

Mandate of the Special Rapporteur on the right to food

Ref.: AL THA 4/2024
(Please use this reference in your reply)

25 March 2024

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 which includes a proposal 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 full capacity to realize its obligation to respect, protect and fulfil human rights, especially the right to food.**

According to the information received:

Since 2005, EFTA member states and Thailand have been conducting negotiations towards a Free Trade Agreement (FTA). Two rounds of negotiations have been held between 2005 and 2006. 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. Besides proving for domestic markets, the country is also a key exporter of products – including widely consumed agricultural commodities such as rice, sugar and rubber. Agriculture employs around 35 percent of the workforce in Thailand.

Thailand is a significant global player in the export of commodity crops. Despite producing 3 to 5 percent of the world's rice, Thailand commands a substantial 25 percent share in the global rice trade. Thailand has a gross national income per capita that is significantly lower than in EFTA countries, with agriculture being of crucial importance to economy and a major source of livelihood and employment in rural areas. Most small scale and family farmers depend on practices of saving, using, exchanging, and selling farm-saved seeds for ensuring access to seeds.

As a member of the World Trade Organization, Thailand is bound to comply with the standards of protection under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which requires signatory parties to provide protection for plant varieties. Consequently, in 1999 Thailand enacted the Plant Varieties Protection Act. The Act gives the rights-holder of a new plant variety the sole right to produce, sell or distribute, import, export, or possess it. Foreign applicants are eligible to apply for registration of protection of a plant variety under certain conditions.

This regulation has been formulated to suit the unique national condition, in which the agricultural sector is largely relying on small scale farmers, with farm saved seeds still playing an important role, containing a rich diversity of traditional and farmer bred seeds. It carefully balances breeders' rights with the rights of farmers and public interest.

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.

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 agricultural realities.

In 2020, more than 250 civil society organizations sent a letter to EFTA member states regarding the UPOV 1991 clause in the FTA. On 10 December 2020, EFTA replied to the letters, stating that the organization 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 to accept a clause that obliges countries to join 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, to the extent that they suggest compliance with UPOV 1991, may present adverse implications by restricting Thai 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.

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.

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 may face difficulties in following up with guidelines and recommendations included in these instruments if the country 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 for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned information.
2. Please provide information on the current PVP system that is being implemented in Thailand and how it promotes farmers rights, as articulated in the International Treaty on Plant Genetic Resources for Food and Agriculture.
3. Please provide information on the extent to which the PVP system in its current form is compatible or at odds with UPOV 1991.
4. Please indicate the position of your Excellency's Government regarding whether UPOV recognizes 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.
5. Please provide details regarding any actions that Your Excellency's Government has implemented or is contemplating to safeguard and promote the rights of farmers, specifically smallholder farmers, during EFTA negotiations.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. 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 your Excellency's Government to prioritize implementing a PVP system that reflects the characteristics of your country's agricultural system and the needs of various actors. I urge to prioritize strengthening the rights of smallholder farmers and to ensure the full realization of farmers' rights as articulated in the International Treaty on Plant Genetic Resources for Food and Agriculture.

Please be informed that similar letters have been sent to all EFTA member states.

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.