

CIVIL SOCIETY LETTER ON EUROPEAN FREE TRADE ASSOCIATION (EFTA)-MALAYSIA FTA

13th March 2017

Dear Negotiators of EFTA-Malaysia FTA,

EFTA-Malaysia Negotiations Must Not Include Obligation to Join or Implement UPOV 1991

We understand that EFTA-Malaysia FTA negotiations will be proceeding. We would like to stress that the FTA must not include any obligation that restricts in any way Malaysia's flexibility in relation to its existing *sui generis* plant variety protection system. In particular the FTA must not obligate Malaysia to join or implement UPOV 1991 or impose any other obligation and/or limitation with regard to plant variety protection.

As a member of the WTO, Malaysia is under an obligation to implement Article 27.3(b). This article however only requires Malaysia to protect plant varieties, and it can choose to do so by an effective *sui generis* system. There are no other requirements.

Utilizing the policy space accorded by the TRIPS Agreement, Malaysia enacted the Protection of New Varieties of Plants Act 2004. This law is unique as it delicately balances the different interests (public interests, commercial plant breeders, public breeders and smallholder farmers). The Act also promotes realization of the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the Convention on Biological Diversity (CBD), and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) to which Malaysia is a Party, and mutual supportiveness among national laws. Some of the key unique features of this law are:

- (a) The recognition of farmer seed systems and their need for protection as well as their need for distinct criteria for registration. It grants protection to varieties of farmers, local communities or indigenous people if the plant variety is "new, distinct and identifiable".
- (b) Recognition of government's right to refuse the grant of plant breeder's right (PBR) in the public interest.
- (c) Requiring an applicant for plant breeders' rights (PBR) to *inter alia* declare the source of the genetic material or the immediate parental lines of the variety, present evidence of prior informed consent as well as show compliance with access and benefit sharing and biosafety legislation. These requirements are aimed at preventing 'biopiracy', facilitating fair and equitable benefit sharing, supporting implementation of other national laws including protecting Malaysians from varieties that are injurious to health or the environment. These are also linked to implementation of Malaysia's obligations under international law including the ITPGRFA, CBD and its Cartagena Protocol on Biosafety.
- (d) Requiring the applicant to deposit samples of the seed or any other propagating material in the required quantity.
- (e) Recognizing as an exception to PBRs, the absolute right of small farmers to save seeds/propagating materials on their own holding, to exchange seed/propagating material among small farmers and to sell farm saved seeds in situations where a small farmer cannot make use of the farm saved seed on his own holdings due to circumstances beyond the farmer's control. For smallholder farmers in Malaysia, the main source of seeds is often from local markets, farm saved seed, relatives and neighbours.
- (f) Requiring the right holder to make available propagating material, of reasonable quality, in reasonable quantities and at a reasonable price.
- (g) Reasonable duration for breeders' rights

- (h) Grounds for issuing compulsory license that safeguard the needs of the farming community and national interests.
- (i) Reasonable grounds for invalidation and revocation of plant breeders' rights.

The unique features have been established taking into account the realities prevailing in Malaysia and its international obligations such as under the ITPGRFA, the CBD, its Cartagena Protocol, the UNDRIP and the various instruments on human rights.

If the EFTA-Malaysia FTA obligates Malaysia to either join UPOV 1991 or to implement its provisions, the above and many other unique features of Malaysia's law will have to be dismantled and this includes eliminating provisions that safeguard the interests of small farmers.

UPOV's provisions are in effect in conflict with Article 6 and 9 of the ITPGRFA.ⁱ Article 6 requires Contracting Parties to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture including supporting the development and maintenance of diverse farming systems, promoting participatory plant breeding, strengthening the capacity to develop varieties adapted to social, economic and ecological conditions, broadening the genetic base of crops etc.

Article 9 of the ITPGRFA states it is government's responsibility to take measures to "protect and promote" Farmers' Rights. Such rights would include farmers' right to save, use, exchange and sell farm saved seeds, their right to the protection of tradition knowledge and the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture.

However, UPOV does not allow policy space for developing country governments such as Malaysia to enact provisions it considers necessary to implement Articles 6 and 9 of the ITPGRFA, to reflect national realities or to protect public interests and farmer seeds systems. For instance, in the case of Malaysia, UPOV has explicitly called for the deletion of most of the provisions mentioned above that make Malaysia's PVP law so uniqueⁱⁱ including provisions protecting farmer seed systems, implementing Farmers' Rights as well as disclosure requirements that are important to safeguard against biopiracy, to implement fair and equitable benefit sharing, and to ensure mutual supportiveness of national laws.

Noteworthy is also a recent study undertaken on behalf of the German Federal Ministry for Economic Cooperation and Development which concluded that "UPOV 91-based PVP laws were found to not advance the realization of Farmers' Rights; rather they are effective in the opposite direction".ⁱⁱⁱ

Furthermore, a human rights impact assessment of UPOV 91 has concluded "...if implemented and enforced, UPOV 91 would sever the beneficial inter-linkages between the formal and informal seed systems", and its "restrictions on the use, exchange and sale of protected seeds could adversely affect the right to food, as seeds might become either more costly or harder to access" as well as "other human rights, by reducing the amount of household income which is available for food, healthcare or education."^{iv}

The assessment further adds that traditional knowledge applied by farmers in the selection, preservation and storing of seed is the basis of local innovation and *in situ* seed conservation and "UPOV's restrictions on saving, exchanging and selling protected seed comes at the expense of farmers gradually losing their know-how related to seed selection and preservation. They would also gradually lose their ability to make informed decisions about what to grow and on which type of land, how to respond to pest infestation, or how to adapt their seed system to changing climatic conditions." "The process of "deskilling" of farmers – which is already underway with the decline of local agrobiodiversity – could become more

acute with restrictions on use of seeds introduced through UPOV 91-style laws, and that from a human rights perspective, restrictions on traditional practices and seed management systems ... adversely impact on farmers' rights, cultural rights, minority rights, indigenous peoples' rights, women's rights, as well as on biodiversity and the right to food".

According to General Comment 12 of the Committee on Economic, Social and Cultural Rights, the right to food requires States to pro-actively engage in activities intended to strengthen people's access to and utilization of resources [includes seeds] and means to ensure their livelihoods including *not* taking any measures that result in preventing such access.^v Therefore intellectual property regimes and seed policies must be compatible with and conducive to the realization of the right to adequate food.

The former Special Rapporteur on the Right to Food in its 2009 report to the General Assembly highlights that "States – particularly developing countries where the function of traditional, farmers' seed systems is even more important both for the prevention of genetic erosion and for the livelihoods of farming communities – should design sui generis forms of protection of plant varieties which allow these systems to flourish, even if this means adopting non-UPOV compliant legislations". He concludes: "No State should be forced to establish a regime for the protection of intellectual property rights which goes beyond the minimum requirements of the TRIPS Agreement: free trade agreements obliging countries to join the 1991 UPOV Convention or to adopt UPOV-compliant legislation, therefore, are questionable."^{vi}

In short, UPOV 1991 offers an extremely rigid, inflexible and inappropriate legal framework for developing countries. And multiple independent experts support this conclusion, and recommend that developing countries should not join UPOV.^{vii}

In comparison, the existing Malaysian PVP law supports implementation of more diverse plant breeding systems, Farmers' Rights and realization of human rights and even more importantly there is flexibility to further strengthen this support.

In addition, we note that for reasons mentioned above in particular the implications on Farmers' Rights, Norway, a member of EFTA has refused to join UPOV 1991. Further, Liechtenstein, another EFTA member, is not a party to UPOV 1991.

Moreover EFTA states are also members of international treaties mentioned above, and thus should NOT undermine implementation of such treaties and fundamental aspects such as Farmers' Rights.^{viii}

We note that some trade agreements negotiated with EFTA states place no obligation in relation to plant variety protection including do not require Parties to ratify or implement UPOV 1991 (e.g. EFTA-SACU FTA, EFTA-Singapore FTA).

We thus reiterate that the EFTA-Malaysia FTA must not include any obligation that restricts in any way Malaysia's flexibility to implement its sui generis plant variety protection system. In particular the FTA must not obligate Malaysia to join or implement UPOV 1991 or impose any other obligation and/or limitation in relation to plant variety protection.

SIGNATORIES

1. Brot für alle (Bread for All), Switzerland
2. Fastenopfer, Switzerland
3. FIAN Schweiz für das Recht auf Nahrung, Switzerland
4. ProSpecieRara, Switzerland

5. Uniterre, Switzerland
6. Public Eye, Switzerland
7. Friends of the Earth, Norway
8. Norwegian Farmers and Smallholders Union, Norway
9. The Norwegian Trade Campaign, Norway
10. Oikos – Organic Norway
11. Consumers Association of Malaysia (CAP), Malaysia
12. Empower, Malaysia
13. Sahabat Alam Malaysia (SAM)
14. Society for the Rights of the Indigenous People of Sarawak (Scrips), Malaysia
15. Third World Network (TWN), Malaysia
16. Uma Bawang Residents Association, Malaysia
17. Long Lunyim Sg Pelutan Residents Association, Malaysia
18. Sungai Buri Bakong Resident Association, Malaysia
19. Long Tepen Resident Association, Malaysia
20. Rumah Lachi Ak Bikang, Sebatuk Baru Suai Niah Resident Association, Malaysia
21. Sungai Peking, Tinjar Resident Association, Malaysia
22. Long Miri Resident Association, Malaysia
23. Ulu Satai, Sebauh Bintulu Resident Association, Malaysia
24. Melayu Marudi Resident Association, Malaysia
25. Sungai Malikat Resident Association, Malaysia
26. Ujat Bato' Resident Association, Malaysia
27. Long Liwok Sungai Layun Tutoh Resident Association, Malaysia
28. Jawatankuasa Bertindak Petani (MADA), Malaysia

ⁱ International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9

ⁱⁱ UPOV doc. C(Extr.)/22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf

ⁱⁱⁱ Available at <https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>

^{iv} "Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines," October 2014. Available at <https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/seeds/owning-seeds-accessing-food/>

^v Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), May 1999, available at: <http://www.refworld.org/pdfid/4538838c11.pdf>

^{vi} Olivier De Shutter, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation, 2009, available at http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf

^{vii} The UPOV Convention, Farmers' Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks" published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development" (June 2015) available at <https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>; UNDP (2008) "Towards a Balanced Sui Generis Plant Variety Regime", available at <http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/toward-a-balanced-sui-generis-plant-variety-regime.html>; "Owning Seeds, Accessing Food – A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines," October 2014. Available at <https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/seeds/owning-seeds-accessing-food/>; Carlos M. Correa et al. (2015), « Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 », APBEBES, available at <http://www.apbebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>

^{viii} "States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extra territorially" See the Maastricht principles. Available at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5bdownloadUId%5d=23