



Can the exchange or sale of self- produced seed be allowed under UPOV 1991?

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”

BY
OXFAM
PLANTUM AND
EUROSEEDS

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Project context and objectives

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A few years ago, following Resolution 8/2013¹ of the Governing Body of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty), a discussion started on the possible areas of interrelations between the UPOV Convention and the Treaty. In this regard, in particular the exception from the breeder's right in respect of private and non-commercial use can be relevant, as included in Article 15.1.i of the UPOV 1991 Convention.² However, the scope of Article 15.1.i is unclear, which may result in legal uncertainty for both farmers and breeders.

After the "Symposium on Possible Interrelations between the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the International Convention for the Protection of New Varieties of Plants (UPOV Convention)" on October 2016, Oxfam,³ Plantum⁴ and Euroseeds⁵ joined forces and started a project to explore specifically the scope of the private and non-commercial use exception (Article 15.1.i) under the UPOV 1991 Convention.⁶ *The project's objective is to increase clarity and, where possible, find common grounds with regard to the scope of this 'private, non-commercial use' exception in*

1 See paragraph 3 of Resolution 8/2013: <http://www.fao.org/3/a-be600e.pdf>

2 Article 15(1) of the UPOV 1991 Convention provides that "the breeder's right shall not extend to (i) acts done privately and for non-commercial purposes."

3 Oxfam is an international confederation of 20 NGOs working with partners in over 90 countries to end the injustices that cause poverty. This project is run under Oxfam's Seeds Project: <https://www.sdhsprogram.org/>

4 Plantum is the Dutch breeders' association: <https://plantum.nl>

5 Euroseeds is the European Seed Association: <https://www.euroseeds.eu>

6 The project is funded by the Dutch government within the so called plant variety protection (PVP) development program coordinated by the Examination Office for DUS testing in the Netherlands Naktuinbouw.

The project's objective is to increase clarity and, where possible, find common grounds

*the UPOV 1991 Convention amongst key stakeholders.*⁷ The outcome of the project should ideally be that countries obtain concrete suggestions/guidance for their national implementation of the private and non-commercial use exception⁸. The implementation on national level should ideally be such that a comfort zone can be provided to smallholder farmers⁹ by identifying whether a certain activity and/or farmer falls in or outside the scope of the exception.

Obviously, plant breeders' rights do not affect any activity to save, use, exchange or sell the traditional varieties currently in use by farmers.

The question that this project aimed to address is to what extent new varieties protected by a plant breeder's right can be used in the practices of smallholder farmers that cannot - due to issues of accessibility or affordability - buy their seed from agro-dealers for each cropping season. For that purpose, the project team wishes to identify 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 perspectives and needs of governments, farmers, plant breeders, and civil society.¹⁰

7 E.g. governments, civil society organizations, farmers and plant breeders.

8 The project objective is not to make a legal analysis regarding the question whether a national provision implementing this exception would be in compliance with the UPOV 1991 Convention, but rather to investigate whether an approach can be found that is supported by different stakeholders.

9 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.

10 It must be noted that besides PBRs also seed legislation (variety registration and/or certification) may affect the practices of smallholder farmers, but this was not addressed in the current project.



PHOTO: JISKA VAN DER HEIDE

Approach

Over three years 10 meetings were held with representatives from governments, the private seed sector, farmers organizations, civil society organizations, international organizations as well as individual farmers and researchers in order to gather maximum input and outreach. These meetings took place under Chatham House rules¹¹ and the reports of the meetings are available online.¹²

The project team began by elaborating a number of possible approaches to delineate the scope of the exception (based on size, produce or income) and held a number of consultations

on those initial ideas with a wide range of stakeholders. Hearing the concerns and discussing alternative approaches, the project team came to the conclusion to abandon a quantitative approach and instead opt for an approach that is based on the nature of the activity itself. This resulted in the development of a flowchart to guide its user in understanding whether or not an activity with self-produced seed is covered by the exception. The form of a flowchart was chosen to visualise the different criteria in such a way that it is easy to understand, in particular for the actual users, in comparison to plain text. The flowchart consists of four

11 See: <https://www.chathamhouse.org/about/chatham-house-rule>

12 See: <https://www.sdhsprogram.org/publications/meeting-reports/>

It is not considered to be a “one-size-fits-all” approach

diamonds, which respectively seek answers to specific questions. The idea is that in case all the highlighted questions are answered positively it can be concluded that the activity in question falls under the studied exception. Once the flowchart was developed by the project team, another round of consultation with stakeholders was held and wide support has been expressed during these meetings to the proposed approach,

which was fine-tuned along the way. The resulting flowchart is meant to assist countries and stakeholders to identify and communicate which activities can be considered as falling under the private and non-commercial use exception but it is not considered to be a “one-size-fits-all” approach, therefore stakeholders are encouraged to further develop it and domesticate it to their needs and circumstances at the national level.



Findings and Results

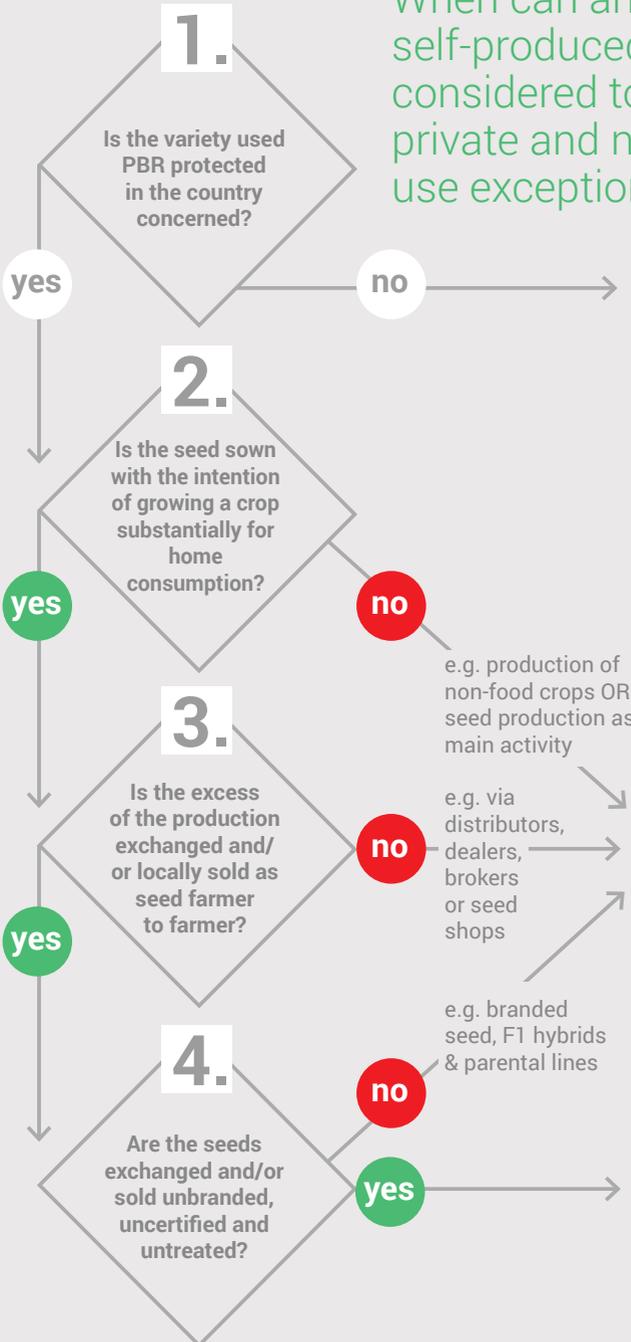
The main result of the project has been the development of a flowchart answering the question “*When can an activity with self-produced seed be considered to fall within the private and non-commercial use exception?*” (figure 1). This flowchart has been developed to serve as a *guideline* for countries, companies, farmers and other stakeholders to distinguish and communicate which activities can be considered to fall within

the scope of UPOV’s private and non-commercial use exception and which cannot. The objective of the developed flowchart is to establish more clarity and – if officially implemented in a country – legal certainty for both farmers and breeders. The flowchart also aims to shed light on one important interrelation between the FAO Treaty and the UPOV Convention, as requested by Resolution 8/2013¹³ of the Governing Body of the Treaty.

When can an activity with self-produced seed be considered to fall within the private and non-commercial use exception?

13 See paragraph 3 of Resolution 8/2013: <http://www.fao.org/3/a-be600e.pdf>

When can an activity with self-produced seed be considered to fall within the private and non-commercial use exception?



The propagation material is NOT covered by a PBR protection title and therefore no PBR restrictions apply to its use. Note: Other legislation (e.g. seed law or commercial law) may put restrictions on these activities

Activity is commercial

Activity is for private and non-commercial use

Note: Other legislation (e.g. seed law or commercial law) may put restrictions on these activities

Explanation of the flowchart

In the flowchart, several questions are raised to distinguish and eliminate all activities that can typically be considered commercial with respect to the use of self-produced seed of a particular variety. After eliminating all these commercial activities the outcome is that the activity falls within the scope of the exception.

The first diamond asks the question whether the variety used is protected by PBR in the country concerned. The flowchart only concerns the use of self-produced seed of varieties protected by PBR since no PBR restrictions apply to propagation materials that are not covered by a PBR protection title. It is important to note that other

legislation may put restrictions on farmers' exchange and trade of self-produced seed. This can be the result, for example, of seed laws that only allow for the trade of certified seed in a country.¹⁴ The project team observed quite some unclarity and misunderstanding to exist amongst stakeholders including farmers as to which restrictions result from PBR – more specifically UPOV 1991-based legislation – and limitations set by other laws and regulations that govern the use and trade of seed. But as stated before, if the variety is not protected by PBRs the UPOV Convention does not set any limitation on its use, exchange and/or trade. The flowchart should be used variety per variety. For

14 See e.g.: <https://www.kit.nl/wp-content/uploads/2018/08/The-support-for-farmers-led-seed-systems-in-African-seed-laws.pdf>

15 The project team did not discuss fruits and leaves this for follow-up work/countries to decide.

In case all questions of the flowchart are answered in the affirmative, the conclusion is that the activity is for private and non-commercial use

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instance, there can be a coffee farmer who would clearly exercise commercial activities with regard to the cultivated coffee varieties but at the same time this farmer could grow some other crops in one corner of her land for home consumption which could fall within the scope of the exception.

The second diamond poses the question whether the seed is sown with the intention of growing a crop substantially for home consumption. This question aims to define whether the particular variety is cultivated by the farmer for a commercial purpose or mainly for one's own use (a substantial part of the harvested crop is intended for

home consumption). As a result, 2 types of activities are explicitly excluded: 1) the production of non-food crops such as ornamentals or fibre crops,¹⁵ and 2) the production of seed as a main activity, which were both considered to fall outside the scope of the private and non-commercial use exception by most stakeholders consulted as such activities are not substantially for home consumption but are conducted with a clear commercial intent.

The third diamond asks whether the excess production is being exchanged and/or locally sold as seed farmer to farmer? This is to distinguish the local trade

15 The project team did not discuss fruits and leaves this for follow-up work/countries to decide.



PHOTO: FREDERIKK VAN OUDENHOVEN

or exchange of seed amongst farmers from seed sales via clearly commercial channels, for example, distributors, dealers, brokers or seed shops.

The fourth diamond poses the question whether only unbranded, uncertified and untreated seeds of the protected variety are being exchanged and/or sold. This is to exclude from the scope of the exception any exchanges or sales of, for example, branded seed, certified seeds, treated seeds, F1 hybrids or parental lines, which are considered clear examples of commercial trade. Whether it is at all possible to exchange or sell unbranded, uncertified and/or untreated seeds in a given country is not answered here. For this other

legislation has to be consulted as well, such as the seed legislation of the country.

Any question of the flowchart being answered negatively results in the conclusion that the activity is considered commercial and falls under the scope of the breeder's right. In case all questions of the flowchart are answered in the affirmative the conclusion is that the activity is for private and non-commercial use – meaning that such activity can be freely executed with self-produced seed of a PBR protected variety under the UPOV 1991 Convention.¹⁶ It needs to be noted, as mentioned above, that other legislation such as seed law or commercial law may still put restrictions on these activities.

16 Although the project did only consider Article 15.1.i of the UPOV 1991 Convention, the project team notes that the flowchart may equally be applicable to the UPOV 1978 Convention in cases where unclarity exists about which activities are to be considered commercial or non-commercial under Article 5 of the UPOV 1978 Convention.

Further observations

During the project meetings, several concerns were raised by participants. One set of concerns related to questions of legal certainty and enforcement. Whereas the project – and flowchart – aim to increase clarity on which activities can be considered to fall within the exception and which do not, legal certainty in any given country depends on official implementation in law. As long as the private and non-commercial use exception is not specified in, for example, the implementing regulations to a country's PBR law, the exception and its legal interpretation and enforcement will remain unclear for both farmers and breeders.

Another concern raised by some participants relates to the possible incongruity between the flowchart and national definitions of commercial use under civil law. The project team does not intend to conclude that selling a small

amount of surplus seed on a local farmer market would not qualify as a commercial activity from the point of view of some countries' commercial/civil law, but the conclusion as depicted through the flowchart is that within the context of the UPOV Convention the commercial scale of the activity is small enough not to qualify as "commercial use".

The drawing of the line between what is considered "private and non-commercial use" and what is not may vary amongst countries depending on, for example, the development of the agricultural sector seed systems in the country. The presented flowchart is the result of multiple stakeholder consultations and the project team invites and encourages countries to further develop and adjust the flowchart to fit their national needs in consultation with all stakeholders involved.

Recommendations

Based on the outcomes of the project, it is recommended that:

- The UPOV Council considers the flowchart as a possible tool providing guidance regarding the implementation of the exception for private and non-commercial use to be included in the FAQs and the Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention (UPOV/EXN/EXC).
- Contracting Parties to the ITPGRFA consider the flowchart as a possible approach to contribute to the mutually supportive implementation of the Treaty and the UPOV 1991 Convention, in light of Resolutions 8/2013, 5/2015 and 7/2017 on Farmers' Rights; and that Contracting Parties discuss the right of farmers to save, use, exchange and sell their seeds in the broader context of other legislation such as seed laws and patent laws.

Furthermore, it is recommended that:

- UPOV members and aspirant members consider the flowchart when working on their national implementation of the UPOV Convention. This may require adjustments to and domestication of the flowchart to match national laws and circumstances. For this, the project team highly recommends further stakeholder consultations at the national level as part of the implementation process. The flowchart, as shaped to fit the national needs and circumstances, may then become part of the implementing measures or explanatory notes or guidelines to the national PBR law.
- Governments and other stakeholders that are involved in PBR development activities actively promote the flowchart when organizing or financing

- PBR development activities.
- Other institutions and organisations (such as DG DEVCO of the European Commission, FAO, CPVO, USAID, WIPO, OAPI, ARIPO and the World Seed Partnership) involved in capacity building and development programs at various levels that cover also PBR, include the flowchart in their relevant activities.
 - International and regional seed associations consider the flowchart for formal adoption as part of their institutional policies and/or relevant positions, and to publish this on their websites.
 - Other industry associations, civil society organisations and farmers' organisations consider and endorse the flowchart in their institutional policies and positions on the UPOV Convention or in other positions relevant for the topic.
 - Seed companies adopt the flowchart in their internal company policy on enforcement

- of their PBR titles, publish it on their website and communicate it in their trading channels.
- All stakeholders actively engage in future consultations to further develop and/or implement the flowchart in international, national or institutional policies or legislation.
 - All stakeholders engage in capacity building to improve knowledge and understanding about Plant Breeder's Rights and other relevant legislations that affects the freedom to operate for breeders and farmers regarding the use of plant varieties in the broadest sense, such as national seed laws, patent rights and their different objectives and implications.



Annex 1 Overview of stakeholder meetings

In total, 10 meetings took place with representatives from the following stakeholder groups:

1. Government representatives from the different regions
2. Representatives from the breeding companies/private seed sector
3. Representatives from Farmers Organizations (FO's)/individual farmers
4. Representatives from Civil Society Organizations (CSO's)
5. Representatives from research and relevant international organizations

Due to budgetary reasons the project team made the choice to organize most of the meetings in conjunction with other events. The project team based its invitations on persons and/or organizations that were already present in one of those meetings, with only a few exceptions. Furthermore, the project team made a choice for relatively small groups in order to enable all participants to give their input in an active manner and to facilitate discussions within the group. Therefore, the meetings were not open to everyone, but were on invitation only.

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In 2017, the project team tried to compose as much as possible diverse groups with participants from all regions in the world, with a main focus on the developing countries. At the same time, the project team tried to invite at least those persons/organizations that are known to be actively engaged in this topic.¹⁷ Whereas the meetings in 2017 predominantly discussed the project objectives and a wide range of approaches to reach the set objectives, in 2018, the project team chose to focus more specifically on the development and validation of a flowchart, which was identified as one of the possible ways forward by stakeholders during the 2017 meetings.

Whereas the meetings took place under Chatham House Rules, the below listed participants agreed to have their names and/or affiliations published. Nevertheless, all participants spoke in their personal capacity.

All meeting reports can be found here:

<https://www.sdhsprogram.org/publications/meeting-reports/>

17 Because the project team is of the opinion that the private and non-commercial use exception is mainly relevant for the basic food crops, organizations that are active in species such as ornamentals and industrial crops were not involved so far.

13 June 2017

Meeting in Gouda (Plantum office) with representatives from stakeholder groups 2, 4 and 5

Project team; Mrs. Marian Suelmann (Rijk Zwaan); Mr. Ton Frijters (HZPC); Mr. Frank Michiels and Mr. Tomas Zaborowski (Bayer); Mr. Orlando de Ponti (East-West Seeds); Mrs. Dawn Ng (Oxfam Novib); Mr. Abishkar Subedi (Center for Development Innovation-Wageningen University).

9 October 2017

Meeting in Riga (at the side of the ESA Congress) with representatives from group 2

Project team; Mrs. Aneke Schwager (KWS); Mrs. Christiane Duchene (Limagrain); Mr. Claude Tabel (RAGT); Mr. Gerard Backx (HZPC); Mrs. Anke van den Hurk (Plantum); Frank Michiels (Bayer; via Skype); Michael Kock (in his personal capacity via Skype) and other participants that preferred to remain anonymous.

23 October 2017

Meeting in Geneva (at the side of the UPOV Council) with representatives from group 1 and 5

Project team; Mr. Marien Valstar (Netherlands); Mrs. Marianne Smith (Norway); Mr. Raimundo Lavignolle (Argentina); Mr. Anthony Parker (Canada), Mr. Patrick Ngwediagi (Tanzania), Mr. Rakesh Chandra Agrawal (India), Mrs. Du Yuan Yuan (China); Mr. Martin Ekvad (CPVO).

24 October 2017

Meeting in Geneva with representatives from groups 3 and 4

Project team; Mrs. Nirmalya Syam (South Centre); Mr Thor Kofoed (Copa-Cogeca); Mrs. Susan Bragdon (QUNO); Mrs. Sangeeta Shashikant (Third World Network); Mrs. Judith Reusser (Swissaid); Mrs. Susanne Gura (ABPREBES); Mr. Guy Kastler (in his personal capacity); 2 translators.

30 October 2017

Meeting in Kigali (at the side of the 7th meeting of the Governing Body of the International Treaty) with representatives from groups 1 to 5

Project team; Mrs. Michelle Andriamahazo (Madagascar); Mr. Erizal Jamal (Indonesia); Mr. Apaitia Macanawai (Fiji); Mrs. Nori Ignacio (Southeast Asia Regional Initiatives for Community Empowerment - SEARICE); Mrs.

Elin Cecilie Ranum, (Norsk Utviklingsfondet); Mr. Jon Sarmiento (Asian Farmers' Association for Sustainable Rural Development - AFA); Mrs. Grace Gitu (African Seed Trade Association - AFSTA); Mrs. Juanita Chaves (Global Forum on Agricultural Research - GFAR); Mr. Eddie Goldschlagg (South African National Seed Organisation - Sansor); Mr. Omer Richard Agoligan (Comite Ouest - Africain des Semences Paysannes - COASP); Mrs. Alimata Traoré (Convergence des Femmes Rurales pour la Souveraineté Alimentaire – COFERSA).

27 June 2018

Meeting in Brussels with representatives from group 2

Project team; Mr. Harry Iwema (Agrico); Mrs. Christiane Duchene (Limagrain); Mr. Frank Michiels (BASF); Mrs. Marian Suelmann (Rijk Zwaan); Mrs. Sietske Wouda (Syngenta); Mr. Rob Keene (Enza); Mr. Jean Donnenwirth (Corteva); Mrs. Andrea Mertens (Bayer); Mrs. Aneke Schwager (KWS); Mr. Christoph Herrlinger (NPZ, via Skype).

18 October 2018

Meeting in The Hague with representatives from groups 1, 3, 4 and 5

Maaik Raaijmakers (BioNext), Laurant Gabarell (Public Eye), Stephan Greenberg (African Centre for Biodiversity), Andrew Mushita (CTDT Zimbabwe), Neth Daño (ETC Group), Willy Douma (Hivos), Fulya Batur (Arche Noah), Thor Gunnar Kofoed (COPA-COGECA), K.M. Gopakumar (Third World Network), Juanita Chaves, (Consultant), Lan LoughDinh (Oxfam Vietnam), Charles Opiyo (Oxfam Uganda), Bert Visser (Oxfam Novib), Madelon Meijer (Oxfam Novib), Gigi Manicad (Oxfam Novib), Monica Martinez (Government of Ecuador), Dan Leskien (FAO).

24 October 2018

Meeting in Berlin (presentation for the Breeders Committee of the International Seed federation - ISF) with representatives from group 2

Project team; Marc Cool (Corteva); José Ré (Ricetec); Anke van den Hurk (Plantum); Léon Broers (KWS); Stevan Madjarac (Bayer); Ali Üstün (Tsuab); Miguel Arancedo (Bayer); Yutaka Fukunaga (Takii); Olivier Lucas (RAGT); JC Gouache (Limagrain); Eduard Fito (Semillas Fito); Bernice Slutsky (ASTA); John Duesing (Corteva); Tom Nickson (ASTA); Paul Olson (KWS); Frank Michiels (BASF); Christian Pflug (Corteva); Christiane Duchêne (Limagrain); Nils Elmegaard (Danish Seed Council); Per Henriksson (SVUF); Niels

Louwaars (Plantum); Carl-Stephen Schäfer (BDP); Donald Coles (Valley seeds); Andy LaVigne (ASTA). H  l  ne Guillot (ISF); Michael Keller (ISF). Note: Participants in ISF committees represent their national seed associations.

31 October 2018

Meeting in Geneva (at the side of the UPOV Council) with representatives from group 1, 4 and 5

Project team; Argentina: Raimundo Lavignolle, Maria Laura Villamayor, Mar  a In  s Rodr  guez; Australia: Nik Hulse; Austria: Heinz-Peter Zach; Canada: Anthony Parker, Lisa Leduc; Denmark: Maria Boye Simonsen; European Commission: Paivi Mannerkorpi; Finland: Tarja P  ivikki Hietaranta; Japan: Atsuhiko Meno; Korea: Eun-Jung Heo; Maroc: Zouida Taoussi; Netherlands: Marien Valstar, Lous van Vloten-Doting, Bert Scholte, Kees van Ettehoven; New Zealand: Chris Barnaby; Norway: Marianne Smith, M  rtha Felton; Slovenia: Joze Ilersic; Slovak: Bronislava B  torov  ; Sweden: Olof Johansson; United Kingdom: Andy Mitchell; United States: Ruihong Guo; Thailand: Thidakoon Saenudom; CPVO: Martin Ekvad, Francesco Mattina, Dirk Theobald; AIPH: Mia Buma; Apbrebes: Francois Meijenberg, Laurent Gaberell; CropLife: Marcel Bruins; ISF: Stevan Madjarac, Sietske Wouda, H  l  ne Guillot, Magali Pla.

12-13 December 2018

Meeting in An Giang Province, Vietnam with representatives from group 3

The project team visited a seed club on Wednesday. On Thursday 13 December, a full-day workshop was held with approximately 30 farmers and 5 extension workers who served as facilitators. The farmers – all members of seed clubs from four different districts (Chau Phu, Thoai Son, Tri Ton and Chau Thanh) – were all rice seed producers based in the Mekong Delta, which is the second biggest rice production area in the world.

