

## **Submission on the Implementation of Farmers' Rights in Switzerland by the Berne Declaration (Switzerland)**

### **1. Introduction**

Swiss federal patent and plant variety protection laws were revised in 2008, and a revised ordinance on seeds and propagation material entered into force in 2010. The revised patent law explicitly allows for patents on biological material, and both laws narrow the farmer's privilege by restricting the reproduction and suppressing the exchange of protected varieties. These amendments contradict the principles of facilitated exchange and use of crop genetic resources that underlie the International Treaty. This has been a step backward for the implementation of Farmers' Rights. Nevertheless, despite their striking limitations, both laws also contain a number of provisions that may reduce the adverse impacts of the patent and plant variety protection laws on the enjoyment of Farmers' Rights. In addition, the ordinance on seeds and propagation material provides for an innovative approach to promote the use of traditional varieties.

### **2. Views, experiences and best practices**

#### **2.1. Shortcomings**

##### **Patentability of biological material including crops and forages**

Under the revised patent law, patents can be taken out on microbiological or other technical processes and their resulting products, provided that the processes are not limited to any specific plant variety.<sup>1</sup> Furthermore, if an immediate product of a patented process is biological material, the effects of the patent even extend to the products obtained through further propagation of the material and any material into which the product is integrated and where its genetic information fulfills its function. Compared to the previous law, this constitutes a substantial expansion of the possibility of patenting crop genetic resources, which works primarily in favor of the interests of the biotechnology industry, at the expense of smaller breeding companies and farmers.

##### **Prohibition of exchange and restriction to reproduce propagating material**

Under the revised patent and plant variety protection laws, farmers do not have the right to offer, sell, market or stock propagating material of patented or protected varieties without the agreement of the holder of the patent or of the title of plant variety protection, respectively, except for private, non-commercial and experimental purposes and breeding of new varieties.<sup>2</sup> In addition, the reproduction of many protected plant genetic resources including fruits, vegetables, vines and berries was officially banned by the revised plant variety protection law and the corresponding ordinance.<sup>3</sup>

The Swiss Fruit Association (Fruit-Union Suisse) requested that the farmer's privilege for fruits and berries should be maintained, based on the claim that on-farm reproduction of planting material is an important safeguard against phytosanitary problems and therefore constitutes an economic necessity for fruit farmers. In direct contradiction with article 6.2 f. of the Treaty, which foresees that Contracting Parties shall maintain policies that support the wider use of crop diversity on farm in order to reduce crop vulnerability and genetic erosion, this request was disregarded by the responsible government agencies.

Both revisions thus exhibit serious drawbacks with regard to the implementation of Farmers' Rights as laid down in articles 9, 5, 6 and the preamble of the Treaty. In fact, the relevant provisions of the Treaty were not

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<sup>1</sup> *Swiss federal patent law*, articles 2.2 b., 8 a. and 8 b.

<sup>2</sup> *Swiss federal patent law*, articles 8 and 9; *Swiss federal plant variety protection law*, articles 5 and 6.

<sup>3</sup> *Swiss federal plant variety protection law*, article 7. Annex 1 of the *ordinance on the protection of new varieties of plants* of 2008 provides for an exclusive list of crop genetic resources for which reproduction is allowed, which is limited to selected fodder crops, cereals, potatoes, oil crops and fiber crops.

even considered in the discussions of the revision process. This is evidenced in the messages of the Swiss Federal Council concerning the revised plant variety protection law and the revised patent law, where the Treaty was only briefly touched upon in the context of the obligation to disclose the source of genetic material in patent applications. This was a major shortcoming in the revision process. Indeed, the Treaty should be fully taken into account in any revision of intellectual property laws that has an impact on Farmers' Rights and the conservation and sustainable use of crop genetic resources.

## **2.2. Positive developments**

Nevertheless, and particularly if compared to the current European patent and plant variety protection law landscape, the revised Swiss federal patent and plant variety protection laws and the ordinance on seeds and propagation materials also provide for a number of progressive provisions in specific areas. The provisions have the potential to reduce the adverse impacts of intellectual property laws on the enjoyment of Farmers' Rights in the spirit of the International Treaty:

### **Exceptions to the effects of patents and plant variety protection**

*Article 9.1 e. of the Swiss federal patent law:*

*The effects of the patent do not extend to the use of biological material for the purpose of the production or the discovery and development of a plant variety.<sup>4</sup>*

*Articles 6 of the Swiss federal plant variety protection law:*

*The breeder's authorization shall not be required for [...] acts which are done:*

*a. privately and for non-commercial purposes;*

*b. for experimental purposes;*

*c. for the purpose of breeding of other varieties entailing the use of the protected variety [...].<sup>5</sup>*

Article 9.1 e. of the patent law and articles 6 a.-c. of the plant variety protection law imply, concretely, that farmers and breeders can use crop genetic material (of a patented respectively protected agricultural variety) for breeding purposes without the obligation to ask for permission or to make payments to holders of patents or of titles of plant variety protection, respectively. However, under the patent law they are not free to market the product of their breeding efforts, as the newly developed plant variety would still fall under the scope of patent claims.

*Article 9.1 f. of the Swiss federal patent law:*

*The effects of the patent do not extend to biological material that is obtained in the field of agriculture by chance or because it is technically unavoidable.<sup>6</sup>*

Article 9.1 f. of the patent law is intended to protect farmers from excessive claims. This means that a farmer cannot be held responsible for alleged patent breaches in cases where the patented genetic information was bred into his or her planting material without his or her knowledge or against his or her will (e.g. by wind-pollination). The inclusion of this provision was a direct reaction to court cases between seed companies and farmers in the United States and Canada.

In its message of 2005 on the revised patent law, the Swiss Federal Council has underlined the importance of these measures for the better achievement of the patent system's inherent goal of promoting research and development.

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<sup>4</sup> Unofficial translation. Please refer to '4. Relevant links' for the official version of the law in French.

<sup>5</sup> Unofficial translation provided by UPOV.

<sup>6</sup> Unofficial translation. Please refer to '4. Relevant links' for the official version of the law in French.

## Farmer's privilege

*Article 35a 1. of the Swiss federal patent law:*

*Farmers who have acquired plant reproduction material placed on the market by the proprietor of the patent or with his consent may reproduce, on their own agricultural holding, the product of the harvest from the cultivation of this material on the said holding.*<sup>7</sup>

*Article 7 of the Swiss federal plant variety protection law:*

*Farmers who have acquired propagating material from a protected agricultural variety put in circulation by the holder or with his consent may, on their holdings, propagate the harvested material they have obtained by growing such material.*<sup>8</sup>

The wording used in the corresponding provisions of the patent law and the plant variety protection law is largely congruent. Under both laws, farmers are entitled to reproduce the product of the harvest from the cultivation of rightfully acquired propagating material (of a patented respectively protected agricultural variety) on their own holdings. In fact, it is important to mention that by adopting the revised patent and plant variety protection laws, the Swiss parliament has explicitly rejected the introduction of any forms of payment by farmers to holders of patents or of titles of plant variety protection, for farm-saved seeds. Therefore, the current law does not foresee any forms of payments for material that is reproduced on farm.

*Article 35a 4. of the Swiss federal patent law:*

*Contractual agreements which limit or revoke the farmer's privilege in the area of food and feed production are invalid.*<sup>9</sup>

*Article 8 of the Swiss federal plant variety protection law:*

*Any agreement which restricts or annuls the exceptions to the right to protection for the varieties referred to in art. 6 and 7 shall be deemed to be null and void.*<sup>10</sup>

These articles imply that the provisions in this regard that are included in several private contracts in use on the international seed market, do not apply in Switzerland.

The farmer's privilege as translated into national law under the Swiss federal plant variety protection law thus figures among the most progressive implementations of the UPOV '91 act.

## Promotion of traditional varieties

Through the ordinance on seeds and propagation material, seeds of so-called "niche varieties" (i.e. varieties of landraces, ecotypes of forages, varieties that have been eliminated from the variety catalogue since more than two years and other varieties, that exhibit interesting traits but do not meet the requirements for inclusion in the variety catalogue set out in the ordinance<sup>11</sup>) can be legally put on the market, once approved by the Swiss Federal Office for Agriculture (FOAG). In addition, seeds and propagation material of "candidate varieties" (i.e. varieties for which approval for inclusion in the variety catalogue is pending and that are not genetically modified) can be legally circulated for propagation or experimental purposes, if the variety is registered with FOAG.<sup>12</sup> The ordinance thereby contributes towards the implementation of Farmers' Rights by promoting the expanded use of local and locally adapted varieties and their management on farm (articles 5.1 c., 6.2 e. and 6.2 f. of the Treaty).

<sup>7</sup> Unofficial translation. Please refer to '4. Relevant links' for the official version of the law in French.

<sup>8</sup> Unofficial translation provided by UPOV.

<sup>9</sup> Unofficial translation. Please refer to '4. Relevant links' for the official version of the law in French.

<sup>10</sup> Unofficial translation provided by UPOV.

<sup>11</sup> For the requirements for inclusion in the variety catalogue see *Ordinance on seeds and propagation material*, articles 13-19.

<sup>12</sup> *Ordinance on seeds and propagation material*, articles 29 and 30.

### 3. Ways and means for the exchange of views, experiences and best practices

The implementation of Article 9 and other provisions of the Treaty related to Farmers' Rights still lags behind with regard other main components of the Treaty. The exchange of views, experiences and best practices among all relevant stakeholders of the Treaty is an important first step to remedy this situation. We would therefore like to propose the following non-exhaustive list of measures:

- Establishment of a data base of national and regional plant variety protection, patent and seed laws and regulations, including notably non-UPOV plant variety protection systems.
- Strengthening the involvement of farmers, farmers' organizations and other relevant stakeholders in processes and discussions related to Farmers' Rights under the Treaty, including by:
  - broadening the participation of civil society organizations in sessions of the Governing Body and other relevant intersessional processes of the Treaty;
  - producing and disseminating farmer-friendly outreach material (materials in print version in addition to the internet, use of non-technical language, translations in a variety of languages, etc); and
  - organizing regional Farmers' Rights consultations and capacity development workshops.

Online notifications and dissemination of information by electronic means, and notably through the Treaty web site, are an important way of exchanging experiences. However, the potential of these measures to reach directly concerned farmers is very limited. This fact needs to be taken into account, and the Governing Body of the Treaty should adopt adequate means for the exchange of views, experiences and best practices that allow farmers to get actively engaged in the discussions related to their Farmers' Rights.

### 4. Relevant links:

- Swiss federal patent law (revised 2008): <http://www.admin.ch/ch/f/rs/2/232.14.fr.pdf> (French)
- Swiss federal plant variety protection law (revised 2008): [http://www.upov.org/upovlex/en/text.jsp?file\\_id=179796](http://www.upov.org/upovlex/en/text.jsp?file_id=179796) (English)
- Ordinance on the protection of new varieties of plants (2008): [http://www.upov.org/upovlex/en/text.jsp?file\\_id=224332](http://www.upov.org/upovlex/en/text.jsp?file_id=224332) (English)
- Ordinance on seeds and propagation material (revised 2010): [http://www.admin.ch/ch/f/rs/916\\_151\\_1/index.html](http://www.admin.ch/ch/f/rs/916_151_1/index.html) (French)
- Message of the Swiss Federal Council concerning the modification of the plant variety protection law (2004): <http://www.admin.ch/ch/f/ff/2004/3929.pdf> (French)
- Message of the Swiss Federal Council concerning the modification of the patent law (2005): <http://www.admin.ch/ch/f/ff/2006/1.pdf> (French)