

Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use**WG-SHF/3/3.****Third Meeting
Geneva, March 24, 2023****Original:** English
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REPORT

adopted by the Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use

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OPENING OF THE MEETING

1. The Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (WG-SHF) held its third meeting in Geneva on March 24, 2023, in hybrid format, chaired by Mr. Yehan Cui, President of the Council.
2. The meeting was opened by the Chair, who welcomed the participants.
3. The list of participants is reproduced in the Annex to this report.

ADOPTION OF THE AGENDA

4. The WG-SHF adopted the draft agenda as proposed in document WG-SHF/3/1.

OPTIONS TO ADDRESS MATTERS DISCUSSED AT THE FIRST AND SECOND MEETINGS OF THE WG-SHF

5. The WG-SHF considered document WG-SHF/3/2.
6. The Delegation of Japan reiterated that it did not support a revision of the explanatory notes and considered that, by definition, any sale or exchange of PBR protected seeds fell outside the exception of private and non-commercial use as provided in the UPOV Convention. The Delegation recalled that it was against continuing the work of the WG-SHF.
7. The Delegation of the European Union noted the importance of clarifying matters concerning smallholder farmers, in particular, their activities in relation to the selling and exchange of small amounts of seed that might not be considered a commercial activity because it was done sporadically and not on regular basis. It noted that the importance of the issue due to its impact on the reputation of UPOV and how its work was perceived. It proposed to continue the work of the WG-SHF with the possible revision of the explanatory notes and the possibility to clarify the Frequently Asked Questions (FAQs).
8. The Delegation of Canada expressed reservations in opening the revision of the explanatory notes at that time. The Delegation was in favor of exploring ways to have openness around exchange where it did not affect the legitimate interests of the breeder and it was a customary practice, excluding asexually propagated varieties. It expressed its preference to first identify needs for further clarity of the current FAQs and, secondly, to consider a possible revision of the explanatory notes.
9. The Delegation of the Netherlands noted that the WG-SHF's work was important in the context of food security matters, access to improved varieties by smallholder farmers and in the clarification of misconceptions and myths about the UPOV Convention that were preventing countries and regions to come closer to UPOV.

10. The Delegation of Norway expressed its support for the intervention of the Delegation of the European Union, and its preference to start work on the revision of the explanatory notes to reflect the different options that members have in implementing the Convention.

11. The Delegation of Switzerland noted that the survey indicated that there were no legal actions against smallholder farmers; therefore, it was rather a matter of perception concerning UPOV. The Delegation was of the view that it was important to address those matters of perception before the acceptance of the UPOV Convention became problematic for countries.

12. The Delegation of Japan expressed support for access to improved varieties by farmers, including smallholder farmers. It explained that protected varieties fall into public domain after their period of protection and those varieties represented 80% of the varieties used by farmers in Japan. It noted that the issue of access to seeds by farmers were rather related to the national listing systems, which provided limits for the distribution of varieties. The Delegation was concerned about creating a loophole in the Convention that would jeopardize the effectiveness of the UPOV system. Moreover, the Delegation of Japan reminded that the FAQ already had a section for the parties to have the flexibility in allowing subsistence farmers to exchange protected material against other vital goods within the local community where the legitimate interests of the breeders are not significantly affected, and did not see the need to revise the FAQ any further.

13. The Delegation of Canada was of the view that the most appropriate place to address those issues concerning the misunderstandings would be clarifying the FAQs and, once that work was done, it might provide the basis to move to the next step concerning the explanatory notes.

14. The Delegation of Argentina expressed its preference to clarify the information in the FAQs. It emphasized the importance to improve the understanding of the relation of the UPOV Convention and other international treaties. It observed that revising an explanatory note would be a lengthier process and that time was of the essence to improve UPOV's perception in the international community.

15. The Delegation of South Africa expressed its support to the work of the WG-SHF and its importance for breeders and, in particular, for smallholder farmers. It noted that clarification of what was meant by "non-commercial purpose" was necessary to provide certainty and would welcome explanatory notes on that notion.

16. The Delegation of Chile noted that the revision of explanatory notes was a sensitive work and expressed concern that the revision could negatively affect the differences between smallholder farmers and subsistence farmers, as defined in different countries. It recalled that, in Chile, some farmers that fall under the category of small farmers were not just working for their families, in some cases they had farm sizes of 20, 50 or 100 hectares, therefore it would not be appropriate to have a single definition or interpretation of smallholder farmer. The Delegation further recalled that there had been no legal actions against smallholder farmers for infringement of plant breeders' rights in UPOV members, hence the revision of the explanatory notes could create more problems than solutions. It was in favor of providing support to smallholder farmers and making the necessary clarifications in the FAQs.

17. The representative of the International Seed Federation (ISF) made an intervention, on behalf of the African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), Euroseeds, ISF and Seed Association of the Americas (SAA), emphasizing that all farmers needed access to good seeds and that it was important to make an effort to improve the livelihood of farmers worldwide. She observed that, as provided in the document WG-SHF/3/2, paragraph 8, many other regulations had an impact on farmers regarding access to quality seed. The representative noted that the survey, conducted by UPOV, addressed to the members and observers, had revealed that no PBR legal actions against smallholder farmers had been reported. She recalled that the ToRs established that the purpose of the WG-SHF was to develop guidance which would be the basis for a revision of the Explanatory Notes on Exceptions to the Breeders' Right under the 1991 Act of the UPOV Convention and a revision of the FAQs. The representative suggested that the term "guidance" could be understood in a broad sense, and expressed the importance to continue the work of the WG-SHF within UPOV's mandate. She was of the opinion that, due to the higher public exposure of the FAQs over the explanatory notes, the WG-SHF could start with the analysis of the FAQs, allowing the WG-SHF to provide guidance and make a recommendation to the Consultative Committee on whether or not there was a need to revise the FAQs.

18. The representative of the Association for Plant Breeding for the Benefit of Society (APBREBES) was of the view that the FAQs were in contradiction with the explanatory notes. He noted that the explanatory notes had a higher value making it more important to start with a revision of the explanatory notes and, subsequently, work on the FAQs to clarify relevant matters in a consistent way. He suggested that, the different views expressed during the discussions of the WG-SHF should be reflected in the revision of the explanatory notes in order to take into account the various options resulting from those different views. The representative emphasized that the current explanatory notes contained a very narrow interpretation and, as such, he proposed to delete the existing explanatory notes since it would be better to have no guidance than one that did not reflect the current views of members.
19. The representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) expressed his concern and reiterated that CIOPORA did not support the revision of the explanatory notes or FAQs. The representative emphasized that, if the WG-SHF continued its work, CIOPORA did not agree with the inclusion of fruit in the scope of its work.
20. The Chair noted the different perspectives and proposals made by the WG-SHF. He observed that the current guidance did not reflect those different perspectives and interpretations. He suggested to start working first with providing clarity in the FAQs.
21. The Delegation of the European Union expressed its support to start the work with the revision of the FAQs, which could then allow the WG-SHF to evaluate the need to revise the explanatory notes.
22. The Delegation of Canada expressed its support for the intervention made by the Delegation of the European Union and requested that the WG-SHF considered not only the issue around the private and non-commercial exception, but also the benefits for smallholder farmers coming from other provisions of the UPOV Convention.
23. The Delegation of Argentina expressed its support for the proposal made by the Delegation of the European Union to start working with the FAQs.
24. The Delegation of Norway requested to keep the revision of the explanatory notes in the agenda emphasizing the need for consistency between both explanatory notes and FAQs.
25. The Delegation of Canada expressed the need for clarity on what was meant by subsistence farmers, smallholder farmers and commercial farmers. The Delegation noted that the current FAQs referred to subsistence farmers.
26. The Delegation of Chile expressed its support for the intervention made by the Delegation of Canada and emphasized that national legislations often did not establish the difference between the concepts of subsistence farmers and smallholder farmers.
27. The representative of Euroseeds noted that the work of the WG-SHF related to the exception to the breeder's right and discussions showed the different views on private and non-commercial use. She emphasized the importance to clarify those concepts that could vary between UPOV members.
28. The Delegation of Argentina noted that members of the WG-SHF had different views and understandings on the notion of smallholder farmers and proposed that the FAQs provide some examples to identify the different practical realities in order to avoid confusion with commercial farmers that were not included in the exception.
29. The Delegation of Norway observed that the ToRs is on the notion of private and non-commercial use under Article 15(1)(i) of the 1991 Act of the UPOV Convention. It proposed that the WG-SHF is true to its ToR when reviewing the current FAQs. The Delegation noted that the list of issues provided in document WG-SHF/3/2 could be kept in mind to assist in identifying possible areas in the FAQs that might need to be revised in relation to the notion of private and non-commercial use.
30. The Delegation of Canada did not support the proposal by the Delegation of Norway to narrow the scope of the work of the WG-SHF to the issues on private and non-commercial use. It was of the view that the benefits for smallholder farmers of the PVP system as a whole were key to understand the main issue. The Delegation observed that the breeder's exemption was often misinterpreted as benefitting only the breeder. It noted that the breeder's exemption was also benefitting the farmer, since it kept the PVP system open, competitive and with a continuous flow of new material entering the market which speeded up innovation and allowed protected varieties

to fall into public domain earlier. The Delegation was of the view that a holistic approach was necessary to consider all aspects of the exemptions and not only private and non-commercial use.

31. The Delegation of Switzerland suggested that the topics identified in the document provided a good starting point to assess if the current FAQs addressed, or not, those topics and if it was necessary to develop more meaningful FAQs as per the mandate of the WG-SHF.

32. The Delegation of the United States of America recalled that, when discussing the notion of private and non-commercial use, the selling of the seed of protected varieties would not meet the requirements of private and non-commercial use.

33. The Delegation of Japan reserved its right to not revising the FAQ but was willing to continue to discuss the matters concerning the FAQs despite its concerns. The Delegation expressed its support for the intervention made by the Delegation of the United States of America.

34. The Chair recalled that the purpose of the WG-SHF was 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”.

35. The Delegation of the Netherlands noted the relevance of developing the wider context and benefits for smallholder farmers, which would fall into the scope of the work of the WG-SHF. The Delegation observed that the FAQs would be an appropriate place to include more information on the topic.

36. The Delegation of Norway stressed again that it did not agree to amend the ToR of the WG-SHF.

37. The Delegation of Canada reiterated that the exceptions and limitations to the PVP system did not operate independently but in relation to each other, which was worth mentioning and should be approached in a balanced way.

38. The Delegation of Kenya noted that this was a very sensitive issue and supported an expansion of the scope of the work of the WG-SHF.

39. The WG-SHF agreed that, as a basis to proceed with its work, the Office of the Union would send a circular inviting the WG-SHF 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.

40. The WG-SHF further agreed that, for the purposes of clarity and transparency, the work of the WG-SHF would be reported to the Administrative and Legal Committee and the Consultative Committee, at its sessions in October, with a request that the Consultative Committee be invited to approve the work set out in paragraph 39, particularly in relation to enabling the WG-SHF to consider all existing FAQs that relate to smallholder farmers and subsistence farmers.²

41. The WG-SHF requested the Office of the Union to compile the replies to the Circular for consideration by the WG-SHF, at its fourth meeting.

¹ The Delegation of Norway had reservation to changing the ToR and stressed that the revisions of the FAQs should be within the ToR of the WG-SHF “concerning smallholder farmers in relation to private and non-commercial use”.

² The Delegation of Norway had reservation to this decision.

DATE AND PROGRAM OF THE FOURTH MEETING

42. The WG-SHF agreed to held its fourth meeting, in hybrid format, on the evening of October 25, 2023, following the seventy-ninth session of the Administrative and Legal Committee (CAJ) and the fourth meeting of the Working group on harvested material and unauthorized use of propagating material (WG-HRV).

43. *This report was adopted by correspondence.*

[Annex follows]

ANNEXE / ANNEX / ANEXO

(dans l'ordre alphabétique des noms français des membres /
in the alphabetical order of the French names of the members /
por orden alfabético de los nombres en francés de los miembros)

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