



APBRES

Association for Plant Breeding for the Benefit of Society

UPOV turns a deaf ear to the concerns of smallholder farmers

A report on the discussions within UPOV on guidance concerning smallholder farmers in relation to private and non-commercial use

A possible new interpretation of the private and non-commercial use exception has been under discussion at UPOV for many years. The way this exception is interpreted has a major impact on the livelihoods of smallholder farmers around the world - on their access to seed and on their ability to multiply, exchange, or sell seed. Despite the far-reaching nature of the debate, it has received little attention from the wider public. This report shows what is at stake, where the idea to adapt the interpretation came from, and how the discussion is developing within UPOV. The preliminary result indicates that UPOV seems to be unwilling or unable to balance its own system - to better meet the needs of smallholder farmers and reduce the negative impact on the farmer-managed seed system. This article also aims to inform stakeholders outside UPOV about the process and help them better understand how UPOV functions.

What is it all about

The ongoing discussion at UPOV focuses on the interpretation of Art. 15.1 (i) of the 1991 Act of UPOV, which states:

Exceptions to the Breeder's Right

(1) [Compulsory exceptions]

The breeder's right shall not extend to

(i) acts done privately and for non-commercial purposes,

UPOV's current interpretation of the exception's scope is extremely restrictive and narrow. The "Explanatory Notes on the Exceptions to the Breeder's Right under the 1991 Act the UPOV Convention" (UPOV/EXN/EXC)¹ states that: "[...] Non-private acts, even where for non-commercial purposes, may be outside the scope of the exception [...]. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example "subsistence farming," where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder's right, [...]."

¹ For the whole text of the Explanatory Notes see https://www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf

This interpretation is extremely limited. It does not allow “any material to be provided to others” including a farmer’s neighbour. Even the multiplication of the protected variety to produce a food crop to be consumed by a neighbour (not living on the holding) is not considered as falling within the scope of the exception. The interpretation applied by UPOV does not address the needs and realities of subsistence or smallholder farmers, who in their daily lives exchange seeds/propagating material with neighbours and sell their products and seeds at the local market. The rationale for exceptions like private and non-commercial use in IP laws is to strike a balance between the interests of the IP holder, society in general, and potential third-party users of the protected subject matter. This balance does not exist with the current interpretation.

The origin of the idea

For over 10 years, scientists, representatives of the seed industry, and governments have been arguing that this interpretation needs to be changed. In the following we quote a paper² by De Jonge (Wageningen University):” *In order to accommodate the needs and traditions of smallholder farmers, and in recognition of the importance of informal seed systems for the provision of seed and the conservation of agro biodiversity, some proposals have been made to adapt UPOV ’91 in such a way that the exchange of farm-saved seed for certain crops and/or farmers is permitted. [...] Another proposal relates to the previously discussed private and non-commercial use exception in UPOV ’91. Since the sharing and exchange of farm-saved seed between smallholder farmers in developing countries is of no commercial importance, but indeed of great importance for food security and conservation, expanding the private and non-commercial use exemption to all resource-poor farmers in order to enable them to exchange seed among their peers has been recommended (De Jonge, Tumushabe, Barungi, & Louwaars, 2011³). In a response to this study, the Dutch⁴ government stated that it will:*

”Urge for greater scope for the ‘private and non-commercial use exemption’ in UPOV 1991 than is currently the case. This will allow small farmers that use protected varieties to trade their surpluses on the market and exchange seeds among themselves. (Bleker, 2012)⁵

“To allow smallholder farmers to trade their surpluses of a protected variety on the market would obviously require a clarification of the definition of ‘non-commercial use.”

The discussion reaches UPOV

As a result of Resolution 8/2013, adopted by the 5th Governing Body of the International Treaty Plant Genetic Resources for Food and Agriculture, which requested the Secretary to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments, a joint Symposium was organised in October 2016 at the UPOV Headquarters in Geneva. During the Symposium on possible interrelations between the International Treaty on Plant Genetic Resources

² Bram de Jonge. (2014). Plant Variety Protection in Sub-Saharan Africa: Balancing Commercial and Smallholder Farmers’ Interests, *Journal of Politics and Law*; Vol. 7, No. 3; <https://ccsenet.org/journal/index.php/jpl/article/view/39778>

³ De Jonge, B., Tumushabe, G., Barungi, J., & Louwaars, N.P. (2011). Agricultural seeds that reduce hunger and poverty – Policies, perceptions and practices in intellectual property rights. In *Harnessing intellectual property rights for development objectives: The double role of IPRs in the context of facilitating MDGs no. 1 and 6* (pp. 111-267). Nijmegen: Wolf Legal Publishers. <https://core.ac.uk/download/pdf/29229871.pdf>

⁴ At the time, the Netherlands was by far the country whose residents held the most plant variety rights. They would therefore be most affected by a change, and yet they were in favour of it.

⁵ The whole letter by the Dutch Minister for Agriculture and Foreign Trade could be found at the APBEBES Website <https://www.apbebes.org/news/dutch-minister-supports-differentiated-approach-pvp>

for Food and Agriculture and UPOV⁶, the discussion about private and non-commercial use reached UPOV members. Szonja Csörgő, at this time Director, Intellectual Property and Legal Affairs of the European Seed Association said: "*Subsistence farmers by definition are understood to act for private, non-commercial purposes and therefore have complete freedom regarding any acts with protected varieties, including exchange, barter or sales of farm-saved-seeds to their neighbours or other subsistence farmers*".

Sangeeta Shashikant, Legal Advisor for Third World Network, Malaysia emphasised that "*UPOV's guidance and interpretation of the scope of the exception is extremely restrictive and narrow.*" And Bram De Jonge, Seed Policy Officer at Oxfam Novib, Netherlands, said: "*Oxfam urges UPOV to establish a proper and explicit balance between Farmers' Rights and Plant Breeders' Rights in order not to obstruct the practice of seed exchange and trade amongst smallholder farmers, thus enhancing seed and food security as well as continuous innovation of the plant genetic resources used by smallholder farmers. This should be done by providing a clear interpretation of the private and non-commercial use exemption, allowing smallholder farmers to freely save, exchange and sell farm-saved seed of protected crop varieties amongst themselves and in local markets, and to assist (prospective) member states to include such interpretation in their national legislation.*"

After the Symposium Oxfam⁷, Plantum⁸ and Euroseeds⁹ joined forces and started a project to specifically explore the scope of the private and non-commercial use exception (Article 15.1.i) under the UPOV 1991 Convention. The project report was published in October 2019 after numerous consultations with various stakeholders. The core part of the report was a flowchart providing a description of which use of self-produced seed fell under the private and non-commercial use exception. The project team agreed on an interpretation that allows smallholders to exchange seeds among themselves or sell them on the local market in certain cases. They recommended that "*The UPOV Council considers the flowchart as a possible tool providing guidance regarding the implementation of the exception for private and non-commercial use to be included in the FAQs and the Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention*".

After an Intervention by the Netherlands, the Consultative Committee¹⁰ of UPOV "agreed to invite the authors to make a presentation at the ninety-seventh session of the Consultative Committee in 2020."¹¹ The explicit support of the seed industry for the initiative at that time certainly contributed to the favourable reception of the initiative by the Consultative Committee. After listening to and discussing the presentation the Consultative Committee agreed on the following¹²:

(a) a circular to be sent to members of the Union and observers¹³ requesting contributions on their experience and on their views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers;

(b) the Office of the Union to draft guidance text taking into consideration the findings of the "Report and Recommendations of the project 'Options to interpret the notion of private and non-commercial

⁶ The proceedings of the Seminar at:

https://www.upov.int/edocs/mdocs/upov/en/upov_itpgrfa_sym_ge_16/upov_itpgrfa_sym_ge_16_2_proceedings.pdf

⁷ Oxfam is an international confederation of 20 NGOs working with partners in over 90 countries to end the injustices that cause poverty

⁸ Plantum is the Dutch breeders' association

⁹ Euroseeds is the European Seed Association

¹⁰ The Consultative Committee is closed for observers.

¹¹ See Report of the Consultative Committee 2019 https://www.apbrebes.org/sites/default/files/cc_96_14.pdf

¹² Report of the Consultative Committee 2020 https://www.apbrebes.org/sites/default/files/cc_97_17.pdf

¹³ The wording "and observers" was added by the Council after an intervention by Switzerland when they adopted the recommendations prepared by the Consultative Committee. https://www.upov.int/edocs/mdocs/upov/en/c_54/c_54_21.pdf

use as included in Article 15. 1. I of the UPOV 1991 Convention” and its flowchart, in conjunction with the contributions in reply to the Circular (see (a) above);

(c) to circulate the first draft of the guidance to the Consultative Committee for comments by correspondence in conjunction with a compendium of the contributions received in reply to the circular; and

(d) based on the comments received on the first draft of the guidance, to prepare an updated version for consideration of the Consultative Committee at its session in 2021, together with consideration of the status (e.g. explanatory note, guidance document, FAQ) that any agreed guidance should have.

This would have been a straightforward process – but it was never implemented. The circular was sent out and the replies¹⁴ have been made available through another circular¹⁵. But then the office of the Union “explained to the Consultative Committee that issues raised in the replies to Circular E-20/246 illustrated that it would be difficult to draft guidance text without further consultation. Therefore, after consultation with the President of the Council, Circular E-21/098 proposed to invite the Consultative Committee to modify the planned procedure [...]”¹⁶ The proposal by the office was commented on by Switzerland and Norway and in a second step by the European Union. The topic was then discussed at the Consultative Committee in October 2021, which decided to establish a Working Group “to develop guidance concerning smallholder farmers in relation to private and non-commercial use. The Project Team (Euroseeds, Plantum and Oxfam), in conjunction with the Office of the Union, was asked to prepare an analysis of the contributions in the compendium with the replies to UPOV Circular E20/246 and present a report with recommendations for consideration by the Working Group at its first meeting.”¹⁷ The Terms of Reference of the working group, which were approved by the Consultative Committee by correspondence after the meeting, included the following objective: “The purpose of the WG-SHF is to develop guidance concerning smallholder farmers in relation to private and non-commercial use, which would be the basis for a revision of the “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention” (document UPOV/EXN/EXC) and a revision of the Frequently asked questions (FAQs) on exceptions to the breeder’s right.”¹⁸

The Working Group begins its work ... and turns in circles

In addition to general statements, the first two meetings of the Working Group in 2022 also included a discussion of the recommendations drawn up by the Project Team. The discussion can be summarised as follows: Various UPOV members, including the EU, Switzerland, and Norway, were willing to work on the Explanatory Notes. However, others, led by Japan, have opposed any weakening of the existing interpretation from the outset, because they consider that any sale or exchange of seeds protected by plant breeders' rights would fall outside the category of private and non-commercial use. The breeders' organisation CIOPORA also echoed this view, rejecting any broadening of the private and non-commercial purposes exemption for vegetatively propagated varieties. An agreement between the positions seemed already unlikely at that time¹⁹.

¹⁴ Including a lot of interesting submissions by member states, observers and stakeholders. See Annex 2 in

https://www.upov.int/edocs/mdocs/upov/en/wg_shf_1/wg_shf_1_2.pdf

¹⁵ Document prepared by the office of the Union for the Consultative Committee 2021:

https://www.apbrebes.org/sites/default/files/cc_98_11.pdf

¹⁶ *ibid*

¹⁷ See report of the Consultative Committee 2021: https://www.apbrebes.org/sites/default/files/cc_98_16.pdf

¹⁸ See https://www.upov.int/edocs/mdocs/upov/en/wg_shf_1/wg_shf_1_2.pdf

¹⁹ For the reports of these meetings see https://www.upov.int/edocs/mdocs/upov/en/wg_shf_1/wg_shf_1_4.pdf and https://www.upov.int/edocs/mdocs/upov/en/wg_shf_2/wg_shf_2_3.pdf

Despite opposition from Japan, it was decided during the UPOV session in October 2022 to continue the Working Group with a similar mandate: to provide guidance to the Consultative Committee on options to draft a revision of the Explanatory Notes, to be prepared by the Administrative and Legal Committee, and on options to draft a revision of the FAQs on exceptions to the breeder's right²⁰.

However, the working group was still unwilling or unable to fulfill its mandate. The discussion followed the lines of argumentation from previous meetings²¹. Japan and part of the industry made it clear that they did not want any changes to the Explanatory Notes (EXN) and wanted to end the discussion. The European Union, on the other hand, said that the discussion needed to continue as it is an important issue that also affects UPOV's reputation and that it therefore needs a gesture from UPOV on this issue. The EU said they were ready to work on a revision of the EXN and the FAQ. Norway, the Netherlands, and Switzerland also supported work on the EXN and FAQ. An intermediate position was taken by Canada, which could only support work on the FAQ as a first step. Argentina pointed out that it was not the right time to work on the EXN. South Africa, faced with the issue at the national level, emphasized its importance and indicated their wish to revise the EXN. Although during the following discussion, some consensus emerged for work on the FAQ, different views were expressed on how this work should be done. Switzerland and Norway mentioned the terms of reference of the Working Group, which clearly focuses on the question of private and non-commercial use. Canada, however, suggested not to overlook the benefits smallholder farmers receive from the IP system. In the end, the decision was taken that, the Office of the Union would send a circular inviting the members of the Working Group to: 1 (a) consider all existing FAQs that relate to smallholder farmers and subsistence farmers, which would be listed in the circular; and (b) consider whether the issues identified in document WG-SHF/3/2 and raised during the discussions in the WG-SHF were adequately covered in those FAQs, and whether revisions and/or additional FAQ(s) would be required to address those issues. Some of these topics clearly went beyond the mandate of the Working Group.

When the Working Group met virtually for its fourth meeting, it was confronted with a whole plethora of proposals on FAQs, with only some of them relevant to the mandate of the Working Group. APBEBES, the EU, and the Netherlands formulated proposals that would under certain circumstances allow the exchange and sale of protected seeds under the exception of private and non-commercial use. Right at the beginning of the meeting, Japan, and in a somewhat softened form, the United States and Chile, expressed their refusal of such a broader interpretation. Others such as Norway, the Netherlands, the EU, and Switzerland supported a broader interpretation of private and non-commercial use. The EU emphasised that this issue is also about UPOV's reputation, others said that an adjustment could make it easier to attract new members. APBEBES made it clear that reputation should not be the main concern, as the ultimate issue was the human right to food. It quickly became clear at the meeting that these opposing positions made it pointless to discuss the various proposals to amend the FAQs. The attempt to shift the negotiations to areas that were not covered by the mandate was also averted in this way. But what should be negotiated if you obviously can't agree on the main issue and a discussion of countless FAQs simply makes no sense? At this stage, the Working Group was at a considerable loss as to how to proceed. The only thing the Working Group could agree on was that there was probably still too little information to make a decision. It was decided that "the Office of the Union should issue a circular to the members of the WG-SHF with a request to identify questions and to whom they should be addressed, in order to

²⁰ See https://www.upov.int/edocs/mdocs/upov/en/c_56/c_56_13_corr.pdf

²¹ See a summary of the meeting by APBEBES here: <https://www.apbrebes.org/sites/default/files/2023-04/APBEBES%20Report%20on%20the%20UPOV%20Spring%20Session%202023%20final.pdf> and the official report here: https://www.upov.int/edocs/mdocs/upov/en/wg_shf_3/wg_shf_3_3.pdf

collect information for the WG-SHF to continue its work.” Based on the replies to the Circular, the Office of the Union would prepare a questionnaire for consideration by the WG-SHF at its next meeting”²². At this point, many people realised that the discussion was going around in circles.

The fifth meeting of the Working Group: If you fear certain answers, it's better not to ask any questions

As input for the 5th meeting, the Office of the Union presented a document²³ with all the questions proposed by the members of the Working Group. Questions had been submitted by Canada, the European Union, Switzerland, APBEBES and the International Seed Federation (ISF). There was some overlap in the questions submitted, i.e. different countries and stakeholders asked similar questions to the same stakeholders. For example, the question about the current use of protected seed by smallholders, the kind of link to the Farmer Managed Seed System, or possible definitions of "smallholder" in various countries or by various actors. These questions should be put to UPOV member countries, farmers' organisations, breeders' associations, and others. Other questions were only asked by some members of the Working Group. For example, the EU wanted to know if countries that are not UPOV members were influenced by their smallholder farmers' existential need to sell surplus seeds of protected varieties. The EU also asked about the potential damage to UPOV's reputation. The Seed Industry wanted to ask countries if breeders provide information to farmers (e.g.: about product placement). APBEBES proposed to ask the UN -Special Rapporteur on the right to food, Michael Fakhri, how relevant it is for food security and the right to food that smallholder farmers can save, reproduce, exchange, and sell seeds (including seeds protected by PVP). The task of the meeting was to provide guidance on the criteria and priorities to be applied when selecting the questions and addressees for a questionnaire.

As at previous meetings of the Working Group, suggestions and statements were used to steer the discussion away from the Working Group's mandate. For example, Canada and Japan questioned the usefulness of a questionnaire in general (although there was agreement on this, six months before...). They argued that too little was known. Some delegates voted in favour of organising a seminar - to which others pointed out that this was not the mandate of the working group - and that questions would also have to be defined for organising a seminar.

A shift in the discussion came with the contribution from South Africa, who said that they were very interested in the issues and had many questions about what private and non-commercial use means and about the impact on smallholders. This idea was supported and further elaborated by Switzerland. The definition of private and non-commercial use should be asked for and whether there is any case law on this. And since there was still opposition to a larger questionnaire. The following questions were the lowest common denominator that could be agreed (not the verbatim wording²⁴): Do you implement the exception "acts done privately and for non-commercial purposes"? And if so, how? Please specify legislation/regulation in this field. Are there definitions for the term "acts done privately and for non-commercial purposes"? Are there challenges and/or opportunities in implementing this exception in your jurisprudence? It was further clarified that these questions should only be answered by UPOV member countries.

APBEBES' view on the negotiations

The fifth meeting of the Working Group showed familiar patterns of reaction from previous discussions. There is a fear within UPOV of facing independent external opinions. It is obvious that private and non-commercial use is about the concerns and rights of smallholders. However, delegates

²² See the official report of the 4th meeting here: https://www.upov.int/edocs/mdocs/upov/en/wg_shf_4/wg_shf_4_3.pdf

²³ See https://www.upov.int/edocs/mdocs/upov/en/wg_shf_5/wg_shf_5_2_rev.pdf

²⁴ The exact wording will be included in the report of the Working Group, which will be published on the UPOV website in a few weeks: https://www.upov.int/meetings/en/details.jsp?meeting_id=80844

refused to ask questions to smallholders to better understand their perspective. It is also clear that strict plant variety rights can have an impact on access to seeds and the right to food. Yet UPOV member states refuse to involve the UN Special Rapporteur in the discussion and ask him questions about possible impacts on the right to food. Understanding the impact of laws and regulations is a prerequisite for respecting, protecting, and fulfilling the right to food. There is already a large body of knowledge about the use, exchange, and sale of seeds by smallholders, and the role this plays in seed supply and farmer-managed seed systems. Still, again, delegates refused to ask questions to scientific institutions to shed light on these interrelationships.

They avoid asking questions for fear of getting answers that do not suit their views. This way, UPOV's self-centered attitude only reinforces its belief that its system is ideal. Japan's statement proved this point when they expressed concern that sending questions to other countries would require them to answer publicly and that this might not be helpful to UPOV. They also implied that we should focus more on the positive things and that the proposed questions are biased. This shows the tendency in UPOV to promote its cause rather than to analyse things neutrally. As mentioned above, some countries were willing to ask the necessary questions and to work on the Explanatory Notes. But they could not get their point across.

These discussions show the true face of UPOV, which is first and foremost about supporting the interests of the seed industry, with societal interests taking a back seat. This is a clear message to countries that are not yet members of UPOV and are considering developing their plant variety protection systems. They will not find support from UPOV if they want to balance their national needs and different interests in their legislation. This view is also reflected in Indonesia's response to the Special Rapporteur on the Right to Food²⁵ when they say that "Indonesia considers the issue of plant variety protection as well as maintaining the appropriate balance between the rights and obligations of farmers and breeders with utmost care and attention" and that "Indonesia maintains its position not to accede to UPOV 91 in order to ensure policy space to protect smallholders' farmers' seed system and plant genetic resources".

The discussions in the Working Group show that UPOV seems to be unwilling or unable to balance its own system - to better meet the needs of smallholder farmers and reduce the negative impact on the farmer-managed seed system. A new interpretation of private and non-commercial in a revised Explanatory Note would have been an opportunity. It appears that UPOV does not see the need to seize it. This is a clear message to the world.

APBREBES/02.04.2024

Published by: Association for Plant Breeding for the Benefit of Society (APBREBES)
Email: contact@apbrebes.org; Internet: www.apbrebes.org

²⁵ To read the whole letter by the Special Rapporteur and Indonesia's response see para 2 in our last Newsletter: <https://www.apbrebes.org/news/updates-plant-variety-protection-61>