

From: Marcel Bruins [mailto:m.bruins@worldseed.org]
Sent: Monday, October 15, 2012 5:40 PM
To: Button, Peter
Cc: Mariette Perey
Subject: ISF comments to UPOV documents on CAJ-AG agenda

Dear Mr. Button,

Herewith ISF would like to express its opinion on some of the documents which are on the agenda of the upcoming meeting of the Seventh Session of the CAJ-AG in Oct. 2012.

With regards to the Explanatory Notes on Acts in respect of Harvested material, under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV draft 8) we propose to re-introduce at least some of the illustrative examples as they greatly clarified some of the more confusing points. Without the examples the document has lost a lot of its explanatory power.

The draft Explanatory Notes also state in the last sentence of point 13 that it is a matter for each member of the Union to determine what constitutes a reasonable opportunity. In the first place ISF considers that the condition for the PBR-holder to exercise his right at each reasonable opportunity should not require him to act against illegal reproduction of material in order to be able to exercise his right on the harvested material resulting there-from.

Secondly ISF is of the opinion that it is not a matter for the individual UPOV members to determine the meaning of a "reasonable opportunity". This is in conflict with the mandatory character of this provision for the protection of the harvested material that was agreed upon after a long discussion during the Diplomatic Conference in 1991. An individual interpretation by UPOV member states may weaken this protection. Additionally it may lead to different decisions in similar cases by national courts, eroding the harmonization effect of the UPOV Convention. Therefore the said phrase should be equally interpreted by all UPOV members. Consequently we request the AG to clarify this point in the Explanatory Note.

We add that the term "his right" in article 14(2) of the UPOV 1991 Act, relates to the PBR in the territory in which the breeder can act against the harvested material. Thus, "reasonable opportunity to exercise his right" in relation to the propagating material means a reasonable opportunity in the territory concerned to exercise his right in relation to the propagating material. Furthermore, in particular, "reasonable opportunity to exercise his right" does not mean a reasonable opportunity to obtain a right, for example in another territory. We herewith re-confirm this statement that we already made during the previous CAJ-AG session in October 2011.

This interpretation above of the UPOV CAJ Advisory Group has been confirmed by the decision of the German Supreme Court of 14 February 2006, No. X ZR 93/04.

ISF is of the opinion that there is unauthorized use if the breeder has not given his explicit authorization. This can be the case of a breach of contract or once material that has been sold on

the market as the end product is being used as propagating material in a country where the variety is not protected.

With regards to the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (document UPOV/EXN/EDV/2 Draft 2), we would like to propose to add at least one example of a situation where the EDV is not protected, to make it very clear that also such cases fall under the scope of the protection.

General comments:

- 1) We have studied the comments made by Ciopora and the European Seed Association (ESA) well and herewith we would like to express our support for the comments made therein.

- 2) At the last ISF World Seed Congress that was held in June 2012, the ISF members adopted unanimously a new "*ISF.View.on.Intellectual.Property*". It contains explanations and additional information on several of the points above and a lot more information on other topics related to IP. We believe this document would provide a very interesting read for the UPOV members. The document is publicly available on the ISF website: www.worldseed.org

With kind regards,

Marcel Bruins, Ph.D.

Secretary General

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