

UPOV  
Attn. of  
the Members of the CAJ-AG  
the Vice-Secretary General, Mr. P. Button  
34, chemin des Colombettes  
CH-1211 Genève 20  
Switzerland



Date: October 9, 2014

Dear Members of the CAJ-AG, dear Mr. Button,

On behalf of AIPH we would like to address the following to you.

With continuing interest AIPH follows the developments of the Explanatory Notes and the ample preparations which are made for these developments in the CAJ-Advisory Group. In relation to the explanatory notes AIPH noted the following issues at the CAJ-AG agenda of the forthcoming CAJ-AG meeting on October 14 and 17, 2014:

1. Essentially Derived Varieties
  - (a) Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (documents CAJ-AG/14/9/2 and UPOV/EXN/EDV/2 Draft 5)
2. Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (Revision) (document UPOV/EXN/HRV/2 Draft 2)

AIPH would like to take the opportunity to make some remarks concerning the above mentioned explanatory notes, in order that the CAJ-Advisory Group can take knowledge about AIPH's considerations. In AIPH's opinion, the growers need a clear and good functioning international PVR system. The large economic necessity for growers that new varieties are available (in enough quantity and good quality) depends strongly on a good and clear functioning international PVR system.

UPOV is already familiar with AIPH's point of view that plant breeders right is an intellectual property right (IP), because the breeding of new plant varieties benefit the progress of mankind and society. Consequently this means a PBR (and any other IP-right) is an abstract right, as PBR is a product of the mind or in other words: it is an attainment of the spirit. This means it does not rest on a plant or something tangible like the ownership of a house does. The latter you can see and feel. A PBR you cannot hear, smell, see or feel, because it occurs in the human brain.

IP is also an absolute right, this means a right which you can maintain to everyone.

As said, goal of PBR is to stimulate plant breeding by an intellectual property right system as it benefits the progress of mankind and society. Therefore the breeder gets a monopoly, be it under strict conditions. Examples of these conditions are the breeders exemption or the protection for propagating material, not for harvested material, besides one exception: the so called nevertheless-condition as formulated in article 14, sub 2 of the UPOV Act 1991. This condition contents that the scope is not restricted to the propagating material if the breeder has had no reasonable opportunity to exercise his right in relation to the said propagating material. In this case he still can take action to get his royalties while the product has reached its final stage.

AIPH underlines that the scope of PVR as such is restricted to propagating material and not to the final product.

The whole UPOV Convention, the European PVR system and the national legislations are based on the principle that the scope of PVR is restricted to propagating material and not to the final product. AIPH's opinion is that as soon as PVR activities go into regulation to control and to limit the trade chain, this is not allowed!

Against this background of the need of a legal correct and good working system, AIPH would like to contribute the following to the above two mentioned explanatory notes.

#### 1. Explanatory Notes on Essential Derived Varieties (EDV)

In AIPH's opinion UPOV should focus on the real important discussion, this being the distances between varieties and not on the getting more and more complicated explanations of the articles of EDV in the UPOV convention 1991. The essence of the discussion should be: is there a new variety, yes or no? If one can live with a certain bandwidth between varieties (which should be possible at least in ornamentals), the issue of EDV could be solved in a less complicated and more legal clear way. AIPH is very willing to give contributions to the thoughts/discussions to come to objective criteria to examine the distinction.

In AIPH's opinion the "essential characteristics" that should be considered in the assessment of whether a variety is an EDV are the same characteristics that are being used in the DUS examination. Therefore the discussion can focus on the question which characteristics are deemed relevant for the DUS testing.

#### 2. Explanatory Notes on Acts in Respect of Harvested Material

In AIPH's opinion, the interpretation as suggested by the EU of the concept 'unauthorized use' does give a useful contribution to the meaning and right explanation of this issue and will consequently contribute to a legal correct and good working PBR system. AIPH emphasizes the following important suggestions in comparison with the current interpretation of term "unauthorized use" in the explanatory notes on Harvested Material.

1. Unauthorized use can not only take place in countries where the variety is protected by PVR, but also in a country where a) no PVR system exist or b) in a country where there is a PVR system (for the concerning variety), but the concerning variety is not protected in this country. Unauthorised use means in AIPH's opinion that there has not been given an explicit authorisation for the use as propagating material. Once authorisation is given the PVR-right is exhausted. Consequently without an authorisation there is also no exhaustion.

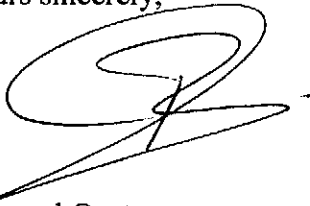
2. In the current explanatory notes it is made explicit that Unauthorized use can also take place in relation to the end product (harvested material) that is capable of being used as propagating material. To this end it is proposed to delete the word "propagate" in the current explanatory notes and thus to make it clear that export of all "material" (including end product) that can serve as propagating material for a country without a PVR system, does not lead to exhaustion of the right, so that in the case of import of the concerning materials, the PBR right can be maintained.

In AIPH's opinion it is important to keep the concerning example of this situation in the explanatory notes, because it often happens that especially the end product is used for 'illegal' propagation. This happens outside the control of the breeder and his licensed growers. The aim is to explain the exception of Article 16, 1, ii (... except when it concerns the export for final consumption purposes) UPOV Act 1991, as it is intended in our opinion, namely to prevent abuse of (final) product/harvested material because it's being used for 'illegal' propagation purposes.

Thank you very much in advance for your attention and AIPH would be pleased if these comments could be transmitted to all the participants of the CAJ-AG session, so that they can give consideration to these matters.

On behalf of the AIPH members,

yours sincerely,



**Bernard Oosterom**  
Vice President and Chairman of the Committee for Novelty Protection



**Mia Buma**  
Secretary Committee for Novelty Protection