



Association for Plant Breeding for the Benefit of Society

CAJ-AG

Consideration by Correspondence

UPOV/EXN/PPM DRAFT 2

Explanatory Notes on Propagation and Propagating Material under the UPOV Convention

1. Harmonisation of PVP laws, going further than the UPOV Acts themselves, may be a goal of some actors, but is not and cannot be a UPOV goal, as UPOV members have very different agricultural systems, they are not bound by the same agreements, treaties or conventions and have different PVP laws based on their realities and needs.
2. Explanatory Notes cannot provide a standard definition. And it is certainly not necessary to have a standard definition in order to be effective. Nowhere in the TRIPS Agreement it is specified what an effective PVP legislation is like.
3. It is completely wrong to believe that UPOV provides protection for parts of varieties. Parts of varieties cannot be protected. UPOV has provided protection of plant varieties since 1961. This is done by defining acts with regard to plant propagating material.
4. The database from which information is drawn regarding the definition of propagating material in national PVP laws is unreliable. Only 39 out of 72 UPOV members were included.
5. The UPOV members had diverging definitions. But even if a majority had a similar definition, every member should keep the freedom to differ in their interpretation.
6. The non-exhaustive list of factors should in no way be cumulative, due to the different national legislations and circumstances.
7. All four points by Argentina should be supported.

UPOV/EXN/HRV/2 Draft 1

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

1. The wording adopted in the original Explanatory Notes UPOV/EXN/HRV/1 “Unauthorized acts can only occur in the territory of the member of the Union where a breeder’s rights has been granted and is in force.” is of utmost importance and must be retained.
2. Terms of the UPOV Conventions should be used consistently; no new terms should be introduced. For

example, instead of “propagating material”, terms such as “material that enables propagation” are used, e.g. in para 5 (ii), or para 7 (alternative text 2). They should be replaced by “propagating material”, as in the UPOV Conventions.

3. APBRES had reminded that contract farming is fast increasing and that private contracts should not prevent the enjoyment of the farmers’ privilege in cases where the optional exception applies. The UPOV Seminar on contracts of 2008 does not refer to the more recent proliferation and diversity of contractual arrangements and has not sufficiently addressed the circumventing of the optional exception. In particular as international value chains are being further developed in quantity and quality, new legal questions have arisen. This issue is very important; UPOV should address it in more detail.
4. The EXN is focusing on international trade issues between countries of differing PBR status. It does nothing to further clarify PBR in relation to harvested material from farm-saved seeds (examples 6 and 7). These examples should be deleted and the EXN focused on international trade issues between countries of differing PBR status.

5. Non-contractual responsibility:

According to the text proposal of the new para 9, even acts of buyers of harvested material which is sold in breach of PBR, including breeders’ conditions and limitations, are considered as a PBR offence. Buyers of harvested material, in order to be on the safe side, would have to ask vendors of harvested material for their license, and read and understand it. This is totally out of proportion.

There is moreover no reason why EU directive 864/2007 that is cited in the EU comment of 27 February 2014 on HRV as basis for this proposal, should be applied to all UPOV members.

6. Reasonable opportunity:

Para 14 has very unclear text with regard to “the territory concerned” It should clearly refer to the “territory where the right title was granted.”

Para 14 (Alternative text) proposes to put the burden of proof on the defendant who will have to prove that the rights holder (the plaintiff) could reasonably have exercised his right at an earlier stage. It should be up to the rights holder to prove that he could not exercise his right. The text should be deleted. The proposed text is moreover wrongly interpreted from the Russian comment of 17 December 2013.

7. If a country has chosen not to provide PVP for good reasons, i.e. the country is not a WTO member, or the country is a Least Developed Country and therefore for good reasons exempted from TRIPS Agreement (currently until 2021), this country should not be burdened with license fees if it exports harvested material. The whole idea of trade globalisation would be turned against countries that can cheaply produce and have an undeveloped sector of independent national breeders if industrialised countries impose license fees.
8. If a country where material is exported to, offers PVP rights for the species in question, but the variety in question is not protected, there may be good reasons for not protecting that variety in that country. The good reasons would be disregarded if the PBR applies when harvested material is exported back from that country to the first country.

UPOV/EXN/EDV/2 DRAFT 4

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention

While the mandate of the Diplomatic Conference should be included in the Preamble, discussions that took place in the running up of UPOV 91 should not be reiterated as they are already reflected in the Convention. 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.

The draft EXN is based on an approach to EDV that hinders innovation, making it difficult for new varieties to enter into the market, giving existing breeders a market monopoly and reducing healthy competition among breeders.

The concept of EDV in the draft EXN is biased if varieties of farmer-breeders are not considered as initial varieties, if they are not protected. But having no pvp right on a variety does not mean that the farmers have no rights at all on these varieties. The Farmers Rights under the FAO-Plant-treaty are just one example for such rights. Essential derivation could apply to varieties derived from such farmers' varieties. Such EDVs should not be protected in their own right.

On Alternative Dispute Settlement (ADR), private settlements should not 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.

UPOV/INF/12/5 DRAFT 1

Explanatory Notes on Variety Denominations under the UPOV Convention

On variety denomination, the text in para7.2 (c) is too weak with regard to change of denomination. There has been an example provided by South Africa (reproduced in document CAJ-AG/13/8/6) where a company wanted to sell a variety under a new name and/or under a new company name.

The relevant text in UPOV/INF/12/5 DRAFT 1 is

“(c) In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a registered denomination following a request by the breeder. ”

Farmers' experiences with a variety are obviously linked to the denomination. These experiences must not be rendered useless by a change of denomination after grant of a breeder's right. UPOV acts should not serve as market management tool, allowing varieties or companies that are unsuccessful in the market to be re-launched with new names and/or by other companies. Farmers adopt a variety when it fulfil their needs and reject when it doesn't. Therefore, UPOV should not undermine its mission of service for the benefit of society. The suggested text is too weak and should be redrafted as follows:

“(c) ~~In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a change~~ of a registered denomination following a request by the breeder ~~is generally not possible~~. **Exceptional circumstances will be considered on case by case basis. If the denomination is changed, the original denomination must remain transparent for the farmer and mentioned next to the new denomination.**”

Association for Plant Breeding for the Benefit of Society (APBREBES)

Email: contact@apbrebes.org

T: 0049 228 9480670, mob: 0049 177 669 1400

Postal address: Susanne Gura, APBREBES Coordinator, Burghofstr. 116, D-53229 Bonn, Germany

Internet: www.apbrebes.org