

Mandate of the Special Rapporteur on the right to food

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(Please use this reference in your reply)

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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 your Excellency's Government information I have received concerning **free trade agreement negotiations between member states of the European Free Trade Association ((EFTA) comprised of Iceland, Liechtenstein, Norway, Switzerland) and Thailand and Malaysia that includes a proposal for these countries to comply with the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV 1991), and the implications that this may have on Thailand's and Malaysia's full capacity to realize their obligation to respect, protect and fulfil human rights, especially the right to food.**

According to the information received:

Since 2005 EFTA member states have conducted different rounds of negotiations respectively with Thailand, India and Malaysia for concluding Free Trade Agreements (FTAs). As part of negotiations, EFTA member states propose partner countries a clause that requires them to comply with the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV 1991).

UPOV is an intergovernmental organization with the objective of promoting and protecting plant breeders' rights. It provides a framework for its member countries to establish and grant intellectual property rights to the breeders of new plant varieties.

The Convention for the Protection of New Varieties of Plants of 1961 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. The 1978 Convention implicitly recognizes farmers' right to save, use and exchange seeds, leaving farmers to 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 protected seed or propagating material as an optional privilege that Member States can elect to enact and it sets narrow limits, e.g. saving of seeds in UPOV 91 is only possible for some crops and "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder". Seventeen countries remain party to the 1978 Convention, having refused to sign the 1991 Convention. Since 1998, States can only join the 1991 Convention.

Thailand, India and Malaysia have a gross national income per capita that is significantly lower than in EFTA countries, with agriculture being of crucial importance to their economy and a major source of livelihood and employment

in rural areas. Most farmers in the concerned three countries are family farmers, dependent on practices of saving, using, exchanging, and selling farm-saved seeds for ensuring access to seeds.

Thailand

In 2005 and 2006 two rounds of negotiations have been held between EFTA member states and Thailand. The negotiations were on hold from 2006 to 2022. The last round of negotiations took place in November 2023. The negotiations aim to achieve an ambitious and comprehensive free trade agreement between EFTA and Thailand.

Thailand is known for its long-standing farming tradition and the agricultural sector is a crucial component of the country's economic and social growth. Thailand is an exporter of widely consumed agricultural commodities such as rice, sugar and rubber. Agriculture employs around 35 percent of the workforce in Thailand.

Malaysia

The first round of negotiations between the EFTA and Malaysia took place in 2014 in Geneva. The last round of negotiations, took place in December 2023. Agriculture is one of the most important industries in Malaysia, contributing around 8.9 percent to the gross domestic product (GDP). The agriculture industry in Malaysia relies heavily on the farming sector and its cash crops, palm oil and rubber. These crops are grown mainly for exportation. Food crops, including rice, fruits, and vegetables are the second most important commodities, after palm oil and palm-based products.

India

On 10 March 2024, EFTA member states and India signed a comprehensive Trade and Economic Partnership Agreement (TEPA). The negotiations between EFTA and India started in 2008, 21 rounds of negotiations led to the conclusion of the agreement in 2024. Annex 8.A of the agreement mentions that each party shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof, in accordance with the TRIPS Agreement. The term of protection provided for in such a sui generis system shall not be shorter than 9 years for trees and vines, and 6 years for other plant varieties, from the date of the grant of the rights, which may be extended to 18 years for trees and vines, and 15 years for other plant varieties, in accordance with its domestic laws and regulations.

1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV 1991)

UPOV 1991, in its mission to provide and promote an effective system of plant variety protection 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 the context of 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.

UPOV imposes intellectual property rights over plant varieties and enables corporations to monopolise and claim ownership over them through patents.

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 significant obstacles to smallholder farmers and falls short of addressing the diverse seed sector characteristics. Thus, compliance with UPOV 1991 will potentially hinder the implementation of unique PVP systems that align with Thailand's and Malaysia’s agricultural realities.

Civil society and other stakeholders' opposition

In 2020, more than 250 civil society organisations sent a letter to EFTA member states regarding the UPOV 1991 clause in the FTA.¹ On 10 December 2020, EFTA replied to the letters², stating that the organisation does not make the accession to UPOV or the adherence to its rules a prerequisite for the conclusion of an FTA. The letter also stated that EFTA’s intent is to insert a new clause in future trade agreements, referring to the Convention for Biological Diversity, Nagoya Protocol and the International Treaty for Plant Genetic Resources for Food and Agriculture, and to require that these instruments be implemented in a mutually supportive manner with the UPOV and other clauses on intellectual property rights.

Whereas it is clear that the clause on UPOV adherence is not essential for EFTA countries to pursue the negotiations, the proposal still remains a component of the negotiation package and can allegedly act as a pressure factor for negotiating countries to accept a clause that obliges them to join

¹ <https://www.recht-auf-saatgut.ch/werde-aktiv/sign-on-letter/>

² EFTA's response to the open letter from the NGO coalition: <https://www.recht-auf-saatgut.ch/wp-content/uploads/2021/03/Antwortbrief-EFTA-201210.pdf>

UPOV or to comply with the substantive provisions of UPOV 1991.

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 ongoing negotiations between EFTA member states and Thailand and Malaysia, to the extent that they suggest compliance with UPOV 1991, may present adverse implications by restricting Thai and Malaysian farmers' rights - especially to freely use, exchange and sell farm-saved seeds and propagating materials. The proposal for compliance with UPOV 1991, if accepted, will create considerable obstacles towards the full realisation of the right to food by Thailand and Malaysia.

At the meantime, I wish to note with appreciation that the recently signed TEPA agreement between India and EFTA contains a reference to India's existing obligations under TRIPS agreement and avoids a mention of UPOV 91. I believe this is a good way forward and I wish to encourage EFTA countries to consider removing the suggestion for joining UPOV 91 from the negotiation package from the outset while conducting negotiations with other developing countries in the future. I also strongly encourage to remove this clause from the package of ongoing negotiations with Thailand and Malaysia.

Since humankind relies on plants for food, 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 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.³

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. 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). I believe Thailand and Malaysia may face difficulties in following up with guidelines and recommendations included in these instruments if they had to comply with UPOV 1991.

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

³ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/397/86/PDF/G2139786.pdf?OpenElement>

for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned situations.
2. Please indicate the position of the EFTA regarding the connections between formal and informal seed systems in developing nations where agriculture, especially small-scale farming, play a substantial role in the economy, serving as a significant source of livelihood and employment.
3. Please provide details regarding any actions that the EFTA has implemented or is contemplating to undertake to safeguard and/or promote the rights of farmers, specifically smallholder farmers, during the negotiations.
4. Please indicate whether in other countries where negotiations for a FTA 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.

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government 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 any potential violations of the right to food and to reconsider EFTA's position regarding compliance with UPOV 91 as part of ongoing and future negotiations.

I also wish to inform you that letter on this subject has been sent to all four EFTA member states as well as to the Governments of Malaysia and Thailand. A copy of this letter has been shared with the Government of India for information.

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 draw attention 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 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 like to draw the 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 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 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 the body of work of WIPO. 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.

In crafting and enacting national legislation on farmers' rights, states are mandated to intricately connect and 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.