

## Position on Plant Variety Protection Systems

### CONTEXT

For centuries, the creation of better performing plant varieties contributed to answer the increasing needs of mankind. To reach the future society expectations plant breeding is one of the key factors for the development of sustainable agriculture.

Plant breeding depends on two main factors:

- ✓ The use of genetic material including existing plant varieties to create new varieties
- ✓ The research effort, either scientific or monetary, devoted to it

The UPOV<sup>1</sup> Convention combined both (i) the principle of free use of commercialised material of protected varieties for the purpose of further breeding and (ii) the protection of plant breeding work. The 1961 UPOV convention, regularly updated, and substantially strengthened by the 1991 Act (UPOV 1991) has been the framework allowing 40 years of dynamism for the plant breeding community, thus demonstrating its capacity to fulfil its mission.

The TRIPS<sup>2</sup> Agreement of the World Trade Organization (WTO) provides Standards concerning the availability, scope and use of Intellectual Property Rights and requires Members to set up a legal frame complying with such Standards.

For the protection of plant varieties, Article 27.3b of the TRIPS Agreement leaves the choice between patents and/or an effective *sui generis* system, such as provided for by the UPOV convention.

In accordance with Article 71.1. of the TRIPS Agreement, the Council for TRIPS must review the TRIPS Agreement in 2002. In the prospect of such

<sup>1</sup> UPOV: *Union pour la Protection des Obtentions Végétales*

<sup>2</sup> TRIPs Trade – *related Aspects of Intellectual Property Rights*

review, various suggestions have been made that are detrimental to the concept of the UPOV Convention which carefully balances the interests of plant breeders and the public. It has for example been proposed to accept only the Patent system as an effective system for protection of plant varieties or to amend Art.53.b of the EPC<sup>3</sup> such that plant varieties *per se* are no longer exempt from patent protection and it has even been proposed to abolish the concept of plant variety protection as a whole.

ESA is deeply concerned about these suggestions. In this context, ESA, restates its convictions :

#### **UPOV 1991**

**UPOV 1991 is the best existing intellectual property right system tailored to protect plant varieties *per se*.**

**The plant variety intellectual property rights provided for by UPOV 1991 are well balanced, as the system allows**

- (i) recognition and effective protection of plant varieties *per se***
- (ii) as well as access to genetic variability by the free usability of protected commercialised plant varieties for further breeding work.**

**Thus ensuring an appropriate framework for breeders' activity while providing the basis for a competitive environment.**

This balance is based on the following features of UPOV 1991:

- UPOV 1991 is specific of the very nature of the object it protects: the plant variety;
- UPOV 1991 authorizes anyone to use commercialised material of a protected variety as an initial source of variation for plant breeding thus

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<sup>3</sup> *EPC : European Patent Convention*

allowing access to the genetic variability. This is known as the “breeders’ exemption”.

- UPOV 1991 addresses the problem of plagiarism by virtue of the concept of Essential Derivation. This concept provides that the consent of the breeder of a protected initial variety (IV) is required for commercial use of a new variety, which retains the essential characteristics of that IV from which it was essentially derived.
- UPOV 1991 offers protectability for all plants, genera and species to which it applies and extends the scope of protection to harvested material under specific circumstances.
- The protection granted by this right is strictly limited to the plant variety and varieties essentially derived there from, but covers neither the processes used to create the protected variety, nor the constitutive genetic characteristics of the protected plant variety.

These features document the relevance and the balance of the UPOV 1991 system for the protection of plant varieties per se in comparison with other intellectual property rights in particular the patent system.

## **BIOTECHNOLOGICAL INVENTIONS**

### **Patent system and patent research exemption**

ESA supports the exclusion from patentability of plant varieties per se. Irrespective of the above, it is ESA's opinion that the patent system is the most appropriate system for protection of biotechnological inventions in general, such as for plants having non-indigenous DNA incorporated into their genome, vectors, plasmids, inventive processes for transformation of plants, processes resulting in an improved useful quality of plant material found in nature, methods, uses, etc., provided of course the patentability criteria are met.

However, it is ESA's position, that patented plants containing as characterizing element(s) one or more non-indigenous DNA components in their genome, should be freely usable for developing new plant varieties. The commercial use of any such newly developed plant variety should be free of charge, if said new plant variety no longer contains the element(s) that characterized the patented invention.

In any case ESA asks for an interpretation, which allows the use of patented material up to the commercial use of the variety.

### **Compulsory Cross-Licensing**

ESA is generally not in favor of compulsory licensing.

Article 12 of Directive 98/44/EC on the legal protection of biotechnological inventions, provides for conditions for obtaining compulsory cross-licenses. Further clarification is needed as to what “constitutes significant technical progress of considerable economic interest” of a plant variety in comparison to the patented invention as specified in Sub-Art. 12.3.(b) thereof. Irrespective of that, it is ESAs position that the party interested in a license should start negotiations at an early development stage (as suggested in Sub-Art.12.3.(a)).

## **REVISION OF TRIPS**

With this conviction, ESA states positively its positions on the following points:

- We are convinced that the protection of plant varieties per se by Utility Patents is not appropriate and creates legal uncertainties for plants breeders. The lack of a mechanism allowing free use of the genetic variability within patented plant material (such as by the breeders exemption) could create a monopolistic holding of existing genetic variability being not in conformity with the needs of plant breeding which is based on the use of existing plant varieties.
- Within the frame of the revision of article 27.3.b) of the TRIPs Agreement of the WTO, we especially underline the importance of the following points:
  - ✓ We support that it will be mandatory for member states to establish an effective *sui generis* system for protecting plant varieties in their national law;
  - ✓ We ask for the recognition of the 1991 UPOV convention as the most suitable *sui generis* system for protecting plant varieties per se.