

Working group on guidance concerning smallholder farmers in relation to private and non-commercial use**WG-SHF/5/3****Fifth Meeting
Geneva, March 22, 2024****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 fifth meeting in Geneva on March 22, 2024, in virtual 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/5/1 Rev.

PROPOSALS BY MEMBERS OF THE WG-SHF ON QUESTIONS TO COLLECT INFORMATION FOR THE WG-SHF TO CONTINUE ITS WORK AND TO WHOM THE QUESTIONS SHOULD BE ADDRESSED

5. The Delegation of the Kingdom of the Netherlands hesitated as to whether the proposed questions would in the end bring new information than what was presented in the initial study made by Oxfam, Euroseeds and Plantum. Some questions proposed aimed at asking for opinions rather than facts. It was of the view that the WG-SHF should focus on gathering facts rather than opinions.
6. The Delegation of Canada reiterated that, in its opinion, a questionnaire should aim at establishing if there was a real problem associated with the scope of the right and the private and non-commercial use exemption. It was questionable if a questionnaire based on all the proposed questions would help to establish if there was a real problem.
7. The Delegation of Canada recalled that the current EXN already referred to subsistence farmers. It noted that a plant variety right gave an economic monopoly, and if there was a leakage of that right to serve a public policy to support economic conditions for farmers, it was understandable. It noted that while all subsistence farmers were small holder farmers not all small holder farmers were subsistence farmers. It was also of the view that it was not possible to find an international norm suitable to define small holder farmers because the definition varied between jurisdictions taking into account factors such as the size of land holding but not necessarily the economic conditions of the farmer. Questions posed in a questionnaire should assist in deciding if the Explanatory Notes should be revised or not.
8. The Delegation of Switzerland was of the view that facts should be gathered, not opinions. It emphasized the need to stick to the mandate and noted that while the proposed questions were all interesting many felt outside the terms of reference of the WG-SHF.

9. The Delegation of the European Union understood that the aim of a questionnaire was to gather information and facts. The European Union had identified two major issues: firstly, is there really a problem? and if so, what is the magnitude of the problem? and secondly, is there a reputational problem at stake that makes countries hesitant to join UPOV?. The Delegation of the European Union was concerned by the fact that, in the WG-SHF, developed countries were discussing matters that might be more related to developing countries, the global south. It was important to involve those who face real problems. In the opinion of the European Union, communication was very important and it welcomed that the UPOV Office was working on UPOV's communication strategy. It was important to communicate on the fact that the issues at hand do not necessarily relate to the intellectual property protection of varieties but also to other matters, such as seed laws in developing countries. The European Union emphasized that it was important to work on those issues and to explore how to carry out fact-finding to gain more precise knowledge and information about possible problems and the extent of such problems.

10. The Delegation of the European Union recalled that, since the creation of the WG-SHF, much had been learned and that the time might now be ripe to organize a seminar to address relevant matters, and to involve those parties that were really concerned with those matters.

11. The Delegation of Japan agreed that the issues in question were posed only by developed countries which may potentially be basing its question on its perception of problem of farmers in the developing countries. Some questions posed were implying answers, which was not the best way to gather neutral facts. The questions did not aim at determining positive aspects of UPOV. The Delegation of Japan suggested to ask positive aspects of joining UPOV mentioning that they had heard from farmers in Africa, that after their country joined UPOV, the farmers had more choice of varieties and that the farmers accepted to pay more for protected varieties since the yields increased.

12. The Delegation of South Africa recalled that in their country, there were both subsistence farmers and small holder farmers and that the administration often received questions on how to define the term private and non-commercial use. The legislation in South Africa did not provide for such a definition. The Delegation of South Africa mentioned that it had an interest in finding out what that term meant in relation to small holder farmers and if the concept restricted the access to seeds. The fact-finding exercise would assist South Africa to implement the UPOV Convention, particularly relating to the issue of small holder farmers.

13. The Delegation of Norway supported the importance of the WG-SHF to remain within its mandate, namely to provide guidance on small holder farmers and the term private and non-commercial use. It proposed to map how UPOV members had implemented Article 15.1(i) of the 1991 Act of the UPOV Convention and to share experiences. Norway emphasized the need to ensure coherency on how UPOV communicates. The Delegation of Norway recalled that in the hierarchy of UPOV documents, the Convention came first, in second place were the Explanatory Notes, then the FAQs and lastly other communications. The Delegation of Norway noted that UPOV communications need to be coherent with the Explanatory Notes. The Delegation of Norway thought it would be useful to conduct the same exercise as it was done in relation to FAQs, namely, to invite members of the WG-SHF to share their views on the need for possible changes to the Explanatory Notes.

14. The Delegation of Canada was also of the view that it might be time to plan a seminar. In a seminar, the right question to be addressed would be how the UPOV system could assist small holder farmers through their financial challenges. The Delegation of Canada recalled that there was a lot of misinformation on intellectual property rights, not only plant variety rights, which was not always factually based. There were examples of farmers in Canada forming co-operatives and engaging in breeding as well as many other initiatives. The question on what the true concerns were for small holder farmers in terms of accessing best varieties should be addressed. As regards the reputation of UPOV, the Delegation of Canada believed that if the Convention is well implemented, there was no need to worry about the reputation.

15. The Delegation of Switzerland supported the intervention of South Africa and proposed to focus the fact-finding on how the members of UPOV had implemented the exemption on private and non-commercial use and possible jurisprudence. It agreed with Norway that it would be of interest to get the views of members on the present wording of the Explanatory Notes to establish if there was an issue that needed to be addressed. The Delegation found the idea of a seminar interesting, but mentioned that even for a seminar, questions need to be identified. In addition, it would probably be necessary to go back to the Consultative Committee since the organization of a seminar would be broader than the mandate of the working group.

16. The Delegation of the European Union was of the view that the questions proposed were aimed at learning more about the matters at hand and not to explain the benefits of UPOV. It was nevertheless also important to communicate on the benefits of UPOV since there are misconceptions in that respect. The

Delegation agreed with Canada to look into how the UPOV system could support small holder farmers to get access to new varieties.

17. The Delegation of the Kingdom of the Netherlands agreed that a Seminar could be an interesting way to move forward. Such a seminar could focus on how the UPOV system assisted farmers and on UPOV members' initiatives and existing projects. The Delegation noted that the Kingdom of the Netherlands was managing a project called "Seed NL" and was confident that other UPOV members were engaged in similar projects. It was also important to communicate that plant breeders' rights might not necessarily be the problem for small holder farmers. It was of the view that other factors, such as seed laws, financial challenges and governance might play an important role. It noted that the organization of a seminar did not appear to be within the present mandate of the working group.

18. The Delegation of Japan was in favor of the organization of a seminar highlighting the benefits of the UPOV system, including examples of tangible cases.

19. The Delegation of the European Union acknowledged that there might be many reasons for a country not to join UPOV, but that exercise aimed at assessing if the issue of small holder farmers had anything to do with countries not joining UPOV. With regards to a seminar, the Delegation of the European Union expressed its appreciation for the support and agreed that such an event would need detailed preparation. It was of the view that the proposal for a seminar could be discussed in the Consultative Committee as proposed by other delegates.

20. The Delegation of Argentina supported the proposal to organize a seminar during which benefits of UPOV in relation to small holder farmers would be highlighted. It mentioned that, in Argentina, there were examples of cooperation between breeders and small holder farmers. The Delegation agreed that the idea of the seminar could be presented to the Consultative Committee in October with an invitation to explore if the mandate of the working group should be revised.

21. The Delegation of Norway proposed that a questionnaire be drafted by the Office of the Union based on the proposals made in writing and comments made during the meeting. The questions proposed could be merged or reformulated by the Office of the Union so that they would fit into the mandate of the WG-SHF. The questionnaire could be shared to all the addressees proposed by WG-SHF members as well as specific institutions in that field. The addressees could choose which questions to answer. The questionnaire could have an introductory part explaining the background and the context of the exercise. The Delegation of Norway stated that the questions should address the concerns raised by South Africa on how Article 15.1(i) of the 1991 Act had been implemented by UPOV members. The Delegation of Norway proposed the circulation of the current Explanatory Notes, and asked members to propose amendments, if any. It noted that the organization of a possible seminar would go beyond the mandate of the working group but the idea could be presented to the Consultative Committee. Such a seminar could then be broader and comprise elements concerning Article 15.1 and 15.2 of the 1991 Act. The Delegation of Norway expressed its preference to first complete the work of the WG-SHF under the present mandate.

22. The Delegation of Canada was concerned about the lack of interest of UPOV members on the topic and noted that only four submissions were made by members and that three of those four originated from developed countries. Canada expressed that some of the questions were specific, aiming at establishing if there was a problem, while many questions went far beyond the purpose of ascertaining if there was a problem and also beyond the terms of reference of the working group. In addition, it would be unfair to ask the Office of the Union to distil the questions since it was a member-driven process. If the Consultative Committee would agree on a seminar, it would be important to hear the views of new members and members from developing countries.

23. The Delegation of Switzerland recalled the question raised by South Africa and was of the view that answering that question was within the mandate of the working group.

24. The Delegation of the Kingdom of the Netherlands was of the view that if the WG-SHF would go ahead with a questionnaire, it should really focus on the question raised by South Africa, to get information on how the exemption of private and non-commercial use had been implemented and practical experiences. A limited questionnaire would also increase the likelihood of a higher response rate. The results of such a questionnaire would be useful as a basis for further discussions on how to go forward.

25. The Delegation of Argentina recalled that there were not only small farmers in Africa but also in South America. The situation for such farmers might vary and it was not certain that the same questions would be equally valid in various regions.

26. The Delegation of the United States of America understood that small holder farmers operate under different conditions in South Africa, Argentina and in other countries or regions. It agreed to address the question raised by South Africa on how the exemption on private and non-commercial use had been implemented in members of UPOV, as well as possible jurisprudence and relevant legislation. Responses to such a questionnaire could be helpful in discussions with parties that sought to join UPOV. The Delegation was open to the idea of a seminar. However, a seminar would still require questions to be addressed. Such questions could relate to the implementation and experiences of the exception in question.

27. The Delegation of the European Union agreed to continue to work on a focused questionnaire. In parallel, the question of a seminar with a broader scope could continue with the view of its possible organization in 2025.

28. The representative of APBREBES recalled that the WG-SHF began its work some years ago reviewing matters raised in the study drafted by Oxfam, Plantum and Euroseeds and that thereafter circulars were sent to members of the WG-SHF. However, discussions on the substance had been avoided. The mandate of the WG-SHF was to provide guidance on small holders and the exemption on private and non-commercial use. He proposed that the work to send a questionnaire based on the proposals should not be paused but to be continued. Firstly, it would be useful to find out definitions, methodologies and frameworks used to define small holder farmers and subsistence farmers before continuing the work to provide guidance. Secondly, it was important to understand if such farmers use protected varieties and if holders of plant breeders' rights enforce their rights, not only in courts, but by other means, such as by sending seize and desist letters, to put pressure on farmers. The representative further questioned what would be the impact of the use of protected varieties if the Explanatory Notes would be amended. Lastly, APBREBES proposed that questions be put to the UN Special Rapporteur on the Right to Food and recalled that there was an obligation to make an assessment on the impact on the right to food when policies were amended.

29. The Office of the Union recalled that on December 22, 2020, the Office issued Circular E-20/246, inviting members and observers of the Council to make contributions by correspondence on the following matters:

(a) experience on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers; and/or

(b) views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

30. The Office of the Union noted that the following members and observers sent contributions in reply to Circular E-20/246: Argentina, Chile, China, Estonia, European Union, Israel, Japan, Norway, Switzerland, United Republic of Tanzania, Malaysia, South Centre, Association for Plant Breeding for the Benefit of Society (APBREBES), European Coordination Via Campesina (ECVC), Euroseeds and a joint contribution from the International Seed Federation (ISF), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), Asia and Pacific Seed Association (APSA) and the Seed Association of the Americas (SAA).

31. The WG-SHF noted that a compendium of the contributions on experiences and views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers, received in reply to Circular E-20/246 of December 22, 2020, was available in Annex II to [document WG-SHF/1/2](#).

32. The members of the WG-SHF exchanged views on the addressees and the questions to be posed. The WG-SHF agreed that the following questions should be sent to all UPOV members:

1. *Is your country/intergovernmental organization implementing the exception "acts done privately and for non-commercial purposes"? If so, how is it implemented?*
2. *Concerning this exception, are there definitions for the following term: "acts done privately and for non-commercial purposes"?*
3. *Please specify legislation/regulation and jurisprudence concerning this exception.*
4. *Are there any challenges and/or opportunities in implementing this exception in your jurisdiction? Please explain.*

33. The WG-SHF agreed that the summary of the interventions by members of the WG-SHF made during the meeting on the possible organisation of a seminar relating to the matters discussed, would be reflected in the report. The WG-SHF further agreed that the Office of the Union would prepare a document for the sixth meeting of the WG-SHF with the summary of those interventions and it will be up to the WG-SHF to decide if any recommendations on a seminar should be made to the Consultative Committee.

DATE OF THE SIXTH MEETING

34. The WG-SHF agreed that the sixth meeting of the WG-SHF be held by hybrid means, on October 23, 2024.

35. *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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