

UPOV CAJ-AG on 25 October 2013

APREBES Intervention on Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)

- i. The decision paragraph requests the CAJ-AG to “consider the **conclusions** of the Seminar on Essentially Derived Varieties in relation to its work on future guidance concerning essentially derived varieties...” However, as the seminar is a forum where there is an exchange of different ideas and views, it seems improper to refer to “conclusions” of the seminar. Especially as they have neither discussed nor agreed.

These summary points drawn are those of moderators of the seminar and should be cited as such.

- ii. The conclusions do not capture certain key aspects. To refer to the possibility of an impact of future guidelines on stakeholders is not enough. E.g. the issue in relation to farmer breeders’ concern was expressed over the restriction on farmers in using protected varieties to adapt to local conditions, leading to increased farmers’ vulnerability and threatening of food security. 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 other presentations such as is 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.

We are of the view that these are important outcomes that deserve further attention and investigation. The framework of guidelines development mainly based on dispute settlement cases within the breeding industry is not likely to answer these questions.

- iii. On Session II of the seminar, the experiences were from Netherlands, Japan, Australia and Israel. There were no experiences from developing countries that are implementing UPOV 1991 in particular the challenges that developing countries would face with this implementation. For e.g. if a small scale breeder is facing a legal challenge from a foreign breeder, how will the small scale breeder deal with such a legal challenge in proving that its variety is not an EDV.
- iv. On the issue of soft law, 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 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.
- iv. On Alternative Dispute Settlement (ADR), how can private settlements be used to influence public court decisions? In addition, the information on settlements is anonymous. 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, as food security depends on the outcome.

Member states would be asked to adopt as Explanatory Notes of the UPOV Convention guidelines 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.

Link to the document http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_2.pdf