

CIVIL SOCIETY LETTER ON EFTA-INDONESIA COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT (CEPA)

11th December 2018

Dear Negotiators of EFTA-Indonesia CEPA,

The undersigned organizations would like to stress that the EFTA-Indonesia Comprehensive Economic Partnership Agreement (CEPA) must not include any obligation that requires Indonesia to join or implement the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV 1991) or impose any other obligation and/or limitation with regard to plant variety protection. We are raising this concern as previous European Free Trade Association (EFTA) trade agreements have had such provisions and we understand that EFTA member states and Indonesia aim to sign the CEPA before the end of the year.ⁱ

Indonesia is classified by the World Bank as a lower middle-income country. Agriculture is of crucial importance to Indonesia's economy. It is the second biggest source of livelihood and employment, in particular in the country's rural areas, with around 33% of Indonesia's labor force being employed in the agricultural sector. 93% percent of Indonesia's total number of farmers are small family farms (i.e. smallholder farmers)ⁱⁱ with an average land holding of 0.6 hectares. Indonesia's GNI per capita is US\$3,540, significantly lower than the GNI per capita of EFTA states such as Switzerland (US\$80,560) and Norway (US\$75,990).ⁱⁱⁱ

Against this background, it would be extremely worrying if Indonesia was asked to comply with UPOV 1991 provisions. The concerns would include the following:

- **UPOV 1991 was negotiated by developed countries for their commercial seed systems:** The demand by the commercial seed sector in Europe led to UPOV 1961 being negotiated and adopted by six countries from Western Europe. UPOV 1991 was negotiated by only 20 UPOV member countries, out of which only one (South Africa) was a developing country. Hence the UPOV system was never developed considering the seed systems prevailing in and needs of developing countries. UPOV 1991 imposes a "one-size-fits-all" system, ignoring that agricultural systems of countries vary significantly. In Switzerland, seed is supplied through the commercial seed system, while in Indonesia, the farmer managed seed system (i.e. smallholder farmers) is the main seed supplier. UPOV 1991 provides extremely limited leeway or flexibility for governments to design a PVP regime that reflects their conditions and realities.

For instance, in the case of Malaysia, UPOV has explicitly called for the deletion of provisions in the national PVP law 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.

- **UPOV 1991 suppresses Farmers' Rights, hindering implementation of Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).** UPOV 1991 does not allow policy space for developing country governments such as Indonesia to enact provisions it considers necessary to implement Article 9 (Farmers' Rights) of the ITPGRFA which 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 traditional knowledge and the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture.

Most revealing of the conflict between UPOV 1991 and the ITPGRFA is UPOV's response to Farmers' Rights provisions enacted by Parties to the International Treaty. For example, in examining the conformity of Malaysia's national PVP legislation with UPOV 1991, UPOV called on Malaysia to delete from its legislation the right of small farmers to exchange reasonable amounts of propagating material of protected variety.^{iv} In the case of the Philippines, UPOV found the farmer's exception that recognised the traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act to be incompatible with the 1991 Act.^v

A 2015 study undertaken on behalf of the German Federal Ministry for Economic Cooperation and Development 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".^{vi}

- **Facilitate bio-piracy of genetic resources:** UPOV does not recognize the principles of the Convention on Biological Diversity (CBD) that access to local genetic resources should be subject to prior informed consent (PIC) and fair and equitable benefit sharing. It based on inequity as new varieties may be developed from traditional varieties and be PVP protected, without requiring the holder of new variety to obtain PIC and pay fair and equitable benefit sharing to the farmer or farming community that developed the traditional varieties.

- **Adverse effects for implementation of human rights.** A human right 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."^{vii}

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".

- **Undermine implementation of the "Declaration on the right of peasants and other people working in rural areas".** This Declaration has been adopted by the Human Rights Council and the UN General Assembly. Its adoption was supported by EFTA members such as Switzerland. This Declaration among others requires 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 seed or propagating material, right to the protection of traditional knowledge,

and right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture and the right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture.

Implementation of the Declaration requires Indonesia to have complete flexibility to put in place relevant measures. As such any obligation on Indonesia to follow UPOV 1991 would be inconsistent with the intent and spirit of the Declaration.

- **Exacerbate erosion of biodiversity:** UPOV 1991's requirements of uniformity and stability focus efforts into the development of a limited number of standard varieties. Farmer varieties will not meet these criteria as they are constantly evolving. What is being rewarded is homogeneity and not agro-biodiversity. This skewed approach has resulted in genetic erosion, making crops vulnerable to pests and climate stress. It is estimated that about 75% of plant genetic diversity has been lost as farmers worldwide have abandoned their local varieties for genetically uniform varieties that produce yield under certain conditions.^{viii} Genetic diversity within crops is also decreasing.

According extensive protection to one type of seed system with implications for the farmer seed systems prevailing in Indonesia, makes a mockery of Article 6 of the ITPGRFA which stresses on sustainable use of plant genetic resources including by pursuing fair agricultural policies that promote the development and maintenance of diverse farming systems.

- **Norway is a member of UPOV 1978, so requiring Indonesia to comply with UPOV 1991 would be unfair.** For reasons mentioned above, Norway has decided not to join UPOV 1991. It thus remains a member of UPOV 1978 which offers limited protection for breeders' rights and more leeway for Farmers' Rights.

Since Norway a developed country, with GNI per capita 21 times higher than Indonesia has refused to join and/or implement UPOV 1991, it is unfair and illogical that Indonesia a lower-middle income country has to agree to join or comply with UPOV 1991. **In fact, Indonesia must be entitled to greater flexibility than Norway.**

In short, UPOV 1991 offers an inappropriate legal framework for Indonesia. It is estimated that joining or complying with UPOV 1991 will increase the cost of seeds by more than 4 times, according to a study of the impact on Filipino farmers of joining UPOV 1991.^{ix} Multiple independent experts support this conclusion, and recommend that developing countries should not join or implement UPOV.^x

The former United Nations 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."^{xi}

Further, there is precedent for EFTA trade agreements to not require Parties to ratify or implement UPOV 1991 (e.g. EFTA-Southern African Customs Union (SACU) free trade agreement (FTA) signed in 2006^{xii}).

In addition, if CEPA needs to include a provision on plant variety protection, it should at the very least offer Indonesia greater flexibility than Norway. Previous EFTA trade agreements (e.g. Hong Kong-EFTA FTA) have allowed a country to comply with UPOV 1978. As Indonesia's GNI per capita is significantly lower than Hong Kong, Indonesia must be given greater flexibility. The CEPA should only require Indonesia to *endeavour* to follow UPOV 1978 as Indonesia considers appropriate.

The CEPA must also recognize Indonesia's policy space to design a PVP system that is appropriate for its agricultural system, allows Indonesia to protect its local plant genetic resources, its farmers and safeguard public interest as well as enables it to take measures to implement the Declaration on the right of peasants and other people working in rural areas.

We are also extremely disturbed by the lack of transparency in the EFTA negotiations with Indonesia and call on **EFTA negotiators to ensure complete transparency in the trade negotiations.**

Signatories

1. Alliance Sud, Switzerland
2. Association for Plant Breeding for the Benefit of Society (APBREBES), Switzerland
3. Brot für alle (Bread for All), Switzerland
4. Fastenopfer, Switzerland
5. Hilfswerk der Evangelischen Kirchen Schweiz
6. FIAN Switzerland for the Human Right to Adequate Food
7. Organic Norway
8. Public Eye, Switzerland
9. Swissaid, Switzerland
10. The Development Fund, Norway
11. Norwegian Farmers and Smallholders Union, Norway,
12. The Norwegian Trade Campaign

ⁱ <http://www.efta.int/Free-Trade/news/EFTA-and-Indonesia-conclude-trade-negotiations-510756>

ⁱⁱ <http://www.fao.org/3/i8881en/I8881EN.pdf>

ⁱⁱⁱ <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD>

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

^v UPOV doc. C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf

^{vi} 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>

^{vii} Owing 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/>

^{viii} See UN General Assembly Document A/64/170 titled “Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation”.

^{ix} “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/>;

^x 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.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>

^{xi} 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

^{xiii} <http://www.efta.int/free-trade/ftas>