



Implementing Guidance about Essentially Derived Varieties through “Soft Law”

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Overview

- A problem?
- UPOV 1991 obligations
- A “soft law” solution
 - » What is “soft law” (and “hard law”)?
 - » Forms of “soft law”
- Case study – Bonn Guidelines
- Conclusions



The problem ...

- UPOV 1991
 - » Introduced “essentially derived varieties” (or EDVs)
 - » Leaves concept to be developed by Council of UPOV
- 2009 Explanatory Note ... but still need clear guidance?
- Is “soft law” an option?

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UPOV 1991 obligations

- Art 2 – “Each Contracting Party shall grant and protect breeders’ rights”
- Art 30 – “shall adopt all measures necessary” including:
 - » Appropriate legal remedies
 - » Granting authority

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UPOV 1991 obligations ...

- Essentially international obligations imposed through domestic laws
 - » Granting authority needs to interpret UPOV obligations and standards
 - » Courts need to interpret UPOV obligations and standards
- What standards and what obligations?
 - » “Soft law” is an option

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What is “soft law” (and “hard law”)?

- “hard law”
 - » formally legally binding laws
 - precise laws
 - impose obligations
 - interpreted and implemented by a third party
- “soft law”
 - » “hard law” weakened along one of the dimensions of:
 - precision
 - obligation
 - delegation

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What is “soft law” (and “hard law”)?

“soft law” is something less than formally legally binding “hard law” along a continuum of relatively less binding. The consequence of “soft law” is therefore to characterize the degree to which an instrument is precise, the degree of the binding legal obligation, and the degree of delegation of interpretation and implementation

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Advantages of “soft law”

- Often a way station to harder legislation
- Deals effectively with uncertainty by allowing actors to learn about impacts over time
- Facilitates compromise by allowing actors to agree despite having different interests, values, time horizons, power, and so on

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Forms of “soft law” under UPOV 1991

- Council of UPOV
 - » “in general, take all necessary decisions to ensure the efficient functioning of the Union”
- Office of the Union
 - » “carry out all the duties and tasks entrusted to it by the Council”

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Forms of “soft law” under UPOV 1991 ...

Already promulgated some ‘soft law’:

- Explanatory Notes, Guidance, Guidelines, Rules, Mechanisms, Lists, Statistics, Reports, Press Releases, Experience and Cooperation reports, “Assistance” webpage, and so on

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Case Study – Bonn Guidelines

1. Frame the issue from the perspective as one of the many issues that need to be resolved
2. Harness the existing bureaucratic machinery to drive and regularly benchmark progress
3. Actively collect materials form all stakeholders

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Case Study – Bonn Guidelines ...

4. Establish different groupings (working parties, expert panels, and the like) to address particular contentious issues
5. Prepare the formal outcomes and recommendations in a way that does not finally decide issues
6. Make the final outputs broadly informative, flexible and as part of an evolving process

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Conclusions

- UPOV 1991 leaves EDVs ambiguous
- “Soft law” is an option
- Council and Office have sufficient power to make and issue “soft laws”
- Bonn Guidelines provides a case study and some useful lessons