



agriculture, land reform
& rural development

Department:
Agriculture, Land Reform and Rural Development
REPUBLIC OF SOUTH AFRICA



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SOUTH AFRICA' S COMMENTS FOLLOWING INVITE FOR ALL UPOV MEMBERS TO REPLY TO THE FOLLOWING QUESTIONS IN RELATION TO ARTICLE 15(1)(I) OF THE 1991 ACT OF THE UPOV CONVENTION.

1. At its fifth meeting, held on March 22, 2024, the Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (WG-SHF) concluded that gathering information would be useful to consider the development of guidance concerning smallholder farmers in relation to private and non-commercial use and agreed that the Office of the Union should invite all UPOV members to reply to the following questions.

Article 15(1)(i) of the 1991 Act of the UPOV Convention provides for the following compulsory exception:

“(1) [Compulsory exceptions] The breeder’s right shall not extend to
(i) acts done privately and for non-commercial purposes,”

2. Following this invite, various stakeholders were consulted. Below are comments received in relation to the four questions circulated by UPOV.
3. Comments made by the various stakeholder are of their own opinion, and have been reported as received in as far as their relevance to the questions circulated.

Question 1

Is your country/intergovernmental organization implementing the exception “acts done privately and for non-commercial purposes”? If so, how is it implemented?

RESPONSES:

1. PRIVATE SECTOR

1.1 NATIONAL SEED ORGANISATION:

Yes, exemptions are included in South Africa’s Plant Breeders Rights Act.

PBR Act 12 of 2018 has the exemption included:

10. (1) Notwithstanding section 32(a), a plant breeder’s right in respect of a variety obtained in a legitimate manner does not extend to— (a) any act done in respect of that variety for private and non-commercial purposes.

PBR Act 15 of 1976

(6) Notwithstanding the provisions of section 23 A (a), a person who procured the propagating material of a variety in a legitimate manner shall not infringe the plant breeder’s rights in respect of the variety if he or she-

(d) uses the propagating material for private and non-commercial purposes.

If the seed/propagating material was obtained legally (bought, received with permission of the breeder or under licence) the seeds or propagating material may be used for private or non-commercial purposes.



1.2 PRIVATE COMPANY (FRUIT):

Both the current PBR Act of 1976 and the PBR Act of 2018 provide for this compulsory exception reflected in the UPOV 1991 Convention, although South Africa is only a member of the UPOV 1978 Convention. There is no definition of what acts would constitute as “private” or “non-commercial” in either the PBR Act of 1976 or the new PBR Act of 2018. There is also no requirement to provide any further detail on the application of this compulsory exception in terms of regulations. Therefore, the public and stakeholders and especially breeders are left in the dark on the application of this section.

It is not to our knowledge whether there have been any disputes between small holder farmers and breeders on this provision in the current PBR Act of 1976.

We submit that to properly understand the implication of this exception (as it has been incorporated again in the PBR Act of 2018) it will firstly be crucial to understand to whom this may relate. This relates to the critical need to define smallholder farmers and other categories of farmers as a starting point. Going forward there should be clear public information on the varieties that may be impacted by such provision, and we reiterate that in our view this should be restricted to the use of grain varieties and not include fruit varieties. It is again not clear what varieties are currently used by smallholder farmers that might trigger this exception. One cannot properly apply your mind to the potential impact without this knowledge.

2. PUBLIC RESEARCH INSTITUTION:

Smallholder Farmers do produce seed for own use and sometimes trade with neighbors. The country does not prohibit farmers from saving seed (seed bank) for future planting.



3. CIVIL SOCIETY ORGANISATIONS:

CSO 1: Implemented through the Plant Breeders' Rights Act and the Plant Improvement Act.

CSO 2: The answer to this question is that acts done privately and for non-commercial purposes are contemplated and set out in section 10 of the Plant Breeders' Rights Act 2018 as exceptions to plant breeders' rights.

4. PLANT BREEDERS' RIGHTS AUTHORITY:

Implemented through the following:

Plant Breeders' Rights Act no 15 of 1976 (currently in force).

(6) Notwithstanding the provisions of section 23A (a), a person who procured any propagating material of a variety in a legitimate manner shall not infringe the plant breeder's right in respect of the variety if he or she-....

- (e) uses that propagating material for private or non-commercial purposes.

PBR Act No 12 of 2018 (not yet implemented)

Exceptions to plant breeder's right

10. (1) Notwithstanding section 32(a), a plant breeder's right in respect of a variety obtained in a legitimate manner does not extend to—

- (a) any act done in respect of that variety for private and non-commercial purposes.



Question 2

Concerning this exception, are there definitions for the following term: “acts done privately and for non-commercial purposes”?

1. PRIVATE SECTOR

1.1 NATIONAL SEED ORGANISATION:

No definitions of private or commercial use are defined in the South African PBR Acts however the explanatory notes of UPOV as always been used as guidance such as the UPOV/EXN/EXC/1.

1.2 PRIVATE COMPANY (FRUIT):

From the outset, we believe before considering the possible acts that could constitute as “private” and “non-commercial” as captured in Article 15(1)(i) of the UPOV 1991 Convention, we believe that a key concern in general with not only the compulsory exception but also the optional exception in Article 15(2) of the UPOV 1991 Convention (concerning to the concept known as “farmer’s privilege”) is the lack of uniformity of what constitutes a “subsistence farmer” versus a “smallholder” farmer.

From our consideration, even in UPOV’s own documentation, there is no clarity and uniformity of what is meant by a “smallholder farmer” and at times reference is even made to “small scale farmer”.

There needs to be clear guidance on different categories of farmers and how member states understand these categories of farmers / producers to ensure these exceptions to Plant Breeders’ Rights will not be abused. Although this should necessarily be dictated by UPOV, as member states’ socio-economic circumstances vastly differ, the member states should at least ensure that the terminology used in their legislative instruments concerning categories of farmers are firstly clear,



consistent, and objective.

We reiterate that, in South Africa, currently there are no definitions in either the PBR Act of 1976 or the PBR Act of 2018 relating to what acts constitute “privately” or “non-commercial purposes”. In our opinion, such acts in the context of producers relying on this exception should be restricted to subsistence farming, which we mean to understand, is the use by an individual of a variety for their own private/ household consumption.

Again, we strongly feel that one cannot apply one’s mind to this question without having knowledge of the category of persons who may rely on this provision and the varieties that may fall under this exception considering current practice.

2. PUBLIC RESEARCH INSTITUTION:

It would be keeping seed back to plant the next season or produce own propagation material for planting next season. Exchange and informal trade of this material with neighbors might be seen as “commercial” depending on scale.

3. CIVIL SOCIETY ORGANISATIONS:

CSO 1:

As the new national Plant Breeders’ Rights Act Regulations are being developed, it is not known what the definitions will be. The following definitions are supported:

“Private”: means saving of seed on one’s own holding for the next season and the use of the products produced by that seed.

“Non-commercial”: producers who are ‘small-scale’ in their production where the farmer, co-operative or farming entity produce for own household and community consumption, and some seed and produce is exchanged and sold as part of their livelihood strategy.



Definition of small-scale: Individual member countries need to be able to define what small-scale means in their national context.

CSO 2:

Acts done privately and for non-commercial purposes are not defined in either the PBR Act or the draft Regulations.

4. PLANT BREEDERS' RIGHTS AUTHORITY:

There is no definition for "acts done privately and for non-commercial purposes" in the national PBR legislation. The PBR Authority is not aware of any other domestic legislation with a definition of the phrase '*private and non-commercial purposes*'.

South Africa's National Policy on Comprehensive Producer Development Support approved by Cabinet on 13 March 2024 however defines a smallholder farmer as a *producer or entity that produces (at primary, secondary and tertiary levels) for household consumption and markets, therefore farming is consciously undertaken in order to meet the needs of their households and derive a source of income. These are usually the new entrants aspiring to produce for the market as a profit with a maximum annual turnover ranging between R50 001 to R1 million per annum*

Also, the Ministry of Agriculture, Land Reform and Rural Development is a custodian of a National Producer/Farmer Register. According to National Report on Producer Farmers register (2021 estimates), a majority of registered farmers are trading in informal markets and about 62% are smallholders of which 42% are involved in crop production.



Question 3

Please specify legislation/regulation and jurisprudence concerning this exception.

1. PRIVATE SECTOR

1.1 NATIONAL SEED ORGANISATION:

PBR Act 12 of 2018 has the exemption included:

10. (1) Notwithstanding section 32(a), a plant breeder's right in respect of a variety obtained in a legitimate manner does not extend to— (a) any act done in respect of that variety for private and non-commercial purposes.

PBR Act 15 of 1976

(6) Notwithstanding the provisions of section 23 A (a), a person who procured and propagating material of a variety in a legitimate manner shall not infringe the plant breeder's rights in respect of the variety if he or she-

(d) uses the propagating material for private and non-commercial purposes.

1.2 PRIVATE COMPANY (FRUIT)

To the company's knowledge there has been no case law concerning the compulsory exception currently provided for in section 23(6)(e) of the PBR Act of 1976 and as the PBR Act of 2018 is yet to be put into operation, there has been naturally no case law (we do reserve the right to conduct further in-depth searches for clarification - if there is such a request).

The department should consider an option to bring a formal amendment to the PBR Act of 2018 to clarify the meaning of "*non-commercial*" and "*private*" acts. However, this as we understand may be a more difficult route for the Department to pursue.



2. PUBLIC RESEARCH INSTITUTION:

Plant Improvement Act

3. CIVIL SOCIETY ORGANISATIONS:

CSO 1:

Plant Breeders' Rights Act and Plant Improvement Act and regulations thereto.

CSO 2:

In terms of section 10(1) of the Plant Breeders Rights Act 2018, the following is provided:

“Notwithstanding section 32(a), a plant breeder’s right in respect of a variety in a legitimate manner does not extend to— (a) any act done in respect of that variety for private and non-commercial purposes.”

There is no jurisprudence concerning this exception to date.

4. PLANT BREEDERS' RIGHTS AUTHORITY

Although South Africa is a signatory to UPOV 1978 Convention, national legislation was amended in 1996 to include provisions of UPOV 1991 Convention. Thus, both the Plant Breeders' Rights Act No 15 of 1976 (currently in force) and the PBR Act No 12 of 2018 (not yet implemented) include the exception on “*acts done privately and for non-commercial purposes*).

The PBR Authority is not aware of any other applicable laws/case law in this regard.



Question 4

Are there any challenges and/or opportunities in implementing this exception in your jurisdiction? Please explain.

1. PRIVATE SECTOR

1.1 NATIONAL SEED ORGANISATION:

Challenges:

A lack of definitions in the legislation can cause confusion and loopholes. The number of seeds and or propagating material of certain protected crop varieties that can be used for private use is under discussion in South Africa. The size of a farmer before becoming a business entity is also being discussed and this will lead to perhaps larger farmers falling within the scope of private and non-commercial use. SANSOR is of the opinion that allowing the exchange and or sale of seed does not safeguard the legitimate interest of the Plant Breeder. Seeds/Propagating material should not be sold and or exchanged and can be only used on a farmer's own property.

Opportunities:

Where the act of private and non-commercial use is defined and still indicative of private use and breeders' rights are still safeguarded, the exemption can be respected. This exemption will then ensure food security for the most vulnerable citizens.

1.2 PRIVATE COMPANY (FRUIT):

We believe that the lack of clarity on the categories of producers / farmers that may rely on the exception read with the lack of uniformity across legislative instruments on defining such categories of farmers, essentially makes this provision very problematic as it may potentially be abused by farmers.

We furthermore believe that the exception to Plant Breeder's Rights, be it the



compulsory and optional exception should be restricted to grain varieties and should not extend to fruit varieties where it is not common practice to firstly save seeds as in the case of the farmer's privilege exception but also where such exception may practically provide greater opportunity for abuse.

We furthermore believe that more resources should be invested in educating smallholder farmers of Plant Breeder Rights, and the Department should properly review the role of smallholder farmers in South Africa. There should be adequate information on their contribution, the varieties mostly planted by such farmers and the current means to support such farmers.

We maintain that the current vague terminology used in legislative frameworks governing the protection of intellectual property provides ample opportunity for abuse and will stifle confidence in investing in South Africa's agricultural sector. There is great opportunity for growth and partnerships with breeders and we sincerely hope that the Department sets out to find ways for these stakeholders to find common solutions to the reality faced by indigenous communities in South Africa.

We strongly submit that all efforts should be made to ensure that South Africa's intellectual property frameworks provides strong protection and comfort to breeders that their legitimate interests will be protected in the territory. This however does not mean that the fine balance between the interests of such breeders and smallholder farmers cannot be struck. It should however not be done at the cost of ensuring ample protection of intellectual property rights.

2. PUBLIC RESEARCH INSTITUTION:

Scale and definition of smallholder farmer could be a challenge.



3. CIVIL SOCIETY ORGANISATIONS:

CSO 1:

We appreciate that as a member of UPOV 78 there is an opportunity to provide exemptions to the Breeders' Right that would take into account the following:

- The high levels of food insecurity and poverty in South Africa,
- The malnutrition in South Africa evident in high rates of stunting and rapidly increasing levels of diabetes and obesity as a consequence of an increasing reliance on industrially produced and highly processed food. This malnutrition is counteracted by access to more nutritious, diverse and fresh foods available in communities which are able to save, plant and exchange their own seed.
- The precarious conditions under which smallholder farmers support food security in their communities both through their own consumption, donation to vulnerable community members, and sale of seed and produce.
- The increasing impact of climate change causing weather variability, drought and extreme winds and storms with flash flooding which requires that communities are able to replenish seed through exchange, and that farmers have sufficient seed to enable replanting in a season.
- The important role smallholders play in ensuring the ongoing conservation and development of varieties with diverse and resilient genetics, and the contribution of these varieties to cultural practices, local food cultures and agricultural resilience.
- The fluidity of smallholder farmer seed systems, where seed with breeders' rights may inadvertently enter through exchange, or through unpreventable cross-pollination and is not always visually recognizable as coming from the commercial system.

We are extremely concerned about powerful players in the seed industry lobbying to limit the exchange of even farmers' varieties of seed to extremely small quantities applicable only to back-yard or hobby gardening; and to completely prevent the sale



of seed by smallholders thus undermining food insecurity and farmers' rights. We see this as challenging the implementation of the exception and thereby undermining Farmers' Rights, which are recognised as a human right in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.

CSO2:

This question is of paramount importance and we hope that South Africa will respond to this question in the following way:

“The free use of seeds, as well as their exchange and sale among neighbours and on the local market, is central to the food and nutrition security for many subsistence farmers. Many of these farmers may not even be aware of the provisions and legal import of plant variety protection legislation and that they may be violating it with their actions. To create legal certainty for these farmers, we intend to include a definition of ‘private and non-commercial use’ in our regulation. Such a definition should be formulated in a way that allows vulnerable household producers and subsistence household producers to freely use, exchange, or sell protected seeds and propagating material on the local market under this exception.

We therefore also support an amendment to the Explanatory Notes in this sense, in line with the proposal of the project team as discussed at the first meetings of the smallholder farmer working group.”

4. PLANT BREEDERS' RIGHTS AUTHORITY:

Although South Africa is bound by the UPOV 1978 Convention, South Africa has amended the national plant breeders' right legislation to incorporate UPOV 1991 provisions. The latest amendments culminated into the Plant Breeders' Rights Act, Act No. 12 of 2018. South Africa is currently drafting and consulting on the Regulations for this new Act in order for the Act to be implemented.

During public consultations on amendments of both the principal legislation and regulations, stakeholders have voiced the need to define “private and for non-commercial purposes” as the lack of definition(s) is problematic for both the breeders



and the farmers.

Some public comments received urged for explicit exclusion of smallholder farmers under the farmers' privilege exception. Concerns have however been raised that excluding smallholder farmers from the farmers' privilege provision will limit their access to improved protected varieties, especially since the legislation does not clearly define "private and for non-commercial purposes" under the compulsory exception.

South Africa has also initiated public consultations on South Africa's accession to the UPOV 1991 Convention. Article 15(1)(i) of the said Convention is one of the provisions where stakeholders sought clarity on. Some of the concerns raised by the principals are around transformational matters in the agricultural sector and the negative impact on food security, resulting from limited access to improved varieties by smallholder farmers.

The above indicates that lack of definitions/clarity may impede an effective national implementation of Article 15(1)(i) of the UPOV 1991 Convention.

Clear UPOV explanatory notes would present an opportunity for PBR Authorities of those countries transitioning from the UPOV 1978 Convention to the UPOV 1991 Act to be able to fully engage breeders, farmers, political principals in addressing any concerns and uncertainties raised on this important provision. This is vital for the country to administer an effective plant breeders' rights system for *the benefit of the society*.

In light of the above, the PBR Authority is of the view that the Explanatory Notes need to be looked into, in order to address and clarify issues in relation to the implementation of Article 15 (1)(ii) of the UPOV 1991 Convention.



