

United States of America

U.S. Comments on UPOV Circular E-20/093 (July 9, 2020), ANNEX III (Appendices I [Policy] & II [Practice])

The United States believes that any revisions to the *Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention (Explanatory Note on EDV)* should result in increased clarity to help resolve the difficulties surrounding EDV determinations. With this aim in mind, the United States offers the following specific points to guide the working group on its revisions to the *Explanatory Note on EDV*:

- The 1991 Act of the UPOV Convention establishes a morphological-based regime for plant variety protection. While modern genetic tools may yield useful evidence in establishing EDV, Art. 14(5)(b)(ii) & (iii) both turn on phenotypic distinctions (i.e., “clearly distinguishable from the initial variety” and “conforms to the initial variety in the expression of the essential characteristics”). The United States believes that any standardization of genetic thresholds for EDV will be useful for the international community, yet at the same time believes member states ultimately should value any such genetic evidence of EDV consistent with their own evidentiary regimes.
- The working group should seek to find support for particular examples of EDV, either from case law of member jurisdictions, or from other areas of consensus which the group can elaborate on the terms used in the treaty text (e.g., “predominantly derived,” “clearly distinguishable from the initial variety,” and/or “conforms to the initial variety in the expression of the essential characteristics”, etc.).
- Further, the process of establishing any useful threshold values for genetic conformity assessments should be mutually arrived at by all interested UPOV members and stakeholders. The costs and impacts on small and medium sized entities should be considered (i.e., is genetic testing so cost prohibitive that small breeders cannot access the technology). Moreover, the working group should consider if certain classes of breeding techniques should trigger a prima facie (but rebuttable) case of “predominant derivations.” Such classes of techniques could include, but not be limited to derivation of mutants by irradiation, point gene edits, or other techniques.
- Relatedly, the United States believes that ultimate EDV determinations are best left to national courts or to an arbitration process. Any granting authority decision on EDV could be used as rebuttable evidence of an EDV in national courts or arbitration processes. However, the United States notes that the 1991 Act of the Convention does not require offices to carry out EDV determinations, and the working group cannot serve as a means to create such a requirement.
- The United States does not support any requirement for variety origination disclosure requirements via the *Explanatory Note on EDV*. No such requirement is established in any Act of the UPOV Convention, and a working group on EDV is not the appropriate forum to introduce such an issue. Doing so will only detract from the group’s task of clarifying EDV.
- Similarly, the United States does not support any scope of work that would mandate examination practices at national or regional plant variety protection offices. Further, any effort by the working group to craft application forms or processes requiring certain information is outside the scope of the treaty and should be outside the scope of the working group (i.e., the working group should work toward clarifying the existing treaty text on EDV).

With the above aims in mind, the United States believes that the *Explanatory Note on EDV* may be revised to bring more clarity to the issue of EDV.