

Imposing double standards: Why EFTA should not demand an UPOV clause in FTA with Thailand.

In its Free Trade Agreements (FTA), EFTA demands clauses that oblige the partners to introduce strict Plant Variety Protection (PVP) regulations that are in line with the International Union for the Protection of New Varieties of Plants (UPOV) 91. Most likely this will also be the case in the current negotiations with Thailand. However, Thailand already has a PVP Act that balances the intellectual property right with farmers rights and with the objectives to maintain biodiversity. The introduction of PVP regulation in line with UPOV 91 would have negative consequences on small scale farmers, food security and biodiversity. It is unnecessary as the existing PVP Act provides sufficient protection of intellectual property of breeders. And it is unjustified, as most EFTA members don't have such a strict PVP.

Thailand has introduced a PVP regulation in 1999 to fill its obligation from TRIPS Agreement to implement some form of intellectual property rights for seeds. 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 play 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 91 Act is a convention defining requirements for national PVP regulation, that has been elaborated by UPOV in 1991. The members then consisted of 19 mostly European and American high-income countries. The Act is ill-adapted to the context of countries like Thailand and it violates farmer's rights on seed as agreed internationally in ITPGRFA, UNDROP and CBD¹. While some aspects like the technical requirements for protectability are similar in UPOV 91 and Thai PVP regulation, other aspects differ significantly, namely:

- **Farmers exemption:** Thai PVP Act allows the farmers to replant farm saved seeds on their own holding (within certain limits) whereas UPOV 91 only allows the use of farm saved seeds for a very limited number of species and with the obligation to safeguard the legitimate interests of the breeder, resulting in royalty payments by farmers.
- **Prevention of biopiracy:** Thai PVP Act provides the possibility to register traditional varieties, as well as varieties that are bred by farmer's communities. Breeders applying for PVP have to disclose the origin of the genetic material used to obtain the new variety. Such conditions to prevent biopiracy are not allowed under UPOV 91, and experiences in countries have shown that this bears a high risk of the misappropriation of traditional and farmer bred varieties².
- **Provisions to prevent the emergence of unfair monopolies on seeds:** The duration of protection in Thai PVP (12-17 years, 27 years for trees) are shorter than in UPOV91 (at least 20 years) and therefore the monopoly of the breeders more limited in time. Besides it gives the Government the possibility to introduce compulsory licensing.

Thai PVP alike to UPOV 91 does provide the breeder the exclusive right to sell seeds of protected varieties (farmers are not allowed to sell or exchange farm saved seeds), with the above-mentioned

¹ Seeds, right to life and farmers' rights: report of the Special Rapporteur on the Right to Food, Michael Fakhri <https://digitallibrary.un.org/record/3956872#record-files-collapse-header>

² A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa <https://swissaid.kinsta.cloud/wp-content/uploads/2019/11/DIV-Studie-UPOV-ADPVPS.pdf>

limitations. Therefore, this regulation is sufficient to safeguard the interest of breeders and EFTA countries hosting breeders, who are interested in selling their products in Thailand.

In the past FTA negotiations, EFTA demanded the introduction of a clause referring to UPOV with the wording: "The Parties, which are not already parties to the 1978 Act of the International Convention for the Protection of New Varieties of Plants (UPOV) shall comply with the substantive provisions of the 1991 UPOV Act". This wording creates a double standard, as existing UPOV-Members can remain with the less restrictive 1978 Act while non-members are obliged to comply with UPOV 91.

Such a clause would oblige Thailand to introduce PVP regulation that is in line UPOV 91 with negative effects on farmers rights, food security and (agro-) biodiversity. As Biothai, a Thai farmer's organization warns, this would be "detrimental to our food security".

Insisting on a UPOV clause would be duplicitous as Switzerland, Norway and Liechtenstein have chosen not to comply with the requirements of UPOV91 in their own national laws. In 2005, the Norwegian government turned down a proposal for a UPOV 91 membership and decided to keep the customary rights of farmers to save and use farm-saved seeds and propagating material. The Swiss PVP act allows for the use of farm-saved propagation material for various crops such as wheat or potatoes, without any limit or royalty payment. This was a main request of farmers when the law was negotiated in parliament. Thus, although Switzerland ratified UPOV 91, it is not in line with its requirements. Such a law would prevent any candidate country from joining UPOV. Liechtenstein has no PVPlaw at all and is not a member of UPOV. It has thus not respected the free trade agreements it has signed over the past 20 years.

Demanding laws from developing and emerging countries that are considered even inappropriate by yourselves is hypocritical and unfair. All the more so as farmers' rights are even more important for food security in the countries of the Global South than in Switzerland, Norway or Liechtenstein. Seeking to impose laws on countries of the Global South, which were drafted without their involvement, is a neo-colonial dictate running counter to their interest. These countries have the right and a duty to develop laws and policies related to seeds that are best suited to their agricultural system and the needs of their population, always taking into account the Farmers' Right to participate in decision-making processes. It is unsettling to see that rich EFTA countries risk jeopardizing the ability of countries to develop tailored laws and make use of the flexibilities provided by the World Trade Organization' Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

For all these reasons, we urge EFTA to remove demands for UPOV 91 compatible PVP laws from the negotiating mandate for the FTA with Thailand and all future FTAs. EFTA shall abstain from any kind of provisions in regard to intellectual property rights on plant propagation material and leave it to the partner states to decide how to design PVP to best suit the needs within the country and to fulfil international obligations from WTO-TRIPS, ITPGRFA, UNDROP and CBD. This would be an important step towards greater justice and a significant contribution towards achieving the United Nations Sustainable Development Goals.

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This briefing paper has been elaborated by the Swiss Coaliton for the right to seeds, consisting of SWISSAID, HEKS/EPER, Fastenaktion, FIAN, Public Eye and Alliance Sud.

Further Information:

- [BioThai: Will collecting seeds for replanting be made a crime?](#)
- [QUNO: Briefing Paper Thailand's sui generis system of plant variety protection](#)
- [APBEBES and Both ENDS: The EU's push for intellectual property rights on seeds and its impact on developing countries](#)
- [APBEBES: Searching for flexibility - Why parties to the 1978 Act of the UPOV Convention have not acceded to the 1991 Act](#)
- [APBEBES, SWISSAID et al: A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa](#)