

U.S. COMMENTS ON ANNEX II (WG-SHF/3/2)

[Extract from document WG-SHF/3/2

“Options to address matters discussed at the first and second meetings of the WG SHF”]

Options for matters that could be considered in a revision of the FAQs on exceptions to the breeder’s right

To explore possibilities to:

- (1) *explain that acts permitted under the exceptions to the breeders’ rights may still be restricted by other national or regional legislation (e.g. seed laws, phytosanitary, GMO biosafety or biosecurity legislation);*

U.S. Comments

There is no need to provide an additional and separate FAQ to explain the exceptions to breeders’ rights which may be restricted by other national or regional legislation. In addressing this issue, we propose amending the following current FAQs as follows:

FAQ-What is the relationship between plant breeders’ rights and measures regulating commerce, e.g. seed certification, official registers of varieties admitted to trade (e.g. National List, Official Catalogue) etc.?

It is not the role of the UPOV system to regulate the marketplace. The UPOV Convention requires that the national law regarding protection of plant breeder’s right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of the UPOV Convention. This clarification should not be taken to mean that UPOV believes that there should be a particular type or level of market regulation, but rather as a recognition that such regulation should be dealt with by an appropriate, dedicated and independent mechanism. Therefore, the acts permitted by plant breeders rights or exceptions under the UPOV system may be subject to other national or regional measures regulating commerce such as requirements for National List or Official Catalogue.

FAQ-Does the UPOV Convention regulate varieties that are not protected by plant breeders’ rights?

The UPOV Convention does not regulate varieties that are not covered or no longer covered by plant variety protection. Therefore, there are many plant varieties that are in the public domain that can be replanted by a farmer without any authorization of the breeder.

UPOV does not regulate any other national or regional system of intellectual property rights governing the protection of plants/plant varieties. It is necessary to consult the legislation in each UPOV Contracting Party in order to know the situation and the answer in that UPOV member.

- (2) *explain that if a surplus production of seed of protected varieties could be exchanged and/or sold without official labelling or the right holder’s brand it would be a de facto permission for “brown bagging” and illegal seed marketing;*

U.S. Comments:

We support a new FAQ that explains the illegality of “brown bagging.”

- (3) *explain how to [deliver]/[provide access to] improved varieties to farmers, including smallholder farmers, when they fall into public domain after their period of protection;*

U.S. Comments:

We support a new FAQ that explains how farmers may access the varieties that are in the public domain, alternatively a new paragraph on the access may be added to the FAQ in Option 1 above.

- (4) *explain how to improve the situation of subsistence farmers in areas within UPOV's mandate while avoiding duplication of work in other international bodies, such as the Food and Agriculture Organization of the United Nations (FAO) and the International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA);*

U.S. Comments:

This proposed option is not clear. UPOV does not provide the definition for "subsistence farmers." It is not certain what UPOV's mandate is regarding subsistence farmers and how other international treaties relate to the said UPOV's mandate. Without a clear proposal, we cannot support this option.

- (5) *explain that the survey of UPOV members had revealed that there have been no reported legal actions against smallholder farmers for infringement of plant breeders' rights in UPOV members;*

U.S. Comments:

We do not support this proposed option. Since UPOV does not provide the definition of "smallholder farmers," the proposed explanation raises several questions. Do breeders themselves define the term "smallholder farmers" in their survey or do they follow the definition provided in each country legislation? Will the survey be conducted every year? Will the breeders consider any legal actions in the future? Will the proposed explanation give a wrong message that smallholder farmers can infringe the breeder's rights, and the breeders will not take action, because they have not done so previously?

- (6) *explain that there would be a problem in trying to define the term "smallholder farmer";*

U.S. Comments:

We proposed amending the current FAQ to address this issue, as follows:

FAQ--Can a farmer replant seed of a protected variety without the authorization of the breeder?

Commercial farmers and Smallholder farmers

It is necessary to consult the legislation in each UPOV member to know the answer to this question. The UPOV Convention does not provide the definition for "commercial farmers" or "smallholder farmers."

Under the [1978 Act](#) of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for the production for purposes of commercial marketing of the reproductive or vegetative propagating material, as such, of the variety. However, no specific mention is made of replanting seed of a protected variety by farmers. Therefore, it is necessary to consult the legislation in each UPOV member.

Under the [1991 Act](#) of the UPOV Convention (see Article 15(2)), there is an optional exception to the breeder's rights according to which UPOV members can decide to allow farmers to replant seed on their own farms without the authorization of the breeder, under certain circumstances. The wording of this optional exception is as follows:

"Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in

relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or Article 14(5)(a)(ii).”

It is a matter for each UPOV member to decide if, and how, to incorporate this option in its legislation, with the goal of particularly supporting the “smallholder farmers” in the member country.

- (7) *explain that all farmers needed access to good seeds and that it was important to improve the livelihood of farmers worldwide and facilitate access to quality seeds by smallholder farmers; and*

U.S. Comments:

We support a new FAQ that explains how smallholder farmers can access quality seeds. This section may be added to the existing FAQ below (in (8))

- (8) *explain how the UPOV PVP system could provide assistance regarding access to, and choices of, protected varieties for all types of farmers, including smallholder farmers.*

U.S. Comments:

We do not support an additional FAQ for this issue. The existing FAQs sufficiently explain the importance/contribution of the UPOV system to all types of farmers, for example:

FAQ--Why do farmers and growers need new plant varieties?

New varieties of plants with features such as improved yield, resistance to plant pests and diseases, salt and drought tolerance, or better adaptation to climatic stress are a key element in increasing productivity and product quality in agriculture, horticulture and forestry, whilst minimizing the pressure on the natural environment. Due to the continuous evolution of new pests and diseases as well as changes in climatic conditions and users’ needs, there is a continuous demand by farmers/growers of new plant varieties and development by breeders of such new plant varieties.

The tremendous progress in agricultural productivity in various parts of the world is largely based on improved varieties, together with improved farming practices, and future food security depend on them.

- [Symposium on the Benefits of Plant Variety Protection for Farmers and Growers](#)

U.S. General Comments on FAQs on the UPOV Website:

It may be useful to assign listing numbers to the FAQs so each can be identified or recited by the listing number, for example FAQ1, FAQ2---.