

# Activity 7 - Closed Workshop on UPOV 1991

## Exceptions to the Breeder's Rights

UPOV and CPVO

December 7, 2023 (Bangkok, Thailand)




# Preview

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## 1. Scope

- a) Acts covered
- b) Material covered
- c) Varieties covered

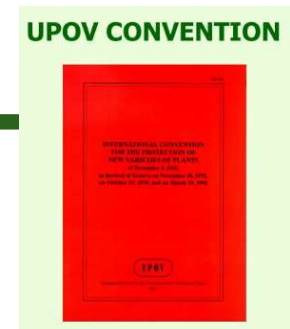
## 2. Exceptions



Farm-saved  
seed (FSS)

# Exceptions to the breeder's right

## Relevant Provisions



### 1991 Act of the UPOV Convention

#### Article 15

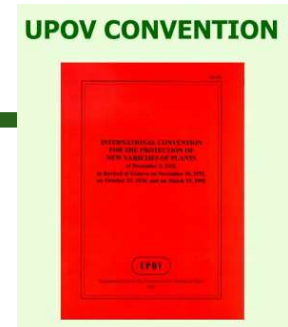
#### Exceptions to the Breeder's Right

- (1) [*Compulsory exceptions*] The breeder's right shall not extend to
- (i) acts done privately and for non-commercial purposes,
  - (ii) acts done for experimental purposes and
  - (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

[.....]

# Exceptions to the breeder's right

## Relevant Provisions



### 1991 Act of the UPOV Convention

#### Article 15

#### Exceptions to the Breeder's Right

[.....]

(2) [*Optional exception*] Notwithstanding Article 14<sup>2</sup>, 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).

# Exceptions to the breeder's right

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## Explanatory Notes



**E**  
UPOV/EXN/EXC/1

ORIGINAL: English

DATE: October 22, 2009

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS  
GENEVA

EXPLANATORY NOTES ON  
EXCEPTIONS TO THE BREEDER'S RIGHT  
UNDER THE 1991 ACT OF THE UPOV CONVENTION

[https://www.upov.int/edocs/expndocs/en/upov\\_exn\\_exc.pdf](https://www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf)

UPOV

## **Exceptions to the breeder's right**

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### Compulsory

Acts done:

- privately and for non-commercial purposes
- for experimental purposes
- breeding other varieties (breeder's exemption")

### Optional

Farm-saved seed

## Exceptions to the breeder's right

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### Compulsory

Acts done:

- privately and for non-commercial purposes
- **for experimental purposes**
- breeding other varieties (breeder's exemption")

## Exceptions to the breeder's right

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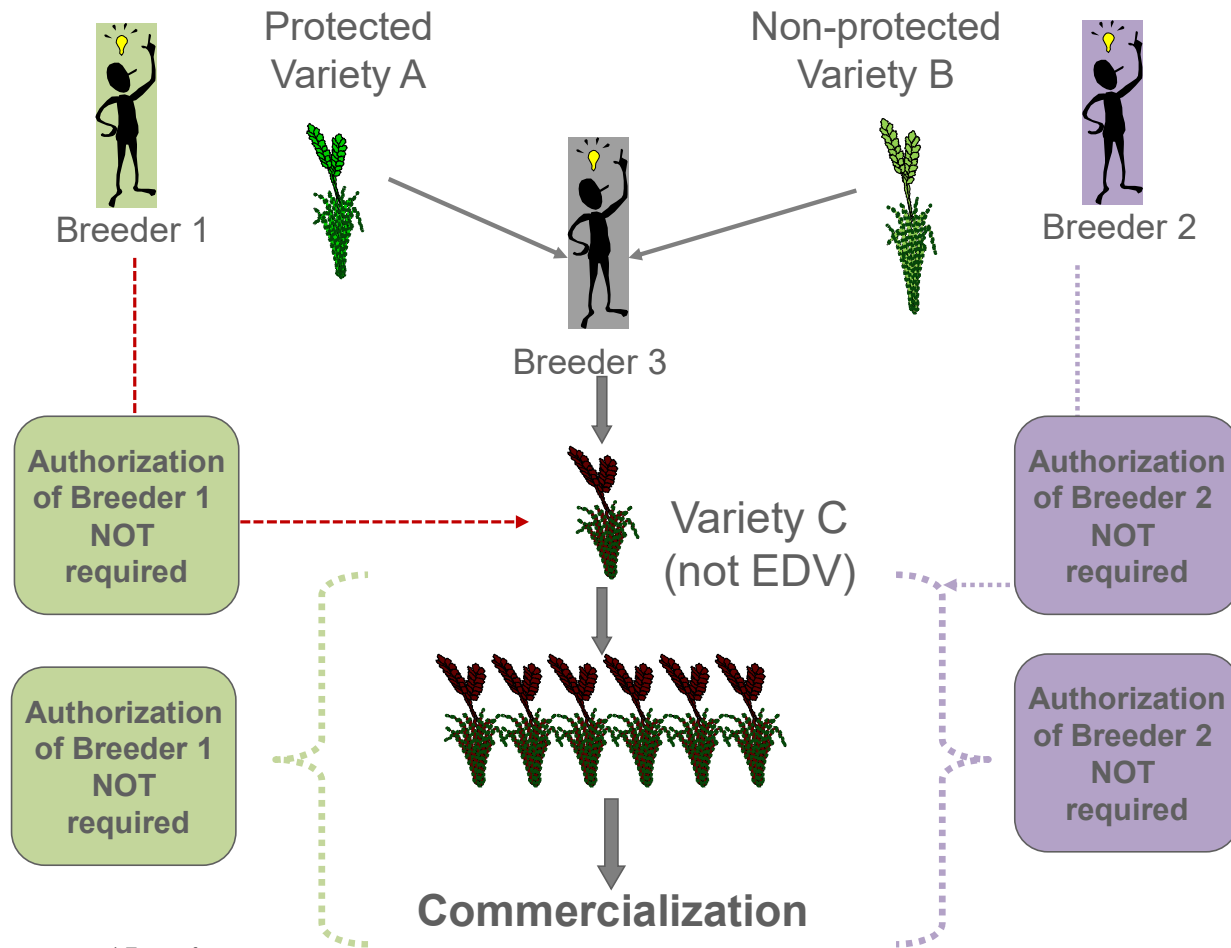


## **BREEDER'S EXEMPTION**

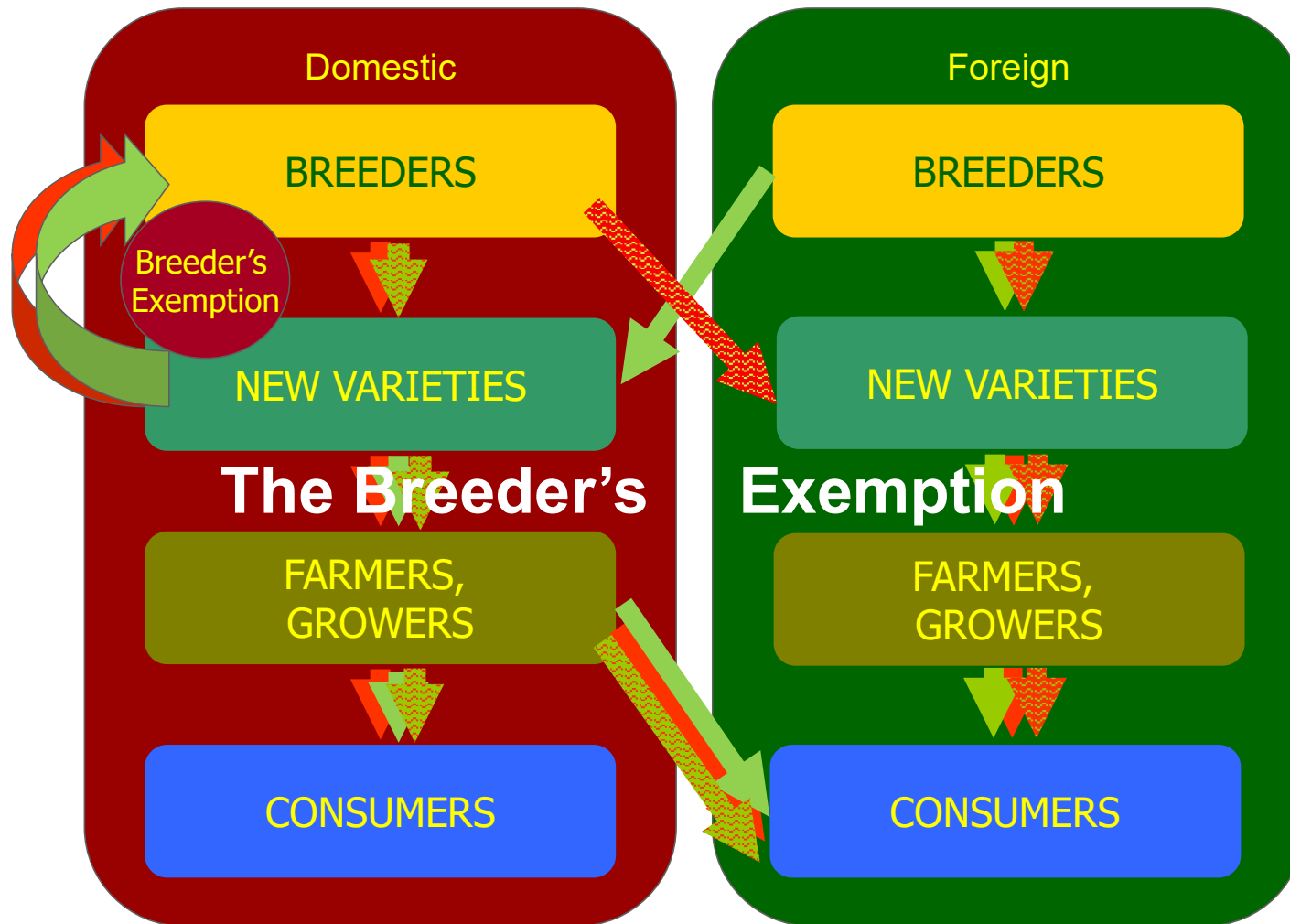
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acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) [multiplication; conditioning; offering; marketing, etc.] in respect of such other varieties

# The Breeder's Exemption



\* Except for:  
 (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,  
 (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and  
 (iii) varieties whose production requires the repeated use of the protected variety.



**Viet Nam - Breeding new variety: Improved by adding material**

Father  
(Protected Var.  
from oversea)



X



Mother  
(Local variety)



New variety



# Republic of Korea

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**KSVS Symposium on Plant Variety Protection  
Seoul, Republic of Korea (September 3, 2015)**

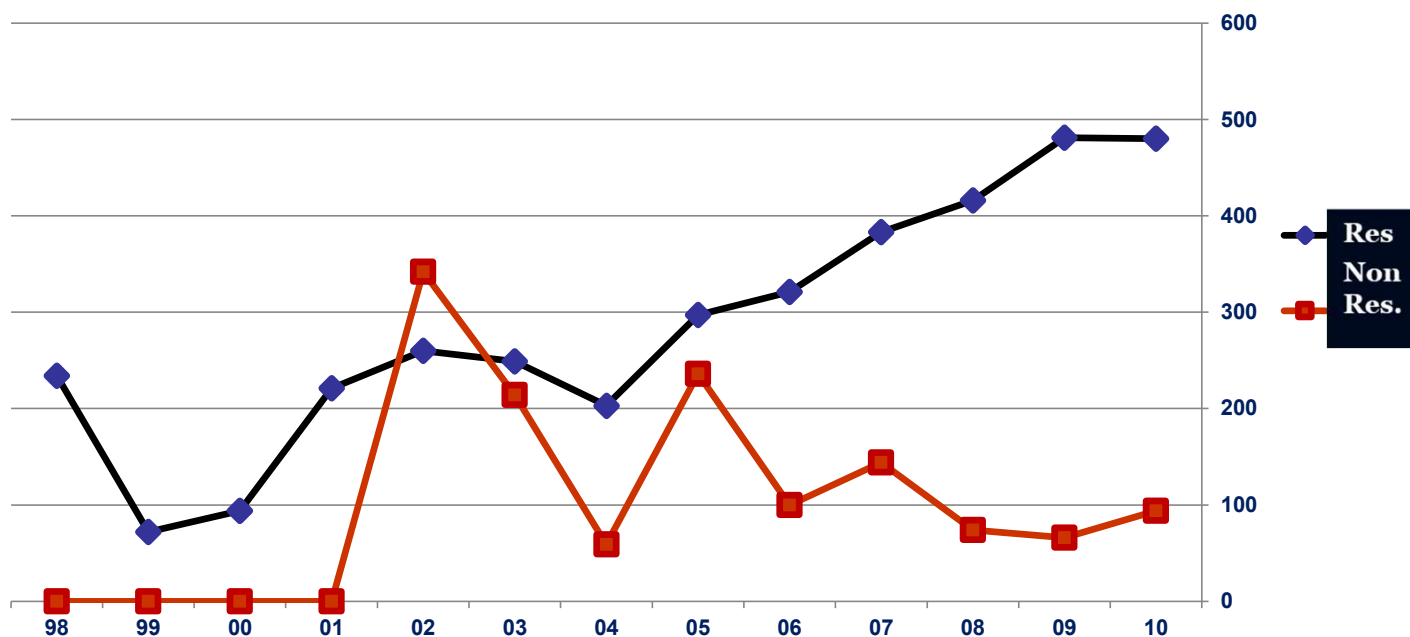
## **Korean Rose Breeding Converts a Royalty Payer into a Receiver**

Charlie Jeong/wonwoo trading

## **Becoming Royalty Receiver**

1. Korean pay rose royalty abroad about 1,040,000plants in year 2014
2. GARES rose varieties are sold about million in year 2014
3. Korea change from royalty payer to royalty receiver

## Republic of Korea - Application Ratio of Residents/Non Res.



Dr. CHO, Il Ho, Symposium on Plant Variety Protection - Future Strategy for Enhancing the Effectiveness of the PVP System (Seoul, July 13, 2011)

## Advantages of the breeder's exemption

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- **Germplasm** sources remain **accessible** to the community of breeders
- **Genetic basis** for plant improvement is **broadened** and is actively conserved
- Variety **improvement** is enhanced
- Opportunity for all **breeders to share** in benefits of breeding activities

## Exceptions to the breeder's right

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### Compulsory

Acts done:

- **privately and for non-commercial purposes**
- for experimental purposes
- breeding other varieties (breeder's exemption")



# Exceptions to the breeder's right

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- Compulsory

- (i) Acts done privately and for non-commercial purposes

**Non private acts:** e.g. providing material to others

**Commercial purposes:** saving of seed for commercial purposes



**Acts Possibly NOT falling within the scope of the exception**

# Exceptions to the breeder's right

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- Compulsory
  - (i) Acts done privately **and** for non-commercial purposes

ses

- amateur gardener

Acts Possibly falling within the scope of the exception



# Exceptions to the breeder's right

- Compulsory

(i) Acts done privately **and** for non-commercial purposes

- 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

**therefore**

**“subsistence farming”** where these constitute acts done privately and for non-commercial purposes, may be considered by a UPOV member to be excluded from the scope of the breeder's right

**Acts Possibly falling within the scope of the exception**



# Smallholder farmers



## WORKING GROUP TO DEVELOP GUIDANCE CONCERNING SMALLHOLDER FARMERS IN RELATION TO PRIVATE AND NON-COMMERCIAL USE (WG-SHF)

### PURPOSE:

to develop guidance concerning smallholder farmers in relation to private and non-commercial use, which would be the basis for a revision of the Explanatory Notes on Exceptions to the Breeder's Right and a revision of the Frequently asked questions (FAQs) on exceptions to the breeder's right

**UPOV**

International Union for the Protection of New Varieties of Plants

Working group on guidance concerning smallholder farmers in relation to private and non-commercial use

WG-SHF/1/3

First Meeting  
Geneva, March 17, 2022

Original: English  
Date: February 11, 2022

ANALYSIS AND REPORT WITH SUGGESTIONS PREPARED BY THE PROJECT TEAM

Whereas no examples of prosecution of smallholder farmers for infringement of the plant breeder's right have been identified in any of the UPOV members

## Exceptions to the breeder's right (1991 Act)

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### Compulsory

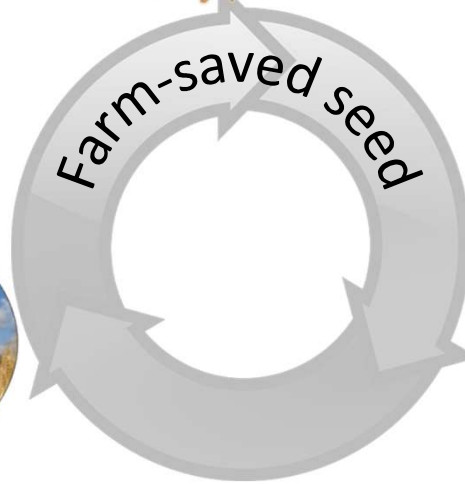
Acts done:

- privately and for non-commercial purposes
- for experimental purposes
- breeding other varieties (breeder's exemption")

### Optional

Farm-saved seed





UPOV

## Optional Exception To The Breeder's Right Farm-saved seed – Article 15(2)

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A Contracting Party may restrict the breeder's rights in order to permit farmers to use:

- for propagating purposes on their own holdings the product of the harvest
- obtained on their own holdings from the protected variety
- within reasonable limits
- subject to safeguarding legitimate interests of the breeder

*[Recommendation of the Diplomatic Conference on Article 15(2)]*

## Exceptions to the breeder's right – Explanatory Notes

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(b) *Deciding on the inclusion of the optional exception*

12. Article 15 (2) is an “optional” provision as clarified by the wording “ ... each contracting Party may ... ”. Thus, it is a matter for each member to decide whether it would be appropriate to incorporate the option provided in Article 15 (2). The purpose of the following paragraphs is to provide guidance to those members of the Union which decide to incorporate the optional exception into their legislation.

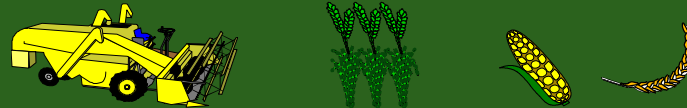
14. The Diplomatic Conference recommendation indicates that the optional exception was aimed at those crops where, for the member of the Union concerned, there was a common practice of farmers saving harvested material for further propagation.



# Optional exception to the breeder's right

Product of the harvest can be used for propagating purposes

small grain cereals:



harvested product may = propagating material

Fruit, ornamentals and vegetables:



harvested product may  $\neq$  propagating material

## Example from EU legislation - list of agricultural crops for FSS

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2. The provisions of paragraph 1 shall only apply to agricultural plant species of:

(a) Fodder plants:

*Cicer arietinum* L. — Chickpea milkvetch

*Lupinus luteus* L. — Yellow lupin

*Medicago sativa* L. — Lucerne

*Pisum sativum* L. (partim) — Field pea

*Trifolium alexandrinum* L. — Berseem/Egyptian clover

*Trifolium resupinatum* L. — Persian clover

*Vicia faba* — Field bean

*Vicia sativa* L. — Common vetch

## **Cont. Example from EU legislation - list of agricultural crops for FSS**

(b) Cereals:

*Avena sativa* — Oats

*Hordeum vulgare* L. — Barley

*Oryza sativa* L. — Rice

*Phalaris canariensis* L. — Canary grass

*Secale cereale* L. — Rye

*X Triticosecale* Wittm. — Triticale

*Triticum aestivum* L. *emend.* Fiori et Paol. — Wheat

*Triticum durum* Desf. — Durum wheat

*Triticum spelta* L. — Spelt wheat

## Cont. Example from EU legislation - list of agricultural crops for FSS

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(c) Potatoes:

*Solanum tuberosum* — Potatoes

(d) Oil and fibre plants

*Brassica napus* L. (partim) — Swede rape

*Brassica rapa* L. (partim) — Turnip rape

*Linum usitatissimum* — Linseed with the exclusion of flax.

# Optional exception to the breeder's right

Reasonable limits and safeguarding the legitimate interest of the breeder

Possible factors:

- Type of variety
- Size of holding/crop area/crop value
- Proportion/amount of harvested material
- Remuneration to the breeder

Review over time

- There is considerable scope for relevant crops to **exempt small commercial farmers from paying remuneration on FSS** without significantly impacting the income to breeders.
- It is important that **farmers that pay remuneration on FSS** have confidence in the benefits that will result for them in the form of new, improved varieties.
- Arrangements for **collecting remuneration** on FSS need to suit the particular situation of each country.

