

Explanatory Note on Acts in Respect of Harvested Material

Mr. Chairman,

When the Consultative Committee endorsed the proposal to draft explanatory notes, it was stated that these explanatory notes are not meant to provide an official interpretation of the provisions of the 1991 Act. Nevertheless it is likely that the explanatory notes have an impact on how the provisions of the Convention are interpreted and applied as well as even how courts decide on a particular matter. It may be interesting to note that Netherlands in a recent letter to the UPOV Secretariat requested changes to Draft 7 of the Explanatory Note on Harvested Material requested changes to the Explanatory note on the basis its court of justice may misunderstand.¹

Thus we raise a general concern with the approach of using explanatory notes, to interpret the UPOV Convention – as it would limit the ability of member states to interpret and apply the Convention as appropriate nationally and even how courts decide on a particular matter.

*Point (b) of para 12 invites the CAJ-AG to revise the explanatory note to include illustrative examples of situations where breeders' might be considered to be able to exercise their rights in relation to harvested material. It is worth noting that at its 6th session the CAJ-AG took the decision to exclude illustrative examples from the explanatory note on the basis that the **“examples could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion”**. It was also agreed that the illustrative examples should be replaced by a general explanation of “unauthorized use of propagating material”.²*

However since that decision was taken, the industry has requested the inclusion of these examples into the explanatory note. Since the CAJ-AG has firstly agreed that illustrative examples should not be included, the matter should not be reopened. It is our view that Decision point (b) should not be agreed to.

*WE do also not support decision point (c). In an earlier draft of the explanatory note on harvested material it was clearly stated that **“it is a matter for each member of the Union to determine what “reasonable opportunity” is”**. Following a request by the industry this has been deleted and now the Industry is going one step further and is even seeking an explanatory note on “reasonable opportunity”. For instance the International Seed Federation is arguing “it is not a matter for the individual UPOV members to determine the meaning of a “reasonable opportunity“ and seeks the CAJ-AG to expand on this point. This is quite concerning because what is “reasonable opportunity” would very much depend on the facts of each case.*

¹http://www.upov.int/edocs/mdocs/upov/en/caj_ag_12_7/upov_exn_hrv_draft_7_comment_nl.pdf

² CAJ-AG Decision at the 6th session: “The CAJ-AG noted that the illustrative examples could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion. It agreed that the illustrative examples should be replaced by a general explanation of “unauthorized use of propagating material”, on the basis of the cases provided in the illustrative Examples 1 to 8. The CAJ-AG noted that Example 9 did not make reference to unauthorized use of propagating material.” See para 10 of CAJ-AG/11/6/7