

**Consultative Committee****CC/98/11****Ninety-Eighth Session  
Geneva, October 28, 2021****Original:** English  
**Date:** August 23, 2021

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*to be considered by correspondence*

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**POSSIBLE GUIDANCE CONCERNING SMALLHOLDER FARMERS IN RELATION TO PRIVATE AND NON-COMMERCIAL USE***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance***EXECUTIVE SUMMARY**

1. The purpose of this document is to report on developments concerning possible guidance on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers and to present proposals for consideration by the Consultative Committee according to the replies to UPOV Circular E-21/098 of June 25, 2021.

2. The Consultative Committee is invited to:

(a) note the developments since the ninety-seventh session of the Consultative Committee on possible guidance concerning smallholder farmers in relation to private and non-commercial use, reported in this document;

(b) request the Office of the Union to include an item "Possible revision of the 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention'", in the agenda of the seventy-eighth session of the CAJ, to be held by electronic means on October 27, 2021;

(c) request the CAJ to draft 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/1) to provide guidance concerning smallholder farmers in relation to private and non-commercial use and to consider the establishment of a working group to assist in that process;

(d) subject to the above agreement by the Consultative Committee in the procedure by correspondence (see UPOV Circular 124 of August 23, 2021), to request the Office of the Union to prepare a CAJ document for consideration by the CAJ, at its seventy-eighth session, to include:

(i) a copy of the compendium with the replies to UPOV Circular E-20/246 (see Annex I), subject to the agreement of the observer State and observer organizations that contributed to the compendium; and

(ii) in consultation with the Chair of the CAJ, draft terms of reference for a working group with the purpose to revise the "Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention" (document UPOV/EXN/EXC/1) to provide guidance concerning smallholder farmers in relation to private and non-commercial use.

3. The structure of this document is as follows:

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## BACKGROUND

4. The Council, at its fifty-fourth ordinary session held via electronic means on October 30, 2020, noted the work of the Consultative Committee at its ninety-seventh session, held on October 29 and 30, 2020, as reported in document C/54/13 "Report by the President on the work of the ninety-seventh session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee", paragraphs 23 to 25, as reproduced below (see document C/54/21 "Report", paragraph 28):

"23. The Consultative Committee considered the joint presentation made by Oxfam, Plantum and Euroseeds (project team) concerning smallholder farmers.

"24. In reply to the questions raised by the Delegation of Canada, the project team clarified that:

"(a) consideration of the findings of the Report would be a choice for each member of the Union. As presented in the report, policy considerations of accessibility or affordability of seed of protected varieties in relation to smallholder farmers might not be relevant for certain members of the Union;

"(b) findings of the report were focused on seed-propagated crops and were not intended to apply to crops for non-food purposes, such as ornamentals and fiber crops. Consultations with fruit breeders were ongoing; and

"(c) the flowchart in the report was intended to apply only to specific acts of smallholder farmers and would cease to be relevant when those farmers become commercial farmers, although there would be grey areas as farmers transitioned to becoming commercial farmers. Breeders would only be interested to enforce their rights if farmers were commercial farmers.

"25. The Consultative Committee agreed the following in relation to providing guidance regarding the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers, taking into account the concerns raised at the session:

"(a) a circular to be sent to members of the Union 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 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.”

5. The Council decided to change paragraph 25(a) of document C/54/13, as follows:

“25. The Consultative Committee agreed the following in relation to providing guidance regarding the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers, taking into account the concerns raised at the session:

“(a) a circular to be sent to members of the Union and observers 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; [...].”

6. A revised version of document C/54/13 (document C/54/13 Rev.) reflects the change in paragraph 25(a) (see document C/54/21 “Report”, paragraphs 25 and 26).

## DEVELOPMENTS SINCE THE NINETY-SEVENTH SESSION OF THE CONSULTATIVE COMMITTEE

### Circular E-20/246 of December 22, 2020

7. The Office of the Union sent Circular E-20/246 of December 22, 2020, inviting members and observers in the Council to make contributions by correspondence on their experiences and their views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers. The following members and observers sent contributions: 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 (ECVVC), 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).

8. A compendium of the contributions received from members of the Union and observers in the Council in reply to Circular E-20/246 is available in Annex I to this document.

### Circular E-21/098 of June 25, 2021

9. The compendium of the contributions received from members of the Union and observers in the Council in reply to Circular E-20/246 (see section above and Annex I) was provided to the Consultative Committee in Circular E-21/098 of June 25, 2021.

10. Circular E-21/098 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 as follows:

“(a) to request the Office of the Union to discuss the contributions received from members of the Union and observers in the Council in reply to Circular E-20/246 (Compendium) with the Team of the Project ‘Options to interpret the notion of private and non-commercial use as included in Article 15. 1. I of the UPOV 1991 Convention’ (Project Team) to explore a basis to prepare a first draft of the guidance;

“(b) subject to the above agreement, to request the Office of the Union:

- (i) to provide a copy of the Compendium to the Project Team, subject to the agreement of the observer State and observer organizations that contributed to the Compendium; and
- (ii) to make an oral report on the progress concerning the above consultations, at the ninety-eighth session of the Consultative Committee in 2021, under the agenda item 22 ‘Possible guidance concerning smallholder farmers in relation to private and non-commercial use’ and to present a proposal for an updated procedure for the development of guidance for consideration by the Consultative Committee.

"In the absence of any objection from a representative of a member of the Union by July 25, 2021, the above proposal will be considered as agreed by the Consultative Committee."

11. In reply to UPOV Circular E-21/098, the Office of the Union received comments from Norway and Switzerland, which are reproduced in Annex II to this document.

PROPOSAL FOR A PROCEDURE FOR THE DEVELOPMENT OF POSSIBLE GUIDANCE CONCERNING SMALLHOLDER FARMERS IN RELATION TO PRIVATE AND NON-COMMERCIAL USE

12. On the basis of the replies to UPOV Circular E-21/098, and after consultation with the President of the Council, it is proposed to invite the Consultative Committee to proceed as follows:

(a) to request the Office of the Union to include an item "Possible revision of the 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention'", in the agenda of the seventy-eighth session of the CAJ, to be held by electronic means on October 27, 2021;

(b) to request the CAJ to draft 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/1) to provide guidance concerning smallholder farmers in relation to private and non-commercial use and to consider the establishment of a working group to assist in that process;

(c) subject to the above agreement by the Consultative Committee in the procedure by correspondence (see UPOV Circular 124 of August 23, 2021), to request the Office of the Union to prepare a CAJ document for consideration by the CAJ, at its seventy-eighth session, to include:

(i) a copy of the compendium with the replies to UPOV Circular E-20/246 (see Annex I), subject to the agreement of the observer State and observer organizations that contributed to the compendium; and

(ii) in consultation with the Chair of the CAJ, draft terms of reference for a working group with the purpose to revise the "Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention" (document UPOV/EXN/EXC/1) to provide guidance concerning smallholder farmers in relation to private and non-commercial use.

13. *The Consultative Committee is invited to:*

*(a) note the developments since the ninety-seventh session of the Consultative Committee on possible guidance concerning smallholder farmers in relation to private and non-commercial use, reported in this document;*

*(b) request the Office of the Union to include an item "Possible revision of the 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention'", in the agenda of the seventy eighth session of the CAJ, to be held by electronic means on October 27, 2021;*

*(c) request the CAJ to draft 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/1) to provide guidance concerning smallholder farmers in relation to private and non-commercial use and to consider the establishment of a working group to assist in that process;*

(d) *subject to the above agreement by the Consultative Committee in the procedure by correspondence (see UPOV Circular 124 of August 23, 2021), to request the Office of the Union to prepare a CAJ document for consideration by the CAJ, at its seventy-eighth session, to include:*

(i) *a copy of the compendium with the replies to UPOV Circular E-20/246 (see Annex I), subject to the agreement of the observer State and observer organizations that contributed to the compendium; and*

(ii) *in consultation with the Chair of the CAJ, draft terms of reference for a working group with the purpose to revise the “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention” (document UPOV/EXN/EXC/1) to provide guidance concerning smallholder farmers in relation to private and non-commercial use.*

[Annexes follow]

COMPENDIUM OF CONTRIBUTIONS RECEIVED  
IN REPLY TO UPOV CIRCULAR E-20/246 OF DECEMBER 22, 2020

This Annex contains a compendium of contributions received in reply to UPOV Circular E-20/246 of December 22, 2020, as follows:

SECTION I: CONTRIBUTIONS FROM MEMBERS OF THE UNION

- Contribution from Argentina
- Contribution from Chile
- Contribution from China
- Contribution from Estonia
- Contribution from the European Union
- Contribution from Israel
- Contribution from Japan
- Contribution from Norway
- Contribution from Switzerland
- Contribution from the United Republic of Tanzania

SECTION II: CONTRIBUTIONS FROM OBSERVERS

- Contribution from Malaysia
- Contribution from South Centre
- Contribution from the Association for Plant Breeding for the Benefit of Society (APBREBES)
- Contributions from the European Coordination Via Campesina (ECVC)
- Contributions from Euroseeds
- 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 Seed Association of the Americas (SAA)

SECTION I: CONTRIBUTIONS FROM MEMBERS OF THE UNION

ARGENTINA  
(original in Spanish)

Argentina provided the following contribution in reply to UPOV Circular E-20/246:

“There is national legislation on smallholder farmers; Law No. 27.118 regulates the Peasant and Indigenous Family Agriculture. Article 5 of this legal text establishes that family farmers are those who carry out productive activities related to farming, livestock, forestry, fishing and aquaculture in rural areas and who meet the following requirements:

- “a) The management of the production process is undertaken directly by the producer and/or a member of their family;
- “b) They own all or part of the means of production;
- “c) The working requirements are covered primarily by the family workforce and/or with additional support from salaried workers;
- “d) The farmer’s family lives in the countryside or in the nearest town;
- “e) The family’s main income comes from the agricultural activities of their establishment;
- “f) Small-scale producers, smallholders, peasants, small-scale farmers, tenant farmers, sharecroppers, independent fishermen, family producers, landless rural peasants and producers, peri-urban producers and indigenous communities are included under sections a), b), c), d) and e).

“Article 26 provides for the establishment of the Production Center for Native Seeds (*Centro de Producción de Semillas Nativas – CEPROSENA*), in collaboration with the National Institute of Agricultural Technology (*Instituto Nacional de Tecnología Agropecuaria – INTA*) and the National Seed Institute (*Instituto Nacional de Semillas – INASE*), which is intended to contribute to guaranteeing food security and sovereignty, with the aim of registering, producing and supplying native and local seeds. Its functions are to:

- “...  
“b) Promote the use of native and local seeds for food, agriculture, forestry, ornamental use and industrial application;
- “c) Organize the collection, production and commercialization of native and local seeds in order to ensure their availability for use and their quantity and quality;
- “d) Carry out and promote research into the use and conservation of native and local seeds.
- “e) Develop actions aimed at avoiding the unlawful appropriation and lack of recognition of native and local seeds;
- “f) Coordinate actions with the regulatory authorities in order to implement legislation protecting native seeds;
- “g) Carry out actions intended to ensure agricultural variety and diversity and to promote exchanges between producers...’

“In accordance with the text highlighted above, the use of native and local seeds is encouraged in order to ensure supply and the food sovereignty of the populations described.

“Under the above-mentioned law, Argentina operationalizes actions, plans and programs to: increase productivity and competitiveness; support diversification and innovation in production; guarantee the preservation, support, validation and dissemination of the practices and technologies used by families working in family, peasant or indigenous agriculture in order to promote cultural identity, knowledge transmission and the reclamation of good practices in production, use, harvesting and water recovery; pay due attention to bioarchitecture for housing and productive infrastructure, value added at source and alternative certification; and register, produce and provide native and local seeds, among other measures in areas including education, health, infrastructure and energy.

"In operational terms, for the application of this law, the groups of farmers and communities that preserve local varieties and show an interest in recovering traditional varieties of different crops have been identified. These varieties are produced in small quantities for personal consumption and potential exchange or commercialization. In this regard, community initiatives for conservation are being developed, including the 'Seed Exchange Fairs' (*Ferias de Intercambio de Semillas*), 'Seed Houses' (*Casas de semillas*) and 'Seed Guardians' (*Guardianes de semillas*) programs, although these are often remote, with insufficient infrastructure and equipment, inadequate communication and limited relevant experience. At the national level, INTA has a network of banks of germplasm from plant genetic resources that preserve local varieties ex situ. These banks carry out studies on the genetic variability of the existing material; these are essential to identifying the material and to developing biodiversity conservation strategies that ensure its resilience in climate change scenarios. This is creating an important database and a pre-selected range of materials that can be adapted to different environmental conditions in order to recover local varieties that are of interest to farmers. In that regard, since 2004, germplasm from local crops has been returned to communities in the Calchaquí Valleys in Tucumán and Catamarca provinces, and to Quebrada and Puna, emphasizing the importance of diversity in potato, bean and corn crops in terms of quality, nutrition, health issues and the dissemination of the crops in the Andean region. Attention should be paid to the ProHuerta Program, which has promoted the growth of family plots nationwide (reaching over 600,000 plots), supplying seeds for self-sufficient food production, and providing spaces for the exchange of plants, seeds, knowledge and practices at dedicated events. Through the extension system, community initiatives have been promoted and integrated into institutional efforts. These actions have been organized through programs intended to contribute to the preservation of plant genetic resources for food and agriculture, and to guarantee the food security of vulnerable groups.

"In this regard, in the past year the 'SemillAR' program has been created under the Secretariat for Family, Peasant and Indigenous Farming, with thematic areas including the development of training and capacity-building programs within INTA and for producers with the aim of managing and recovering native and local seeds.

"Another significant initiative is the establishment of the National Roundtable for Native and Local Seeds, which is intended to involve all relevant actors in the development of public policies on the issue and thereby create the synergy required to finally attain a seed production system that can be adapted to the country's varied territories and climates, as well as to regional growth and the recovery of varieties.

"On the other hand, on a complementary note, there is Law No. 20.247 on Seeds and Phylogenetic Creations, under the 1978 UPOV Convention, which guarantees nationwide access to the breeder's right, while also regulating the exceptions permitted under the legal framework. These exceptions include the farmer's privilege (**Art. 27.** The right of ownership of a cultivar shall not be infringed by anyone who provides seed from the same cultivar in any way, with authorization from the owner, or anyone who keeps and sows seeds for personal use, or who uses or sells as a raw material or food the product obtained from the cultivation of this phylogenetic creation') and the breeder's exemption (**Art. 25.** Ownership of a cultivar shall not prevent other persons from using the same cultivar for the creation of a new cultivar, which may be registered under the name of its creator without the consent of the owner of the phylogenetic creation used to obtain it, provided that the latter does not have to be used on an ongoing basis to produce the new one'). The farmer's privilege and the possibility of a seed bank must not be confused with the rights provided to farming families, who are claiming their status as farmers with ancestral rights and mainly targeting local and native seeds not covered by a breeder's right.

"This does not mean that a family farmer cannot breed plants and protect their variety, or make personal use of it under Law No. 20.247, but there must be no confusion between the specific advantages intended, on the one hand, for a more vulnerable productive sector and, on the other, for the proper use of seeds by, in most cases, large-scale agricultural producers who could influence rights not intended for them.

"Moreover, Argentina has ratified the International Treaty on Plant Genetic Resources for Food and Agriculture (through Law No. 27.118, approved on September 23, 2015, and enacted on October 5, 2015. The instrument of ratification of the Treaty was deposited with the United Nations Secretariat on May 13, 2016, entering into force in Argentina on August 15, 2016).

"Through domestic legislation, in Argentina, there has been promotion and support of various programs and actors involved in the development of farmers and local communities with the aim of managing and preserving the use of plant genetic resources for food and agriculture on farms. On the estates of producers, INTA, through its outreach and research activities, and with the support of local governments in some cases, work nationwide to promote and preserve the reintroduction of local germplasm, community organization, and the exchange and use of local seeds in order to contribute to maintaining agrobiodiversity and to recognizing the cultural identities of local communities.

"The National Seed Institute has regulations on native species in relation to their traceability and commercial production with added value, such as INASE Resolution No. 318/18, establishing production areas for native species that respect national authorizations in order to be able to make use of this germplasm.



“At the national level, there are complementary regulations that make it possible for smallholder farmers to be able to use, produce, exchange and sell native and local seeds and cultivars possessed by these farmers without ownership of them, as mentioned initially.

“At the same time, the farmer’s privilege makes it possible to make personal use of seeds owned for non-commercial purposes, in accordance with national legislation that requests declarations of the amount kept and the cultivar used.

“We have not found evidence that the source of infringements of the breeder’s right comes from either smallholder farmers or family producers, but rather that it stems from a lack of payment for the breeder’s right by other users of seeds who do not comply with national legislation on the personal use of seeds, as under the Law on Seeds and Phylogenetic Creations.

“INASE continues to work towards cooperation between the country’s different seed systems in order to guarantee the rights of those who want to use and protect the varieties, and towards strengthening the rights of different sectors without pitting them against each other.”

CHILE  
(original in Spanish)

Chile provided the following contribution in reply to UPOV Circular E-20/246:

“Please accept my greetings and apologies for not having replied earlier to the consultation on the proposal by Oxfam, Plantum and Euroseeds regarding a compulsory exception as provided for in the UPOV Convention of 1991:

“Article 15. 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”**

“However, after close review of the Oxfam, Plantum and Euroseeds project ‘Options to interpret the notion of private and non-commercial use as included in Article 15(1)(i) of the UPOV Convention of 1991 in relation to smallholder farmers’, we have encountered issues that we consider unsatisfactory and shall outline in detail:

“- First, the exception to ‘**acts done privately or for non-commercial purposes**’ does not suggest that it apply to small, medium, or large-scale farmers and clearly establishes a private, non-commercial context. By pointing out that the purpose is non-commercial, the provision of seeds in any manner or form, including sale or barter, is restricted.

“- The inclusion of the term ‘smallholder farmer’ would imply that each country should embrace that term. Should it already exist, would it need to be brought into line with a universal definition? I refer specifically to the fact that in South American countries, a “smallholder farmer” may farm up to 500 ha, and in the particular case of Chile they may farm more than 100 ha.

“- If we were to incorporate those interpretations into article 15 (1), it would be very difficult to incorporate the optional exception enabling farmers to implement the so-called ‘farmer’s right’ or ‘farmer’s privilege’, because it would be counterproductive to permit the sale of seeds for one group of farmers and not for another, since the parameters for establishing who may be entitled to one benefit or another are extremely unclear.

“- In the region, and specifically in Chile, only seeds that are duly registered or listed in a commercial seed register can be marketed. Furthermore, the marketing of seeds is subject to minimum requirements such as minimum percentages of purity and varietal authenticity, labelling, etc. That aims precisely at protecting farmers from poor quality seeds. The proposal would back or justify something that we have been fighting against for so many years, namely illegal seeds.

“Therefore, incorporating smallholder farmers among the options for interpretation of this concept is not feasible for our farming and could prove highly prejudicial to national breeders.”

CHINA

China<sup>1</sup> provided the following contribution in reply to UPOV Circular E-20/246:

“(a) China has joined to the 1978 text of the UPOV Convention, so has not implemented the relevant contents of the 1991 text.

“(b) Corresponding to this, China implements the ‘farmer privilege’ in the 1978 text, that is, the smallholder farmers can use the propagating materials of the protected varieties harvested on their own holdings for propagating purposes, and the quantity is not more than the reasonable amount of their land, without the permission of the variety owner and without paying the use fee.”

ESTONIA

Estonia provided the following contribution in reply to UPOV Circular E-20/246:

“Estonia has no **experience on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers** and question about **views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers** we haven’t had any discussions yet.”

EUROPEAN UNION

The European Union provided the following contribution in reply to UPOV Circular E-20/246:

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

“We do not have experience on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

“Information on the farm size in the EU can be found in the recent publication on Europe’s agricultural structure: ([https://ec.europa.eu/eurostat/statistics-explained/index.php/Farms\\_and\\_farmland\\_in\\_the\\_European\\_Union\\_-\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Farms_and_farmland_in_the_European_Union_-_statistics).)

“Broadly-speaking, there are three distinct groups of farms in the EU: (i) semi-subsistence farms, where the focus is on growing a high proportion of food to feed farmers and their families (ii) small and medium-sized farms that are generally family-run businesses and (ii) large agricultural enterprises which are more likely to have a legal form or be cooperatives.

‘These distinctions are made clearer by analysing farms in terms of their economic size. Of the EU’s 10.5 million farms, 4.0 million had a standard output below EUR 2 000 per year and were responsible for only 1% of the EU’s total agricultural economic output. These very small farms are at the (semi-)subsistence end of the farming scale; about three-quarters of such farms in the EU consumed more than one half of their production.

‘A further 3.0 million farms had an economic output within the range of EUR 2 000 – EUR 8 000 per year. Together these very small and small farms accounted for two-thirds (67.6 %) of all farms in the EU in 2016.

‘In contrast, 304 000 farms (2.9 % of the EU total) each produced a standard output of EUR 250 000 per year or more in 2016 and were responsible for a majority (55.6%) of the EU’s total agricultural economic output; these farms can be characterised as being large agricultural enterprises. Two in every five of these large farms had a legal or group holding form.

‘A majority (55.1 %) of the standard output generated by agriculture across the EU was from farms in France (16.8 %), Italy (14.2 %), Germany (13.5 %), and Spain (10.5 %) in 2016. Although Romania accounted for about one third of the EU’s farms, it accounted for only 3.3 % of the EU’s standard output’.

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<sup>1</sup> Reply provided by the National Forestry and Grassland Administration (NFGA) of China.

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

"As it is evident that there are issues in relation to informal seed exchange between small farmers, in particular for subsistence farmers (see the 'Oxfam, Plantum and Euroseeds report'), where the interrelations are not clearly understood, interpreted or communicated, it would be beneficial to clarify these issues. It should also be made clear that there are national (e.g. EU) rules on marketing of plant reproductive material - a separate legal framework from the variety protection rules – in which the general marketing requirements for seed are laid down.

"We can agree to the following suggestions:

"Action for UPOV

"— Amending the explanatory note on exceptions to the breeder's right under the 1991 Act of the UPOV Convention ('private and non-commercial use').

"— Consequently improving the FAQs: further clarification of 'private and non-commercial use'.

"FAQ/explanatory note

"On the basis of above the EU and its Member States wish to make a recommendation to the Council to work on communication and explanations with the help of explanatory notes and FAQs. As a fall-back position, EU can agree to work on the FAQ only.

"Moreover, it could be reflected to amend the FAQs on farmers to make it more clear that farmers can be breeders, e.g. farmers who select their varieties according to their own agro-climatic and cultivation conditions, and to make a cross reference to the FAQ on breeders. In addition, in the FAQ on subsistence farmers their possibility to exchange seeds to vital goods in the local community could also be made clearer."

## ISRAEL

Israel provided the following contribution in reply to UPOV Circular E-20/246:

"The Israeli PBR Council supports the initiative of the project presented in the last UPOV meeting allowing **smallholder farmers**, **self-consumption** and **occasional sales** of seeds produced from protected varieties. In many countries, smallholder farmers are part of the most vulnerable communities and taking care of them is just a universal moral rule. Nonetheless, Plant Breeders' Rights are designated to prevent abuse and proliferation of varieties, results of research and developments for many years.

"Because agricultural, economical, demographical, social and cultural situations are different between countries, the definition of 'smallholder farmers' might be different among them as well. Thus, the presented flowchart should serve as a **consultation tool** and **not as a strict guideline**, serving the local authorities to define to whom and when this process might be applicable. The definition of '**smallholder/subsistence farmers**' and also the meaning of '**occasional sales**' should be clarified locally by the competent authorities. Since these definitions could be quite vague, some measurable criteria should be considered – for example: the grown quantity of a set variety as the rate of its total market in a specific country. Another possible measurable parameter to define when an 'occasional sale of a smallholder farmer' falls out of the scope of the PBR could be a maximum threshold of 'X' percentage of the market value by farmer and by variety. These are few examples that should be defined by each and every country.

"Moreover, we would like to underscore three categories that should be treated differently by these criteria: A larger scale may be given to **field crops** than to **vegetable crops** and **vegetative production** is recommended not to be allowed out of the scope of PBR.

"In addition, a possible takeover of commercial entities on smallholder farmers working for their survival must be eliminated."

JAPAN

Japan provided the following contribution in reply to UPOV Circular E-20/246:

"When considering measures for smallholder farmers, or subsistence farmers, we should be fully aware of possible negative impacts by this proposal on welfare of such farmers.

The following points should be further discussed:

- "Clear criteria of the implementation of the exception

"If the act of subsistence farmers is included in the scope of private and non-commercial use, first of all, the criteria for its implementation should be clear enough.

For example, targeted subsistence farmers could be defined as those who gain their livelihood mainly from agriculture (or gain majority of their income) and their sales of less than \$ 2 a day.

Also, criteria of "targeted area" where the exception can be implemented should be clearly defined.

It should be considered how to prevent outflow of PBR protected varieties from "targeted area" (especially to foreign countries), via trade among subsistence farmers.

Without clear criteria, this exception would be loopholes for unintentional distribution of PBR-protected varieties.

- "Either variety denomination or brand name do not represent values of PBR-protected varieties.

"Therefore, trade without showing variety denomination or brand name cannot be excused from PBR.

- "Possible negative impacts on breeding

"In case that the exception for subsistence farmers is allowed, incentive for breeders to develop new varieties for subsistence farmers in developing countries could be undermined.

"As a result, excellent improved varieties would not be available for such farmers.

"In case that PBR-protected varieties are outflowed from their 'targeted areas' under this scheme, activities to breed new varieties for developing countries would be negatively affected.

- "Exclusion of fruit trees

"Exclusion of perennial crops, such as fruits trees, for the exception for subsistence farmers, should be positively considered.

In case of perennial crops, the above mentioned negative impacts on breeders' incentives would be more crucial.

- "Consideration of other seed-related systems

"Availability for all farmers of sufficient amount of seed/seedlings often depends on seed-related systems which regulate seed distribution in each country, such as national listing.

PVP System might not be a main factor on seed availability for subsistence farmers."

NORWAY

Norway provided the following contribution in reply to UPOV Circular E-20/246:

"Norway appreciates the initiative of Oxfam, Plantum and Euroseeds of expanding the current interpretation of the art.15.1 1991 Act of the UPOV Convention. Norway would like to share the following views and experiences:

"First, in 2019, the Ministry of Agriculture and Food adopted a national strategy on genetic resources for food and agriculture, which states i.e.: *Continue the work on Farmers' Rights in Norway, for example through ensuring that farmers have easy access to genetic resources and can keep on participating in decision-making processes. Norway's farmers should continue to be able to use farm-saved seeds and their own live animals in their production.*

"Second, Norway would like to share a recent experience regarding acts done privately and for non-commercial purposes in our seed regulation. In July 2020, Norway made the following amendments to its seed regulation:

"The scope and extent of the seed regulation as a whole was restricted to seeds of specific regulated species intended for professional use, with the exception for ornamentals. Some few rules regarding seeds of narcotic species, GMOs and treated seeds still covers all seeds.

"We expect this to reduce the burden on the Food Safety authorities to control the market and makes it easier for small actors in the field to operate.

"Third, the Norwegian Plant Breeder's Rights Act allows farmers to save and exchange propagating material of protected varieties without any remuneration to the right holder. This recognition of farmers' rights to save seeds became particularly important during the drought in the summer of 2018. During that season, farmers, particularly in the Southern and Eastern part of Norway, experienced huge loss in harvest. The drought also severely impacted seed producing farmers. Thus, all farmers were encouraged to save seeds from their harvest. During this season, there was far more exchange of seeds among farmers than what is usually the case. This illustrates the increased importance of farm-saved seeds during challenging seasons, regardless of the size of the farmers. Norway would consider this far more important in countries where farmers to a larger degree rely on the informal seed system to access seeds.

"Fourth, in order to better investigate the possible impact of Plant Breeder's Rights on smallholder farmers, including interpretation of acts done privately and for non-commercial purposes, Norway requests the Office of the Union to also consider *the Inventory of national measures, best practices and lessons learned from the realization of Farmers' Rights, as set out in Article 9 of the International Treaty* that was welcomed by the eighth session of the International Treaty in 2019.

"Fifth, Norway shares the finding of the study of Oxfam, Plantum and Euroseeds that drawing the line between what is considered 'private and non-commercial use', and what is not will vary from context to context, depending on the production and seed systems in the country. A narrow interpretation of the term commercial use may not be appropriate in many contexts as it does not reflect the reality of smallholder farmers and their agricultural production systems.

"Sixth, Norway would like to stress the need for coherent communication by UPOV. Thus, it is imperative that the Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention and relevant FAQs are updated in accordance with the outcome of this process.

"Finally, Norway looks forward to learn more about the views and experiences of other members of the Union and to continue the work on this important matter"...

SWITZERLAND  
(original in German)

Switzerland provided the following contribution in reply to UPOV Circular E-20/246:

"We welcome the opportunity to share with the Office of the Union the experience and views of Switzerland on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers. The remarks below also concern the issue of farmer's privilege and legislation on plant propagating material in Switzerland.

"LEGAL SITUATION IN SWITZERLAND

"1. Legislation on plant variety protection

"According to Article 6(a) of the Federal Act on the Protection of Plant Varieties (SR 232.16), the breeder's authorization is not required for the acts referred to in Article 5 (production or reproduction, conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting or importing of the propagating material of the protected variety, or stocking for any of those purposes), when they are done privately and for non-commercial purposes.

"Furthermore, farmers who have acquired propagating material from a protected agricultural variety through the breeder or with the breeder's consent may, on their holdings, propagate the harvested material they have obtained by growing such material (art. 7(1) of the Federal Act on the Protection of Plant Varieties). This farmer's privilege applies to the 23 species listed in annex 1 of the Ordinance on the Protection of New Varieties of Plants (SR 232.161). It may be exercised regardless of the size of the farmer's holding or the quantity of farm-saved seed and is therefore not limited to smallholder farmers.

"Any private-law contract that restricts or annuls the exceptions for acts done privately or the farmer's privilege is deemed to be null and void (Art. 8 of the Federal Act on the Protection of Plant Varieties).

## “2. Legislation on plant propagating material

“The commercial production and entry into free circulation of plant propagating material for commercial agricultural use is regulated by law (Art. 1 of the Ordinance on Plant Propagating Material (SR 916.151)). The detailed provisions on the production and certification of propagating material ensure the varietal identity and purity of propagating material released for commercial sale. There are also specific provisions on varieties grown in small quantities (niche products) that contribute to the conservation of varietal diversity (conservation of plant genetic resources). The regulation on niche varieties provides for the free circulation of propagating material not listed in the national variety register. However, niche varieties may not be marketed freely either. Doing so requires a sales permit, the definition of the niche variety and oversight of the amount concerned, and the implementation of plant health measures.

### “EXPERIENCE/PRACTICES IN SWITZERLAND

“In Switzerland, commercial agriculture is practiced as a principal or secondary activity. The marketing of seeds intended for commercial agriculture is heavily regulated and there is no informal trade. Little use is made of the farmer’s privilege. Farmers usually buy certified propagating material each year and for some crops, mainly protected varieties, the use of certified planting material is compulsory. The annual sales figures for seed and planting material suggest that 85 per cent of demand for seed potatoes and 95 per cent of demand for cereal seeds in Switzerland is met through certified propagating material. The practice of farm-saved seeds therefore plays a secondary role in Switzerland.

“The question as to whether farmers are entitled to exchange propagating material of protected varieties does not arise, as the placement on the market of vegetative propagating material, for phytosanitary reasons, is subject to the so-called plant passport. Growers must register with the Federal Plant Protection Service and sign up for annual on-site monitoring of their production plots. Unlike with planting material, relatively few seeds require a plant passport, because most quarantine organisms are not spread through seeds. The exchange of propagating material of protected varieties has never given rise to legal proceedings.

“For most varieties – protected or not – an informal exchange or sale of propagating material would contravene legislation on plant propagating material.

“The private, non-commercial use of propagating material constitutes an exception to the provisions of the Federal Act on the Protection of Plant Varieties and does not come under legislation on plant propagating material either. At most, in individual cases the question might arise as to whether an activity should be considered commercial. To our knowledge, no Swiss court has had to rule on the matter to date.

“The trading of propagating material is dependent on many factors, of which variety protection is only one aspect. Under Swiss law, various provisions (laws on plant propagating material and plant health) make it difficult for farmers to trade with one another, regardless of their farms’ size. In addition, the type of subsistence farming referred to in the explanatory notes by the Office of the Union is rarely practiced in Switzerland. All of the above may explain why there have been no court rulings on the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.”

### “EXPLANATORY NOTES BY THE OFFICE OF THE UNION ON THE EXCEPTION OF ACTS DONE PRIVATELY AND FOR NON-COMMERCIAL PURPOSES IN RELATION TO SMALLHOLDER FARMERS

“In Switzerland, it is common practice for private individuals such as amateur gardeners to exchange seeds. It is indicated in the explanatory notes by the Office of the Union that the scope of the exception may extend to the propagation of a variety for exclusive use in one’s own garden. It is unclear, however, whether that would also apply to private and non-commercial use in someone else’s garden. According to the explanatory notes, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and his or her dependents living on that holding may also fall within the meaning of acts done privately and for non-commercial purposes. Again, emphasis is placed on the location of the act and it is unclear whether the exception should also apply if the farmer’s dependents do not live on the holding, which is not uncommon in Switzerland. Both examples raise the question as to whether the wording of the explanatory notes is not unnecessarily narrow. The same question arises as regards the abovementioned subsistence farming and the location of the act.

“In the course of the revision by the Office of the Union of the Explanatory Notes on Exceptions to the Breeder’s Right Under the 1991 Act of the UPOV Convention (UPOV/EXN/EXC/1), it is therefore important for Switzerland that the exception be interpreted in a balanced way within the bounds of legality. Appropriate consideration should be given, in particular, to the specific circumstances of developing countries, where 80 per cent of seeds come from informal seed systems, and the reality and needs of their smallholder farmers. Here, too, the current interpretation of the exception of acts done privately and for non-commercial purposes is unnecessarily narrow and does not do justice to the situation. The study conducted by Oxfam, Plantum and Euroseeds provides useful input for the revision of the explanatory notes. At the same time, it raises a number of questions that remain to be clarified.

"For Switzerland, it is essential that the revised explanatory notes contribute to a balanced implementation of the exception and do not introduce legal uncertainties. Switzerland therefore seeks clarification on the following issues in the course of this work:

- "How would a possible new interpretation of the compulsory exception under Article 15.1 affect the interpretation of the optional farmer's privilege under Article 15.2? This question is particularly important to the extent that non-commercial purposes would be understood to include acts to which explicit reference is made under Article 15.2.
- "Would it make sense to interpret the provision on a case-by-case basis for different types of crops and, if so, why and on the basis of which criteria?
- "Should acts done privately for non-commercial purposes be defined only on the basis of qualitative criteria or also on the basis of quantitative criteria? How should commercial and non-commercial purposes be distinguished? Is an act commercial if, for example, compensation is charged for the work involved? These questions are particularly important in cases where certain commercial uses (for example the sale of seed material) might be deemed to be for non-commercial purposes.
- "Does the location of the act play a role in the definition of an act done privately for non-commercial purposes?
- "Are there any criteria that might help to define "smallholder farmers" and how can such criteria take into consideration the different circumstances in the member States of the Union?

#### UNITED REPUBLIC OF TANZANIA

The United Republic of Tanzania provided the following contribution in reply to UPOV Circular E-20/246:

"1. Experience on implementation of exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

"The United Republic of Tanzania has not experienced any challenge in the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers. Small holder farmers are not restricted in using the protected varieties for non commercial purposes. It is provided in the regulations that the small holder farmer is one who produces crops in less than five acres of land.

"2. Views on the implementation of the exception of acts done privately and for non commercial purposes in relation to smallholder farmers.

"Providing guidance on how to deal with the implementation of exception of acts done privately and for non-commercial purposes in relation to smallholder farmers matter in the regulations helps to reduce misinterpretation on intention of provision on exception of acts done privately and for non commercial purposes in relation to smallholder farmers."

## SECTION II: CONTRIBUTIONS FROM OBSERVERS

### MALAYSIA

Malaysia provided the following contribution in reply to UPOV Circular E-20/246:

#### “THE IMPLEMENTATION OF THE EXCEPTION OF ACTS DONE PRIVATELY AND FOR NON-COMMERCIAL PURPOSES IN RELATION TO SMALLHOLDER FARMERS

“At current, the term of ‘small farmers’ was described as farmer whose farming operations do not exceed 0.2 hectare for all crop types as prescribed in the Malaysian Protection of New Plant Varieties Regulations 2008.

“Malaysia anticipates the claim of acts done privately and for non-commercial purposes by smallholder farmers in the country listed non-exhaustively as follows:

- “i. Farm saved seed for next growing season in their own holding;
- “ii. Exchange for cultural and ritual purposes;
- “iii. Genetic resource collection and hobbyist satisfaction;
- “iv. Research and development purposes, etc.

“Aside from these listed acts, farmers in Malaysia representing by some NGOs also demand the long-practiced conventional act on selling seeds either as seeds or harvested materials or product for basic self-subsistence purposes such as paying bills, loans, children education, buying other food for consumption to be conceded for protected varieties in the aspect of humanity. Those related crops are rice and vegetatively propagated crops (e.g. tapioca, sweet potato, pineapple, flowers).

“Malaysian government through dialogue platforms clarified that the use of new protected varieties in their holding is a choice but not a compulsory requirement and farmers can still opt for other alternatives such as choosing non-protected varieties for their planting. At the cost of giving up, they will lose the opportunity to gain benefits of new protected varieties, which at most of the time is more superior to the non-protected varieties. Despite that, the farmers in Malaysia are still keen and demanding on new superior varieties.

“From our point of view, the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers is RELEVANT as long as the amount of seeds is reasonable legitimately without jeopardizing breeders’ benefit while taking care of smallholder farmer’s social needs. Malaysia also foresees the exception of the above-mentioned acts would provide opportunity to smallholder farmers in trying new protected varieties, eventually educating them on the importance of new plant varieties and the new plant variety protection.”

### SOUTH CENTRE

The South Centre provided the following contribution in reply to UPOV Circular E-20/246:

“The South Centre, as an intergovernmental observer to the UPOV Council, submits this contribution on views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers. The South Centre appreciates this opportunity to inform the possible development of guidance regarding the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

#### “Objective of the guidance

“The South Centre supports the discussion on options to interpret the UPOV 1991 exception for private and non-commercial use in such a way that it accommodates, to the largest possible extent, the needs of smallholder farmers and provides for greater legal certainty for farmers and breeders.

“The guidance should also support the needs of governments to establish coherent policy and regulation with respect to the implementation of UPOV 1991, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), specially its article 9, and the UN Declaration on the Rights of Peasants and Other People Living in Rural Areas (UNDROP), for Parties of these international legal instruments.

“In countries that have adopted the UPOV model as enshrined in the 1991 version of the Convention, farmers are faced with civil (and, in some cases, even criminal sanctions) for conduct that should be deemed legitimate and which is functional to society’s interest in a sustainable agriculture and the attainment of food security.



“While article 9 of the ITPGRFA stipulates that ‘that the responsibility for realizing Farmers’ Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments’, this task cannot be undertaken if the international legal system is incoherent and dysfunctional to the implementation of such rights. The protection of breeders’ rights under the UPOV Convention 1991 should be made compatible with the recognition of Farmers’ Rights, via interpretation and amendment of the relevant provisions.

“An immediate step is for the UPOV Council to repeal the current guidance in the ‘Explanatory Notes on Exceptions to the Breeder’s Right Under the 1991 Act of the UPOV Convention’ – UPOV/EXN/EXC, adopted by the UPOV Council in 2009, and replace with a new guidance.

#### “Comments

“The purpose of the UPOV system is to protect the rights of breeders. While this objective is legitimate, it should be pursued taking broader public interests into account. The Preamble of the 1978 revision of the UPOV Convention noted that Contracting Parties were ‘conscious of the special problems arising from the recognition and protection of the rights of breeders and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right’. The application of the UPOV Convention, as revised in 1991, does not contribute, but can effectively undermine the implementation of Farmer’s Rights. There is, thus, an incoherence in the international legal system which, on the one side, recognizes in the ITPGRFA and UNDROP the rights of farmers to save, exchange and sell seeds and, on the other, restrict such rights if a country is bound under the UPOV Convention in its 1991 version, as currently interpreted. Some aspects of this incoherence may be solved by way of a proper (and less restrictive) interpretation, consistent with the Vienna Convention on the Law of the Treaties, of the Convention’s provisions that would allow to take into account the essential components of Farmers’ Rights, by way of the issuance of a new guidance. Other aspects would require further discussion and an amendment of the Convention in order to make it compatible with the ITPGRFA, as *lex posterior*.

“It is a generally accepted interpretation that under the UPOV Convention as amended in 1978, the breeder’s right does not extend to the farmers’ acts of saving and exchanging seeds, since the Convention only provides for exclusive rights in relation to acts entailing the marketing (or the offer for sale) of the reproductive or vegetative propagating material. At the time when UPOV as amended in 1978 was still open to accession, FAO Resolution 4/89 stated that ‘Plant Breeders’ Rights, as provided for under UPOV (International Union for the Protection of New Varieties of Plant) are not incompatible with the International Undertaking’ (Article 1. of the Agreed Interpretation).

“The concept of Farmers’ Rights, although well recognized by the international community at the time of the 1991 revision of the UPOV Convention,<sup>2</sup> was overlooked in the process of revision and ignored in the final text adopted by the diplomatic conference.<sup>3</sup>

“The UPOV Convention, as amended in 1991, is more restrictive than the UPOV 1978 version regarding the rights of farmers. The breeder’s exclusive rights conferred under article 14(1) would allow the breeder to prevent farmers’ acts of saving seeds, unless an (optional) exception is established by the national law. The scope of the permissible exception is, in addition, limited by a number of conditions. *Article 15(2) stipulates that:*

*‘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 (ii)’.*

“The UPOV explanatory note on exceptions to breeder’s rights adopted by the Council in 2009 further recalls that ‘the Diplomatic Conference recommended that the provisions laid down in Article 15(2) of UPOV 1991 should not be read so as to be intended to open the possibility of extending the practice commonly called ‘farmer’s privilege,’ to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned’.<sup>4</sup>

“The explanatory note has elevated this recommendation, in practice, to the status of an additional condition. It adds another – ambiguously defined – restriction on the farmers’ ability to save and use protected seeds.

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<sup>2</sup> FAO Resolution 5/89 on Farmers’ Rights referred, in particular, to allowing ‘farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods’.

<sup>3</sup> This revision was negotiated and adopted by 20 UPOV member countries, out of which only one (South Africa) was a developing country. See UPOV, Record of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Plant Varieties, Geneva, 1991, p. 535-543.

<sup>4</sup> UPOV, Explanatory Notes on Exceptions to the Breeder’s Right Under the 1991 Act of the UPOV Convention, UPOV/EXN/EXC [https://www.upov.int/edocs/expndocs/en/upov\\_exn\\_exc.pdf](https://www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf) para. 13 and 14.”

**“Amendments to the Explanatory Notes on the Exceptions to the Breeder’s Right under the 1991 Act the UPOV Convention - UPOV/EXN/EXC**

“The current Explanatory Note on Article 15(1)(i) contains several over-restrictive interpretations of this provision, not consistent with the interpretative rules of the Vienna Convention on the Law of the Treaties:

“1) There is no reason why the exception should be limited to ‘food crops’ and not apply to all crops, as there is no distinction in the treaty provision. The exception should apply to all kinds of propagating materials.

“2) ‘...to be consumed entirely...’ The Explanatory Note’s interpretation seems to assume that everything which is not ‘consumed’ should be disposed of. It excludes the traditional practice of saving seeds, one of the key elements of Farmers’ Rights. There is nothing in article 15(1)(i) supporting such limitation. Moreover, saving and planting seeds is allowed – under certain conditions- under article 15(2).

“Further, the exchange of seeds with neighbours or in local markets is an extended farmers’ practice, which is key for food security. Exchanges of seeds are both private and non-commercial acts that should be explicitly recognized as legitimate under article 15(1)(i). Similarly, sales to other farmers of non-consumed seeds, including those resulting from an excess in production, is a common practice that does not encompass a ‘commercial purpose’ to the extent that the farmer does not act as a commercial entity and, for instance, the seeds are not branded.

“3) ‘...by that farmer and the dependents of the farmer living on that holding’ would mean, for instance, that consumption by visitors, even if done on the holding, or by farmer’s family members who are not ‘dependents’ or who do not live on the same holding, would be prohibited acts. There is no rationale justification for these limitations.

“4) The phrase ‘...activities, including for example ‘subsistence farming’, where these constitute acts done privately and for non-commercial purposes...’ improperly narrows down the concept of ‘subsistence farming’ to systems where farmers act in total isolation, without any relationship with their neighbours and communities, particularly through exchanging seeds. This does not reflect the reality of subsistence farming systems in developing countries.

“The flowchart in the report ‘Can the exchange or sale of selfproduced seed be allowed under UPOV 1991?’ provides useful elements for correcting the misinterpretation of article 15(1)(i). On the one hand, it refers to ‘growing a crop substantially for home consumption’ (emphasis added), which would allow for other uses not covered by the Explanatory Note; on the other, it makes it clear that seeds could be exchanged and/or sold unbranded, uncertified and untreated by the farmer.

“In summary, while noting that the Explanatory Notes should not be deemed to be binding on the UPOV members and that plant variety protection needs to balance the interests of breeders and farmers, **the South Centre recommends a substantial revision of the current Explanatory Note on article 15(1)(i) in order to i) make it clear that the exception applies to all crops and types of protected propagating materials, ii) drop the ‘consumed entirely’ rule and recognize that saving and further planting of seeds are a legitimate practice; iii) clarify that the exchange and sale of (unbranded) seeds produced in excess to consumption by subsistence farmers falls under the exception.**

“The South Centre looks forward to providing further comments to the UPOV Council on subsequent draft for options or new draft guidance.”

## ASSOCIATION FOR PLANT BREEDING FOR THE BENEFIT OF SOCIETY (APBREBES)

The Association for Plant Breeding for the Benefit of Society (APBREBES) provided the following contribution in reply to UPOV Circular E-20/246:

“APBREBES welcomes the invitation to express its views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

“Our views are the following:

**“1) The current interpretation is extremely narrow and therefore meaningless.**

“UPOV’s 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) 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, [...].’

“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 neighbor (not living on the holding) is not seen 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 neighbors and sell their products and seeds at the local market. The rationale for exceptions like private and non-commercial 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.

**“2) The current interpretation including the Explanatory Note and the Frequently Asked Questions (FAQ) are not coherent or consistent.**

“In response to increasing criticisms over the adverse implications of UPOV’s provisions for farmers’ rights, in October 2014, UPOV’s Council adopted an answer to ‘Frequently Asked Questions’ (FAQ) on this topic (Is it possible for subsistence farmers to exchange propagating material of protected varieties against other vital goods within the local community?). The APBREBES Report on the UPOV Autumn Session 2014 called the response ‘legally incorrect and deliberately misleading.’ It argued that the response cannot be supported by either the interpretation of Article 15(1) that has been applicable thus far, nor by the practices of UPOV, which has consistently rejected national draft PVP legislation that allows even limited exchanges of seeds/ propagating material.<sup>5</sup> In addition, there are conditions incorporated in the FAQ (such as ‘the legitimate interests of the breeders are not significantly affected’ or ‘in the occasional case’) that cannot be justified under Article 15(1) or under Article 15(2) of the Act and its scope is unclear.

**“3) Any adjustment of the interpretation of «private and non-commercial use» must be done by way of amendment of the Explanatory Note.**

“As the explanatory note is the main guiding document for interpretation and implementation of UPOV 1991, there is no other possibility than to amend UPOV/EXN/EXC ‘Explanatory Notes on the Exceptions to the Breeder’s Right under the 1991 Act the UPOV Convention’. As highlighted above, the UPOV FAQs has only resulted in more confusion especially given it is clearly inconsistent with the interpretation of Article 15 and the practices of UPOV today. Hence, any adjustment of the interpretation of ‘private and non-commercial use’ must be done by way of amendment of the Explanatory Note.

“As with all other Explanatory Notes and Guidance Documents it is evident that these are to be as guidance and are optional, with every member entitled to adopt its own interpretation of the UPOV 1991 provisions.

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<sup>5</sup> For example, in examining the conformity of the Malaysian national PVP legislation with UPOV 1991 (UPOV document C(Extr./ 22/2), the Secretariat expressly stated that «the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act and on that basis recommended deletion of Section 31(1)(e) of the Malaysian Protection of New Plant Varieties Act which contained the following exception: «any exchange of reasonable amounts of propagating materials among small farmers». See UPOV document C(Extr./ 22/2) available at [http://www.upov.int/edocs/mdocs/upov/en/c\\_extr/22/c\\_extr\\_22\\_2.pdf](http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf).

**“4) The proposal by Oxfam, Plantum and Euroseeds is a good starting point for an adaptation of the Explanatory Note, but needs further clarification and adaptation.**

“— It needs to be clarified that the Exception under Art. 15.1 of the UPOV Convention does not only cover seeds, but propagation material in general (e.g tubers, cuttings).

“— In the flowchart presented by the project team there is a need to clarify the 3rd question ‘Is the excess of the production exchanged and/or locally sold as seed farmer to farmer?’ Logically, in the vast majority of cases, a substantial part of the surplus is sold as a product for direct consumption and not only as seed or propagation material. Therefore, a formulation like ‘Is all or a part of the excess of the production exchanged and/or locally sold as seed farmer to farmer?’ seems more correct to us.

“— The current flowchart only includes in the exception the exchange and sale of seeds, but not the use of farm-saved seeds. It makes no sense that selling and exchanging would in certain circumstances interpreted as private and non-commercial, but not the use of farm-saved seeds. Certainly, in most countries farm-saved seeds are dealt under Art. 15.2. But as this is an optional exception it should still included in the interpretation of Art. 15.1 (i).

“— Certainly, small amounts of non-food crops (e.g. fiber crops) could also be used by smallholder farmers. It is therefore not clear why non-food crops should be excluded from the exception. They should certainly be included.

“— Regarding parental lines the only question is, if they are protected by Plant Breeders’ Rights. There is no legal basis in the UPOV Convention to differentiate parental lines in the exceptions from other protected propagating material. Therefore, the reference to parental lines must be deleted.

**“5) An adjustment of the interpretation of «private and non-commercial use» is necessary — but it will not solve the inherent contradictions between Farmers’ and Breeders’ Rights in the 1991 Act.**

“We would like to be clear that even a new, improved and expanded definition of private and non-commercial use will not fully address implementation of farmers’ rights, in particular the right recognized in the Treaty and enshrined in the UN Declaration on the Rights of Peasants (UNDROP) to save, use, exchange and sell farm-saved seed and other propagating material. The implementation of these rights cannot be ‘provided for’ under a ‘private and noncommercial use’ exception, but would require a substantial revision of the UPOV Convention. As long as this is not the case, the application of other sui generis laws remains the only possibility for a mutual supportive implementation of the various international agreements and declarations.

**“6) There will only be a legitimate outcome of the revision with the active involvement of farmers’ organisations.**

“The dominant role and influence of the seed industry in UPOV is well-known. However, on this issue, which will affect many smallholders in their very concrete living conditions, it is crucial to actively integrate those affected into the opinion-forming and decision-making process. This is a task for the UPOV Secretariat as well as for the individual member countries. The right to participate in decision-making is enshrined in the International Treaty on Plant Genetic Resources for Food and Agriculture as well as in the UN Declaration on the Rights of Peasants (UNDROP).”

EUROPEAN COORDINATION VIA CAMPESINA (ECVC)  
(original in French)

The European Coordination Via Campesina (ECVC) provided the following contribution in reply to UPOV Circular E-20/246:

**“a) Experiences on the implementation of the exception regarding acts done privately and for non-commercial purposes in relation to smallholder farmers**

“As an observer at UPOV, representing 31 farmer organizations that bring together smallholder farmers and European peasant farmers,<sup>6</sup> and as a regional member of the Via Campesina, which represents 200 million peasant farmers, the European Coordination Via Campesina has valuable information on the experience of smallholder farmers in Europe and the rest of the world. We are therefore able to report that peasant farmers around the world have long practiced and continue to practice de facto and in the vast majority of cases, the use, exchange and sale of seeds from their harvests, ignoring the “exception regarding acts done privately and for non-commercial purposes for the benefit of smallholder farmers” provided for in the 1991 Act of the International Convention for the Protection of New Varieties of Plants.

<sup>6</sup> In the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted on 28 September

“Neither the exception, nor the interpretation of it presented in a recent report by Oxfam, Plantum and Euroseeds (2019), takes into account the reality faced by peasant farmers. In Northern and Southern countries, farmers who fully consume all of their farm products themselves and do not sell any part of their harvest constitute a tiny minority, or even an illusion of agricultural practices in so-called developing countries, far removed from the reality of peasant farmers throughout the world.<sup>7</sup> The exception is useful for amateur gardeners who wish to use and exchange their seeds but is of no practical use for smallholder farmers who wish to use, exchange and sell seeds that they have selected on the farm as part of their crops for the market.

“For smallholder farmers, who represent more than 90 per cent of farmers worldwide, that is an essential practice. For most, the harvest product is intended as much to feed their family and community and for sale on the market, as it is to be used on the farm as propagating material. Informal seed systems, which predominately use part of the harvest as reproductive material, now provide more than 70 per cent of the world’s food supply using only 25 per cent of cropland (Food and Agriculture Organization of the United Nations (FAO), 2012).<sup>8</sup> Peasant farmers who use informal seed systems often do not have the financial means to buy commercial seed and the necessary inputs for their crop.

“The self-production of seeds is therefore as much a tradition and financial necessity as it is a means to adapt commercial varieties to local growing conditions and climate change. Seeds selected in laboratories or experimental stations and produced outside the farm, often in other countries, are not adapted to the soil or growing conditions of individual farms. Instead, the growing conditions must be adapted to the seeds by using all manner of inputs and pesticides rejected by communities because of the considerable harm they cause to health and the environment. The production of propagating material on a farm for use on that farm is, in fact, the best way to progressively adapt repeated propagation to the desired growing conditions. This local adaptation is a key factor in ensuring agroecosystems are resilient to the scale, increased frequency and irregularity of changes in climate. The other essential factor in resilience is the diversity within and between the varieties of the reproduction material used. Peasant farmers regularly renew that diversity through informal seed exchange systems (Mula, 2013). To address climate change and challenges such as the release of pesticides, agriculture requires seeds selected by peasant farmers in the growing conditions for which they are intended. In view of this, limiting, obstructing and criminalizing informal seed systems is tantamount to threatening world food security.

“It is also worth recalling that commercial varieties of the UPOV system have been selected using varieties grown by millions of peasant farmers – collected free of charge from fields all over the world. Hence, the equitable sharing of benefits required by the Convention on Biological Diversity means that peasant farmers should also be able to freely reuse commercial seeds that they have bought from seed companies. The payment of license fees for the use of seed from the harvest is a reverse form of benefit-sharing, which is unfair and unjust. The seeds selected and produced by peasant farmers, which adapt each year to climate change, also represent an important repository of new plant genetic resources that the industry needs.

“For farming communities, the use, exchange and sale of seeds selected and produced on the farm is part of a collective organization in which the means of production are self-produced and is not a market activity constituting a peasant farmer’s income, which mainly comes from the sale of crops on agricultural markets. That collective organization obviously does not concern peasant farmers who propagate seeds under contract on behalf of seed companies, which are supplied to them by the latter for that sole purpose. By applying the same regulations to seed companies, which earn their income from the sale of seeds, and peasant farmers, for whom this is an integral part of their agricultural production, the UPOV 91 system penalizes and weakens farming communities and their know-how, which is essential to the resilience of food production systems.

“Furthermore, under pressure arising from free-trade agreements, many countries are adopting laws in line with the UPOV 91 Convention and criminalize the propagation and exchanges between peasant farmers of seed varieties protected by a plant variety right that are not certified as meeting the criteria of distinctness, uniformity and stability. They then criminalize the self-production of reproductive material from the only commercially available seed in order to secure their monopoly not only over the market, but also over the fields. As a result, peasant farmers are deprived of any supply of freely reproducible seeds.

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2018 by the General Assembly, “peasants” are defined as “any person who engages or who seeks to engage, alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land” (Art.1.1).

<sup>7</sup> In fact, according to FAO (2011), “the vast majority of the world’s family farms are very small, with women-operated family farms on average only one half to two-thirds the size of those operated by men”. Furthermore, family farming constitutes “the predominant form of food production both in developed and developing countries, producing over 80 per cent of the world’s food in value terms” (FAO, 2018).

<sup>8</sup> It should also be noted that “Perhaps because of its local specificity to needs and preferences the informal system provides most of the seeds the farmers use, worldwide between 80 per cent and 90 per cent of stocks”. (International Center for Tropical Agriculture and others).

**“b) Guidance on the implementation of the exception regarding acts done privately and for non-commercial purposes in relation to smallholder farmers**

“First, the European Coordination Via Campesina wishes to recall that, in 2018, the Member States of the United Nations committed themselves, through the adoption of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, to respect the rights of peasants as defined therein. Articles 19 and 20 cover peasant farmers’ rights to seeds and the obligations of States concerning the conservation and sustainable use of biodiversity and specifically provide that peasants and other people working in rural areas have the right to “save, use, exchange and sell their farm-saved seed or propagating material” (art. 19(1)(d)). Those commitments must be respected by the Member States of the United Nations, including those which are members of UPOV, and therefore by UPOV itself.

“Given that recent commitment and the reasons set forth in point (a) above, the European Coordination Via Campesina reiterates its position that farmers cannot enjoy their right to seeds, as guaranteed in line with the United Nations Declaration, under the exception that is the subject of this contribution. The interpretation of the private and non-commercial use exception presented in the aforementioned report presented by Oxfam, Plantum and Euroseeds limits the rights of farmers to the non-commercial use of the crop. It applies only to non-professional gardeners and therefore violates the rights of farmers to seeds as guaranteed by the United Nations Declaration.

“With regard to the issue of contracts addressed in the Oxfam, Plantum and Euroseeds report, the European Coordination Via Campesina wishes to recall that a contract that is contrary to public law (national, European or international) has no legal force and that a person who does not respect it may not be prosecuted. Thus, the prohibition of farmers from exercising their breeder’s right to use a variety covered by a plant variety right to select new varieties according to the traditional peasant farming technique of mass selection, based primarily on dynamic management, open pollination or certain types of directed cross-fertilization and progressive local adaptation as repeated propagation occurs, should not be subject to review by contract. Current Italian law<sup>9</sup> on the rules governing contracts for the purchase of goods stipulates that “a sale is a contract that has as its object the transfer of ownership of one thing or the transfer of another right for a price” (art. 1470 of the Civil Code). The wording of that article is crystal clear: the seller must transfer the ownership of a good that he or she sells. Thus, the seller of seed cannot impose obligations on how it should be used by the buyer — the farmer — who may make use of it freely, including replanting by selecting grains for reuse on the farm. That is why seed companies say that they do not sell only seeds, but seeds with a right of use restricted to one use only.

“Consequently, with the aim of ensuring that the rights of peasant farmers are fully respected and in the light of what is set forth in part (a) above, we request that the UPOV 91 Convention be amended in order to allow the implementation of two different seed systems: a formal seed system for seed companies whose main economic activity is the sale of commercial seeds and an informal seed system for peasant farmers wishing to use, exchange and sell their propagating material as part of the collective organization of their agricultural production. Unlike for a seed company, the sale of seeds is not the main activity of a peasant farmer. A distinction must be made between a commercial seed activity and a seed activity integrated into agricultural production, which aims to use, exchange and sell seeds or propagating material selected on the farm as a part of farming activity.

“There is an urgent need to provide agricultural seed systems with a legal framework so that they may continue to renew seed biodiversity; the formal commercial system actually came into existence by drawing all of its resources from the gaps in the informal system. The current repository of plant genetic resources is finite. FAO estimates that a 75 per cent loss of agricultural biodiversity has coincided with the spread of uniform and stable commercial varieties. Moreover, the current digitization of genetic resources is leading to an incalculable loss of all genetic information that cannot be digitized. The hundreds of millions of peasant farmers who reproduce their seeds every year create far more new diversity than a few thousand researchers with sophisticated equipment. The many polygenic adaptive traits of any given plant to climate change do not appear in the test tubes of laboratories, which can only select a few monogenic traits. The constant renewal of cultivated biodiversity in the field is vital, not only for its adaptation to changing growing conditions in each locality, but also for the replenishment the industry’s repository of plant genetic resources.

“Lastly, a number of UPOV member States have not ratified the 1991 Act of the Convention for precisely so as not to criminalize peasant seed systems that guarantee their food security and sovereignty. By amending the Convention so that it fully respects the rights of farmers over seeds, the UPOV would gain many new members.”

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<sup>9</sup> <https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile>

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## EUROSEEDS

Euroseeds provided the following contribution in reply to UPOV Circular E-20/246:

"In response to Circular E-20/246, soliciting experiences and views on the implementation of the private and non-commercial use exception under the UPOV Convention in relation to smallholder farmers, Euroseeds would like to share its observations and comments.

"As you know, Euroseeds was party to the project team that developed the report presented to the Consultative Committee in October 2020 and as a member to the project, first of all, we would like to express one more time our utmost appreciation to the UPOV Secretariat and the Consultative Committee for considering the findings of the project report and for agreeing on a clear procedure towards the possible development of guidance on the matter at issue.

"Euroseeds has been of the view since long that acts carried out by subsistence farmers – in principle – fall under the scope of the exception for 'acts done privately and for non-commercial purposes' since we believe that, by definition, subsistence farmers in developing countries are understood to act for private and non-commercial purposes. Therefore, any acts with protected varieties by subsistence farmers (including exchange, barter or sales of farm-saved-seeds to their neighbours or other subsistence farmers) are outside the scope of plant breeder's rights. This position also reflects the approach that seed companies, members of Euroseeds have been adhering to in their practices.

"We are of the view that the project report adequately reflects this standpoint and therefore we fully support its content and findings. The flowchart points out the key elements that need to be reflected on when assessing whether a type of activity would qualify as commercial or non-commercial and appropriately takes into account and balances the needs of both smallholder farmers and the right holders. We are aware of the discussions that are ongoing in other international fora around the interrelations between breeder's rights and Farmers' Rights and we believe that the flowchart can serve as an interesting tool to bring further clarification on the scope of the private and non-commercial use exception and can increase the confidence of all involved stakeholders that the UPOV Convention supports the objectives of other international instruments and provides for sufficient flexibility to its existing and future members to adjust to the needs of their agricultural systems when implementing the Convention at the national level.

"We would nevertheless like to underline and draw the attention of UPOV members and stakeholder to two important elements from the project report:

- "- The project report uses the term 'smallholder farmers' instead of subsistence farmers and provides the following explanation to the choice of terms: 'We have chosen the notion smallholder farmer over subsistence farmer as this covers better the type of farmers that are the target group for this project. But instead of trying to define the notion of smallholder farmer we will focus on the type of activities that are conducted, as will be explained hereafter.' The choice of the term is therefore coming from the preference of the authors of the report and should not be understood as the element that determines the scope of the flowchart and the exception at issue. Instead, as it is also explained above, it is the activities outlined in the flowchart that should be looked at and the type of farmers who might be covered will be a matter for each and every country to further define at the national level.



- “- Following up on the previous point, it is important that the flowchart of the project report is not perceived as an absolute solution. The elements in it are to serve as guidance that may assist decision-makers and other stakeholders in the various countries to find a balanced way of implementation, adapting the criteria to their own societal, economic and agricultural systems and needs at the national level.

“As a last point, as regards the format, we would like to understand more on the purpose, scope and intended audience of the guidance that might be developed by UPOV, since the guidance is a tool not yet known to us within the UPOV framework. Nevertheless, we would like to note that the current EXN on Exceptions to the Breeder’s Right as well as the relevant FAQs will require revision to be able to accommodate the content of the project report and its flowchart.

“Euroseeds wishes to thank you for the opportunity to provide comments and is looking forward to further collaboration on this matter.”

#### ISF, CIOPORA, APSA AND SAA

The International Seed Federation (ISF), International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), Asia and Pacific Seed Association (APSA) and Seed Association of the Americas (SAA) provided the following joint contribution in reply to UPOV Circular E-20/246:

“The International Seed Federation, CIOPORA, APSA (Asia and Pacific Seed Alliance), SAA (Seed Association of the Americas) represent the interests of thousands of companies, research institutes and universities active in research, breeding, production, and marketing of agricultural, horticultural, ornamental and fruit plant varieties.

“As expressed before, we confirm our intention to be engaged in the discussions at UPOV level working towards a mutually supportive implementation of the UPOV Convention and the ITPGRFA at the national level.

“Following your request expressed in Circular E-20/246, we would like to raise 2 points of importance:

- “• Vegetative propagating material shall be excluded from the scope of the discussions, to maintain the incentive for breeding activities.
- “• Each country has a different agricultural, economical, demographical, social situation which influences how the notions of smallholder farmer, subsistence farmer, commercial activity, private activity, are defined/implemented by policymakers and PVP officials at the national level.

“We would appreciate to get more clarification and information on the purpose, scope and intended audience of the guidance expected by the Consultative Committee, which is a tool not yet known to us within the UPOV framework.

“We are actively engaged in a dialog to enable more countries to become a member of UPOV, providing more clarity regarding subsistence farmers, which would ultimately lead to more farmers around the world accessing quality seed. Because seed is the most important input in crop production, farmers must have the widest range of options available to them.”

[Annex II follows]



COMMENTS RECEIVED FROM MEMBERS OF THE UNION  
IN RESPONSE TO UPOV CIRCULAR E-21/098 OF JUNE 25, 2021

This Annex contains the follows:

- (a) Appendix I: Comments from Norway
- (b) Appendix II: Comments from Switzerland

[Appendix I follows]

ANNEX II, APPENDIX I

NORWAY

Norway provided the following comments in reply to UPOV Circular E-21/098 of June 25, 2021:

“In reference to UPOV Circular E-21/098 regarding the *initiative on smallholder farmers – request for approval of next steps of the procedure*, we would like you to know that Norway is not in agreement to the proposed changes on the next steps. Given the feedback by members and observers of the Union, there seem to be broad support for the need to revise the Explanatory Notes. The rich feedback also identify several issues that such a revision process should look further into. There is already experience in UPOV on how to revise explanatory notes that could guide the process, such as the process of revising the explanatory notes on EDV. Therefore, Norway would like to propose the following way forward:

“(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~~ contributions received on the first draft of the guidance, to propose a procedure for revising the EXN, possibly by setting up a working group under CAJ, including identifying questions that need further clarification, ~~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.”

[Appendix II follows]

ANNEX II, APPENDIX II

SWITZERLAND

Switzerland provided the following comments in reply to UPOV Circular E-21/098 of June 25, 2021:

“Thank you for your Circular E-21/098 on developments in relation to the initiative on smallholder farmers and your proposal for the next steps.

“We would like to inform you that Switzerland is not in agreement with the proposal of the UPOV Secretariat for the next steps of the procedure. Based on the contributions of the members and observers of the Union, we believe that there is a need to revise the Explanatory Notes (EXN).

“For the next step we therefore propose a process to revise the EXN based on the contributions received. As a way forward, we propose that the UPOV Bureau presents to the next meeting of the CC a compilation of the contributions received. As a second element, we propose that the UPOV Bureau formulates to the same session of the CC a proposal of a process to revise the relevant EXN. We would welcome that this process includes the establishment of a working group under CAJ in order to enable the active participation of the private sector and civil society.”

[End of Annex II and of document]