



EUROPEAN FREE TRADE ASSOCIATION

Thomas Braunschweig
Public Eye
Dienerstrasse 12
CH-8021 Zurich

*Annotated version of EFTA's
response letter to an open letter to
EFTA of July 2020;
Swiss Coalition Right to Seed,
February 2021*

Ref. 20-4484

Berne, 10 December 2020

Your open letters concerning UPOV in free trade agreements

Dear Mr. Braunschweig

As the current Chair of the European Free Trade Association (EFTA), I am writing you on behalf of our four Member States in response to your letters of July 7, 2020, in which you disapprove of the position of EFTA regarding the Convention of the International Union for the Protection of New Varieties of Plants (UPOV Convention) and free trade agreements (FTAs). We take note of your concerns raised in this letter.

Regarding UPOV membership of EFTA countries, Liechtenstein is currently in the process of preparing its accession to the UPOV Convention, which requires a unanimous decision by the UPOV Council. The other EFTA countries are already members.

Comment by the Swiss Coalition Right to Seed:

Crucial information is not mentioned here:

- *the important difference between UPOV 78 and UPOV 91. In Norway, UPOV 78 applies, mainly because this version offers more flexibility for the implementation of farmers' rights.*
- *that Swiss plant variety protection law is not in conformity with UPOV 91*
- *that neither Liechtenstein nor potential partner countries can use Switzerland's law for UPOV accession, precisely because it is not UPOV 91-compliant.*

The sustainable use of agrobiodiversity and ensuring food security and nutrition for all are indeed important tasks that governments, farmers, the private sector and civil society are working towards. FTAs are one type of instruments, next to other policy measures, governments may employ in this regard.

Comment by the Swiss Coalition Right to Seed:

We welcome the fact that the sustainable use of agrobiodiversity and ensuring food security are recognised as important tasks. However, in what sense free trade agreements represent a tool for their implementation is unclear to us and lacks any evidence. We are not aware of any examples in which the sustainable use of agrobiodiversity and food security were the declared goal of a free trade.

All WTO members have to provide for the protection of plant varieties, either through patents or through a *sui generis* system. The UPOV Convention is the most widespread specific

international agreement regulating such protection. This is why, as a starting point for negotiations, EFTA proposes to refer to the UPOV Convention for the substantive regulation of plant variety protection in free trade agreements.

Comment of the Swiss Coalition Right to Seed

The main message of our [open letter](#) is that even 30 years after the negotiations on UPOV91, three out of four EFTA countries have not adopted these regulations into national law (Norway and Liechtenstein not at all, Switzerland not completely). This is precisely why it is misleading and untrustworthy to describe UPOV 91 as the ideal starting point, because it means that partner countries are being asked to do more than they themselves are prepared to implement. Unfortunately, the response letter does not address this criticism at all.

We recognize the fact that many farmers, especially smallholders in developing countries, obtain their seeds through a variety of seed systems. The UPOV Convention, however, only covers new varieties that fulfill the UPOV criteria and does not affect old traditional farmers' varieties.

Comment by the Swiss Coalition Right to Seed:

It has never been argued from our side that the UPOV system has a negative impact on old, traditional landraces. Therefore, this answer is misleading. The real problem is that the UPOV system has a negative impact on farmers' seed systems. These make up the vast majority of seed supply in many countries and for many species. The formal and peasant seed systems are interdependent. Both systems use genetic resources from the other system for their own advancement. While the access of the formal seed system to the genetic resources of the farmer seed systems is common practice and internationally regulated (International Treaty ITPGRFA), the access of the farmer systems to the varieties of the formal system is blocked by plant variety protection laws according to UPOV. However, if the flow of genetic resources from the formal to the farmer seed system is disrupted, this has a negative impact on the farmer seed system and thus on food security and agrobiodiversity. We all depend on this agrobiodiversity. It is therefore also in Switzerland's interest to promote systems that maintain, sustainably use and further develop agrobiodiversity.

EFTA does not make the accession to UPOV or the adherence to its rules a prerequisite for the conclusion of an FTA. The objective of any FTA negotiated by EFTA is to provide the best possible solution for all stakeholders concerned. Therefore, EFTA is open to finding alternative solutions that take into account the situation of all farmers in the partner countries, including those that rely on the so-called informal seed system.

Comment by the Swiss Coalition Right to Seed:

We are pleased that UPOV membership or implementation of the UPOV rules is not a prerequisite for concluding a free trade agreement. We also welcome the fact that EFTA wants to find alternative solutions that also take into account the situation of farmers in partner countries who depend on the farmer seed system. However, if the purpose of FTAs is indeed to find the best possible solution for all stakeholders concerned, including farmers in partner countries, the call for UPOV 91 as a starting position cannot be maintained for the reasons outlined above.

In order to better reflect the importance of both the formal and the informal seed systems, EFTA States have sought a clarification in their approach to FTA negotiations. In the future, in its initial negotiating proposal, EFTA will thus supplement the provisions relating to the protection of new plant varieties with an article on genetic resources and traditional knowledge which references the Convention on Biological Diversity and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. The article will call upon Parties to implement the international agreements related to IP and genetic resources in a mutually supportive manner. - EFTA considers this to be a balanced approach, which we trust addresses the concerns of all farmers in partner countries.

Comment by the Swiss Coalition for the Right to Seed:

At a meeting at the end of January 2021 with Ambassador Markus Schlagenhof, the Swiss government's delegate for trade agreements, we were given the text of the new article that should be included in the model text of the EFTA negotiating mandates and thus in the first negotiating proposal in each case. It reads as follows:

Article YY

Genetic Resources and Traditional Knowledge

- 1. The Parties reaffirm their sovereign rights over their natural resources. Considering the close and traditional dependence of subsistence farmers, indigenous Peoples and local communities embodying traditional lifestyles on genetic resources, the Parties also recognise their rights and obligations as established by the Convention on Biological Diversity, the International Treaty on Plant Genetic Resources for Food and Agriculture and other relevant international agreements, to which they are a Party, related to genetic resources and associated traditional knowledge.**
- 2. The Parties shall endeavour to implement the international agreements in the area of intellectual property related to genetic resources and associated traditional knowledge in a mutually supportive manner with those international agreements in paragraph 1 above.**

This addition in no way invalidates the concerns we have described regarding the requirement for the UPOV system. On the contrary.

The talk of a balanced approach is misleading, because the proposal is in no way balanced: On the one hand, partner countries are to be obliged to amend their national seed legislation in order to accede to UPOV 91. On the other hand, they are to comply with agreements to which they have already acceded (recognise their rights and obligations). However, the latter is a matter of course and does not really need to be mentioned in a trade agreement. While the demand for UPOV 91 is a new obligation imposed from the outside, the implementation of agreements to which the partner countries are already members is merely the confirmation of a decision that the respective partner country has already made.

The demand for the implementation of the various agreements in a mutually supportive manner is also not balanced. This is because accession to UPOV 91 requires an almost word-for-word implementation of the 1991 UPOV Act. The national plant variety protection law must be assessed as UPOV-compliant by the UPOV Council before accession. However, the other agreements mentioned (Biodiversity Convention, International Treaty) can be implemented in a flexible manner adapted to the respective country. In contrast to the UPOV Convention, the partner countries have full freedom of choice here.

Norway in particular has explicitly not accepted UPOV 91 for this reason, because the implementation of UPOV 91 does not allow for mutually supportive implementation with the International Treaty and the Biodiversity Convention. Other sui generis PVP systems are much better suited for this purpose. This is also the conclusion of a Swiss co-financed study by Medaglia et al (CIDSL, 2019): "Sui generis PVP systems adopted outside of the UPOV Convention framework - as permitted by TRIPS - may provide a way to better balance rights and obligations relating to the Nagoya Protocol, Plant Treaty, and Plant Variety Protection". And Switzerland itself has not implemented the farmers' rights mentioned in the International Treaty in accordance with UPOV 91, but has chosen a different path.

In the desire for a mutually supportive implementation of different agreements, the primacy of human rights should not be forgotten. See also the study by C. Golay, Geneva Academy 2020: The Right to Seeds and Intellectual Property Rights: "In accordance with the priority to be given

to human rights norms in international and national laws, reflected in the UNDROP, states shall ensure that their laws and policies, as well as the international agreements to which they are party, including on intellectual property, do not lead to violations, but to a better protection of peasants' right to seeds".

What would be possible within the framework of free trade agreements with WTO members, however, is to anchor the demand for an effective system of plant variety protection. Such a solution would give all countries the necessary flexibility to implement the protection of intellectual property rights and the CBD and the Treaty in harmony.

Our respective administrations remain available for a discussion with you to further explain EFTA's approach on a country-by-country basis.

Comment by the Swiss Coalition for the Right to Seed:

The choice to adopt a country-by-country approach from now on is welcome. However, the other statements in the letter do not indicate this. One of the main points of criticism of our open letter is that so far EFTA has indiscriminately demanded the accession of all countries to UPOV in the first place. In a conversation with Ambassador Markus Schlagenhof, it was stressed that this fundamental demand would be maintained. It is therefore misleading to speak here of a country-specific approach.

Sincerely yours,

H.E Guy Parmelin
Federal Councillor
Head of the Federal Department of Economic Affairs,
Education and Research
Switzerland

Rue de Varembe 9-11 • CH-1211 Geneva 20 • Tel +4122332 26 00 • Fax +4122332 26 77
Rue Joseph II 12-16 • B-1000 Brussels • Tel +32 2 286 17 11 • Fax +32 2 286 17 50
mail@efta.int • www.efta.int