

**AGRICULTURAL BIODIVERSITY:  
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FARMERS' RIGHTS AND *SUI GENERIS*  
PROTECTION OF PLANT VARIETIES**

**UNICE PRELIMINARY COMMENTS**

The general TRIPs rule for patents is that patent rights should be available in all technical areas, without discrimination (Article 27.1). Even if exceptions to this general principle are available for plants and animals in Article 27.2, the Agreement also states, that “*Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof*” (Article 27.3(b)).

In the USA, breeders can choose either or both of these possibilities<sup>1</sup>. In Europe (EU and Switzerland), plant varieties are not patentable as such<sup>2</sup>: protection can only be obtained through UPOV legislation. This creates some lack of flexibility for European companies. However, the European Directive on Biotechnology 98/44/EC tends to clarify this issue by providing that inventions which concern plants or animals shall be patentable if the technical feasibility of the invention is not confined to any particular plant or animal variety.

What are the **essentials of a *sui generis* system** for plant variety protection?

It has to:

- Be effective (as required by TRIPs);
- Protect against use of unfair commercial competition;
- Ensure a clear definition of the subject matter; namely, a variety has to be distinctive, uniform and stable.

UPOV model law incorporates the three above-mentioned definition factors and provides room for implementation of an “effective *sui generis* system”. In this context, the review of Article 27.3(b) should not lead to a weakening of the protection required for plant varieties. UNICE shares the opinion that it might be useful to insert a specific reference to the UPOV system when the TRIPs-relevant provisions are reviewed.

The UPOV Convention was updated in 1991 because of the development of genetic engineering. Changes include: a broader scope, increased protection for the breeder, farm-saved seed (farmers' privilege), and “essentially derived” varieties (promotion of biodiversity via “dependency” provisions). The text achieves a balance between the products of biotechnology and farmers' varieties and wild material; and between breeder rights and farmer rights. It also recognises that plant breeder rights provided under the UPOV Convention were not inconsistent with the International Undertaking of FAO.

In addition, FAO has developed a comprehensive international agreement dealing with plant genetic resources for food and agriculture.

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<sup>1</sup> Under certain circumstances, a further option exists.

<sup>2</sup> European Patent Convention, Art.53 (b)

However, FAO's interest in TRIPs concerns intellectual property rights over plant varieties, animal breeds and related technologies. With respect to the mandate endorsed by FAO in the field of technical assistance and legal assistance, UNICE supports EC initiatives in this framework and remains committed to providing further assistance (e.g. reviewing and analysing the statutory instruments in force; legislative experience with identifying the objectives to be attained for the proposed legislation in the light of government priorities; submitting recommendations; assisting in the formulation of legislation; supporting workshops and meetings on both technical and legal matters related to the TRIPs Agreement).

In this context, UNICE encourages the Commission and the Member States to continue their actions within the UN fora with a view to:

- Promoting the use of modern technologies, including biotechnologies;
- Creating incentives whilst protecting intellectual property: in order to ensure the development of their relevant industry, it is essential that all countries adopt plant variety protection laws based on the UPOV Convention that has proved its effectiveness;
- Favouring access to plant genetic resources for food and agriculture; and
- Setting up an efficient system of benefit-sharing under the CBD.

**UNICE shares the opinion that suitable intellectual property protection for plant varieties via either patent rules or a *sui generis* system – and preferably both – is indispensable in order to ensure innovation.**

**UNICE believes that the minimum standards contained under the TRIPs provisions should be maintained as well as underpinned by technical assistance.**

**UNICE urges that such protection for plant varieties should be made available at the lowest possible cost in order to make protection available for all innovators in this field.**

**UNICE supports the view suggesting that Article 27.3 (b) should refer expressly to UPOV and clearly state that legislation in conformity with the Convention fully meets the TRIPs requirements.**

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