

COMMENTS OF THE REPUBLIC OF ARGENTINA ON DOCUMENT UPOV/EXN/HRV/2 Draft 1

EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION

In our view, this explanatory note calls for the following comments, which we have divided into general and specific.

GENERAL COMMENTS

- 1.1. Article 14 (2) of the UPOV Convention to enable breeders to exercise their right in relation to the product of the harvest requires compliance with the following requirements:
- (a) that the situation should not fall within the compulsory and optional exceptions to Article 15, including the exception allowing the breeder and farmer to sow their own seeds;
 - (b) that the right should not be exhausted under the terms of Article 16;
 - (c) that a third party should have made “unauthorized use” of the propagating material of the protected variety;
 - (d) that there should have been a reasonable opportunity for the breeder to exercise his right in relation to the propagating material of the protected variety, meaning that his authorization should have been sought for any of the acts contemplated in Article 14(1) in respect of the said material; and
 - (e) that the extension of the breeder's right is over “the product of the harvest”, including entire plants and parts of plants.

1.2. DEFINITIONS

Apart from the term “unauthorized use” mentioned in paragraph 6, there is no definition of key terms for consistent interpretation of Article 14(2), such as “product of the harvest”, “reasonable opportunity to exercise the right” and “propagation material of the protected variety”.

For the interpretation of this article, the scope of the above concepts must be clearly established, as they are vital for the national authorities responsible for implementing national legislation and the UPOV Convention in relation to this article.

Interpretation should not be predicated upon vague concepts or references to other explanatory notes. Nor should it be stated that the Convention does not define the product of the harvest but that it includes entire plants or parts of plants obtained through the use of propagating material, as this neither explain anything nor provides details on the object of the right which is being legislated, generating legal uncertainty that is detrimental to the harmonization which is the purpose of the explanatory notes.

Nor is paragraph 3 acceptable as it creates a “*praesumptio iuris tantum*”, assuming without factual basis that the product of the harvest which includes entire plants or parts of plants may potentially be used as propagating material. Any plant or part of a plant is propagating material if it is planted, regardless of how it was obtained.

Therefore sections 2 and 3 and the last part of Alternative 2, paragraph 7 should be removed and a precise definition of “product of the harvest” should be provided, together with clear, illustrative examples.

1.2. “UNAUTHORIZED USE”

- (a) With respect to paragraph 4, the required authorization is from the “holder of the breeder's right” who is the person who holds the right and who has been granted a title and not the breeder mentioned in the definition of the Convention, who may be, without distinction, any of the three persons mentioned in the definition of the Convention.
- (b) For the following reasons, it is therefore inaccurate to state in the last part of paragraph 12 that acts that do not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception can be construed as “unauthorized use”.

It is for national law to determine optional exceptions and only it can determine the limits, scope and interpretation of the optional exceptions and legislate and determine if reasonable limits and the legitimate interests of the breeder are respected.

If breeders disagree with regulations governing such action, they must submit the comments and objections they consider relevant in the relevant country, but an explanatory note of an international convention that specifically vests the legislative power in this area with each Contracting Party cannot interpret concepts that are alien to it. The last part of paragraph 12 should be deleted.

Without prejudice to the foregoing no explanation or practical examples concerning situations could be interpreted are included in the last part of paragraph 12, which is accordingly incomprehensible.

On the other hand, as the delegation of our country stated, the optional exception to the farmer's right to reserve and use his seeds should not be conflated with situations of "unauthorized use" by the breeder because the optional exception depends not on what the breeder decides to authorize or the conditions or limitations the breeder set, but emerges from a legal stipulation by the country in accordance with its intellectual property law concerning plant varieties, which, on this point, is independent of the decisions of breeders.

- (c) In both the first part of the explanatory note and in the examples, the concept of "unauthorized use" of Article 14(2) is incorrectly conflated and equated with the exhaustion of the breeder's right under Article 16.

On this issue, we must consider the following points.

- Intellectual property rights are "territorial" and their granting and enforcement apply only in the country in which the breeder obtained a title to a new plant variety. Therefore, a right granted in one territory, as mentioned in paragraph 4, cannot be extended to other territories, except where a property right, be it a breeder's right or any other kind of property right for that plant variety, is in force in the other territories.

They have no extraterritorial effect unless supranational legislation so provides and regulates regional plant breeder's rights.

Therefore, in paragraph 4 the text as from "..... and in other territories" until the end should be deleted.

- For exhaustion of a breeder's right, the territory must have previously enacted legislation which grants such rights and protects the genus and species as well as varieties owned by a breeder. If the right has not been granted, it cannot be exhausted, as in the examples cited in paragraphs 4(i) and (ii) deriving from Article 16 of the UPOV Convention of 1991. These examples should therefore be removed.
- A country may not considered it necessary for its domestic policy to protect plant varieties or to consider the escalation of protection, as did many countries that have acceded to the UPOV 1978 Act or to protect the breeder's right by a different system. Therefore, not all propagating material that is marketed or used illegally act constitutes a violation of plant breeder's right or "unauthorized use".

If plant breeders' rights do not exist because the country does not protect plant varieties, or species or genus, there is no "unauthorized use".

Alternative 1 of paragraph 7 does not follow.

- For all the more reason, there is no "unauthorized use" if the variety has not been protected because the breeder's right is a private right and it falls solely to him to protect his variety in countries that he considers relevant, and if he fails to do so, he has no rights over the variety. Therefore, the examples and the text cannot state that if the variety has not been protected, there is "unauthorized use" of the material or its propagation.
- The last part of paragraph 9, referring to non-contractual responsibility, is not understood. It should be specified exactly which situations are referred to because it is a very vague explanation.

1.4 REASONABLE OPPORTUNITY TO EXERCISE OF THE BREEDER'S RIGHT TO THE PROPAGATION MATERIAL

- (a) There is no definition and clear examples are not given concerning this very important concept, because together with unauthorized use, it is the key to the breeder's exercise of his right in relation to the harvested product.
- (b) Propagating material is not defined within the meaning of this article.

This means that it is not known with legal certainty what underpins the extension of the right for those to whom this rule applies. The result is considerable legal uncertainty internationally, as it leaves it to each country freely to interpret these concepts, which are not only fundamental to the harmonization of UPOV principles but whose vagueness can also be detrimental to the interests of the country and its free trade.

- (c) For the Republic of Argentina, "have reasonably exercised their right" means that the breeder has taken "some effective action to prosecute and try to secure the conviction of a third party who has illegally used his propagating material", i.e. he has initiated legal action which has culminated in a final judgment and that the court has found against him.

Moreover, in Argentina, the National Seed Institute requests the breeder's authorization for protected varieties in both the seed certification process and any trade act, including import and export; it does not authorize any act in which the breeder does not participate. Also, officials of the Institute vested with police power require proof of authorization from the breeders of protected varieties and failure to produce an authorization constitutes a crime.

Therefore, the alternative mentioned in paragraph 14 does not apply to all countries. Moreover, it is not clear why it has been included and thus should be removed.

- (d) The indication in paragraph 14 that a breeder can only reasonably exercise his right “in the territory concerned” is not accurate, as the breeder can own licensees in other countries or hold a property right in one or more countries and therefore can reasonably exercise his right over the propagating material, preventing its import or export, as the case may be.

1.1.5. REVERSAL OF THE BURDEN OF PROOF

The last part of paragraph 14 is unacceptable, given the reversal of the burden of proof: it is the holder of the breeder’s right who must prove the unauthorized use of their propagating material, prove that they have reasonably exercised their right in relation thereto, and that the propagating material corresponds to their protected variety. The third party should not be expected to provide evidence of facts that it is not privy to.

SPECIFIC COMMENTS

As said, the plant breeder’s right is “TERRITORIAL”, which means its granting and enforcement are limited to the territory of the country in which it was granted.

Moreover, the plant breeder’s right is a “private right” and it is only for plant breeders to take the action provided for in national legislation for the violation of their rights.

From this it follows that it is worth conducting an analysis to determine whether the grounds for unauthorized use and reasonable exercise of the right and the possible extension of the right in relation to the harvested product in the country where the propagating material of was produced and in which the breeder holds a title, as well as the country’s existing legislation in regard to plant breeders’ rights and its procedures and enforcement systems in that regard.

Therefore, it is ineffective and sometimes even contradictory to generalize, providing examples from possible situations in other countries, as is done in the illustrations provided in the explanatory note.

If the breeder expressly or implicitly authorized any of the acts referred to in Article 14(1) with respect to the propagating material in a country with plant breeder’s rights, including imports and exports, then he has exhausted their right and cannot complain.

Therefore the accompanying illustrations are not effective and should be incorporated once detailed clarification is provided in regard to the above-mentioned points, because the explanations are often unclear.

COMMENTS OF THE REPUBLIC OF ARGENTINA ON DOCUMENT UPOV/EXN/EDV/2 Draft 4

EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE 1991 ACT OF THE UPOV CONVENTION

In our view, the explanatory note calls for the following comments, which we have divided into general and specific.

Paragraph 8

The text refers to the fact that making the essentially derived variety (EDV) “clearly distinguishable” makes it protectable independently of the initial variety. We believe that on this point contains ideas which could be expressed more clearly.

- In referring to “clearly distinguishable”, the definition of essentially derived varieties clearly establishes that an essentially derived variety must meet the condition of “Distinctness” according to the same criteria that apply to any variety that is considered for the purposes of protection. Accordingly, all the UPOV recommendations set forth in the General Introduction, the TGP documents and the Test Guidelines are applicable.
- Moreover, in order to meet this condition and the others governing protection which are set forth in the Convention, the breeder’s right will have to be granted, since additional conditions cannot be imposed.
- The draft text appears to suggest that the protection of an EDV is independent of the protection of the Initial Variety (IV), when in fact it is not, since an EDV is achieved by the protection of the IV. Obviously, this was not the intended meaning but the formulation could cause confusion.

Paragraph 10

Reference is made to “*paragraph (i)*” in the third line. We think it should be 14(5)(b)(i).

Paragraph 11

The reference to document IOM/IV/2 is not clear, given that this document is an explanatory note to the UPOV Convention and not to document IOM/IV/2. If this reference is intended to clarify the origin of the text that follows – which is what we think – then the reference to document IOM/IV/2 should be an endnote as in other cases. This then raises the question of whether the text of the paragraph “(ii) the derived variety must...” should be included under paragraph 10. Hence, Argentina favors the inclusion of the said paragraph in the explanatory note.

Former Paragraph 15 (page 14)

Endnote jj states that paragraph 15 was moved to section (c), but there is no such section.

Paragraph 29

This paragraph is unclear. It states that both “predominant derivation” and “conformity on the essential characteristics” could be considered as starting points in providing an indication that a variety might be essentially derived. It is not clear whether this means that the fact that a variety is predominantly derived from and conforms to the initial variety in its essential characteristics are starting points for indicating that a variety is an EDV, in which case only the distinctness would need to be demonstrated, or whether it means that seeking indications of supposed derivation and supposed conformity in the essential characters can be the starting point for determining whether or not a variety is essentially derived.

ESTABLISHING WHETHER OR NOT A VARIETY IS ESSENTIALLY DERIVED

At the April 2014 meeting of the CAJ, Argentina offered to present its opinion as to whether determining if a variety was essentially derived or not is always a matter for breeders. In order to analyze this issue, we set out two theoretical examples and our respective opinions.

Situation A

Breeder A obtains Variety 1, which is NOT an essentially derived variety, and protects it.

Breeder B obtains Variety 2 from Variety 1.

Breeder A claims that Variety 2 is essentially derived from Variety 1 and Breeder B disagrees.

This example is a problem between Breeder B and Breeder A. In this example, we can say that it is a problem between breeders.

Situation B

Breeder A creates a variety, Variety 3, and protects it. Subsequently, the same Breeder A creates Varieties 4, 5 and 6 from Variety 3 and declares that they are EDVs of Variety 3 and does not protect them because he considers that they are covered by the breeder’s right for Variety 3.

Third-party users of Varieties 4, 5 and 6 consider that these varieties are NOT EDVs and can be marketed without permission from the breeder. In this second example, we consider that this is not a matter exclusively for the breeders. The enforcement authority must take action.

COMMENTS ON THE “EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION” UPOV/INF/12/5/ Draft 1

Paragraph 2.2.2. Regarding the concept of “*established practice*” in denominations consisting “solely of figures”, Argentina accepts the use of denominations consisting entirely of figures even in those species for which varieties in this form have not been registered. That is, the “established practice” is construed broadly and is not restricted to only one group.

Thus, it is proposed to add a paragraph (c) in which “established practice” is determined to be when registration has been accepted for one species or group, so that it can be used in other species which have not yet registered any variety whose denomination consists solely of figures.

Paragraph 2.3. As for the requirement that the denomination “should not [...] cause confusion concerning the identity of the breeder”, in our country this has led to the use of letters in the denominations identifying the breeder. In many designations, acronyms, which are known in the market as designating a company, are registered at the beginning of the denomination.

Accordingly, designations using such acronyms have been rejected when registration was requested by another company in order to comply with this provision and not create confusion about the identity of the breeder.

Following the licensing of the variety by the breeder, the licensee requested to change the denomination in order to record his own initials or another denomination for marketing purposes. This stems from the “exclusive licensing” of varieties which are marketed by the licensee, as some companies which lack their proprietary programs acquire breeding programs or varieties from third parties.

If the denomination change requested by the licensee is accepted, this may lead to confusion about the identity of the breeder. Companies have asked the agency to accept these changes, with the consent of the breeder that his variety bear the denomination that identifies another company.

Example:

- Breeder-Licensor: “SOL”
- Licensee: “DA”
- Variety registered: “SOL AMARILLO”
- A denomination change to “DA AMARILLO” is requested. The variety was not marketed but acceptance of the change means that the variety bears the denomination of a third party, not that of the breeder.

Argentina presents the matter to the UPOV Committee in order to ascertain whether or not this assumption can be considered to cause confusion about the identity of the breeder.

Paragraph 2.3.1

- (c) Argentina disagrees with this recommendation and with the example mentioned under this paragraph. In our country, breeders often use the same denomination, changing the figure, and it is not interpreted as implying that the varieties derived from one another.

Paragraph 2.3.3

- (a) The recommendation that for denomination with a combination of letters and figures or solely of figures, changing only ONE letter or figure may be considered not to cause confusion concerning the identity of the breeder is confusing. It implies that confusion may or may not be caused, seeming to leave it to the interpretation of Member States, which may lead to a variety of solutions. The recommendation should follow a clear pattern.

One way to provide clarity would be to adduce examples to this paragraph.

- (b) It is suggested that “denominations not consisting of a combination of letters and figures, or “solely of figures” be changed “all other denominations”.

On this point, in our country it has been established that when the denomination consists of two or more “bodies” or “terms” – usually one body consists of letters and the other of figures – a letter or figure should be changed in each body. The difference is analyzed independently IN EVERY body or term of the denomination.

- (i) It is proposed that an example in Spanish be added, such as “Helena” and “Elena” to address a situation in which there is a clear visual difference but not a phonetic one, since the letter “H” is mute in Spanish.