

UPOV CAJ-AG on 25 October 2013

APBREBES Intervention on Explanatory Notes on Acts in Respect of Harvested Material

In our view the document in front of us is very confusing. More questions are raised than answered. For example it is not clear if the examples 1-8 and the alternative explanations only refer only to cases of unauthorized export. (and not to authorized exports). Is the second para in these examples only valid if the requirements of the first para are met? And obviously the examples need more discussion as it is shown e.g. by example 9 and others where the alternative explanation comes to a contrasting result. All this shows that the time is not ripe to forward these Explanatory Notes on Harvested Material.

Contract farming nowadays covers many countries. New forms of direct contracts with farmers, not with propagators, are now proliferating, because breeders find it more attractive to capture added value in a system based on licenses for harvested material. Such contracts include "licenses for producers or traders for harvested material" under which royalties are established on harvested material.

We support the opinion of the global small farmer organisation Via Campesina that the legal basis for those contracts is dubious and may not comply with the UPOV Convention, in particular with the principle of exhaustion of the breeder's right. Once the material is marketed by the breeder or with his consent, no further remuneration should be required. Contracts allowing for globalised vertical integration into the supply chain, for example "Closed loop marketing" contain various commitments, including with regard to breeders' rights licenses. These types of contracts are not in line with the UPOV Convention and prevent the enjoyment of the farmer's privilege in cases in which the optional exception contained in the 1991 Act of the Convention applies. Of special interest in this discussion is *Article 8* of the Swiss federal plant variety protection law:

"Any agreement which restricts or annuls the exceptions to the right to protection for the varieties referred to in art. 6 and 7 (and this is about the farmers privilege) shall be deemed to be null and void.

On the related question of guidance on the term of "reasonable opportunity" it is our view that the older text considered earlier by the CAJ-AG is still valid: *"It is a matter for each member of the Union to determine what constitutes 'reasonable opportunity' to exercise his right."* We totally agree with this statement, as it will always depend on the case and on the national circumstances what is a reasonable opportunity.

Although it has been decided that the text should be deleted from the current version of the explanatory note, this does not mean that the content is wrong. Following the text mentioned we believe that we should refrain to draft a guidance on this term and therefore not ask members and observers to submit proposals for guidance.

For the document CAJ-AG/13/8/3 see

http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_3.pdf

For the view of the global small farmer organisation Via Campesina see

http://www.upov.int/edocs/mdocs/upov/en/caj_ag_12_7/caj_ag_12_7_7.pdf paras 14 and 15