



Association for Plant Breeding for the Benefit of Society

**Statements on drafts of Explanatory Notes
on the agenda of CAJ-AG 9, 14 October 2014**

UPOV/EXN/EDV/2 DRAFT 5

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention

Thank you for giving APBREBES the opportunity to comment on draft 5.

Our comments on draft 4 were submitted in June 2014 and posted on the UPOV website end September. They are cited in the endnote b of the draft Explanatory Note. I would like to explain the rationale of our comments on six items.

1. Flexibility

An important concern is the loss of flexibility with regard to how to approach EDVs. There are different approaches to identifying EDVs, e.g. the presentation by Australia (at the Seminar on EDV in 2013) presented a different approach from others. This is useful as every country can implement the concept as it considers best and workable in the context of its country. This is perfectly in harmony with the TRIPS Agreement as well as the UPOV Conventions.

There is text in para 2 explaining the purpose of the explanatory note followed by the sentence on binding obligations. In between the two sentences, a third one should be inserted: "However, the TRIPS Agreement, in particular but not only Art. 37 (b), as well as the UPOV Conventions, allow flexibilities in national law and regulations and accordingly in national court decisions." It is certainly a matter of course, but it is as important as both of the other two matters of course, which are the general purpose of the explanatory note and the usual sentence on binding obligations.

2. Distinctness and distinguishability

The draft EXN is based on an approach to EDV that tends to hinder innovation, making it difficult for new varieties to enter into the market, giving existing breeders a market monopoly and reducing healthy competition among breeders.

If variety B is distinguishable from variety A by one essential characteristic, variety B must be considered as distinct. UPOV 91's provisions on EDVs seem to be inherent contradictions, and the fact that the discussion continues since more than two decades seems to confirm this point. It may be advisable to delete Paras 4 to 8. It is obvious that more efficient criteria for distinctness are needed, and that such criteria should focus on essential characteristics, essential meaning that they are essential for farmers.

3. Mutations

It is understandable that a mutation found in a farmers' fruit orchard or in an ornamental plant growers plot creates disputes as to who is the right holder. To the rights title holder of the initial variety, it could mean another rights title for the same investment, with another full term of 20 respectively 25 years. To the person who found the mutation, it could mean a full term of license fees without having invested in the breeding work or without having bought the title. Natural mutations should therefore be excluded from protection. They give raise to doubts regarding the purpose of the UPOV Convention. Para 15 should be replaced by : "Natural mutations are not protectable". Or at least, the EXN should only mention induced mutations, but not natural mutations.

The example of a mutant cited in the new para 15 of the EN Draft 5 is not an argument that renders the method of breeding irrelevant. The breeding methods are relevant since the Convention is concerned with them in Article 14 (5)c. The new para 15 should therefore be deleted.

4. Initial variety

The concept of EDV in the draft EXN is biased if varieties of farmer-breeders are not considered as initial varieties, as long as they are not protected. But having no PVP right on a variety does not mean that the farmers have no rights at all on these varieties. The Farmers Rights under the FAO-Plant-treaty are just one example for such rights. Essential derivation could apply to varieties derived from such farmers' varieties. Such EDVs should not be protected in their own right.

Therefore, before para 4, a para should be introduced: "Initial varieties can include protected varieties as well as not protected varieties. Depending on the national situation, in case of farmer-bred initial varieties, EDVs can or cannot be protected in their own right." This would also reflect Figure 4. Figure 4 should be completed with the sentence "Depending on the national situation, in case of farmer-bred initial varieties, EDVs can or cannot be protected in their own right."

5. Concerns of members where protected varieties are predominantly bred abroad

The issue of EDVs is to a large extent a problem between Northern owners of PVP rights, who fight amongst themselves whether a variety B claimed by right holder B is derived from an initial variety A already owned by right holder A. There is a danger that interests of member countries where protected varieties are predominantly bred abroad, are not considered by their own national courts.

Some industry associations are running a dispute settlement mechanism dealing with such cases. In a situation where many developing countries will have to grant UPOV 91 based PVP titles to foreign companies, the companies also want to enforce their rights and need local courts for that. They want these courts in developing countries to follow standards established between Northern

companies, and nothing else. The proposition to use an international list of experts who are experienced in dispute settlement only adds to the concern. We are not at all doubting the expertise of excellent experts; our concern is that such experience focuses on Northern breeding companies while local breeding companies in developing countries may have different interests. National public courts in developing countries should not be influenced in their decision making.

Private settlements should not be used to influence public court decisions. In addition, the information on settlements is anonymous by nature.

The fact that WIPO facilitates such arbitration with regard to internet domains is not well enough comparable and less valid in the case of crop varieties.

6. Meeting on possible alternative dispute settlement

The following is a remark on document CAJ-AG/14/9/3:

In this document, a meeting is proposed to exchange information with CIOPORA, ISF and WIPO to explore the possible role of UPOV. No information is given under which terms and rules such a meeting is to take place. Will it be a CAJ or CAJ-AG meeting? What is the reason for a separate meeting – the information could be provided orally or in writing within the existing CAJ rules at a CAJ meeting.

UPOV/EXN/PPM DRAFT 3

Explanatory Notes on Propagation and Propagating Material under the UPOV Convention

Thank you for giving APBREBES the opportunity to explain its comments submitted in June 2014. They were posted on the website end September, and are not reflected in the draft 3 of the Explanatory Note, not even as an endnote. We did not suggest text at that time but some points to consider.

Harmonisation of PVP laws, going further than the UPOV Acts themselves, may be a goal of some international actors holding PVP rights, but is not a UPOV goal as such, as UPOV members have very different agricultural systems, they are not bound by the same agreements, treaties or conventions and have different PVP laws based on their realities and needs.

The UPOV members had diverging definitions of plant propagating material in their national laws for good reasons. But even if a majority had a similar definition, every member should keep the freedom to differ in their interpretation. We have earlier pointed to the fact that the database, from which information is drawn regarding the definition of propagating material in national PVP laws, is unreliable. Only 39 out of 72 UPOV members were included. In order to be fair to national laws, all of them should be evaluated and respective additions made to the non-exhaustive list in para 4.

Explanatory Notes cannot provide a standard definition of propagating material. And it is certainly not necessary to have a standard definition in order to be effective in order to foster national innovation.

Therefore, in para 1, the following text should be inserted: "The following section is not a standard definition. UPOV members have in their national PVP laws, definitions that differ widely but are all

valid under the TRIPS Agreement and the UPOV Conventions. It was not possible to reflect them all in this Explanatory Note.”

This would replace the somehow coincidental insertions in paras 2 and 4 of Draft 5 and provide national law the respect it needs and deserves.

Although in this draft already reflected, the non-exhaustive list of factors should in no way be cumulative, due to the different national legislations and circumstances. The newly inserted point (vi) should be deleted.

UPOV/EXN/HRV/2 Draft 2

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

Thank you for giving APBREBES the opportunity to comment on draft 2. Our comments on draft 1 were submitted in June. The suggested text is included in draft 2, and we would like to explain the rationale.

The wording adopted in the original Explanatory Notes UPOV/EXN/HRV/1 “Unauthorized acts can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force.” is of utmost importance and must be retained. Currently the suggestion is in para 4, but also a Member suggests to move para 4 to para 7. Since the issue is fundamental, it should come at the beginning, even before para 1.

To return on the point of harmonisation, not all countries are equal in front of international trade. It is not up to UPOV to create a situation that does not reflect the legal situation. Not all countries are WTO members.

If a country has chosen not to provide PVP for good reasons, i.e. the country is not a WTO member, or the country is a Least Developed Country and therefore for good reasons exempted from TRIPS Agreement (currently until 2021), this country should not be burdened with license fees if it exports harvested material. Among the good reasons for the grace period is the fact that LDCs have only small numbers of innovations at national level, and at the same time they have only small means to pay for licenses if they import innovations. The whole idea of trade globalisation would be turned against countries that can cheaply produce and have an undeveloped sector of independent national breeders if industrialised countries impose license fees.

If a country where material is exported to, offers PVP rights for the species in question, but the variety in question is not protected, there may be good reasons for not protecting that variety in that country.

The good reasons would be disregarded if the PBR applies when harvested material is exported back from that country to the first country.

The EXN is focusing on international trade issues between countries of differing PBR status. It does very little to further clarify PBR in relation to harvested material from farm-saved seeds (examples 6 and 7). These examples should be deleted and the EXN focused on international trade issues between countries of differing PBR status.

APBEBES had reminded that contract farming is fast increasing and that private contracts should not prevent the enjoyment of the farmers' privilege in cases where the optional exception applies. The UPOV Seminar on contracts of 2008 does not refer to the more recent proliferation and diversity of contractual arrangements and has not sufficiently addressed the circumventing of the optional exception. In particular as international value chains are being further developed in quantity and quality, new legal questions have arisen.

Increasingly, even seed marketing laws are circumvented by contract farming. That way, large parts of the farming population are not any more reached by the scope of PVP and marketing legislation, both important and interrelated sets of legislation with regard to seed and planting material.

This issue is very important; UPOV should address it in more detail. We suggest that the Members put this question on the agenda of the next session.

With regard to the EXN on Harvested Material, in the meantime, an additional example should be foreseen, that addresses the situation of contract farming in cases of international trade between countries of differing PBR status.

Non-contractual responsibility:

According to the text proposal of the new para 9, even acts of buyers of harvested material which is sold in breach of PBR, including breeders' conditions and limitations, are considered as a PBR offence. Buyers of harvested material, in order to be on the safe side, would have to ask vendors of harvested material for their license, and read and understand it. This is totally out of proportion.

There is moreover no reason why EU directive 864/2007 that is cited in the EU comment of 27 February 2014 on HRV as basis for this proposal, should be applied to all UPOV members.

Reasonable opportunity:

Para 14 has very unclear text with regard to "the territory concerned" It should clearly refer to the "territory where the right title was granted."

Para 14 (Alternative text) proposes to put the burden of proof on the defendant who will have to prove that the rights holder (the plaintiff) could reasonably have exercised his right at an earlier stage. It should be up to the rights holder to prove that he could not exercise his right. The text should be deleted.

UPOV/INF/12/5 DRAFT 2

Explanatory Notes on Variety Denominations under the UPOV Convention

Thank you for giving APBEBES the opportunity to comment on draft 2. Our comments on draft 1 were submitted in June 2014 and posted on UPOV Website in September. The suggested text is included in draft 2, and we would like to explain the rationale.

On variety denomination, the text in para 7.2 (c) is too weak with regard to change of denomination. There has been an example provided by South Africa (reproduced in document CAJ-AG/13/8/6) where a company wanted to sell a variety under a new name and/or under a new company name.

The relevant text in UPOV/INF/12/5 DRAFT 1 is

“(c) In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a registered denomination following a request by the breeder. ”

Farmers’ experiences with a variety are obviously linked to the denomination. These experiences must not be rendered useless by a change of denomination after grant of a breeder’s right. UPOV acts should not serve as market management tool, allowing varieties or companies that are unsuccessful in the market to be relaunched with new names and/or by other companies. Farmers adopt a variety when it fulfil their needs and reject when it doesn’t. Therefore, UPOV should not undermine its mission of service for the benefit of society.

The suggested text is too weak and should be redrafted as follows:

“(c) In general, subject to (a) and (b) above,~~it would not be appropriate for the authority to change~~ *a change of* a registered denomination following a request by the breeder *is generally not possible. Exceptional circumstances will be considered on case by case basis. If the denomination is changed, the original denomination must remain transparent for the farmer and mentioned next to the new denomination.*”

Thank you for the opportunity to provide comments and to explain their rationale, we appreciate the personal communication. We also appreciate that the CAJ intends in future to discuss issues without the help of an additional body; both transparency and efficiency may increase substantially.

We feel it is equally important for us to listen to and comment on the propositions of other observers, if they are presented at the Consultative Committee. Those propositions may have a very substantial impact on UPOV, on developing countries and on farmers, consumers and citizens around the world.

Thank you Mr Chair.

Association for Plant Breeding for the Benefit of Society (APBREBES)

Email: contact@apbrebes.org

T: 0049 228 9480670, mob: 0049 177 669 1400

Postal address: Susanne Gura, APBREBES Coordinator, Burghofstr. 116, D-53229 Bonn, Germany

Internet: www.apbrebes.org