



Mr. Peter Button
UPOV
34 chemin des Colombettes
CH-1211 Geneva 20

21 January 2022

Contribution in response to UPOV Circular E-21/228

Dear Mr. Button,

The AFSTA (African Seed Trade Association), APSA (Asia and Pacific Seed Alliance), CIOFORA, Crop Life International, Euroseeds, ISF (International Seed Federation), and SAA (Seed Association of the Americas) represent the interests of thousands of companies, universities and research institutes, active in breeding, research, production and marketing of agricultural, horticultural, ornamental and fruit plant varieties.

Following your request expressed in Circular E-21/228, we would like to provide you with our comments on the three Explanatory Notes (“EXNs”) that are subject to a UPOV revision exercise, namely the EXNs on Propagating Material, Harvested Material and Provisional Protection.¹

Enclosed you will find the EXNs with draft text proposals both in track changed versions and clean versions. In order for readers of the proposed texts to better understand the rationale of the proposed amendments, a brief background with explanations is found in the enclosed Cover Note.

¹ - “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1) - 2013

- “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/1) - 2017

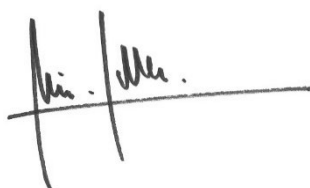
- “Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/2) – 2015

Due to the short deadlines, the holiday periods and the internal consulting procedures of companies and breeders' associations, a final set of proposals have not yet been adopted. For these reasons the signing associations reserve the right to amend or retrieve any proposals found in the enclosed documents.

Lastly, we would like to thank UPOV and its members for taking the initiative to revise these very important EXNs and we will actively contribute in order to make the process successful.

We are staying at your disposal may you have further questions,

Sincerely Yours,



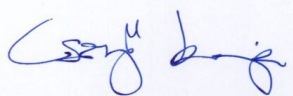
Michael Keller
ISF Secretary General



Dr. Edgar Krieger
CIOPORA Secretary General



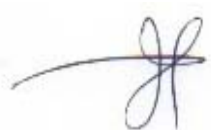
Kanokwan Chodchoey
APSA Executive Director



Szonja Csörgő
Euroseeds IP Director



John Mc Murdy
CLI Vice President
of Innovation and Development



Justin Rakotoarisona
AFSTA Secretary General



Diego Risso
SAA Executive Director

Annexes

- The three Explanatory notes with proposed amendments in track changes
- The three Explanatory Notes with proposed amendments, clean versions
- Cover Note with explanations on the rationale for the proposed amendments

Cover note to UPOV in response to UPOV Circular E-21/228

Date 21 January 2022

On behalf of AFSTA (African Seed Trade Association), APSA (Asia and Pacific Seed Alliance), CIOFORA, Crop Life International, Euroseeds, ISF (International Seed Federation), and SAA (Seed Association of the Americas).

1. General

The most recent UPOV Act is more than 30 years old. During this period of time, great changes in agriculture, horticulture, farming, plant breeding and trade have taken place. Experiences show that there is a need to update the Explanatory Notes on a regular basis, taking into account the developments in jurisprudence and plant breeding. Our attached proposals reflect on those changes and provide fair and balanced solutions. We look forward to discussing these proposals with UPOV members in a constructive manner.

- The breeders' associations have discussed possible amendments to the explanatory notes and some text proposals have been drafted which are enclosed. However, due to the short deadlines, the holiday periods and the internal consulting procedures of companies and breeders' associations, a final set of proposals have not yet been adopted. For these reasons the breeders' associations reserve the right to amend or retrieve any proposals found in the enclosed documents.
- The breeders' associations are of the opinion that the UPOV 1991 Act, as well as the UPOV 1978 Act, provide a minimum framework for the protection of new varieties of plants. Therefore, members of the Union are free to provide broader protection than the one provided for in the respective UPOV Acts. In those countries where this is the case, it has been shown that farmers have more access to new and improved varieties.
- The breeders' associations believe that the EXNs in question need an update following experiences made in applying the relevant provisions in practice. The plant breeding sector needs legal foreseeability in order to decide on strategies in relation to breeding activities, an activity that is by definition long term. Clarity and harmonisation are key, not only for breeders but also to farmers and growers.
- The proposals made are without prejudice to the scope of the exemptions as laid down in the UPOV Convention, and to the principle of exhaustion.

2. Explanatory Notes on Propagating Material

- The UPOV Convention does not provide a definition of "propagating material". The term propagating material is key to determining the scope of the breeders' rights and how it can be enforced. It is important that UPOV members take a common approach when defining propagating material. An unharmonized situation leads to legal uncertainties for breeders and farmers, especially those with cross-border activities. In addition, it is important that the scope of the definition is sufficiently broad in order to give the rights the effect that were intended by the founders of the Convention.

- The existing explanatory notes on propagating material state that propagating material encompasses reproductive and vegetative propagating material. The approach then taken is to provide a non-exhaustive list of examples of factors that have been considered by members of the Union in relation to whether material is propagating material.
- This approach leads to an unharmonized situation amongst UPOV members since different choices are made by different members when implementing the Convention.
- In addition, the approach taken by some UPOV Members means that the scope of the right is limited and makes enforcement cumbersome and sometimes impossible.
- It is therefore proposed that the explanatory notes recommend one approach. The proposal of the breeders' associations is, in essence, that plants or parts of plants that are capable to produce new plants true to type should be considered as propagating material. This is the approach already taken in various UPOV Members.¹

3. Explanatory Notes on Harvested Material

- The revision of the UPOV Convention in 1991 has been a very significant attempt to align the level of protection afforded to breeders as users' needs. Together with the introduction, among others, of the concept of EDV and the broader list of acts reserved to the PVP holder, the extension of the protection to the harvested material provided by Article 14-2 is a key feature of the 1991 UPOV Act.
- As regards harvested material, the Convention imposes two conditions for the breeders' rights before the right can be exercised in relation to such material:
 - the harvested material must have been obtained from the unauthorized use of the propagating material of the protected variety.
 - The PVP owner didn't have a reasonable opportunity to exercise the rights in relation to the said unauthorized use of the propagating material.
- It is important that explanatory notes explain how the conditions should be uniformly interpreted in order to give effect to the promises of the 1991 Convention.

The most important point to clarify is the condition "unauthorized use". Any use shall be considered 'unauthorized' if the breeder has not given an authorization or consent to the use.

Another important question is on whom the burden of proof lies to when assessing if the two conditions are fulfilled. After more than 30 years of experiences, it is clear that when the harvested material of a protected variety is internationally traded, it is impossible for the breeder to trace back whether the grower of the harvested material (unless it is a licensee) was authorized or not. Proving the negative, that there is no authorization, is impossible. The holder cannot establish that s/he **didn't** give an authorization to such production nor that s/he **didn't** have a reasonable opportunity to exercise the rights vis-à-vis the unauthorized use of the propagating material.

¹ Australia, Canada, the European Union, Hungary, Mexico, Rep. of Moldova, Morocco, New Zealand, Nicaragua, Romania, Singapore, Slovenia, South Africa, Tunisia, Ukraine

The essence of the proposal of the breeders' associations is that there should not be a presumption that the holder of the breeders right has authorized someone who possesses the protected plant material in question to use it. Likewise, in cases where there is no legal basis for the holder of the breeders' right to give an authorization for the use of the propagating material, it should be considered that such use has not been authorized by the breeder within the meaning of the Art 14.3 UPOV 91.

Accordingly, anyone dealing with the harvested material of a protected plant variety is obliged to check or to have checked in the supply chain and prove that it has been obtained from an authorized use of the propagating material of that variety. It is not up to the holder of the breeder's right to prove that s/he has not given the authorization (impossible to prove that an act has not taken place, whilst easy for someone to show that s/he has been authorized to do something).

4. Provisional Protection

- The UPOV Convention expressly includes the concept of "provisional protection", establishing the purpose to safeguard the interests of the breeder during the period between the filing, or the publication, of the application for the grant of a breeder's right, and the grant of that right. The use of the term "**provisional protection**" clearly indicates the intention to attribute **effective protection** to the breeder already during that period, beyond the **retroactive** compensation in which the equitable remuneration that the breeder should be **a posteriori** entitled to claim (from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization) would consist of. The use of the text "**at least**" clarifies that the members of the Union may already provide full protection in this period.
- The legal situation in which the plant material propagated during the period between the filing (or publication) and the grant of the PBR will remain, after the grant of the right, entirely depends on the notion of "provisional protection". This is a crucial issue for specific species (woody plants such as fruit trees) where, once reproduced without authorization, the plants could remain under production for many years. If no effective protection is granted to the breeder already from the filing of the application, the legitimacy of the pre-grant acts would persist after grant, effectively 'legalizing' the latter acts. That would be an unwelcome incentive for unscrupulous growers and nurseries to start propagating varieties under the process of protection.
- Full scope of protection during the period of "provisional protection" is a key incentive for breeders for making quickly available their state-of-the-art varieties to the market. This is particularly important for multiannual plants (like fruit trees) that require several years of field trials to ascertain the fulfilment of DUS requisites, i.e., that are affected by longer periods of time between application and granting of the breeder's right (even more than five years in some cases). Furthermore, for those perennial plants, propagating material obtained during the period of provisional protection usually continues being cultivated and producing harvested material (fruits) for many years after the grant of the breeder's right, i.e., during the period of protection. In the case of annual plants, the breeder can exercise the right every time a third party obtains or reproduces propagating material once the protection is provided. On the other hand, in case of perennial plants, such as fruit trees, the breeder would not have any opportunity to exercise the right over propagating material (nor the harvested material), if the grower planted and grew the propagating material which was obtained before the protection was granted (during the provisional protection period).

- After years of breeding new varieties, plant breeders seek to bring the benefits of innovations quickly to growers and consumers. A narrow interpretation of the scope of “provisional protection” (and “unauthorized use”) can result in serious delays in making available newest, innovative varieties that could help to solve the many challenges we are facing (growing population, diseases, climate change, etc.) to the market, as there would not be an incentive but rather risks for breeders to commercialize their varieties before PBR is granted.
- The proposal of the breeders associations is that full protection should be provided already from the filing (or publication) of the application for the grant of a breeder’s right, and during the entire period of provisional protection.