

Mandate of the Special Rapporteur on the right to food

Ref.: AL OTH 140/2023

(Please use this reference in your reply)

4 December 2023

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to food, pursuant to Human Rights Council resolution 49/13.

In this connection, I would like to bring to the attention of the European Commission and other relevant institutions of the European Union (EU) (the External Action Service (EEAS), the European Parliament and the Council of the European Union) information concerning the **EU-Indonesia negotiations on the Comprehensive Economic Partnership Agreement (CEPA) that requires Indonesia to comply with the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV 1991), and the implications which this may have on Indonesia's full capacity to ensure the right to food.**

According to the information received:

Since 2016 EU and Indonesia have been conducting CEPA negotiations aimed at fostering market access, boosting trade and investment, and promoting sustainable development. The negotiations aim to achieve a comprehensive trade agreement between Indonesia and the EU. The latest round of negotiations took place in Indonesia in July 2023. The EU has already concluded Free Trade Agreements (FTAs) with Singapore and Vietnam and negotiations are ongoing with other countries of the Association of Southeast Asian Nations (ASEAN). The ultimate goal of these processes would be to conclude a regional agreement between the EU and ASEAN countries.

Agriculture holds vital significance for Indonesia's economy, constituting the second-largest source of livelihood and employment, particularly in rural areas where around 33% of the country's workforce is engaged in the agricultural sector. Small family farms, comprising 93% of Indonesia's total number of farmers¹, play a crucial role in this landscape contributing to food production and food security.

As part of CEPA negotiations, the EU has requested Indonesia to join the International Union for the Protection of New Varieties of Plants (UPOV). UPOV is an intergovernmental organization, established by the International Convention for the Protection of New Varieties of Plants, with the objective of promoting and protecting plant breeders' rights. UPOV provides a framework for its member countries to establish and grant intellectual property rights to the breeders of new plant varieties. Although several rounds of negotiations between the EU and Indonesia have been concluded since 2016, plant variety protection (PVP) is still an open issue and no agreement has been reached on this subject to this date.

¹ FAO Indonesia Fact Sheet <https://www.fao.org/3/I8881EN/i8881en.pdf>

Article X.46 of the EU's proposal for the Chapter on Intellectual Property for the EU-Indonesia FTA states that "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".

The Convention for the Protection of New Varieties of Plants of 1961 (the Convention) has been revised in 1972, 1978 and 1991. The 1991 revision of the Convention is considered controversial, since the latest version granted breeders more bargaining power over farmers by expanding the scope of breeders' rights and curtailing farmers' rights. For example, the 1978 Convention implicitly recognizes farmers' right to save, use and exchange seeds, leaving farmers to only have to seek permission from the intellectual property rights holder if they sell the seed or propagating material. The 1991 Convention reframes farmers' rights to save, use and exchange seed or propagating material as an optional privilege that Member States can elect to enact. 17 countries remain party to the 1978 Convention, having refused to sign the 1991 Convention. Since 1998, States can only join the 1991 Convention.

Thus, UPOV 1991 – in its mission to provide and promote an effective system of PVP, with the aim of encouraging the development of new varieties of plants for the benefit of society – establishes a paradigm where breeders enjoy considerable protection at the expense of constraining the customary activities of smallholder farmers, including their right to save, use, exchange and sell farm-saved seeds or propagating materials as well as the application of breeding techniques like "selection".

UPOV 1991's stringent criteria of "private and non-commercial" excludes crucial and customary practices such as local seed exchange and familial sharing of harvests, while its guidance on "subsistence farming" presents an impractical definition that neglects the customary actions of subsistence farmers.

Seed saving, outlined as an optional exception in article 15(2) of UPOV 1991, is constrained to a farmer's own holding, subject to conditions, and focuses on crops with a customary practice of saving harvested material, excluding certain agricultural and horticultural sectors. UPOV's guidance emphasizes the "within reasonable limits" condition, introducing further restrictions on varieties, holding/crop size, potential royalties, etc. This ultimately prohibits the exchange or sale of seeds among farmers, including smallholders.

In many countries smallholder farmers face restrictions in adapting seeds to local needs through the "selection" method, crucial for climate change adaptation, when the variety is protected under PVP laws. These restrictions do not apply to a commercial breeder under the same conditions.

In Indonesia most of the seed supply is provided by the diverse farmer-managed seed systems. The informal seed system used by farmers, marked by practices such as saving, exchanging, and selling farm-saved seeds,

serves as a fundamental pillar sustaining both the agricultural sector and the livelihoods of small-scale farmers. The act of saving, storing, and reusing seeds is rooted in ancestral traditions regarded as local wisdom, contributing to the preservation of the environment's carrying capacity for sustainable livelihoods.

The UPOV 1991 system, often criticized for its inflexible “one size fits all” approach and its limited leeway or flexibility to design a PVP regime that reflects the conditions and realities of various agricultural systems, poses a significant obstacle for Indonesia, impacting its population of smallholder farmers within the agricultural sector and at the same time falls short of addressing the diverse seed sector characteristics.

Compliance with UPOV 1991 will potentially hinder the implementation of unique PVP systems that align with Indonesia's agricultural realities. Further, UPOV's rejection of disclosure provisions and compliance with access and benefit sharing laws in national PVP legislations creates challenges for Indonesia to curb biopiracy.

In June 2022, almost 90 civil society and farmer organisations and networks from around the world wrote to the European Commission urging to refrain from any demands concerning plant variety protection rights in the FTA with Indonesia, stressing that the adherence to UPOV 91 would jeopardise the farmer-managed seed system and thus food sovereignty, food security and agrobiodiversity.²

In July 2022, civil society and farmer organizations addressed a public letter to the Indonesian government urging to reject the European Union's proposal requiring compliance with UPOV 1991 emphasizing that Indonesia must maintain a necessary degree of policy leeway to protect farmers' seed systems, plant genetic resources and to be able to effectively implement the United Nations Declaration on the right of peasants and other people working in rural area (UNDROP).³

While I do not wish to prejudge the accuracy of the information made available to me, I would like to express my serious concern regarding the fact that the EU Indonesia CEPA negotiations, to the extent that they require compliance with UPOV 1991, may present adverse implications by restricting Indonesian farmers' rights - especially to freely use, exchange and sell farm-saved seeds and propagating materials. The EU, despite acknowledging smallholder farmers' concerns about the impact of new plant variety provisions, regretfully continues to favour a more coercive approach, demanding Indonesia's compliance with UPOV 1991, which will create considerable obstacles towards the full realisation of the right to food by Indonesia.

Since humankind relies on plants for food, feed, fibre and a functional ecosystem, nothing less than the right to life is at stake when farmers' seed systems are challenged or poorly supported. Farmers' seed systems are integral to the world's genetic and cultural diversity and are foundational for all food systems. In my

² https://www.bothends.org/uploaded_files/document/220629_OpenLetter_EU-Indonesia_UPOV.pdf

³ <https://www.bothends.org/en/Whats-new/Letters/Open-letter-to-the-Indonesian-Government-concerning-plant-variety-rights-in-the-Free-Trade-Agreement-with-Indonesia/>

2021 report, “Seeds, right to life and farmers’ rights” I stated that the more a seed system recognizes and supports farmers as stewards of a seed system for all of humankind, the more likely this system fulfils people’s human rights.⁴ This is reflected in target 2.5 of the Sustainable Development Goals.

In this report, I recommended that states should consider not pressuring other member states to join the International Convention for the Protection of New Varieties of Plants in any way. I am convinced being a party to that Convention should no longer be required as part of bilateral or regional agreements and such requirements should be removed from current agreements. I also recommended that states base their national seed systems on the International Treaty on Plant Genetic Resources for Food and Agriculture and human rights law as articulated in instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).

Hence, I believe Indonesia may face difficulties in following up the above mentioned recommendations and ensure compliance with its international obligation to protect and promote the right to food, if the country is required to comply with UPOV 1991, which foresees a rather rigid PVP system.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please share the outcome of the correspondence between the European Commission and civil society and farmer organisations and networks concerning the PVP rights in the EU FTA/ CEPA with Indonesia.
3. Please indicate the position of the European Commission regarding the connections between formal and informal seed systems in developing nations where agriculture, especially small-scale farming, plays a substantial role in the economy, serving as a significant source of livelihood and employment.
4. Please provide details regarding any actions that the European Commission has implemented or is contemplating to safeguard and/or promote the rights of farmers, specifically smallholder farmers, during the EU-Indonesia negotiations on the CEPA.

⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/397/86/PDF/G2139786.pdf?OpenElement>

5. Please indicate whether in other ASEAN countries where the EU FTA/CEPA negotiations have concluded and compliance with the UPOV was required, there have been human rights impact assessments and social impact assessments, with adequate consultations with smallholder farmers. If so, please also share the outcomes of these assessments as they relate to the right to food and food security in the ASEAN countries.

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from the EU institutions will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence.

Please be informed that a letter on this subject matter has been also sent to the Government of Indonesia.

Please accept, Excellency, the assurances of my highest consideration.

Michael Fakhri
Special Rapporteur on the right to food

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, I wish to recall to relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

Article 25 of the Universal Declaration of Human Rights that recognises the right of everyone “to a standard of living adequate for the health and well-being of himself and of his family, including food.”

I would equally like to draw attention to article 11 (1) of the ICESCR which recognises “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.” This article must be read in conjunction with article 2.2 of the Covenant, which provides for the exercise of any right under the Covenant without discrimination of any kind.

In its General Comment No. 12 Committee on Economic Social and Cultural Rights (CESCR) stresses that the right to food requires States to proactively engage in activities to enhance access and populations of the resources and means necessary to ensure their livelihoods. States are required to respect existing access to adequate food and to take no action to prevent such access. The Committee also recalled that the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food may constitute a violation of this right. The formulation and implementation of national strategies, mandatory for the progressive realization of the right to food, require full compliance with the principles of transparency, accountability and participation of the people. In this regard, the CESCR states that the formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people’s participation, decentralization, legislative capacity and the independence of the judiciary (para. 23).

In December 2018, the General Assembly adopted the UNDROP, in which it recognized the right to seeds of peasants and other people working in rural areas and the right to maintain, control, protect and develop their own seeds and traditional knowledge. It also indicated that States should take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.

The UNDROP reaffirms farmers’ rights, recognizing them as inalienable human rights and making explicit the rights of rural people to maintain, control, protect and develop their own seeds and traditional knowledge. The Declaration also clarifies States’ obligations with added detail.

Article 15 of UNDROP states that Peasants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty. This includes the right to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures. States shall formulate, in partnership

with peasants and other people working in rural areas, public policies at the local, national, regional and international levels to advance and protect the right to adequate food, food security and food sovereignty and sustainable and equitable food systems that promote and protect the rights contained in the present Declaration. States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in the UNDROP.

In addition, article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture recognizes the significant contributions of local and indigenous communities and farmers, especially those in biodiversity centres, to the conservation and development of plant genetic resources vital for global food and agriculture. The Treaty mandates contracting parties to safeguard and enhance farmers' rights, encompassing the protection of traditional knowledge, equitable participation in benefits, involvement in national-level decisions on resource conservation, and the right to save, use, exchange, and sell farm-saved seed/propagating material, aligned with national laws.

Farmers' rights, anchored in the International Treaty on Plant Genetic Resources for Food and Agriculture, extend across multiple global treaties and legal frameworks, including the Nagoya Protocol, UN Declarations on Indigenous Peoples and Peasants' Rights, and World Intellectual Property Organization's work on Intellectual Property. When crafting national legislation on farmers' rights, states are legally obligated to align with relevant treaties. Many states, signatories to various agreements, face the challenge of reconciling obligations under the Plant Genetic Resources Treaty, World Trade Organisation (WTO)'s Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and the International Convention for the Protection of New Varieties of Plants. The TRIPS Agreement's article 27.3 (b) mandates protection of plant varieties, presenting options of patents or a sui generis system. Farmers' rights are also addressed in the New Varieties of Plants Convention, allowing contracting parties to permit farmers to save, reuse, exchange, and sell farm-saved seeds—a provision adopted by most signatory countries in their domestic legislation.

In crafting and enacting national legislation on farmers' rights, states align their strategies with pertinent treaties. Numerous states, signatories to the International Treaty on Plant Genetic Resources, are also parties to the WTO Agreement on TRIPS and the International Convention for the Protection of New Varieties of Plants, necessitating a coordinated and coherent approach across these diverse legal frameworks.