

## Swiss Coalition for the Right to Seed

# What is wrong with UPOV?

## 10 answers to 10 key questions

When negotiating free trade agreements, the EFTA requests countries in the Global South to introduce plant variety protection laws in accordance with UPOV 91. However, even within the EFTA there is no uniform system for plant variety protection, and neither Switzerland, Norway, nor Liechtenstein have implemented the requirements of UPOV 91 in their national laws, as these do not align with their national needs. They nonetheless demand their trading partners to implement rules that they do not consider appropriate for themselves.

The requirements of UPOV 91 are ill-suited for countries in the Global South, that – like Switzerland and Norway – give greater weight to farmers' rights in their plant variety protection laws than is permitted under UPOV 91. Farmers' rights are central to food security and the preservation of agrobiodiversity in these countries. In a report from 2022<sup>1</sup> the UN Special Rapporteur on the Right to Food, Michael Fakhri, concludes that the implementation of UPOV 91 threatens food security and biodiversity. Furthermore, he explicitly condemns the fact that countries in the Global South are being pushed to join UPOV via trade agreements and calls for this practice to be stopped.

Ultimately, the enforcement of UPOV in countries in the Global South benefits neither the EFTA countries as a research location nor the economy of its member countries. **For this reason, future negotiations for free trade agreements should not contain clauses referring to UPOV.**

What exactly is UPOV about and what is its background? We provide the answers to 10 key questions.

### 1. What is UPOV?

UPOV<sup>2</sup> is the acronym for the International Union for the Protection of New Varieties of Plants (Union internationale pour la protection des obtentions végétales in French). It is an intergovernmental organisation based in Geneva which aims to promote a worldwide uniform regime of plant variety protection through the International Convention for the Protection of New Varieties of Plants (the UPOV Act). Plant variety protection gives an exclusive right comparable to a patent and protects the intellectual property of new plant varieties.<sup>3</sup>

Founded by 12 European countries in 1961, UPOV now comprises 77 countries and two intergovernmental organisations, some of which joined after signing trade agreements with the EU, Switzerland, the EFTA or the USA. To become a member, countries must introduce plant variety protection provisions that conform to the UPOV Act, of which there are currently two different versions. While members that joined UPOV before April 1999 can stay with the older 1978 Act (UPOV 78), new members must comply with the stricter 1991 Act (UPOV 91). The latter is extremely problematic as it severely restricts farmers' rights to seeds.

<sup>1</sup> Human Rights Council, Forty-ninth session 28 February–1 April 2022: Seeds, right to life and farmers' rights. Report of the Special Rapporteur on the right to food, Michael Fakhri. [A/HRC/49/43 \(un.org\)](https://www.unhcr.org/refugees-and-migrants/2022/2/20220228-seeds-right-to-life-and-farmers-rights)

<sup>2</sup> UPOV: Union pour la protection des obtentions végétales

<sup>3</sup> [Bundessortenamt: Sortenschutz](https://www.bundessortenamt.de/sortenschutz)

However, UPOV is only one of many ways to introduce protection for new plant varieties. Many countries in the Global South, such as India, Thailand, the Philippines, Malaysia, Ethiopia, Zambia and others, have introduced their own plant variety protection laws. While largely aligning with UPOV, these laws take into account the specific conditions and needs of their own countries, particularly farmers' rights. For this reason, practically all Latin American countries, as well as China, South Africa, New Zealand and Norway, remain members of UPOV 78 and reject adherence to UPOV 91.

## **2. How does UPOV 91 undermine food security?**

At least half of the world's food is produced by smallholder farmers, who obtain their seeds from their own harvest, from neighbours or from the local market, i.e. from farmer-managed seed systems, particularly in the Global South. Their production – and thus the food security of millions of people – is based on free access to seeds from these farming systems. Especially in large parts of Africa and Asia, these form the backbone of local agriculture. A 2016 study analysed the production of 40 crops in six African countries and found that farmers obtained up to 90 per cent of their seeds and propagation material from farmer-managed seed systems.<sup>4</sup> These local seed systems are therefore essential for food security.

Under laws based on UPOV 91, farmers will have to buy costly seeds from agricultural corporations every year. In some countries, violations of these regulations are penalised with imprisonment.

## **3. What consequences does UPOV 91 have on agrobiodiversity?**

The diversity of varieties stored in gene banks, cultivated on fields and in gardens around the world is the result of centuries of farmers' breeding practices. Maintaining and strengthening this diversity requires a functioning farmer-managed seed system. A study from 2020<sup>5</sup> found that the genetic diversity of 27 crops is predominantly maintained by small-scale farming communities who cultivate these traditional varieties.

Replacing genetically diverse traditional varieties by genetically uniform modern seeds is a major driver for the ongoing genetic erosion. The UPOV system exacerbates this process by providing powerful commercial breeders the right to IPR-sanctioned monopolies. This right is only conferred to varieties with high levels of uniformity. Consequently, UPOV limits who can profit from the plant variety protection system. In many cases, farmers cannot benefit from the UPOV system because the varieties they breed do not meet the UPOV criteria and because they cannot benefit from the UPOV breeder's exemption, which is not applicable to selection breeding. This not only leads to a loss of genetic diversity in agriculture but also reduces farmers' ability to adapt their production to new challenges, particularly those linked to climate change.

## **4. How does UPOV 91 negatively affect farmers' seed systems?**

Depending on the crops, small farmers use not only traditional varieties but also commercial seeds of protected varieties. Often distributed and supported by states or development projects, these protected seeds are integrated in farmer-managed seed systems. This means farmers risk being criminalised when continuing their traditional practices of storing, exchanging or selling the seeds in question.

## **5. How does the European Free Trade Association (EFTA) oblige its partner countries to comply with UPOV 91?**

As a starting point in the negotiation of a trade agreement, Switzerland and the other EFTA members propose a clause that obliges partner countries to either ratify UPOV 91 or "comply with the substantive provisions of UPOV 91". According to the State Secretariat for Economic Affairs (SECO), the clause is not a prerequisite for concluding a free trade agreement and it is possible to respond to the needs of partners and find individual solutions in terms of variety protection. However, this can only be the case when the partners country insists on a change and is prepared to make concessions in other areas.

<sup>4</sup> Rist et al. (2020): Variety is the source of life. Swiss Academic Fact Sheets 15/1. Swiss Academy of Sciences (SCNAT). [online\\_E\\_Layout\\_Factsheet\\_Agrobiodiversity\\_sm.pdf \(scnat.ch\)](https://www.scnat.ch/online/E/Layout/Factsheet_Agrobiodiversity_sm.pdf)

<sup>5</sup> Rist et al. (2020): Variety is the source of life. Swiss Academic Fact Sheets 15/1. Swiss Academy of Sciences (SCNAT). [online\\_E\\_Layout\\_Factsheet\\_Agrobiodiversity\\_sm.pdf \(scnat.ch\)](https://www.scnat.ch/online/E/Layout/Factsheet_Agrobiodiversity_sm.pdf)

Unfortunately, in many countries, governments do not prioritise farmers' rights and farmers' organisations have no way of influencing the trade negotiations. This also violates the farmers' right to participate, as enshrined in various international treaties, including the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and in the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).

#### **6. In what ways does the UPOV clause contradict the international responsibilities of EFTA member states?**

The provisions of UPOV 91 are in stark contradiction to the right of farmers to seeds as set out and agreed in several UN treaties and conventions, such as the Convention on Biological Diversity (CBD), the ITPGRFA and the UNDROP. An important element of this latter declaration is for states to "take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas" which include the right to save, use, exchange and sell their farm-saved seeds or propagating material, as well as the right to the protection of traditional knowledge.

#### **7. In recent trade agreements, the UPOV clause has been complemented by an article referring to CBD and ITPGRFA. Does this eliminate the problem?**

No. UPOV does not allow policy space for developing countries' governments to enact provisions they consider necessary to implement Article 9 (Farmers' Rights) of the ITPGRFA, which obliges member states to take measures to "protect and promote" farmers' rights.

Furthermore, UPOV and the ITPGRFA are incompatible when it comes to the right of farmers to save, use, exchange and sell farm-saved seeds and other propagating material.

As long as plant variety protection laws conforming to UPOV 91 are proposed in trade negotiations, this additional article will not solve the problem. While accession to UPOV requires the implementation of the UPOV 91 Act in national law, this is not the case for the agreements mentioned in the additional article. Maintaining the UPOV requirement while adding a new article referring to other international agreements is rather likely to lead to new conflicts.

#### **8. Does Switzerland implement UPOV 91? And what is the situation with UPOV and plant variety protection in other EFTA member states?**

Switzerland does not implement UPOV 91 in its entirety. The Swiss act for plant variety protection 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 does not conform to its requirements.

In 2005, the Norwegian government also explicitly decided against the application of UPOV 91 in its national legislation. The government came to the conclusion that UPOV 91 would lead to an unreasonable restriction on the rights of its farmers to save, use and exchange farm-saved seeds. The country remained with UPOV 78, mainly because this version offers a better balance between the rights of farmers and those of plant breeders and enterprises.

Liechtenstein has no plant variety protection law at all and is not a member of UPOV, contrary to its obligation from a range of EFTA trade agreements over the past 23 years. The country would like to access UPOV through the Swiss law for plant variety protection. However, according to the government of Liechtenstein<sup>6</sup> this is impossible because the Swiss laws themselves are not UPOV 91 compliant.

Iceland is the only EFTA country that applies UPOV 91 to the letter. However, currently it does not have a single protected variety.

<sup>6</sup> [Minor interpellation of 9 June 2021, „Plant variety protection law in free trade agreements and in Liechtenstein“](#)

### **9. How is it possible that EFTA member states require conditions from their FTA partner countries that they themselves do not comply with?**

Switzerland and Norway were already members of UPOV before it was mandatory for new members to adhere to UPOV 91. Hence, they were able to choose between staying with UPOV 78 or updating to UPOV 91.

In 2005, Norway examined the possibility of accessing UPOV 91. As explained in point 8, however, the Norwegian government decided to stay with the UPOV 78 standards.

Switzerland has ratified UPOV 91 but only partially implemented its provisions in the revised Federal Law on the Protection of New Varieties of Plants, thus allowing farmers to continue to freely use, reproduce and multiply seeds of certain plant species. This was possible by the fact that the UPOV Secretariat only checks compliance with legislation for new members, but not for countries that are already members of UPOV.

In contrast to these decisions by EFTA members, the clause in the trade agreements leaves partner countries no choice but to implement UPOV 91. It is hypocritical and unfair of EFTA states to require countries in the Global South to implement laws that they themselves consider inappropriate, especially since the rights of farmers in the Global South are even more important for food security than in Switzerland, Norway or Liechtenstein.

### **10. In what way does the UPOV clause further the national interests of EFTA?**

Imposing UPOV requirements on countries of the Global South does not contribute to any overarching national interest of EFTA member countries. There is only one international seed corporation that potentially could benefit from such provision – the Swiss-based company Syngenta, which is owned by China and has its seed business headquartered in Chicago. Most seed breeders within the EFTA develop locally adapted seeds for European markets and have little interest in selling seeds overseas. Thus, the demand to stop proposing a clause referring to UPOV has been supported by several breeders based in Switzerland.

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