

APBEBES Summary of key issues discussed by the Administrative and Legal Committee Advisory Group (CAJ-AG)

The 8th session of the **Administrative and Legal Committee Advisory Group** (CAJ-AG) met on 21st and 25th October 2013. The CAJ-AG is not open to observers. However some observers were invited for the purpose of presenting their views on agenda items before the CAJ-AG. The CAJ-AG is a sub-group of the CAJ tasked with assisting CAJ in preparing information materials particularly in cases where it is considered that there are difficult issues or unexpected concerns.

This summary captures some of the key issues/points discussed at the CAJ-AG.

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision), Doc. CAJ-AG/13/8/2.

The concept of "Essentially Derived Varieties" is absent from UPOV 1978. It was introduced in UPOV 1991 (Article 14) to strengthen breeder's rights over the protected variety and narrow the scope of breeders' exemption. Though the concept is defined in Article 14(5)(b) of the 1991 Convention, there is significant uncertainty about the practical application of the concept.

According to the purpose of document CAJ-AG/13/8/2 is to provide information to assist the CAJ-AG in the consideration of the revision of the "Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention" and of relevant matters that might result from the Seminar on Essentially Derived Varieties to be held in Geneva on October 22, 2013. For a brief report by APBEBES on the Seminar see http://www.apbrees.org/files/seeds/APBEBES%20rep%20EDV%20Sem%2022%20Oct%2013_0.pdf

Francois Meienberg of APBEBES said that the final presentation on summary points from the seminar did not capture certain key aspects. The fact that EDV limits further development of varieties especially in relation to farmer breeders in that it restricts farmers from using protected varieties to adapt to local conditions, leading to increased farmers' vulnerability and threatening of food security was not adequately reflected. It was also highlighted that formal breeders' breeding materials are derived to some extent from farmers' varieties with little or no restriction, not even a restriction against essentially deriving a variety from these varieties. Other fundamental issues were also raised by growers associations regarding the current approach to EDV hindering innovation, making it difficult for new varieties to enter into the market, giving existing breeders a market monopoly and reducing healthy competition among breeders. These are important outcomes that deserve further attention and investigation, Meienberg said, adding that a framework of guidelines based on dispute settlement cases within the breeding industry is not likely to answer these questions.

He also pointed out that the experiences of developing countries that are implementing UPOV 1991 in particular the challenges that developing countries would face with this implementation were not addressed. He added that on the issue of soft law, an important concern is the loss of flexibility with regard to how to approach EDVs. On Alternative dispute settlement (ADR), he questioned how private settlements can be used to influence public court decisions adding that 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, the more so, if food security depends on the outcome.

He added that member states should not be asked to adopt as Explanatory Notes of the UPOV Convention such guidelines developed on the basis of privately and anonymously settled disputes among mainly Northern breeding companies. Courts dealing with cases in developing countries should not be influenced by such soft law. For the full statement of APBEBES, see <http://www.apbrebes.org/files/seeds/Intervention%20EDV%20CAJ-%20AG%202013.pdf>

CIOPORA in its statement objected against language that an EDV would differ from the initial protected variety "typically by one" characteristic as it limited the EDV concept adding that the difference of one characteristic was meant as minimum not maximum and this is against UPOV Convention. It argued that this approach (presented in paragraph 10 of CAJ-AG/13/8/2) was not based on UPOV91 but on the 1989 Diplomatic Conference negotiating UPOV 1991. It added that the act of derivation needed to be clarified, but the draft Explanatory Note was silent on it.

Explanatory Notes on Propagation and Propagating Material, Doc. UPOV/EXN/PPM Draft 1.

The aim of this Explanatory Note is to provide guidance on propagation and propagating material. These terms appear in Articles 1, 6, 8, 9, 14, 5, 16, 20 of UPOV 1991. The 1978 Act of the UPOV Convention, Article 5 (1) clarifies that material is considered to be propagating material if it used as such, even if it is a type of material that is not normally marketed for the purpose of propagation.

Paragraph 3 of the document concludes with a non-exhaustive list of factors that might be considered in deciding whether material was propagating material: (i) whether the material has been used to propagate the variety; (ii) whether the material is capable of producing entire plants of the variety; (iii) whether there has been a custom/practice of using the material for that purpose; (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); and (v) whether the plant material is suitable for reproducing the variety unchanged.

In a letter to CAJ-AG dated 4 September 2013, CIOPORA calls for UPOV to develop a standard definition of propagating material, which the UPOV must implement. The letter is available at http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_250068.pdf

Francois Meienberg of APBEBES in his intervention (<http://www.apbrebes.org/files/seeds/APBEBES%20Intervention%20on%20an%20Explanatory%20Notes%20on%20Propagation%20and%20Propagating%20Material%20%281%29.pdf>) said that APBEBES supports the view that there is no need for the development of explanatory notes on propagation and propagating material. Meienberg refers to CIOPORA's call for a standardized definition, adding that hopefully that the intention is never be fulfilled by an explanatory note. Referring to the Preamble of the UPOV explanatory notes which says: "*The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned*", he added that Explanatory notes are **not** a standard definition to be included into national laws.

Taking into account that the current interpretation of *propagation* and *propagation material* of member countries differs substantially, a definition is highly problematic, he said, adding that any specific definition could be in contradiction with the Preamble (mentioned above) as it will be inconsistent with relevant acts of at least some members of the union. Meienberg also questioned whether the reference to Article 5.1 of UPOV 78 in the document meant that the 1978 Act should

be used as a basis for the interpretation of the 1991 Act?

If the members of the Union decide to go on with the development of an explanatory notes on propagation and propagation material, it seems necessary, as a first step, to have a survey which includes the current definition of **all** members of the Union. This would give us a more complete basis of information for the discussion, Meienberg added.

The Vice-Secretary General chairing CAJ-AG responded that such a survey had already been done but APBEBES pointed out that not all members had been included in the survey.

CIOFORA stressed that the lack of harmonisation would be perpetuated and protection ineffective if the narrow definition focusing on the intention of the use of plant material as propagating material was applied. The definition of propagation and propagation material must be sufficiently broad and based on the capacity of plant material to be used as propagating material, CIOFORA said.

ISF added that food security needed a strong regulatory environment that could only be achieved by a standard broad definition.

Explanatory Notes on Acts in Respect of Harvested Material, Doc. CAJ-AG/13/8/3.

On 24th October, the Council adopted Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV/1). However the CAJ, at its 67th session in March 21, 2013 had already agreed to invite the CAJ-AG to immediately start work on a future possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" in order to include illustrative examples of situations where breeders might be considered to be able to exercise their rights in relation to harvested material. Thus the Explanatory Note was being re-examined.

It is worth noting that at its 6th session the CAJ-AG already 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".^[1] However since that decision was taken, the industry has requested the inclusion of these examples into the explanatory note, thus leading to the decision of the CAJ to consider revising the explanatory note. For comments of CIOFORA and the European Seed Association (ESA) see http://www.upov.int/meetings/en/details.jsp?meeting_id=26466.

"Harvested Material" is used in Article 14(2) of UPOV 1991 and pertains to the scope of breeders' rights. Article 14 (2) states that the rights mentioned in Article 14(1) extend to "harvested material,

including entire plants and parts of plants”, if such material is “obtained through the unauthorized use of propagating material of the protected variety” and the breeder did not have “reasonable opportunity” to exercise his right in relation to the propagating material.

The Explanatory Note CAJ-AG/13/8/3 discusses the scope of breeders’ rights, the issue of exhaustion of rights, discussions that took place prior to the 1991 Diplomatic Conference and 11 illustrative examples of situations where breeders’ rights extend to harvested materials. The Note also calls for the consideration of developing guidance on the matter of “reasonable opportunity” and invites proposals on the matter.

Francois Meienberg of APBREBES in his intervention called document CAJ-AG/13/8/3 “very confusing”, adding that “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) he said. He stressed that the document was not sufficient mature as 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.

Meienberg also raised the issue of contract farming which is proliferating and whereby the contracts include “licenses for producers or traders for harvested material” under which royalties are established on harvested material. He expressed support for the position of the global small farmer organisation Via Campesina that those contracts are inconsistent 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 issue of “reasonable opportunity”, Meienberg expressed support for the previous text of CAJ-AG that: *“It is a matter for each member of the Union to determine what constitutes ‘reasonable opportunity’ to exercise his right”* which has been deleted from the current version of the explanatory note. He added that the CAJ-AG should refrain from drafting a guidance on the matter. Such 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.

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CIOPORA sought to delete example 8 but the Chair recalled that CIOPORA had provided the particular example. ISF commended the examples and asked how would UPOV deal with the alternative contrasting explanations? ISF also stressed that the examples were built on a broader definition of unauthorized use; the seed industry wished for a narrower definition. The Chair commented that the examples are not in a final form, they just served to discuss the understanding of stakeholders.

Comment on Explanatory Notes:

At the 67th session of the CAJ in March 2013, APBREBES had raised a general concern (link to INTERVENTION) with the approach of using explanatory notes, to interpret the UPOV Convention. APBREBES stressed that the Notes limit the ability of member states to interpret and apply the Convention as appropriate nationally. It would also affect how courts decide on a particular matter.

It is also 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 on the basis its court of justice may misunderstand.

See:

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

Matters concerning cancellation of the breeder's right (Doc. CAJ-AG/13/8/4)

The 7th session of the CAJ-AG considered that it would be appropriate to develop further guidance on the cancellation of breeders' rights. Document UPOV/EXN/CAN/1 explains that, "[u]nder the 1991 Act of the UPOV Convention, if the reasons for cancellation apply, the competent authority 'may' cancel the breeder's right, i.e. there is no automatic obligation to cancel. Subject to applicable legislation, the competent authority may take into account the particular circumstances and may decide to cancel a breeder's right or may, for example, provide additional time to remedy the situation."

The CAJ-AG was invited to consider the development of guidance

- on reasons for possibly not cancelling a breeder's right;
- to explain that it is a matter for the member of the Union concerned to decide which authority is competent to decide on cancellations;
- to explain that cancellation proceedings may be initiated by a request from a third party or ex officio by the competent authority of the member of the Union concerned;
- on the use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4; and
- on the use of Test Guidelines for verifying the maintenance of the variety that are different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS"), in relation to document CAJAG/13/8/7 "Matters concerning Variety Descriptions".

Contributions on this matter from Argentina, Brazil, the EU and the Netherlands are annexed to CAJ-AG/13/8/4.

Matters concerning nullity of the breeder's right (Doc. CAJ-AG/13/8/5)

The 7th session of the CAJ-AG considered that it would be appropriate to develop further guidance on the nullity of breeders' rights. Guidance on nullity of the breeder's right is currently provided in document UPOV/EXN/NUL/1 "Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention".

The CAJ-AG considered the development of guidance:

- to explain that it is a matter for the member of the Union concerned to decide which authority is competent to decide on nullity of breeders' rights.
- to explain that nullity proceedings may be initiated by a request from a third party or ex officio by the competent authority of the member of the Union concerned.
- to explain measures that might result from a decision on nullity, as set out in paragraph 15 of document CAJ-AG/13/8/5.
- to explain the importance of the authority maintaining information on all varieties considered in the examination of distinctness of a candidate variety; consider that matter in relation to document CAJAG/13/8/7 "Matters concerning Variety Descriptions and propose to the Administrative and Legal Committee (CAJ) to invite the Technical Committee (TC) to pursue this matter in the first instance.

Contributions on this matter from South Africa and the EU are annexed to CAJ-AG/13/8/5.

Matters concerning variety denominations (Doc. CAJ-AG/13/8/6).

The 7th session of the CAJ-AG considered that it would be appropriate to develop further guidance on Matters Arising after the Grant of a Breeder's Right" concerning variety denominations. Guidance on variety denominations is currently provided in document UPOV/INF/12/4 "Explanatory notes on variety denominations under the UPOV Convention".

Contributions by Argentina and South Africa are annexed to CAJ-AG/13/8/6 and concern situations in which the breeder makes a request to change a variety denomination after the grant of the breeder's right.

The CAJ-AG considered the development of guidance in relation to a request from a breeder to change a registered variety denomination in cases other than where the denomination of the variety is cancelled after the grant of the right.

Matters concerning variety descriptions (Doc. CAJ-AG/13/8/7)

The CAJ-AG was invited to consider the matters that might be considered for further guidance as set out in paragraph 4 of CAJ-AG/13/8/7 and to identify matters that it considers to be of an administrative and legal nature, which it would wish to pursue in the first instance, and those matters of a more technical nature, which it may wish to propose that the Administrative and Legal Committee (CAJ) to invite the Technical Committee (TC) to pursue in the first instance.

Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights (Doc. CAJ-AG/13/8/8).

The 7th CAJ-AG session agreed that the Secretariat should seek clarification on certain issues raised by the EU and Russian Federation with regard to provisional protection and on filing of applications and enforcement of breeders' rights.

By letter of September 3, 2013, from Dr. Y. Rogovskiy, Deputy Chairman State Commission of the Russian Federation for Selection Achievements Test and Protection, the Russian Federation informed the Office of the Union that, for the time being, it did not propose the development of further explanatory notes for matters arising after the grant of a breeder's right in relation to provisional protection, filing of applications, nor enforcement of breeders' rights. No matters have been raised by the European Union concerning further guidance on provisional protection.

The CAJ-AG was invited to agree not to continue discussions on for matters arising after the grant of a breeder's right in relation to provisional protection, filing of applications, nor enforcement of breeders' rights.

[1] 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