on the country's Gross Domestic Product (GDP) at around USD 5 billion per year, which is more than 2.5% of its national GDP¹⁹. A report²⁰ recently published by Searice, APBREBES and Fastenopfer, shows that these figures are absurd and misleading, because the study wants to establish a causal link between the increase in yield and UPOV membership, which obviously does not exist²¹. This is shown by the fact that for sweet potatoes, the crop with the highest yield increase reported in the UPOV study, not a single application for plant variety protection (PVP) had been filed with Vietnam's Plant Variety Protection Office (PVPO). An equally major shortcoming of the EU's argument is that it does not consider possible negative impacts, e.g., on farmers' seed systems, agrobiodiversity, and food security.

1.1.2 ADVERSE EFFECTS OF UPOV 1991 ON SEED SYSTEMS²²

The consistent advocacy of UPOV 1991 provisions is based on the **contested premise that strong protection of plant varieties develops the national plant breeding sector**, and as a result leads to more sustainable and productive agricultural production. First, by the very nature of the conditions that ought to be fulfilled by the varieties to be protected under any of the UPOV Convention (i.e., distinctness, uniformity, and stability), this type of *sui generis* protection *de facto* excludes the fruits of farmer selection efforts, farmer-led or inclusive participatory plant breeding. It also excludes other plant breeding efforts that aim to develop more diverse plant varieties and populations adapted to local agroecological or low-input conditions. It thus most of all caters to the needs of industrial plant breeding geared towards input-intensive agriculture.

Furthermore, the promises of UPOV regarding the increase of seed availability, higher yields or the development of a diversified new breeding sector are often mistakenly associated with the introduction of a PVP law in line with UPOV 91 and do not justify for its 1991 implementation²³. These promises are rather undermined by the fact that these claims, along with the lack of transparency of the organisation, have been heavily criticised and alleviated in literature and by civil society actors²⁴. The promotion of the UPOV 1991 in countries with little to no national plant breeding and seed industry would indeed not necessarily lead to the sector's development, as industrial plant breeding is a resource and time-intensive process that requires considerable influx of money and know-how, requiring other alternative types of indirect support. This reality is evident in the case of African Intellectual Property Organisation ("OAPI") countries²⁵, where the introduction of UPOV 91 was a failure²⁶. There is no evidence that the adoption of a UPOV system of plant breeders' rights positively influences seed imports²⁷. But there are indications that show that a national seed sector can very well develop outside of the UPOV realm²⁸.

There is also growing evidence of the adverse effects of UPOV 1991 on food and seed security, but also on biodiversity conservation²⁹ ³⁰. One of the main reasons for this is the negative impact that the UPOV system has on the farmer seed sys-

tem. After all, it is farmer seed systems that contribute a major part of food security in the countries of the South, while maintaining and developing agrobiodiversity.

Policy coherence and congruence with other international agreements, but also internal EU policies also need to be highlighted when reflecting on the promotion of the 1991 UPOV Act in third countries, especially having regard to their stages of economic development, truly assessing the access and suitability of intellectual property rights regimes for local farmers³¹. At the international level, ample literature has highlighted the discrepancies between UPOV 1991 and the human and indigenous rights framework³², the notion of farmers' rights under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)³³, the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), the Convention on Biological Diversity (CBD) and the Sustainable Development Goals (SDG). The international legal framework has evolved through the adoption of the CBD, ITPGRFA and UNDROP, raising awareness that a sustainable seed policy needs to promote both the formal and the farmer managed seed systems³⁴. To such incongruities, one should add the need to assess how the promotion of such a restrictive take on informal seed systems and seed security can be in line with the underlying goals of conserving and sustainably managing crop biodiversity, as enshrined in the EU Biodiversity Strategy and the Farm to Fork Strategy, both part of the new European Green Deal announced in May 2020³⁵.

2

PVP & UPOV 1991 in EU Foreign Trade Policy, the State of Play

All States that are members of the World Trade Organisation (“WTO”)³⁶, except least developed countries, ought to “provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof”³⁷. The *sui generis* system refers to plant variety protection, of which the UPOV Conventions are just examples of. Scientific literature has abundantly shown that not only all the different Acts of the UPOV Convention could be viewed as “effective” protection under the terms of the WTO TRIPS Agreement, but also that complete alternatives could also be envisaged successfully³⁸. Still many countries are led to believe that adherence to the 1991 Act of the UPOV Convention is the only option they have to establish such an “effective *sui generis* system”, even though for instance Least Developed Countries are not required to provide plant variety protection until 1st July 2034³⁹, a period in which they have a legal right to extend such timeframe⁴⁰, and others are free to develop their own *sui generis* system.

The pressure to provide *sui generis* plant variety protection under the terms of the UPOV Convention is fuelled by widespread advocacy of the Act by the UPOV organisation itself, but also by the European Union and some of its Member States, whether through soft training tools, consultancy services, or through strong negotiating stances in regional or bilateral trade and/or association agreement talks. **Trade agreements** are built upon the reciprocity principle, which applies to cited goods, but also services, and extends to trade-related regulatory issues such as competition, public procurement, or intellectual property rights. **Economic Partnership Agreements** are “lighter” preferential trade agreements with trading rules and common standards, but with less reciprocity than found in more comprehensive trade agreements⁴¹. **Association agreements** do not merely cover trade elements, but reach farther in the range of topics covered, with larger “non-mercantilist” goals⁴², as they are concluded with countries with close historical links to the EU, or those who wish to engage in an EU accession process. These three types of agreements, which all remove or reduce customs tariffs in bilateral trade, are different than simple **Partnership or Cooperation agreements**, which provide a

general framework for bilateral economic relations, but leave customs tariffs as they are.

The inclusion of strong wording on UPOV protection in Trade, Association and Economic Partnership Agreements poses additional concerns due to the **general architecture and compliance obligations** that are usually present in such Agreements. Indeed, signatory countries that do not comply with the terms of FTA provisions that relate to the UPOV Convention, whether requiring cooperation and or protection under one of its specific Acts, could be subject to the **arbitration and sanctions systems** that are built into the Trade Agreements, like to State to State dispute settlement mechanisms, or the progress reports drawn up in Association Agreements, or the monitoring mechanisms included in the Economic Partnership Agreements. The lack of protection of plant varieties under UPOV terms in any given national legal order cannot present a violation of the UPOV Convention on its own. When such protection level is required by the terms of a trade agreement, the latter’s dispute mechanisms will enter into play, allowing for instance a country to raise the tariffs on its trading partner until it joins the UPOV Convention or changes its laws to comply with the Convention’s 1991 Act, depending on the terms of the trade agreement. Furthermore, if accession the 1991 UPOV Act is required by the trade agreement, the trading country will also not be allowed to withdraw from the UPOV Convention without withdrawing from or amending the trade agreement itself in parallel, with the range of severe disruptions that such actions would be accompanied by. Requiring adherence to the UPOV Convention through a trade agreement has thus more far-reaching consequences than a unilateral desire from a country to join the Convention by its own accord.

To provide a comprehensive picture of the advocacy made by the EU for the UPOV Convention system in its foreign trade policy, this section will thus methodically analyse (1) the different provisions found in the various trade, association and partnership agreements relating to intellectual property rights that are in force, have been signed or concluded at the time of writing, and (2) those that are still being negotiated by the EU.

2.1. PVP & UPOV 1991 in Trade Agreements Ratified, Signed or Concluded

2.1.1 FREE TRADE AGREEMENTS

A. FULLY APPLICABLE

SOUTH KOREA

The FTA linking EU Member States and the **Republic of Korea (South Korea)**⁴³ entered into force on 14th May 2011, under provisional application of certain provisions that do not relate to intellectual property rights and has been formally fully ratified in December 2015.

Chapter 10 of the FTA is dedicated to IPR, and its article 10.39 specifically focuses on plant variety protection:

Article 10.39 Plant varieties

Each Party shall provide for the protection of plant varieties and comply with the International Convention for the Protection of New Varieties of Plants (1991).

It should be noted that the Republic of Korea has been a member of UPOV 1991 since 7th January 2002, which also explains why the language used in the Agreement is strong, even though it does not refer to cooperation or transparency, as done in other FTAs, as we will see below.

SINGAPORE

The **EU-Singapore** trade and investment protection agreements⁴⁴ were signed on 19 October 2018. The European Parliament gave its consent to the agreements on 13 February 2019, while EU Member States endorsed the trade agreement on 8 November 2019, allowing the Treaties to enter into force on 21 November 2019. As Singapore had been a signatory to the 1991 Act of the UPOV Convention since 2004, the trade agreement once again refers to the 1991 UPOV Act, albeit in a less assertive fashion, simply reaffirming obligations (not ensuring protection or the promotion of the Act) and recalling the exceptions to breeders' rights that can be introduced to allow farmers' (restrictive) use of protected varieties:

Article 10.35 International Agreements

The Parties affirm their obligations under the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as last revised in Geneva on 19 March 1991, including their ability to implement the optional exception to the breeder's right, as referred to in paragraph 2 of Article 15 of that Convention.

By only "affirming obligations", rather than ensuring their respect through the use of the verb "shall", the EU-Singapore Agreement creates a lighter lock-in situation, as it means that both Parties are not bound by the obligations under the specific

article, should they decide to unilaterally withdraw from the international agreement in question, i.e., the UPOV Convention. This wording thus allows for policy change at national level with regards to plant variety protection.

JAPAN

The EU and **Japan's** Economic Partnership Agreement (JEFTA) entered into force on 1 February 2019. As both countries were already signatories to UPOV 1991, and each have a strong formal seed industry with several national companies of international reach. The provisions regarding the protection of plant varieties are thus quite strongly worded:

Article 14.3 §2 The Parties affirm their commitment to comply with the obligations set out in the international agreements relating to intellectual property to which both Parties are party to at the date of entry into force of this Agreement, including the following: [...] the International Convention for the Protection of New Varieties of Plants, done at Paris on 2 December 1961 (hereinafter referred to as "the 1991 UPOV Convention").

Article 14.6. For the purpose of further promoting transparency in the administration of its intellectual property system, each Party shall make all reasonable efforts to take appropriate available measures to: (a) publish information on, and make available to the public information contained in the files on: [...] (iv) registrations of new varieties of plants".

Article 14.38 New varieties of plants. Each Party shall provide for the protection of new varieties of all plant genera and species in accordance with its rights and obligations under the 1991 UPOV Convention.

Even more than a cooperation to protect and promote the protection of plant varieties under UPOV 1991, the two signatories enshrine a full duty to protect new varieties under its terms, and to set up a transparent system listing the varieties protected in their territory. For the European Union, this tool is the CPVO Variety Finder⁴⁵.

VIETNAM

The **EU-Vietnam** Free Trade Agreement was signed on 30 June 2019, published on the Official Journal of the EU on 12 June 2020⁴⁶, and entered into force on 1st August 2020⁴⁷. The FTA includes a substantial IPR chapter in which Vietnam has committed to a high level of protection, going beyond the standards of the TRIPS Agreement. As the country has been a signatory to the 1991 Act of the UPOV Convention since 2006 (forced to do so by the 1999 IPR Agreement signed between the country and Switzerland), the FTA contains assertive language with regards to UPOV protection:

Article 12.42 Plant Varieties Rights

The Parties shall protect plant varieties rights in accordance with the International Convention for the Protection of New Varieties of Plants, adopted in Paris on 2 December 1961, as last revised in Geneva on 19 March 1991, including the exceptions to the breeder's right as referred to in Article 15 of that Convention, and cooperate to promote and enforce these rights.

The provision's terms are even more restrictive than other existing wording, as it contains an obligation to protect varieties written in absolute terms, along with a reference to the enforcement of these rights, which is absent from applicable clauses in other FTAs. Interestingly, it refers to the so-called breeders' exception and farmers' privilege, just like the EU Agreement with Colombia, Peru & Ecuador.

B. PROVISIONALLY APPLIED

ANDEAN: EU Columbia-Peru-Ecuador Trade Agreement

Although EU efforts to negotiate a region-to region agreement with the **ANDEAN Community** (CAN⁴⁸) were not successful, a more limited Trade Agreement has come out of the negotiations. The EU **Colombia-Peru** Trade Agreement⁴⁹ has been provisionally applied with Peru since 1 March 2013 and with Colombia since 1 August 2013. On 1 January 2017, **Ecuador** joined the trade agreement.

Although the Agreement is currently only provisionally applied, its provisions on UPOV are in force⁵⁰. The provisional application of the Trade Agreement is a declaration made by one of the Parties to the Agreement to implement its provisions while the Agreement awaits formal ratification. Such provisional application does not have complete binding force under public international and national law without ratification. However, if the Agreement's provisions on State-to-State dispute settlement are also provisionally applied and cover the provisions that relate to IPR protection in general, and plant variety protection in particular, such provisional application may have significant effects on State obligations. A failure to comply with the UPOV provision could thus be enforced during the provisional application period.

Within the Agreement's chapter on Intellectual Property, there are interesting articles explicitly providing the opportunity to continue to use the flexibilities under existing multilateral intellectual property agreements, thereby allowing for any effective *sui generis* plant variety protection system to be carved out at national level (Art 197), and providing for caveats to recognise rights under the Convention on Biodiversity (Art 201), which includes inter alia the rights of indigenous and local communities and the regulation of access to traditional knowledge.

Article 197 1. Having regard to the provisions of this Title, each Party may, in formulating or amending its laws and regulations, make use of the exceptions and flexibilities permitted by the multilateral intellectual property agreements, particularly when adopting measures necessary to protect public health and nutrition, and to guarantee access to medicines.

Art. 201 3. Subject to their domestic legislation, the Parties shall, in accordance with Article 8(j) of the CBD 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 conditioned to the prior informed consent 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.

4. In accordance with Article 15 paragraph 7 of the CBD, the Parties reaffirm their obligation to take measures with the aim of sharing in a fair and equitable way the benefits arising from the utilization of genetic resources. The Parties also recognise that mutually agreed terms may include benefit-sharing obligations in relation to intellectual property rights arising from the use of genetic resources and associated traditional knowledge.

6. The Parties shall cooperate, subject to domestic legislation and international law, to ensure that intellectual property rights are supportive of, and do not run counter to, their rights and obligations under the CBD, in so far as genetic resources and associated traditional knowledge of the indigenous and local communities located in their respective territories are concerned.

While Article 197 would in theory allow for any effective *sui generis* plant variety protection system to be carved out at national level, and Article 201 ensures greater regard for local farming communities' practices and knowledge, the Agreement directly refers to UPOV 1991, with ambiguous language.

Article 232: The Parties shall cooperate to promote and ensure the protection of plant varieties based on the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as 'UPOV Convention'), as revised on 19 March 1991, including the optional exception to the right of the breeder as referred to in Article 15(2) of such Convention.

The unique qualifier of the obligation stemming from the article is to "cooperate", obliging the countries to start an open-ended collaboration process to "ensure protection" under UPOV 1991. It should be noted that while **Peru** is a signatory to the 1991 Act of the UPOV Convention, both **Colombia and Ecuador** have ratified the 1978 Convention, respectively in 1996 and 1997⁵¹.

However, the provision is not interpreted in this fashion by the European Commission, which reads the provision as requiring Parties to "ensure" protection under UPOV 1991, rather than cooperating to ensure protection. As a result, the European Commission for instance considers Ecuador's Ingenuity Code to be in violation of its commitment in the EU FTA to ensure protection in line with the UPOV 1991 Act⁵². Indeed, the country is to this date only a signatory to the 1978 UPOV Convention. According to the European Commission, the time limits for the protection ought to be longer than 18 years for vines and trees and 15 years for the rest of the crops, just as the fact that breeders' rights should be awarded for all crops and not only for ornamentals, and finally, farmers should not be able to propagate a

protected variety without the authorisation of the breeder and to exchange propagating material with other farmers without authorisation. It is thus clear that the European Commission is asking Ecuador to provide protection levels according to the 1991 Act of the UPOV Convention, and not its 1978 Act; thereby stretching the obligation to “cooperate” into an obligation to accede to UPOV 1991 standards.

CANADA

The Comprehensive Economic and Trade Agreement (CETA)⁵³ between the European Union and **Canada**, which is provisionally applied since 21 September 2017, contains a commitment to UPOV 91:

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.

The promotion and reinforcement of the UPOV 1991 Act is thus enshrined as a clear obligation in CETA, which does not directly affirm a need to protect plant varieties under UPOV 1991. For Canada, it nonetheless signalled a commitment to strengthen the protection of plant varieties based on UPOV 1991 in its national legislation. The national Plant Breeders Rights Act was thus amended in February 2015, and Canada formally became a signatory to the 1991 UPOV Convention in July of the same year. The adhesion triggered a nation-wide campaign by Canadian Farmers to “save [their] seed”, as the Act was considered to be “turning farmers’ age-old right to save and use farm saved seed into a privilege that can be taken away by regulation”⁵⁴.

2.1.2 PARTNERSHIP & COOPERATION AGREEMENTS

The EU has also negotiated and signed so-called **Partnership and Cooperation Agreements**, which are generally designed as a first step to facilitate the trade of goods between the regions, and put emphasis on cooperation and capacity-building, rather than legislative alignment. Economic Partnership Agreements (EPA’s) signed by the EU, especially those covering the African continent, do not directly address intellectual property standards. Other Partnership Agreements, mostly signed with Middle Eastern and Central Asian countries, address the topic of intellectual property rights and plant variety protection more directly.

A. ECONOMIC PARTNERSHIP AGREEMENTS WITHOUT FORMAL REQUIREMENTS ON INTELLECTUAL PROPERTY

Most of the EPA’s signed with countries of the African continent put the emphasis on raising capacity and cooperation between signatories, either leaving the subject of intellectual property standards outside of the Agreement’s scope, or main-

taining the topic open for further negotiation, in so-called “**rendezvous clauses**”⁵⁵.

In Agreements signed with **West African** countries, such as the Ivory Coast⁵⁶, in provisional application since December 2016 for example, Article 44 states that “*Parties will cooperate to facilitate all the necessary measures leading to the conclusion as soon as possible of a global EPA between the whole West Africa region and the EC in the following trade in services and electronic commerce, investments, competition and intellectual property rights*”. The EPA with Ghana⁵⁷, provisionally applied since September 2016, also replicates the exact wording as the Ivorian Agreement in its Article 44.

A similar clause is also included in Article 3 of the EPA signed between the EU and **East African Community**⁵⁸, which was signed by all EU Member States, Kenya and Rwanda in September 2016, but not yet by other EAC members (Burundi, Tanzania, Uganda, and South Sudan).

When it comes to **Central Africa**, only the EU and Cameroon have ratified the interim EPA⁵⁹ which was concluded in December 2007, respectively in 2013 and 2014, and which includes a clause on the “continuation of negotiations on intellectual property” (Article 58).

The Economic Partnership Agreement signed on 10 June 2016 with the **South African Development Community Group** comprising of Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini (formerly Swaziland)⁶⁰ states in its Article on cooperation on the protection of intellectual property rights, that the “*Parties may consider entering into negotiations on the protection of IPRs in future, and the SADC EPA States have as their ambition, and will endeavour, to negotiate as a collective. Should negotiations be launched, the EU will consider including provisions on cooperation and special and differential treatment*”.

The **Eastern & Southern Africa EPA**⁶¹, which is at the time of writing provisionally applied for 5 countries: Comoros, Madagascar, Mauritius, Seychelles & Zimbabwe. The clauses do not directly mention plant variety protection, but rather ensure “*support for capacity building for the development of legal frameworks responsive to Agreements on trade and investments*” and have recently been activated. Indeed, negotiations on a new Partnership Agreement with the so-called “ESA5” kicked off on 2nd October 2019, with the goal of deepening the existing Interim EPA. The Sustainability Impact Assessment supporting the negotiations does not mention the UPOV Convention or plant variety protection as such, but rather maintains a general positive stance on raising intellectual property standards in signatory countries⁶².

Outside of the African continent, there are also Partnership Agreement that do not even include rendezvous clauses, but rather list intellectual property rights in the general **exclusion clause** which sets out the scope of the EPA, such as the Interim Agreement covering so-called **Pacific States** (applied by Papua New Guinea, Fiji, Samoa, and the Solomon Islands at the time of writing)⁶³.

B. PARTNERSHIP AGREEMENTS WITH PROVISIONS ON PLANT VARIETY PROTECTION

Although IPR provisions are generally included as “rendezvous clauses” to be negotiated at a later stage, especially those signed

with countries from the African continent, other Partnership Agreements include stronger provisions on intellectual property and plant variety protection. Such is the case of the **Cariforum EPA**⁶⁴, which directly refers to **plant variety protection standards**:

Article 149 Plant varieties

1. The EC Party and the Signatory CARIFORUM States shall have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material.

2. The EC Party and the Signatory CARIFORUM States shall provide for the protection of plant varieties in accordance with the TRIPS Agreement. In this respect, they shall consider acceding to the International Convention for the Protection of New Varieties of Plants — UPOV (Act of 1991).

The language is considerably different than other clauses present in EU FTA's and Association Agreements, since it specifically refers to a limited exception to allow farmers to save, use and exchange (but not sell) propagating material. It also simply requires "consideration for accession to UPOV 1991", when Parties comply with their sole legal obligation, which is to provide for *sui generis* (or patent) protection of plant varieties under TRIPS Article 27.3. The EPA also interestingly has a subsequent provision on genetic resources and biodiversity, which contains assertive language on the protection of traditional knowledge held by indigenous and local communities, within the intellectual property rights chapter of the Agreement.

Some Partnership Agreements include **strong language with regards to plant variety protection**. For example, the "Comprehensive and Enhanced Partnership Agreement" signed between the EU and **Armenia**⁶⁵, in force since January 2018, contains strong provisions comparable to those of the aforementioned free trade agreements. The Agreement also contains a specific clause on plant variety protection, which requires the PVP law to be in accordance with the UPOV Convention, without mentioning a specific Act (although referring to Article 15 of the 1991 Act) or requiring adhesion to the UPOV Convention itself.

Article 253 Plant varieties

1. Each Party shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants ('UPOV'), including the exceptions to the breeder's right as referred to in Article 15 of that Convention, and cooperate to promote and enforce those rights.

2. For the Republic of Armenia, this Article shall apply no later than three years after the entry into force of this Agreement.

With regards to **Iraq**⁶⁶, a country which is not a signatory to any of the UPOV Conventions, the Partnership and Cooperation Agreement binding the country and the EU since 2012 does not require accession to UPOV 1991 as such. However, in an odd twist of legal terminology, rather requires the country (as well as EU Member States) to comply with the terms of the 1991 Act within the three years of the Agreement's entry into force.

Article 60 Nature and scope of obligations

1. Pursuant to the provisions of this Article and of ANNEX 2 to this Agreement, Iraq shall adopt, within five years of the entry into force of the Agreement, legislation in order to ensure adequate and effective protection of intellectual, industrial and commercial property rights according to the highest international standards including the rules set by the Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement (hereinafter referred to as the 'TRIPS Agreement'), as well as effective means of enforcing such rights.

2. Within three years of the entry into force of the Agreement, Iraq shall accede to the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 2 of ANNEX 2 to this Agreement to which Member States are parties or which are de facto applied by Member States according to the relevant provisions contained in these conventions.

3. Within three years of the entry into force of the Agreement, Iraq shall comply with the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 3 of ANNEX 2 to this Agreement to which one or several Member States are parties or which are de facto applied by one or several Member States according to the relevant provisions contained in these conventions.

4. The implementation of this Article and of ANNEX 2 to this Agreement shall be regularly reviewed by the Parties. In preparing its legislation or if problems in the area of intellectual, industrial and commercial property affecting trading conditions were to occur, urgent consultations will be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions. In no later than three years from the entry into force of this Agreement, the Parties will enter into negotiations for more detailed IPR provisions.

ANNEX 2 INTELLECTUAL PROPERTY RIGHTS Intellectual, industrial and commercial property conventions referred to in Article 60.

3. Paragraph 3 of Article 60 concerns the following multilateral conventions with which Iraq shall comply with: 3.7 International Convention for the Protection of New Varieties of Plants (Geneva Act, 1991) (known as 'UPOV').

In another Partnership and Cooperation Agreement signed with **Kazakhstan**⁶⁷, in force since 4th February 2016, provisions on plant variety protection also mention the UPOV Convention, but do not establish any firm obligation for the country to accede to this specific system, or comply with its rules:

Article 96 Plant varieties

The European Union reaffirms its commitment to the International Convention for the Protection of New Varieties of Plants (the UPOV Convention), to which the Republic of Kazakhstan shall make reasonable efforts to accede.

It should be noted that, despite these Agreements signed with the EU, at the time of writing, neither Armenia, nor Iraq or Kazakhstan have acceded to the UPOV Convention system.

2.1.3 ASSOCIATION AGREEMENTS

Association agreements concluded by the EU touch upon a wide diversity of both mercantilist and non-mercantilist topics, such as justice and home affairs, and thus have a considerably greater reach than agreements that aim to facilitate trade and investment. Association agreements are traditionally negotiated and signed with countries that either have strong historical ties with the Union (as former colonies for instance), or those that target future adhesion to the EU. As such, these agreements are not solely a matter of trade policy, but generally also form an integral part of the European Neighbourhood Policy framework. In contrast to Trade Agreement though, Association Agreement do not have the same State-to-State dispute settlement instruments, but rather rely on a so-called “Association Council”, or alternatively on arbitration.

Most of the Association Agreements concluded by the EU aim at the “**approximation of laws**” between the national legal order of the signatory State moving towards the European “*acquis communautaire*”, encompassing all EU rules and regulations. The approximation or alignment of laws required by Association Agreements includes competition rules and intellectual property standards, requiring the Contracting State to provide a similar level of protection of intellectual, industrial, and commercial property rights than the one provided for in the EU. Most of these Association Agreements contain strong provisions that relate to intellectual property rights standards and their enforcement, either through a formal process of “approximation of laws”, whereby the Contracting State needs to transpose all EU laws and standards into its national legal order, or through obligations to align national laws to certain standards. Association agreements indeed ubiquitously request the signatory State to ratify and/or accede to several international agreements, which at times specifically include the 1991 UPOV Act, or offering the choice between the 1978 and 1991 Acts of the UPOV Convention. The implementation and enforcement of such “approximation” are monitored through a specific programme set up by the Agreement itself, generally through the publication of a yearly report on the progress made by the Contracting State.

A. WESTERN BALKANS

In the framework of the stabilisation and association process in the **Western Balkan** region, the EU has progressively concluded bilateral Agreement that are referred to as “Stabilisation and Association Agreements”. These instruments do not solely target economic development, but also aim at the political stabilisation of the countries in the region and are *de facto* legal instruments that align national laws to the EU *acquis* and ensure progressive integration into the EU market.

With regards to plant variety protection, all Association and Stabilisation Agreement concluded between the EU and Western Balkan countries require accession to the 1991 Act of the UPOV Convention and grants quite important powers to the Stabilisation and Association Councils established by the Agreement in case of non-compliance. All Agreements, concluded with **North Macedonia**⁶⁸ (Article 71 & Annex 7, in force since

2004), **Albania**⁶⁹, (Article 73 & Annex 5, in force since 1st April 2009), **Montenegro**⁷⁰ (Article 75 & Annex 7, in force since April 2010), **Serbia**⁷¹ (Article 75 & Annex 7, in force since October 2013), **Bosnia & Herzegovina**⁷² (Article 73 & Annex 7, in force since June 2015) and **Kosovo**⁷³ (Article 77 & Annex 7, in force since April 2016), read as follows:

Article xxx Intellectual, industrial and commercial property

1. Pursuant to the provisions of this Article and Annex V, the Parties confirm the importance that they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights.

2. Albania shall take all the necessary measures in order to guarantee no later than four years after the date of entry into force of this Agreement a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights.

3. Albania undertakes to accede, within four years after the date of entry into force of this Agreement, to the multilateral Conventions on intellectual, industrial and commercial property rights referred to in paragraph 1 of Annex V. The Stabilisation and Association Council may decide to oblige Albania to accede to specific multilateral Conventions in this area.

4. If problems in the area of intellectual, industrial and commercial property affecting trading conditions occur, they shall be referred urgently to the Stabilisation and Association Council, at the request of either Party, with a view to reaching mutually satisfactory solutions.

ANNEX V Intellectual, industrial and commercial rights

Article xxx (3) concerns the following multilateral Conventions to which Member States are Parties, or which are de facto applied by Member States [...]:

- *International Convention for the Protection of New Varieties of Plants (UPOV Geneva Act, 1991)*
- *alternative wording: International Convention for the Protection of New Varieties of Plants (UPOV Convention, Paris, 1961, as revised in 1972, 1978 and 1991).*

As a result of these stringent obligations put upon signatory States, it should be noted that Serbia acceded to the Convention's 1991 Act in 2013, as did North Macedonia in 2011, Montenegro in 2015, and Bosnia Herzegovina in 2017. The Republic of Moldova has been an UPOV Member, bound by its 1991 Act since 1998, as Albania has been since 2005. Kosovo is not yet a member of the UPOV Convention.

B. EURO-MEDITERRANEAN & CENTRAL ASIA

Other agreements do not directly mention such “approximation of laws” in view of EU accession, but still require **legislative alignment** with the 1991 Act of the UPOV Convention in all signatories through a general provision on intellectual property right protection, and relevant annexes. Although the difference is a very subtle one, the notion of alignment provides more flexibility to the signatory States than the approximation process, which is also why there are some differences in the text of the

different Association Agreements signed with countries of the Mediterranean and Central Asian regions. They nonetheless all require formal accession to the UPOV system, whether explicitly its 1991 Act, or with slight deceitful flexibility, since the UPOV Council has in practice required accession to the 1991 Act since its entry into force in 1998.

Alignment with regards to plant variety protection is for instance required in all **Euro-Mediterranean Association Agreements**, in the form of mandatory accession to the 1991 Act of the UPOV Convention. The only exception is the Agreement signed with the state of **Israel**⁷⁴ in June 2000, whereby the Parties only “confirm the importance they attach to the obligations arising from” the 1991 Act of the UPOV Convention, since the country has been a member of UPOV since 1979.

The Agreement with **Tunisia**⁷⁵, the first of the Euromed Agreements, having entered into force in March 1998, has set the scene for all the other Agreements concluded by the EU in the region, using strong terminology with regards to intellectual property rights and plant variety protection. The Tunisian Agreement, clearly requires accession to the 1991 Act of the UPOV Convention:

Article 39

1. *The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards. This shall encompass effective means of enforcing such rights.*

2. *Implementation of this Article and of Annex 7 shall be regularly assessed by the Parties. If difficulties which affect trade arise in connection with intellectual, industrial and commercial property rights, either Party may request urgent consultations to find mutually satisfactory solutions.*

ANNEX 7 relating to intellectual, industrial and commercial property.

1. *By the end of the fourth year after the entry into force of the Agreement, Tunisia shall accede to the following multilateral conventions on the protection of intellectual, industrial and commercial property:*

- *International Convention for the Protection of the New Varieties of Plants (Act of Geneva, 1991).*

Tunisia has acceded to the 1991 Act of the UPOV Convention on 31st August 2003. Negotiations for a Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Tunisia were launched on 13 October 2015. Negotiating rounds have taken place in April 2016, May 2018, and December 2018, and have been on hold since then. The text proposed by the EU on plant variety protection unsurprisingly establishes an obligation to protect plant varieties under the terms of UPOV 1991, as well as an obligation to cooperate on the promotion and enforcement of these rights⁷⁶.

The Euromed Agreement with **Morocco**⁷⁷, in force since 18th March 2000, uses the exact same terminology as the Tunisian Agreement, requiring Morocco to accede to the 1991 Act of the UPOV Convention by the end of the fourth year of the Agreement's entry into force (Article 39 & Annex 7). As a result, Morocco has become a signatory to UPOV 1991 since 8th October 2006. Negotiations for a Deep and Comprehensive Free

Trade Area (DCFTA) between the EU and Morocco were launched on 1 March 2013. Four negotiating rounds have taken place so far, the most recent in April 2014, but negotiations have since then been put on hold.

Other Euro-Mediterranean Agreements signed between the EU and **Egypt**⁷⁸, in force since 1st June 2004, with **Jordan**⁷⁹, in force since May 2002, with **Algeria**⁸⁰, in force since 1st September 2005, **Lebanon**⁸¹, in force since 30th May 2006, use the exact same terminology as the Tunisian Agreement, requiring accession to the 1991 Act of the UPOV Convention by the end of the fourth year for the former (Article 37 & Annex 6 of the Agreement with Egypt), and by the end of fifth year of the Agreement's entry into force for the latter three countries (Article 56 & Annex 7 of the Agreement with Jordan; Article 44 & Annex 6 of the Agreement with Algeria; Article 38 & Annex 2 of the Agreement with Lebanon).

It should be noted that while Jordan became an UPOV Member in October 2004, and Egypt in December 2019, neither Algeria nor Lebanon have acceded to the Convention at the time of writing. It is also interesting to note that the obligation to adhere to the 1991 Act of the UPOV Convention, which is clearly put-upon EU Member States along with its trading partners in a number of Agreements, such as the one signed with **Algeria**, has clearly not been respected by some EU Member States, which individually remain signatories to the 1978 Act of the Convention, even though the European Union is a signatory to the 1991 Act, as mentioned above.

Indeed, the Euromed Agreement signed with Algeria reads, in its Annex 6 that:

3. *By the end of the fifth year after the entry into force of this Agreement, Algeria and the European Community and/or its Member States shall, to the extent they have not yet done so, accede to, and ensure an adequate and effective implementation of the obligations arising from, the International Convention for the Protection of New Varieties of Plants (Geneva Act, 1991), known as 'UPOV'.*

Parallel provisions can also be found in the Agreement signed with **Azerbaijan**⁸², which requires the Republic to accede to the 1991 Act of the UPOV Convention, without a replicated obligation for EU Member States, and no flexibility with regards to the UPOV Act to which to adhere to, contrary to the Association Agreement signed with Chile, examined later in this paper. As a result of the EU Association Agreement, which came into force in 1999, Azerbaijan has become an UPOV Member bound by its 1991 Act in December 2004.

CHAPTER VI Intellectual, Industrial and Commercial Property Protection Article 42

1. *Pursuant to the provisions of this Article and of Annex II, the Republic of Azerbaijan shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by the end of the fifth year after the entry into force of this Agreement, for a level of protection similar to that existing in the Community, including effective means of enforcing such rights.*

2. By the end of the fifth year after entry into force of this Agreement, the Republic of Azerbaijan shall accede to the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 1 of Annex II to which Member States are parties or which are de facto applied by Member States, according to the relevant provisions contained in these conventions.

ANNEX II Intellectual, Industrial and Commercial Property Conventions Referred to In Article 42

1. Paragraph 2 of Article 42 concerns the following multilateral conventions:

– International Convention for the Protection of New Varieties of Plants (UPOV) (Geneva Act, 1991).

Arguably the strongest language can be found in the Association Agreement signed between the EU and **Ukraine**⁸³, which also establishes a so-called “Deep and Comprehensive Free Trade Area (DCFTA)” between the EU and Ukraine, was negotiated between 2007 and 2011 and signed on 21 March and 27 June 2014. The DCFTA has been provisionally applied since 1 January 2016 and the Association Agreement formally entered into force on 1 September 2017 following ratification by all EU Member States. The Agreement contain a specific provision on plant varieties, like those found in free trade agreements, especially the CETA wording, which can also be explained to a certain extent by the fact that Ukraine has been a Party to UPOV 1991 since the year 1995:

Article 228 Plant varieties

The Parties shall co-operate to promote and reinforce the protection of plant varieties rights in accordance with the International Convention for the Protection of New Varieties of Plants of 1961 as revised in Geneva on 10 November 1972, 23 October 1978 and 19 March 1991, including the optional exception to the breeder's right as referred to in Article 15.2 of the said Convention.

C. CENTRAL & SOUTH AMERICA

Other association agreements put emphasis on cooperation with regards to intellectual property rights related legislation, without approximation or alignment with EU laws as such, but still also formally require plant variety protection levels aligned to the UPOV Convention, albeit with more flexibility as to the Act to be implemented. For instance, the EU's Association Agreement with **Chile**, which entered into force on 1st March 2005⁸⁴, require national protection to be granted to the level of either the 1978 or the 1991 Acts of the UPOV Conventions, and contains provisions regarding technical cooperation for legislative drafting to that effect:

Article 168 Objective

The Parties shall grant and ensure adequate and effective protection of intellectual property rights in accordance with the highest international standards, including effective means of enforcing such rights provided for in international treaties.

Article 170 Protection of intellectual property rights

In pursuance of the objectives set out in Article 168, the Parties shall:

(a) continue to ensure an adequate and effective implementation of the obligations arising from the following conventions:

(i) the Agreement on Trade-related Aspects of Intellectual Property, Annex 1C to the Agreement establishing the World Trade Organisation (“the TRIPS”).

(v) the International Convention for the Protection of New Varieties of Plants 1978 (“1978 UPOV Convention”), or the International Convention for the Protection of New Varieties of Plants 1991 (“1991 UPOV Convention”)

Negotiations for the “modernisation” of the EU–Chile Agreement have been in the making since 2017, with the EU's mandate for this process aiming to ensure “a high level of protection of intellectual property rights”, covering general provisions on different topics, including, and “commitments, where applicable, to adhere and/or comply with relevant multilateral agreements and conventions”⁸⁵.

The picture is quite different for the Association Agreement signed with **Central America**⁸⁶ countries, which is provisionally applied between the EU, Nicaragua, Honduras, Panama from 1st August 2013 and between the above parties and El Salvador and Costa Rica from 1st October 2013. The Agreement's chapter on intellectual property rights emphasises cooperation between the different countries, with a stated objective of providing “adequate and effective protection of intellectual property rights”, quite similarly to other agreements. However, its specific provision focusing on plant variety protection remains completely silent on the UPOV Convention. On the contrary, it solely mentions the TRIPS obligation to provide an ‘effective sui generis protection’ for plant varieties and goes further by mentioning farmers' rights to save, use and exchange “protected farm-saved seed”:

SECTION F Plant varieties Article 259 Plant Varieties

1. The Parties shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.

2. The Parties understand that no contradiction exists between the protection of plant varieties and the capacity of a Party to protect and conserve its genetic resources.

3. The Parties shall have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material.

Even though some minor linguistic variations exist between the plant variety protection provisions present in Trade Agreements signed by the EU with Canada, Japan, Singapore, Vietnam, Andean & South Korea, all of them require at minima cooperation between the Signatory States on the protection of plant varieties under the terms of the 1991 Act of the UPOV Convention, if not its full implementation. Economic Partnership Agreements signed with most of the countries and regional associations of the African continent, and the Pacific States do not address intellectual property rights, except for those envisaging such discussions in the future, and the nota-

ble exception of the CARIFORUM EPA, which directly addresses plant variety protection, albeit quite loosely compared to other applicable FTA & Association Agreements, especially through the recognition of exceptions to breeders' rights to allow farmers to save, use and exchange protected farm-saved seed or propagating material. Other Partnership Agreements signed with Armenia, Kazakhstan and Iraq do contain IPR Chapters and address plant variety rights, in a similar fashion than free trade agreements. The most definite language with regards to the adoption of UPOV 1991 standards is found in most of the Association Agreements signed by the EU, which leave much

less room for interpretation. All these Agreements, signed with numerous countries of the Western Balkans, Euro-Mediterranean, and Central Asia, directly require countries to accede to the UPOV System under its 1991 Act in a specific timeframe set in the Agreements' Annexes. On the other hand, Association Agreements signed with Chile, Nicaragua, Honduras, Panama, El Salvador, and Costa Rica remain more lenient and flexible, either leaving the possibility to be bound by the terms of the 1978 of the UPOV Convention, or simply requiring an "effective *sui generis* plant variety protection", potentially outside of the UPOV System.

2.2. PVP & UPOV 1991 in Trade Agreements in Negotiation

2.2.1 CENTRAL & LATIN AMERICA

A. MERCOSUR

Negotiations of the trade part of the Association Agreement between the EU and MERCOSUR countries (Argentina, Brazil, Uruguay, Paraguay) reached political conclusion on 28 June 2019, but still need to be signed and ratified by all Parties involved to enter into force.

The clause of the Agreement related to plant variety protection was subject to intensive debates and underwent significant changes during the negotiations. It should be noted that all the MERCOSUR countries are signatories to the 1978 Act of the UPOV Convention, even though they have ratified the Acts after 1991. The MERCOSUR Agreement's provision on plant variety protection underwent a positive change with regards to its inclusion of UPOV 1991, with more flexible wording than the text that was negotiated in 2017.

In December 2017, Article 9 of the Proposal Chapter on Intellectual Property Rights read as follows:

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

The draft version available in 2017 showed a dispute between the blocs regarding the final disposition of these clauses, and MERCOSUR argued that the final wording should not be mandatory, so that there would be no obligation for parties to adopt UPOV'91⁸⁷. This resulted in a considerable shift of language between the texts of 2017 and 2019. The agreement in principle

dated as of 1st July 2019⁸⁸, subject to final transcription, indeed now reads:

*Chapter on Intellectual Property, Sub-Section 6, Article X.41 International Agreements.
Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on December 2, 1961, as revised in Geneva on November 10, 1972, and October 23, 1978 (1978 UPOV ACT) or on March 19, 1991 (1991 UPOV ACT) and shall cooperate to promote the Protection of Plant Varieties.⁸⁹*

The article creates a direct obligation ("shall protect") under UPOV in general terms. However, it includes both UPOV standards: the one of 1978 and the one of 1991⁹⁰. The difference is essential because, as mentioned above, none of the MERCOSUR countries are a member of UPOV'91, but rather of the 1978 Act of the Convention. However, in its internal report on infringement issues, the European Commission itself seems to read this article of the trade agreement as "encouraging [MERCOSUR countries] to protect plant varieties in line with the UPOV 1991 standards"⁹¹.

B. MEXICO

Trade relationships between Mexico and the EU have long been regulated through the EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement signed in 1997⁹², which had a small section dedicated to intellectual and industrial property, with no reference to plant variety protection.

The trade relationship between the country and the Union has entered a new phase in 2016, with the decision to modernise the so-called "Global Agreement". An agreement in principle was announced on 21st April 2018 in the bilateral trade deal negotiated between the EU and Mexico⁹³, which includes a very strong version of the UPOV clause⁹⁴, identical to the one pro-

posed by the EU to New Zealand, and with an additional time constraint for its implementation by Mexico.

Article X.47 Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on March 19, 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15 of the said Convention, and co-operate to promote and enforce these rights.

A footnote attached to the provision states that “Mexico shall implement this provision not later than four years after the date of entry into force of this Agreement”, which means that, as a current signatory to the 1978 UPOV Act, Mexico would need to amend its national law to accede to the 1991 Act.

Negotiations on the FTA were undertaken at technical level and seem to have succeeded, as the closure of the agreement was communicated in April 2020 by the European Commission⁹⁵. The text will become binding only after its signature and ratification by all concerned parties.

2.2.2 ASIA & OCEANIA

A. INDONESIA

Since 2016, Indonesia has been negotiating a FTA with the European Union (“CEPA”)⁹⁶, with the objective to conclude a comprehensive economic and partnership agreement with a robust IPR Chapter, although negotiations had been temporarily put on hold before being recently resumed once more. Ten negotiation rounds have been held so far. The ninth session held on December 2019 reported open issues in the IPR chapter, namely on supplementary protection certificates for plant protection products, and plant variety protection. The latest negotiating round at the time of writing was held virtually from 22 February to 5 March 2021. Since the published meeting report does mention plant variety protection with regards to discussions on intellectual property rights, nothing is known about the substance and progress of these negotiations⁹⁷.

The EU proposal on the IPR Chapter aims to strengthen the IPR rules and regulations in the field of new plant varieties proposing adherence to UPOV 1991. The text initially proposed by the EU in December 2016⁹⁸ was indeed very far-reaching, especially considering the fact that Indonesia is not a signatory to any UPOV Conventions:

SUB-SECTION 7 Plant Varieties Article X.46

The Parties shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on 19 March 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15(2) of that Convention.

Even though the provision does not require formal accession to the UPOV Convention system as an official signatory, it requires

both parties to enact national legislation that is “in accordance with” the terms of the 1991 Act of the UPOV Convention.

The Sustainability Impact Assessment carried out by consultants for the European Commission did highlight that the right to seeds and the protection of new plant varieties were contentious issues in stakeholder consultations, where “small-hold farmers have expressed the view that they could be negatively impacted by new plant varieties provisions in the prospective FTA, [urging] negotiators to take into account the needs of small-hold farmers in Indonesia”⁹⁹.

B. PHILIPPINES

Currently regulated under the terms of the EU-Philippines Framework Agreement on Partnership and Cooperation¹⁰⁰, which does not touch upon intellectual property rights, the trade relationship between the two entities is currently being updated, with the launch of negotiations on an EU-Philippines trade and investment agreement on 22 December 2015.

Published in March 2017, the document detailing the EU proposal¹⁰¹ clearly shows the request to adhere to UPOV 1991 criteria, without strictly requiring adhesion to the Convention itself:

SUB-SECTION 7 Plant Varieties Article X.46

The Parties shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on 19 March 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15(2) of that Convention.

It should be highlighted that the Philippines is not a signatory to any of the UPOV Conventions, and that any obligation equating to that level of plant variety protection would be accompanied by significant changes in the national legal order. This has been highlighted in the **Draft Interim Report of the Sustainability Impact Assessment carried out within the FTA negotiations, which states that** “the Philippine Plant Variety Protection Act of 2002 permits exemptions for small farmers giving them the traditional right to save, use, exchange and sell farm-saved seeds without the special permission of the government”, a provision that is “important for smallholder farmers, some of whom live from the sale and breeding of their local seeds, using traditional knowledge”¹⁰². The issue of plant variety protection is not mentioned in neither of the two negotiation reports that have been published at the time of writing¹⁰³.

C. INDIA

The European Union and India have been negotiating a FTA since 2007. Despite growing trade between the EU and India, talks stalled in 2013 after 16 rounds, only resuming in 2018. At the last EU-India Sub-Commission on Trade in July 2019, both sides agreed to launch a regular and dedicated IPR dialogue.

The latest leak of the draft FTA’s Intellectual Property Rights Chapter dates from 2010¹⁰⁴ is much more flexible than other

proposals currently discussed in other fora, as it does not even mention the UPOV Convention itself. This is a considerable shift from the initial proposal made by the European Commission, in the draft provision seen in the leaked negotiation text from 2008, which reads: “*The Parties shall cooperate to promote and reinforce the protection of plant varieties based on [UPOV] as revised on March 19, 1991, including the optional exception to the breeders’ right as referred to in Article 15(2) of the said Convention*”¹⁰⁵.

Quite opposite, the wording which currently sits on the negotiating table reads as follows:

Article 16 Plant Variety

The parties shall cooperate to promote and reinforce the protection of plant varieties subject to their applicable laws and based on any international agreement to which both parties are signatories.

The proposed wording is the most flexible provision to date in comprehensive trade agreements outside of the economic partnership agreements that do not have chapters on intellectual property rights. It indeed solely enshrines an obligation to ‘co-operate’ on the promotion and protection of plant varieties in respective national legal orders, without any reference to international law instruments, or a specific Act of the UPOV Convention.

Within the more general IPR dialogue between the partners, the Commission is also planning to launch an IPR SME Helpdesk in India in 2020, with the aim to support the EU’s small and medium sized enterprises in protecting and enforcing their IPR in India through the provision of free information and services. The rendered services will include a free-of-charge helpline, trainings, and web-based materials, most probably including items related to plant variety protection as well other topics in the future.

D. NEW ZEALAND

Negotiations between the EU & New Zealand were launched in June 2018 and are currently ongoing, having reached 11 rounds of talks.

The EU proposals on intellectual property rights, and more specifically plant variety protection, which have been made public, do include a strong reference to UPOV 1991 Act¹⁰⁶, as the proposed Article X.47 reads

Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants (UPOV) as lastly revised in Geneva on March 19, 1991, (the so-called “1991 UPOV ACT”) including the optional exceptions to the breeder’s right as referred to in Article 15 paragraph 2 of the said Convention, and the Parties co-operate to promote and enforce these rights.

It should be noted that New Zealand is still only a signatory of the 1978 UPOV Act, although its national plant breeders’ rights law was amended in 1999.

E. AUSTRALIA

Trade and economic relationships between the EU and Australia are currently conducted on the basis of the 2008 EU-Australian Partnership Framework¹⁰⁷, which does not touch upon intellectual property rights. Negotiations towards a Free Trade Agreement were opened in May 2018.

The EU proposal¹⁰⁸ with regards to plant varieties is identical to the one submitted in the context of the negotiations with New Zealand, and reads:

SUB-SECTION 7 Plant varieties Article X.47 General provisions

Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants (UPOV) as lastly revised in Geneva on March 19, 1991, (the so-called “1991 UPOV ACT”) including the optional exceptions to the breeder’s right as referred to in Article 15 paragraph 2 of the said Convention, and the Parties co-operate to promote and enforce these rights.

Contrary to New Zealand, Australia has been a signatory to the 1991 UPOV Convention since January 2000.

CONCLUSIONS

The review of the wide array of provisions dealing with plant variety protection in the different trade and association agreements signed by the EU shows us unequivocally that the Union requires extremely strict protection of plant varieties, even in countries where farmer managed seed systems play the leading role in seed supply. The introduction of an UPOV-style system would nonetheless limit the effectiveness of these systems and thus have a negative impact on food security and agrobiodiversity. The EU requirement requires thus even stricter protection than the one enforced nationally in certain of its own Member States and appears unwilling to award the flexibilities it awards its own Member States for its trading partners with regards to their national plant variety protection regimes. Indeed, several bilateral and regional trade or association Agreements signed by the EU require all Contracting Parties to the Agreement to accede to the 1991 Act of the UPOV Convention, which is the case of the European Union as an entity but is not the case in all EU Member States, as Italy and Portugal remain bound by its 1978 Act, while Cyprus, Greece, Malta, and Luxembourg are not member of UPOV at all. Furthermore, the Commission expresses its criticism with regards to the absence of royalties on farm-saved seed in certain of its trading partners¹⁰⁹, while such seed-saving is allowed without royalty payment in different EU countries such as Romania, Bulgaria, Italy, Malta, Luxembourg, Cyprus, Greece, Portugal, Croatia, Slovenia and Austria. Agreements that are currently being negotiated nonetheless show that the trajectory set out by the EU can be strayed from through strong mobilisation and awareness-raising before national authorities of the trading partners.

3

Promotion of UPOV through other Activities

In parallel to specific trade negotiations, there are numerous activities that include the EU or are led by the Union, which aim to promote membership of the 1991 Act of the UPOV Convention. Besides legal obligations stemming from trade agreements as such, the EU's foreign trade policy also includes additional activities and soft law tools to influence the adoption and implementation of UPOV 1991 level PVP laws in their trading partners' legal orders. Both the Community Plant Variety Office, and national plant variety offices of EU Member States engage with the national intellectual property division and plant variety offices, when they exist, of third countries in **informal and formal technical meetings**, which often include presentations of the UPOV 1991 system. Recognising that the exercise is by no means an exhaustive list of such softer trade diplomacy tools, this section aims to illustrate the different means through which such diplomacy is deployed with regards to plant variety protection.

The East Asia Plant Variety Protection Forum was established in 2007 at the initiative of Japan. Its membership consists of the 10 ASEAN countries plus China, Japan, and South Korea. Japan serves as the secretariat. The main goal of the forum is to ensure that all its members join UPOV and harmonise their plant variety protection laws. The forum's activities focus on training and exchanges, including visits to European countries like the Netherlands, to harmonise regulations and procedures for the implementation of UPOV Protocols in seed testing for distinctness, uniformity, and stability. **Officials from the EU's Community Plant Variety Office regularly take part in the Forum's activities. In November 2020 for instance, a seminar was organised on the protection of new varieties, with contribution from the Community Plant Variety Office, presenting its upcoming 2021 Study on the EU PVP system, in addition to different outreach projects in Asia in 2020, aiming to "provide support for accession to international agreements such as UPOV 91"**¹¹⁰.

In the same vein, IP Key Southeast Asia (IP Key SEA) is a new project of the EU launched in April 2018, initiated by the European Commission's Directorate General for Trade, and implemented by the EU Intellectual Property Office (EUIPO)¹¹¹. As

a four-year seven-million-euro programme implemented by the EUIPO, IP Key SEA support 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 have been organised. In Autumn 2018, IP Key SEA organised a conference on international plant variety protection benefits in Indonesia, where the CPVO presented the key implementation steps of the UPOV Convention in the EU¹¹². In September 2019, a High-Level Study Visit for senior officials responsible for plant variety protection in Indonesia, Malaysia, Thailand, and Viet Nam was organised in France, Belgium, and the Netherlands on "Plant Variety Protection and UPOV 1991"¹¹³, while the project's 2020 work plan included trainings on UPOV 1991 and the organisation of "Awareness Raising Seminars on an International Harmonized PVP System". In this context, a webinar series was launched in November 2020, with three events focusing on the positive impacts of UPOV 1991 protection, with input from European stakeholders from the CPVO, different national plant variety offices and the industrial farming and seed lobby, respectively COPA-Cogeca and Euroseeds¹¹⁴.

In parallel, **IP Key Latin America** carries out activities dedicated to the promotion of plant variety protection under the UPOV 1991 Act. In 2020 for example, the entity held three events in Ecuador together with UPOV, the Community Plant Variety Office, the French national seed testing authority ("GEVES"), the Ecuadorian Institute of Intellectual Property ("SENADI"), and planned a webinar on plant variety protection, along with a "High level tour on PVP and its benefits", initially foreseen in Spain¹¹⁵. Events have been held in the past in Chile and Peru to "diffuse the scope and content of UPOV 1991, and provide support for accession", regrouping examiners from at least thirteen different Latin American countries¹¹⁶. Through the participation of the CARIFORUM Intellectual Property Rights and Innovation (CarIPRI), it was also possible to secure the participation of the Dominican Republic in the aforemen-

tioned activities, which is praised for its active contribution to the discussions¹¹⁷.

The push toward the 1991 Act of the UPOV Convention on the African continent has taken a slightly different road than in other continents, through attempts to influence national and regional seed laws that uphold its standards¹¹⁸, rather than their direct inclusion in trade negotiations, except for the few aforementioned Partnership Agreements that contain so-called “rendezvous clauses” on intellectual property rights. The signature of the **African Continental FTA, (AfcFTA)** on 21 March 2018, and its official institutionalisation signed a new era and a framework for trade liberalisation in goods and services between the 54 African Union States, which has received political, technical and financial support from the EU since its launch in 2015¹¹⁹. The AfCFTA is built as an umbrella instrument regrouping different protocols, all of which have not yet been completed. While protocols covering trade in goods, in services and dispute settlement are finalised, those relating to investment, competition policy and intellectual property rights (and thus presumably plant variety protection) have yet to be negotiated. In an Action Document for “Intellectual Property Rights (IPRS) Action for Africa” for the year 2019, the European Commission does not hide away from its promotion of international agreements and their proper implementation, which includes the UPOV Convention. Indeed, its **Pan-African Multi-Annual Indicative Programme**¹²⁰ clearly shows its intent to construct an agreement going against farmer seed systems that are the foundation of food security, especially on the African continent, and even more so in least developed countries, that are free to have no plant variety protection under the WTO rules. Furthermore, the EU has also provided funds to a project for the “**African Intellectual Property Organisation**”¹²¹ (**OAPI**) aiming at “the promotion of intellectual property to foster the creation of new varieties adapted to the African market and to provide an incentive to make superior varieties existing elsewhere available to OAPI area”, which kicked off in July 2019¹²². The CPVO joined the first inaugural meeting of the project and will help implementing its roadmap, while several national plant variety protection offices are named as technical cooperation partners¹²³.

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” and the German Sortenschutzamt 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 Forum¹²⁴¹²⁵ for many years, participated in seminars of IP Key in Asia¹²⁶, promoted the UPOV System in Francophone Africa¹²⁷¹²⁸ and Anglophone Africa¹²⁹ (only GNIS) and in Iran (only GNIS)¹³⁰. The German Bundessortenamt also promoted the UPOV-System in Mongolia¹³¹.

4

Concluding Remarks

Plant variety protection finds its way in the Intellectual Property Rights chapter of all FTAs that are currently being negotiated or those that have already been adopted by the EU and its different trading partners, with very few exceptions. When included in the different agreements, whether those ensuring “free trade”, establishing an “association” or an “economic partnership”, plant variety protection is overwhelmingly linked to the standards set out by the 1991 Act of the UPOV Convention, often requiring adherence to the Act itself, or protection at that level. In contrast to this premise are the vast majority of the EPAs that do not address intellectual property in their provisions, except in so-called “rendezvous” clauses, and the notable exception of the CARIFORUM EPA that includes a specific clause on plant variety protection.

The wording of the clauses regarding plant variety protection varies greatly from one trade Agreement to the other, from an obligation to accede to the UPOV System and comply with its 1991 Act (in most Association Agreements), to strong legal commitments assumed by parties to protect plant varieties in accordance with the standards of UPOV 1991, to lighter obligations “to cooperate” on the topic. In most applicable and proposed provisions in Free Trade Agreements, Association Agreements, but also Partnership Agreements that have provisions on intellectual property rights, reference is made to the Parties’ duty to indirectly (“to cooperate to”) or directly (“shall”) promote and ensure protection under UPOV 1991. Several Agreements also formally require accession to the UPOV 1991 Act in a certain timeframe. There are also more nuanced and flexible requirements to protect plant varieties under the UPOV system without referring solely to its 1991 Act, leaving the freedom to do so under the 1978 Act.

Our research nonetheless shows that the EU negotiating position always starts from the first type of strong clause which requires a binding commitment to protect plant varieties under UPOV 1991 terms. The differences that do appear after the negotiations highlight the importance of raising awareness about the topic within governments of trading partners and civil society actors who scrutinise European trade policy. It is crucial to highlight the incongruities of this negotiating position with the Old Continent’s overarching goals and international commitments under human rights instruments, the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food

and Agriculture, whether in terms of food security, sustainability, or the right to seeds. The integration of obligations related to the UPOV Convention create a significant lock-in for all States involved, preventing potential policy change with regards to plant variety protection, both in EU Member States and its trading partners.

A CALL FOR CHANGE

For APBEBES and Both ENDS, an agreement negotiated 30 years ago by a few industrialized countries is not a basis for shaping the global agriculture of tomorrow. Times have changed. With the CBD, ITPGRFA and UNDROP, the international legal framework has evolved, and awareness has been raised that a sustainable seed policy needs to promote both the formal and the farmer managed seed system. To achieve this, it is first and foremost necessary to strengthen farmers’ rights, and more particularly the farmers’ rights to seeds, including the right to save, use, exchange and sell farm-saved seeds and propagation material also of protected varieties. All too often in the last 60 years, only the formal, industrial seed system has been promoted, leading to a one-sided and unsustainable one-size-fits-all approach. What is needed today are flexible systems considering the specificities of each country’s national agriculture and the wide range of active farmers in its borders. Only in this way can the global community meet the great challenges of the future, such as the food or climate crisis. EU trade policy must take this balancing act into account. By exporting an outmoded system of intellectual property rights to the countries of the South, it is doing the opposite.

Stakeholders need to be made aware of the underlying rationale of UPOV 1991 protection, along with its false promises and its potential adverse effects. Partner countries need the full flexibility when drafting their seed and plant breeders’ rights laws to promote a truly sustainable agriculture, agrobiodiversity, and food security. Only by this way they will be able to design a legal system that both protects breeders’ innovation and enshrines farmers’ rights, adapted to their local conditions, and needs. APBEBES and Both ENDS therefore call for the EU to stop requiring developing countries to adopt the 1991 Act of the UPOV Convention through trade agreements or any other activities.

Annex

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Acronyms

CBD	Convention on Biological Diversity
CPVO	Community Plant Variety Office
EPA	Economic Partnership Agreement
EU	European Union
IPR	Intellectual Property Rights
ITPGRA	International Treaty on Plant Genetic Resources for Food and Agriculture
FTA	Free Trade Agreement
PVP	Plant Variety Protection
TRIPS	Agreement on Trade related Intellectual Property Rights
UPOV	Union for the Protection of Plant Varieties
WTO	World Trade Organisation

Summary Table on State of Play UPOV 91 in EU Trade, Association & Partnership Agreements

Country or region	Status of FTA (or EPA)	Member of UPOV?	Article mentioning UPOV protection
IN FORCE			
South Korea (Free Trade agreement)	Ratified, entry into force 14.05.2011	1991 Act, since 2002	<p>Article 10.39 Plant varieties</p> <p>Each Party shall provide for the protection of plant varieties and comply with the International Convention for the Protection of New Varieties of Plants (1991).</p>
Japan (Free Trade agreement)	Ratified, JEFTA in force 01.02.2019 <i>(not investment Agreement yet)</i>	1991 Act, since 1998	<p>Article 14.3 §2 The Parties affirm their commitment to comply with the obligations set out in the international agreements relating to intellectual property to which both Parties are party to at the date of entry into force of this Agreement, including the following: [...] the International Convention for the Protection of New Varieties of Plants, done at Paris on 2 December 1961 (hereinafter referred to as “the 1991 UPOV Convention”).</p> <p>Article 14.6. For the purpose of further promoting transparency in the administration of its intellectual property system, each Party shall make all reasonable efforts to take appropriate available measures to: (a) publish information on and make available to the public information contained in the files on: [...] (iv) registrations of new varieties of plants”.</p> <p>Article 14.38 New varieties of plants.</p> <p>Each Party shall provide for the protection of new varieties of all plant genera and species in accordance with its rights and obligations under the 1991 UPOV Convention.</p>
Singapore (Free Trade agreement)	Ratified, in force 21.11.2019 <i>(not investment Agreement yet)</i>	1991 Act, since 2004	<p>ARTICLE 10.35 International Agreements</p> <p>The Parties affirm their obligations under the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as last revised in Geneva on 19 March 1991, including their ability to implement the optional exception to the breeder’s right, as referred to in paragraph 2 of Article 15 of that Convention.</p>
Vietnam (Free Trade agreement)	Ratified, in force 12.06.2020. <i>(Not investment Agreement yet)</i>	1991 Act, since 2006	<p>Article 12.42 Plant Varieties Rights</p> <p>The Parties shall protect plant varieties rights in accordance with the International Convention for the Protection of New Varieties of Plants, adopted in Paris on 2 December 1961, as last revised in Geneva on 19 March 1991, including the exceptions to the breeder’s right as referred to in Article 15 of that Convention, and cooperate to promote and enforce these rights.</p>
Israel (Association Agreement)	In force since 2000	1991 Act, since 1979	Parties confirm the importance they attach to the obligations arising from the 1991 Act of the UPOV Convention

Country or region	Status of FTA (or EPA)	Member of UPOV?	Article mentioning UPOV protection
Western Balkans Association Agreements	In force North Macedonia , 2004 Albania , 2009 Montenegro , 2010 Serbia , 2013 Bosnia & Herzegovina , 2015 Kosovo , 2016	North Macedonia , 1991 Act since 2011 Albania , 1991 Act since 2005 Montenegro , 1991 Act since 2015 Serbia , 1991 Act since 2013 Bosnia & Herzegovina , 1991 Act since 2017 Kosovo , none	Article XXX Intellectual, industrial and commercial property 2. <i>COUNTRY X</i> shall take all the necessary measures in order to guarantee no later than four years after the date of entry into force of this Agreement a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights. 3. <i>COUNTRY X</i> undertakes to accede, within four years after the date of entry into force of this Agreement , to the multilateral Conventions on intellectual, industrial and commercial property rights referred to in paragraph 1 of Annex V. The Stabilisation and Association Council may decide to oblige Albania to accede to specific multilateral Conventions in this area. ANNEX V Paragraph 1 of the Agreement. Article XXX (3) concerns the following multilateral Conventions to which Member States are Parties, or which are de facto applied by Member States [...]: International Convention for the Protection of New Varieties of Plants (UPOV Geneva Act, 1991) alternative wording: International Convention for the Protection of New Varieties of Plants (UPOV Convention, Paris, 1961, as revised in 1972, 1978 and 1991).
Euro-Mediterranean Association Agreements	In force Tunisia , 1998 Morocco , 2000 Egypt , 2004 Jordan , 2002 Algeria , 2005 Lebanon , 2006	Tunisia , 1991 Act, since 2003 Morocco , 1991 Act, since 2006 Egypt , 1991 Act, since 2019 Jordan , 1991 Act, since 2004 Algeria , none Lebanon , none	Article XX 1. The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards. This shall encompass effective means of enforcing such rights. ANNEX 7 relating to intellectual, industrial and commercial property. By the end of the fourth (or fifth) year after the entry into force of the Agreement, XX shall accede to the following multilateral conventions on the protection of intellectual, industrial and commercial property: International Convention for the Protection of the New Varieties of Plants (Act of Geneva, 1991).
Azerbaijan (Association Agreement)	In force 1999	1991 Act, since 2004	Article 42 1. Pursuant to the provisions of this Article and of Annex II, the Republic of Azerbaijan shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by the end of the fifth year after the entry into force of this Agreement, for a level of protection similar to that existing in the Community, including effective means of enforcing such rights. 2. By the end of the fifth year after entry into force of this Agreement, the Republic of Azerbaijan shall accede to the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 1 of Annex II to which Member States are parties or which are de facto applied by Member States, according to the relevant provisions contained in these conventions. ANNEX II Intellectual, Industrial and Commercial Property Conventions Referred to In Article 42 1. Paragraph 2 of Article 42 concerns the following multilateral conventions: – International Convention for the Protection of New Varieties of Plants (UPOV) (Geneva Act, 1991) .

Country or region	Status of FTA (or EPA)	Member of UPOV?	Article mentioning UPOV protection
Ukraine (Association Agreement)	In force 2017 (signed 2014)	1991 Act, since 1995	Article 228 Plant varieties The Parties shall co-operate to promote and reinforce the protection of plant varieties rights in accordance with the International Convention for the Protection of New Varieties of Plants of 1961 as revised in Geneva on 10 November 1972, 23 October 1978 and 19 March 1991 , including the optional exception to the breeder's right as referred to in Article 15.2 of the said Convention
Chile (Association Agreement)	In force 2005	1978 Act, since 1995	Article 170 Protection of intellectual property rights In pursuance of the objectives set out in Article 168, the Parties shall: (a) continue to ensure an adequate and effective implementation of the obligations arising from the following conventions: (i) the Agreement on Trade-related Aspects of Intellectual Property, Annex 1C to the Agreement establishing the World Trade Organisation ("the TRIPs"). (v) the International Convention for the Protection of New Varieties of Plants 1978 (" 1978 UPOV Convention "), OR the International Convention for the Protection of New Varieties of Plants 1991 (" 1991 UPOV Convention ")
Central America (Association Agreement)	In force, 2013	Nicaragua , 1978 Act since 2001 Panama , 1991 Act since 2012 Costa Rica , 1991 Act since 2009 Honduras & El Salvador , none	Article 259 Plant Varieties 1. The Parties shall provide for the protection of plant varieties either by patents or by an effective <i>sui generis</i> system or by any combination thereof. 2. The Parties understand that no contradiction exists between the protection of plant varieties and the capacity of a Party to protect and conserve its genetic resources. 3. The Parties shall have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material.
Economic Partnership Agreements	In force (rendez-vous clause) West Africa – East African Community – Central Africa – South African Development Group – Eastern & Southern Africa <i>Negotiations of trade agreement with ESA5 under way, no publicly available text on IPR)</i>	–	No provision related to plant variety protection

Country or region	Status of FTA (or EPA)	Member of UPOV?	Article mentioning UPOV protection
Economic Partnership Agreement CARIFORUM	In force, 2008	Trinidad and Tobago , 1978 Act since 1998 Dominican Republic , 1991 Act since 2007 Saint Vincent and the Grenadines , 1991 Act since 2021 Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Kitts and Nevis, Suriname , none	Article 149 Plant varieties <ol style="list-style-type: none"> 1. The EC Party and the Signatory CARIFORUM States shall have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material. 2. The EC Party and the Signatory CARIFORUM States shall provide for the protection of plant varieties in accordance with the TRIPS Agreement. In this respect, they shall consider acceding to the International Convention for the Protection of New Varieties of Plants – UPOV (Act of 1991)
Armenia	In force, since January 2018	None	Article 253 Plant varieties <ol style="list-style-type: none"> 1. Each Party shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants ('UPOV'), including the exceptions to the breeder's right as referred to in Article 15 of that Convention, and cooperate to promote and enforce those rights. 2. For the Republic of Armenia, this Article shall apply no later than three years after the entry into force of this Agreement.
Iraq	In force, since 2012	None	Article 60 Nature and scope of obligations <ol style="list-style-type: none"> 1. Pursuant to the provisions of this Article and of ANNEX 2 to this Agreement, Iraq shall adopt, within five years of the entry into force of the Agreement, legislation in order to ensure adequate and effective protection of intellectual, industrial and commercial property rights according to the highest international standards including the rules set by the Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement (hereinafter referred to as the 'TRIPS Agreement'), as well as effective means of enforcing such rights. 2. Within three years of the entry into force of the Agreement, Iraq shall accede to the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 2 of ANNEX 2 to this Agreement to which Member States are parties or which are de facto applied by Member States according to the relevant provisions contained in these conventions. 3. Within three years of the entry into force of the Agreement, Iraq shall comply with the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 3 of ANNEX 2 to this Agreement to which one or several Member States are parties, or which are de facto applied by one or several Member States according to the relevant provisions contained in these conventions. <p>ANNEX 2 INTELLECTUAL PROPERTY RIGHTS Intellectual, industrial and commercial property conventions referred to in Article 60.</p> <ol style="list-style-type: none"> 3. Paragraph 3 of Article 60 concerns the following multilateral conventions with which Iraq shall comply with: 3.7 International Convention for the Protection of New Varieties of Plants (Geneva Act, 1991) (known as 'UPOV').

Country or region	Status of FTA (or EPA)	Member of UPOV?	Article mentioning UPOV protection
Kazakhstan	In force (since 2016)	None	Article 96 Plant varieties The European Union reaffirms its commitment to the International Convention for the Protection of New Varieties of Plants (the UPOV Convention), to which the Republic of Kazakhstan shall make reasonable efforts to accede .

PROVISIONAL APPLICATION

Limited Trade Agreement with Columbia, Peru & Ecuador (waiting for ANDEAN deadlock)	Ratified for Preliminary & Provisional Application in force 01.03.2013 (Peru), 01.08.2013 (Colombia), and 01.01.2017 (Ecuador)	Peru 1991 Act, since 2011 Colombia 1978 Act, since 1996 Ecuador 1978 Act, since 1997	Article 232 The Parties shall cooperate to promote and ensure the protection of plant varieties based on the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as 'UPOV Convention'), as revised on 19 March 1991 , including the optional exception to the right of the breeder as referred to in Article 15(2) of such Convention".
Canada	Provisionally in force 21.09.2017, Pending full ratification	1991 Act, since 2015	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

IN NEGOTIATION

MERCOSUR	Political agreement 28.06.2019	Argentina 1978 Act, since 1994 Brazil 1978 Act, since 1999 Paraguay 1978 Act, since 1997 Uruguay 1978 Act, since 1994	Article 9 On Plant varieties, the Parties agreed to cooperate on promoting the protection of plant varieties as set out under the aegis of the two versions of the multilateral Treaty regarding the Protection of New Varieties of Plants (UPOV ACT) ". "Each Party shall protect plant varieties rights , in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on December 2, 1961, as revised in Geneva on November 10, 1972, and October 23, 1978 (1978 UPOV ACT) or on March 19, 1991 (1991 UPOV ACT) and shall cooperate to promote the Protection of Plant Varieties."
Mexico	In negotiation (agreement in principle on 21 April 2018)	1978 Act, since 1997	Article X.47 Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on March 19, 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15 of the said Convention, and co-operate to promote and enforce these rights .

Country or region	Status of FTA (or EPA)	Member of UPOV?	Article mentioning UPOV protection
Indonesia	In negotiation	None	<p><i>EU Proposal</i></p> <p>SUB-SECTION 7 Plant Varieties Article X.46</p> <p>The Parties shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on 19 March 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15(2) of that Convention.</p>
Philippines	In negotiation	None	<p><i>EU Proposal</i></p> <p>SUB-SECTION 7 Plant Varieties Article X.46</p> <p>The Parties shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on 19 March 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15(2) of that Convention.</p>
India	In negotiation	None	<p><i>Unofficially agreed text.</i></p> <p>Article 16 Plant Variety</p> <p>The parties shall cooperate to promote and reinforce the protection of plant varieties subject to their applicable laws and based on any international agreement to which both parties are signatories.</p>
New Zealand	In negotiation	1978 Act, since 1981	<p><i>EU Proposal</i></p> <p>Article X.47</p> <p>Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants (UPOV) as lastly revised in Geneva on March 19, 1991, (the so-called "1991 UPOV ACT") including the optional exceptions to the breeder's right as referred to in Article 15 paragraph 2 of the said Convention, and the Parties co-operate to promote and enforce these rights."</p>
Australia	In negotiation	1991 Act, since 2000	<p><i>EU Proposal</i></p> <p>Article X.47</p> <p>Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants (UPOV) as lastly revised in Geneva on March 19, 1991, (the so-called "1991 UPOV ACT") including the optional exceptions to the breeder's right as referred to in Article 15 paragraph 2 of the said Convention, and the Parties co-operate to promote and enforce these rights."</p>

Endnotes

- 1 See for example Michele BOLDRIN and David K. LEVINE, www.dklevine.com/general/intellectual/againstfinal.htm
- 2 UPOV 1991 Convention, Article 14.1
- 3 United Nations Declaration on the Rights of Peasants and People Living in Rural Areas, Article 19, adopted on 28th September 2018, available at <https://digitalibrary.un.org/record/1650694?Ln=en>
- 4 Carlos M. CORREA, with Sangeeta SHASHIKANT and François MEIENBERG, *Plant Variety Protection for Developing Countries. A Tool to Design a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, October 2015, APBREBES, pp.5-15, www.apbrebes.org/files/seeds/files/toolenglishcompletedez15.pdf.
- 5 *Ibidem*
- 6 UPOV, Members of the International Union, status as of 3rd February 2020, available at www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf
- 7 For a short overview about the differences between UPOV 78 and 91 see also "Owning Seeds – Accessing Food", p.12, www.publiceye.ch/fileadmin/doc/Saatgut/2014_Public_Eye_Owning_Seed_-_Accessing_Food_Report.pdf
- 8 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, JOL 227, 01.09.94 p.1, available in its unofficial consolidated version at <https://cpvo.europa.eu/sites/default/files/documents/en2100consolide.pdf>
- 9 UPOV 1991 Convention, Article 14.1
- 10 UPOV 1991 Convention, Article 14.2
- 11 UPOV 1978 Convention, Article 5.1
- 12 UPOV 1991 Convention, Article 15.2
- 13 This is apparent from the Explanatory Note on Exceptions to the Breeders' Rights under the 1991 Act", adopted in 2009 (www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf); as the note explicitly mentions that the exception covers solely an exclusive use in a farmer's garden, with no material of the variety being provided to others. Even though these "Notes" are not legally binding, they have a persuasive effect on the legislative, executive, and judicial authorities of countries carving out and implementing UPOV 1991 protection in their territory. This has notably let to the conclusion that the exchange of seeds among farmers would not be permissible under UPOV 1991, during the assessment of the draft legislation of Malaysia and the Philippines, see Carlos CORREA et al. *op. cit.*, APBREBES, 2015, p. 37.
- 14 Sangeeta SHASHIKANT and François MEIENBERG, *International contradictions on Farmers' Rights: The Interrelations between the International Treaty, its Article 9 on Farmers' Rights, and Relevant Instruments of UPOV and WIPO*, 2015, available at www.apbrebes.org/files/seeds/files/Treaty_UPOV_WIPO%20Interrelations_def_150929.pdf, and www.aipla.org/docs/default-source/news/eu-report.pdf?sfvrsn=c7fd817e_0
- 15 European Commission Staff Working Document, *Report on the protection and enforcement of intellectual property rights in third countries*, 8th January 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158561.pdf, and www.aipla.org/docs/default-source/news/eu-report.pdf?sfvrsn=c7fd817e_0
- 16 European Commission Staff Working Document, *Report on the protection and enforcement of intellectual property rights in third countries*, 8th January 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158561.pdf
- 17 *Ibidem*
- 18 European Commission, *The Economic Impact of the Comprehensive Economic and Trade Agreement: An analysis prepared by the European Commission's Directorate-General for Trade*, 2017, p. 56, available at http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156043.pdf
- 19 *Ibidem*
- 20 Searice, APBREBES, Fastenopfer, *Plant Variety Protection in Practice in Vietnam: The Pains in the Gains Achieved*, March 2021, available at www.apbrebes.org/node/326
- 21 Press release by Searice, APBREBES, Fastenopfer, March 1st, 2021, available at www.apbrebes.org/node/327
- 22 A selection of studies and articles about Impact of UPOV and UPOV-based plant variety protection laws can be found at the APBREBES Website: www.apbrebes.org/node/297
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- 33 See footnote 8.
- 34 Such a balanced approach is also advocated by the FAO and its Voluntary guide for national seed policy formulation; see notably www.fao.org/publications/card/en/c/272c15fb-0949-479d-aba9-72d918891fc5/
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- 37 World Trade Organisation Agreement on Trade-related Intellectual Property Rights, www.wto.org/english/docs_e/legal_e/27-trips.pdf
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- 40 TRIPS Agreement, Article 66.1
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- 45 CPVO Variety Finder, which is available after the creation of a specific user profile on their dedicated website, requiring the submission of an email address and physical address details: <https://online.plantvarieties.eu/#/login>
- 46 Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, full text available at the following address: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?Uri=OJ:L:2020:186:FULL&from=EN#page=110>
- 47 The EU- Vietnam Investment Protection Agreement, negotiated in parallel to the FTA, and signed on the same date, is still pending ratification at the time of writing.
- 48 The Andean Community is a trade bloc of four countries - Bolivia, Colombia, Ecuador, and Peru. Chile, Argentina, Brazil, Paraguay, and Uruguay are associate members while Panama, Mexico, and Spain have Observer status.
- 49 Trade Agreement between the EU and its Member States of the one part, and Colombia and Peru, of the other part; Available in full text at https://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf
- 50 The EU does not apply provisionally Article 2, Article 202(1), and Articles 291 and 292 of the Agreement, pending the completion of the procedures for its conclusion, see "Notice concerning the provisional application between the European Union and Peru, of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part", JO L 56, 28.2.2013, p.1 (<https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:22013X0228%2801%29>)
- 51 It should be noted that Peru's accession to UPOV 1991 has been linked to the country's obligations under a FTA signed with the United States: <https://ustr.gov/trade-agreements/free-trade-agreements>. The same obligation also applies to Colombia, but the country has not yet made the required move.
- 52 European Commission Staff Working Document, *Report on the protection and enforcement of intellectual property rights in third countries*, 8th January 2020, page 58, available at: www.aipla.org/docs/default-source/news/eu-report.pdf?sfvrsn=c7fd817e_0
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- 54 More information on the campaign can be found at: www.nfu.ca/campaigns/save-our-seed/
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- 56 Stepping-stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part - Protocol, OJ L 59, 3.3.2009, p. 3–273, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22009A0303\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22009A0303(01))
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- 59 Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, OJ L 57, 28.2.2009, p. 1–360, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L._.2009.057.01.0001.01.ENG&toc=OJ%3AL%3A2009%3A057%3ATOC#L_2009057EN.01000201
- 60 Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJ L 16.09.2016, available at https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf
- 61 Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AL%3A2012%3A111%3ATOC>
- 62 LSE, Sustainability Impact Assessment in support of negotiations with ESA5, Final Inception Report, 15th October 2020, TRADE 2019/D2/D09, available at https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc_158982.pdf
- 63 Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part. OJ L 272, 16.10.2009, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2009:272:FULL&from=EN>
- 64 Cariforum is a subgroup of the Organisation of African, Caribbean and Pacific States and serves as a base for economic dialogue with the European Union. It was established

- in 1992. Its membership comprises the 15 Caribbean Community states, along with the Dominican Republic., the full text available of the Agreement can be found at www.sice.oas.org/Trade/CAR_EU_EPA_e/CAR_EU_e.asp#P2T4C2S2A11
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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. The work of APBREBES is financially supported by the Swiss Agency for Development and Cooperation, Salvia Foundation and Misereor. The views expressed in this working paper do not necessarily reflect the views of the Swiss Agency for Development and Cooperation and the other supporters.

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