THE ROLE OF “SOFT LAW” GUIDANCE IN DIFFERENT JURISDICTIONS

Mr. Charles Lawson, Associate Professor, School of Law, Griffith University, Nathan Queensland, Australia

This paper details the potential of ‘soft law’ to promulgate instruments about the conception of ‘essentially derived varieties’ introduced by the International Convention for the Protection of New Varieties of Plants in 1991 (UPOV 1991). After addressing the forms of ‘soft law’ possible under the UPOV 1991 the paper provides a case study example of adopting the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation under the United Nations Convention on Biological Diversity (CBD) as a ‘soft law’ means of addressing the uncertain and contentious access and benefit-sharing obligations. The paper concludes with some key learnings for adopting ‘soft law’ instruments.

1. Introduction

The International Convention for the Protection of New Varieties of Plants in 1991 (UPOV 1991) introduced the concept of ‘essentially derived varieties’ (EDVs) as an expansion of the scope of breeder’s rights. The UPOV 1991 text deems a plant variety as an EDV according to a threshold standard and then provides possible examples, albeit key terms, such as ‘predominantly derived’ and ‘essential characteristics’, remain uncertain. At the Diplomatic Conference on the adoption of the EDV provision the conference resolved:

The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19, 1991, requests the Secretary-General of UPOV to start work immediately after the Conference on the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties.

Over time the Council of UPOV has sought to clarify the meaning of EDVs issuing an explanatory note in 2009. More recently UPOV’s Administrative and Legal Committee (CAJ) and Administrative and Legal Committee Advisory Group (CAJ-AG) have again been considering the scope of EDVs preparing a revised version of the explanatory note. Despite ongoing discussions the participants have been unable to settle on common understandings about key elements of the expressed UPOV 1991-expressed EDV standard. Further, as the UPOV 1991 obligations are implemented through domestic laws then it is the

6 See CAJ-AG/12/7/3, above n 3; Administrative and Legal Committee Advisory Group, Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision), Sixth Session (2011) CAJ-AG/11/6/3; Administrative and Legal
courts of Contracting Parties that will ultimately determine the meanings. So far, however, the courts have had difficulty applying the UPOV 1991 standards and the ‘available court decisions [are] contradictory and not helpful’. Perhaps ‘if there was clear guidance the courts would have less need for interpretation’. This paper considers the kinds of ‘soft law’ instruments that might be made under the auspices of the UPOV 1991 that could be useful to plant breeders, courts and others as authoritative sources for interpreting and applying the UPOV 1991 EDV standards.

The paper is structured as follows: Part 2 outlines the obligations imposed on Contracting Parties to UPOV 1991 highlighting that UPOV 1991 is implemented through domestic laws for granting and protecting breeders’ rights; Part 3 sets out a conception of ‘soft law’ in distinction to ‘hard law’; Part 4 outlines the UPOV 1991 obligations to identify the sources and scope of powers available to promulgate ‘soft law’ instruments; Part 5 sets out a case study of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation (Bonn Guidelines) under the United Nations Convention on Biological Diversity (CBD) to illustrate the elegance of ‘soft law’ in dealing with a deeply contested and intractable issue; and Part 6 sets out some conclusions including the key learnings from the Bonn Guidelines experience that might be adopted in promulgating ‘soft law’ instruments. These conclusions are that ‘soft law’ instruments are eminently possible under UPOV 1991 and that such instruments could be useful to plant breeders, courts and others as authoritative sources for interpreting and applying the UPOV 1991 EDV standards.

2. UPOV 1991 obligations

The basic obligation of a UPOV 1991 Contracting Party is that ‘Each Contracting Party shall grant and protect breeders’ rights’. The agreement then imposes requirements on Members, providing:

Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:

(i) Provide for appropriate legal remedies for the effective enforcement of breeders’ rights;
(ii) Maintain an authority entrusted with the task of granting breeders’ rights or entrust the said task to an authority maintained by another Contracting Party;
(iii) Ensure that the public is informed through the regular publication of information concerning;
   - Applications for and grants of breeders’ rights; and
   - Proposed and approved denominations.

These measures effectively require each Contracting Party to establish laws within its jurisdiction to administer the granting of plant breeder’s rights consistent with UPOV requirement for a plant breeder’s right where the variety is ‘new’, ‘distinct’, ‘uniform’ and ‘stable’, and a means of enforcing a plant breeder’s right once granted. This has been achieved through legislation of a plant breeder’s right, governmental agencies to assess and grant a plant breeder’s right and a court system to enforce infringements of plant breeder’s rights. For example, the Australian Parliament has adopted the Plant Breeder’s Rights Act 1994 (Cth) that is administered by the governmental agency IP Australia, and infringement of the plant breeder’s rights is resolved through the courts. Important, as a consequence of UPOV 1991’s form, implementing the obligations depends on Contracting Parties interpreting UPOV 1991 and reducing the requirements to legislation in the context of their domestic legal systems. It is then these domestic standards that are administered by the governmental agency and subject to scrutiny by the courts of the Contracting Party.


8 CAJ-AG/12/7/7, above n 5, [27].
9 CAJ-AG/12/7/7, above n 5, [30].
11 International Convention for the Protection of New Varieties of Plants, Article 30(1).
14 Plant Breeder’s Rights Act 1994 (Cth) as s 3 (‘Court’) and 56.
According to UPOV 1991 the Contracting Parties are ‘members of the Union’\(^\text{15}\). The organs of the Union are the ‘Council’ and the ‘Office of the Union’\(^\text{16}\). And the ‘tasks of the Council’ include the very broad power to ‘in general, take all necessary decisions to ensure the efficient functioning of the Union’\(^\text{17}\). Decisions addressing the ‘tasks of the Council’ require a ‘simple majority of the votes cast’ by members\(^\text{18}\). To change UPOV 1991 there would need to be a formal conference of Contracting Parties\(^\text{19}\) and a majority of ‘three-fourths of the votes cast’\(^\text{20}\). An alternative and perhaps easier means of seeking change would be to adopt various ‘soft laws’ to establish norms. These are considered next.

3. **What is ‘soft law’ (and ‘hard law’)?**

There remains some confusion and disagreement about exactly what is ‘soft law’, how it might operate and how it might contrast with ‘hard law’\(^\text{21}\). Perhaps the most useful understanding for ‘soft law’ is in distinction to ‘hard law’. For present purposes ‘hard law’ might be conceived as formally legally binding laws (being precise laws that impose obligations and that are interpreted and implemented by a third party), and become ‘soft law’ if the laws ‘are weakened along one of the dimensions of obligation, precision, and delegation\(^\text{22}\):

- **Obligation** means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. **Precision** means that rules unambiguously define the conduct they require, authorize, or proscribe. **Delegation** means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules\(^\text{23}\).

According to this understanding, ‘soft law’ is something less than formally legally binding ‘hard law’ along a continuum of relatively less binding\(^\text{24}\). 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. With these flexibilities ‘soft law’ has advantages:

... soft law is sometimes designed as a way station to harder legalization, but often it is preferable on its own terms. Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own. Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization. This is especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty. Soft legalization also provides certain benefits not available under hard legalization. It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time. In addition, soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power (footnotes omitted)\(^\text{25}\).

---

\(^{15}\) International Convention for the Protection of New Varieties of Plants, Article 23.

\(^{16}\) International Convention for the Protection of New Varieties of Plants, Article 25.

\(^{17}\) International Convention for the Protection of New Varieties of Plants, Article 26(5)(x).

\(^{18}\) International Convention for the Protection of New Varieties of Plants, Article 26(7).

\(^{19}\) International Convention for the Protection of New Varieties of Plants, Article 38(1).

\(^{20}\) International Convention for the Protection of New Varieties of Plants, Articles 26(7) and 38(2).


\(^{22}\) Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 International Organizations 421 at 421-422. See also Martha Finnemore and Stephen Toope, ‘Alternatives to “Legalization”: Richer Views of Law and Politics’ (2001) 55 International Organizations 743 (critiquing Abbott and Snidal). This is not the only way to conceive ‘soft law’ albeit this is the preferred approach of this author.


\(^{25}\) Abbott and Snidal, above n 22 at 423.
UPOV 1991 might be considered to be ‘hard law’ in the sense that it is an agreement that imposes an obligation on Contracting Parties to ‘grant and protect breeders’ rights’, with some precision defines the threshold criteria of breeders’ rights’, and then delegates authority for implementing and enforcing the law to governmental agencies and the legal system of the Contracting Party’. In this scheme, and according to the previous definitions, ‘soft law’ is all the laws (actions and instruments) that weaken along one of the dimensions of obligation, precision and delegation. Providing some kind of definition about EDVs that is not itself a part of the text of UPOV 1991 is a weakening of the ‘hard law’ of UPOV 1991. The next issue to consider is the form of ‘soft law’.

4. Forms of ‘soft law’

UPOV 1991 provides for both a ‘Council’ and an ‘Office of the Union’. The Council has a range of tasks including the broadly framed power to ‘in general, take all necessary decisions to ensure the efficient functioning of the Union’. The Office of the Union is then to ‘carry out all the duties and tasks entrusted to it by the Council’. The Council assisted by the Office of the Union has already promulgated some ‘soft law’ in the form of ‘Explanatory Notes’, ‘Guidance’, ‘Guidelines’, ‘Rules’, ‘Mechanisms’, ‘Lists’, ‘Statistics’, ‘Reports’, ‘Press Releases’, ‘Experience and Cooperation’ reports’, “Assistance” webpage’, and so on. Each of these instruments provides some measure of interpretation or direction (even if only obliquely) about the ways that the UPOV 1991’s obligations might be addressed by Contracting Parties. A notable illustration of the place of this ‘soft law’ is the clear statement in each of the ‘Explanatory Notes’.

The purpose of these Explanatory Notes is to provide guidance on ... [the subject matter of the Explanatory Notes] under the 1991 Act of the International Convention for the Protection of New Varieties of Plants.

The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

---

31 International Convention for the Protection of New Varieties of Plants, Article 27(1).
33 See C/46/19, above n 32, [19]; Council, Report, Forty-Fifth Ordinary Session (2012) C/45/18, [19] and [23]; C/43/17, above n 4, [15], [17], [21], [22] and [25]; and so on.
34 See C/45/18, above n 33, [16]; C/44/17, above n 32, [17] and [34]; and so on.
35 See C/46/19, above n 32, [25] and [28]; C/44/17, above n 32, [24]; and so on.
36 See C/46/19, above n 32, [30]; and so on.
37 See C/46/19, above n 32, [44]; C/44/17, above n 32, [20]; C/43/17, above n 4, [18]; and so on.
38 See C/46/19, above n 32, [44]; and so on.
39 See C/46/19, above n 32; C/45/18, above n 33; C/43/17, above n 4; and so on.
40 See C/46/19, above n 32, [50]; C/45/18, above n 33, [41]; C/44/17, above n 32, [49]; and so on.
41 See C/44/17, above n 32, [16]; and so on.
42 See C/45/18, above n 33, [8].
43 See C/44/17, above n 32, [21] and [22]; C/43/17, above n 4, [23].
In short, the Council and the Office of the Union have sufficient power to promulgate 'soft law' instruments and they have a record of such actions. The next question to address is how 'soft law' might address EDVs? Perhaps the best approach here is to detail as a case study about the adoption of the Bonn Guidelines and their dealings with intellectual property under the CBD. This is addressed next.

5. Case study – Bonn Guidelines

The CBD was concluded at the United Nations Conference on Environment and Development in 1992. One of the CBD’s objectives was the fair and equitable sharing of the benefits from using genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. This benefit-sharing objective marked a fundamental shift in binding international measures to conserve biodiversity. First by recognising the sovereign right of countries over their genetic resources. Second, by linking access to those resources with the outcomes of scientific research and commercial uses, and access to technology on more favourable and non-commercial terms, including the products and technologies of the private sector derived from those genetic resources. And third, by introducing intellectual property into the economic and policy debates about conserving genetic resources that might benefit future technological, economic and social development.

The problem was that the CBD itself did not provide much guidance about how access and benefit sharing might be operationalized by Contracting Parties. While there was almost universal consensus that the predominantly poor countries with the majority of the Earth’s useful biological diversity (the South) should benefit from the exploitation of that diversity by the predominantly rich and technologically advanced countries (the North), the content of the benefits to be shared and the issue of access to and transfer of technology protected by intellectual property to exploit those genetic resources remained contentious. The outcome in the final CBD text was just agreeable diplomatic language effecting a compromise and a postponement of the issues to the implementation stages, such as ‘that patents and other intellectual property rights may have an influence on the implementation of this [CBD]’ with an obligation to ‘cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives’. And it was this process navigating intellectual property during the implementation stages that illustrates an approach to


The term ‘genetic resource’ is broadly defined to mean ‘genetic material of actual or potential value’ and ‘genetic materials’ means ‘any material of plant, animal, microbial or other origin containing functional units of heredity’: Convention on Biological Diversity, Art 2. In practice, however, the CBD definition has difficulties with respect to leaving out biochemicals, leaving out ex-situ holdings acquired before 29 December 1993, including human genetic materials and applying only to some marine resources: see Conference of the Parties to the Convention on Biological Diversity, Access to Genetic Resources and Benefit Sharing: Legislation, Administrative and Policy Information (1995) UNEP/CBD/COP/2/13, pp 15-18.

Convention on Biological Diversity, Art 1.


Convention on Biological Diversity, Art 15(1).

Convention on Biological Diversity, Arts 15, 16 and 19.

For the purposes of this article ‘intellectual property’ is a term used generally to mean copyright, patent, plant breeder’s rights, know how, trade secrets/confidential information and geographic indicators; for an overview of intellectual property applied to genetic resources see Graham Duffield, Intellectual Property, Biogenetic Resources and Traditional Knowledge (Earthscan, 2004) pp 25-41.

Convention on Biological Diversity, Preamble and Arts 3, 10, 11, 15, 16, 19 and 22.

Technologies which Make Use of Genetic Resources

Parties to the Convention on Biological Diversity

Convention on Biological Diversity

At the second COP the ‘Access to Genetic Resources’ programme was considered rather than the ‘Issues Relating to Technology’ programme, thereby linking intellectual property considerations to the transfer of technologies that made use of the accessed genetic resources. Significantly, the consideration of intellectual property was placed under the ‘Access to Genetic Resources’ programme rather than the ‘Issues Relating to Technology’ programme, thereby linking intellectual property considerations to the transfer of technologies that made use of the accessed genetic resources. The effect of this decision was to focus the role of intellectual property in the arrangements for access to genetic resources (thus linking Articles 15 and 16(5)), rather than the broader debate about restricting intellectual property in making technology available to developing countries as a possible means of alleviating poverty (as set out in Articles 16(1) and (2)). In effect this decision framed the consideration of intellectual property as one of the many matters to be addressed in negotiating access rather than as a barrier to technology transfer.

Following the signing of the CBD, the first Conference of the Parties (COP) adopted a medium-term ‘Access to Genetic Resources’ programme of work that included two subjects, the compiling of information and documents about access to genetic resources and the sharing of its benefits (Article 15), and about access to and transfer of technology in exchange for that access (Article 16). Significantly, the consideration of intellectual property was placed under the ‘Access to Genetic Resources’ programme rather than the ‘Issues Relating to Technology’ programme, thereby linking intellectual property considerations to the transfer of technologies that made use of the accessed genetic resources. The effect of this decision was to focus the role of intellectual property in the arrangements for access to genetic resources (thus linking Articles 15 and 16(5)), rather than the broader debate about restricting intellectual property in making technology available to developing countries as a possible means of alleviating poverty (as set out in Articles 16(1) and (2)). In effect this decision framed the consideration of intellectual property as one of the many matters to be addressed in negotiating access rather than as a barrier to technology transfer.

At the second COP the ‘Access to Genetic Resources’ programme was considered, with the COP deciding to compile the views on possible options for developing national legislative, administrative or policy measures to implement Article 15. The second COP also sought to analyse the impact of intellectual property on the conservation and sustainable use of biological diversity and the equitable sharing of benefits from their use ‘in order to gain a better understanding of the implications of Article 16(5)’, including ‘inviting Governments and other relevant stakeholders to submit case studies that address the role of intellectual property in the technology transfer process, in particular the role of intellectual property rights in the transfer of biotechnology’. The third COP continued this work deciding to seek further information about existing mechanisms both addressing access to genetic resources and sharing the benefits. The third COP also sought to extend co-operation with other institutions dealing with intellectual property, notably the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO).

---

55 Convention on Biological Diversity, Art 30(1).
56 Convention on Biological Diversity, Arts 29 and 30(2)(a).
60 See UNEP/CBD/COP/2/19, above n 58, pp 26-28.
61 UNEP/CBD/COP/2/19, above n 58, p 64.
62 UNEP/CBD/COP/2/19, above n 58, p 65.
After considering the various materials before the meeting\(^{65}\), the fourth COP decided to convene a Panel of Experts on Access to and Benefit-Sharing (the Panel):

> to draw upon all relevant sources, including legislative, policy and administrative measures, best practices and case studies on access to genetic resources and benefit-sharing arising from the use of those genetic resources, including the whole range of biotechnology, in the development of a common understanding of basic concepts and to explore all options for access and benefit-sharing on mutually agreed terms including guiding principles, guidelines, and codes of best practice for access and benefit-sharing arrangements\(^{66}\).

The focus was to be on legislative, administrative and policy measures for prior informed consent, references to the country of origin in relevant publications and patent applications, mutually agreed terms including on benefit-sharing and intellectual property and technology transfer, and incentive measures to encourage the conclusion of ‘contractual partnerships’\(^{67}\).

The subsequent report of the Panel reached a broad consensus about the ‘principles that should govern access and benefit-sharing arrangements’ and ‘a common understanding of the key concepts such as prior informed consent, mutually agreed terms, and fair and equitable benefit-sharing ’, together with ‘important information and capacity-building needs associated with access and benefit-sharing arrangements’\(^{68}\). The key recommendation of the Panel was the need to develop guidelines about prior informed consent and mutually agreed terms\(^{69}\).

At this early stage the Panel considered intellectual property might provide an incentive to comply with the CBD’s prior informed consent requirements by a requirement to provide evidence of satisfactory consent on applying for intellectual property (presumably this was addressed to patents and plant breeder’s rights that require formal registration)\(^{70}\).

Significantly, the Panel considered the COP needed to explore intellectual property issues ‘in greater depth’ recognising that intellectual property was a component of other domestic and international legal instruments\(^{71}\). However, in dealing with intellectual property, the Panel concluded:

> The Panel acknowledged that intellectual property rights may have an influence on the implementation of access and benefit-sharing arrangements and may have a role in providing incentives for users to seek prior informed consent. The Panel was not able to come to any conclusions about these issues, and therefore suggests that the [COP] consider these matters further\(^{72}\).

Usefully the Panel identified a number of issues that required further study, including that intellectual property application procedures require that the applicant submit evidence of prior informed consent, the place of intellectual property in traditional knowledge related to genetic resources, the guiding parameters for contractual arrangements\(^{73}\), application of the formal intellectual property threshold standards and the

---


\(^{67}\) UNEP/CBD/COP/4/27, above n 66, p 110.


\(^{70}\) See UNEP/CBD/COP/5/8, above n 69, p 23.

\(^{71}\) See UNEP/CBD/COP/5/8, above n 69, p 24.

\(^{72}\) UNEP/CBD/COP/5/8, above n 69, p 27.

\(^{73}\) Meaning (a) Regulating the use of resources in order to take into account ethical concerns; (b) Making provision to ensure the continued customary use of genetic resources and related knowledge; (c) Provision for the exploitation and use of intellectual property rights include joint research, obligation to work any right on inventions obtained or provide licenses; (d) Taking into account the possibility of joint ownership of intellectual property rights: UNEP/CBD/COP/5/8, above n 69, p 25.
resulting scope, and an assessment of the effect of intellectual property as an incentive to conservation and benefit-sharing.

In parallel with the Panel’s work, the fourth COP convened an Inter-Sessional Meeting on the Operations of the Convention (ISOC) as ‘a preparatory discussion’ on access to genetic resources. The ISOC began assessing the relationship between intellectual property and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the CBD, ex situ collections made before 29 December 1993, and a number of other matters that the Panel should consider without formally making any firm conclusions about the place of intellectual property in access and benefit-sharing arrangements.

The fifth COP took note of the Panel’s report and the ISOC report, and then decided, in dealing with access to genetic resources, to establish an Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing with the mandate to develop guidelines and other approaches to access and benefit sharing. The outcome of this decision was the Ad Hoc Open-Ended Working Group’s report that recommended the adoption of the Draft Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation, although key terms remained to be defined, including ‘access to genetic resources’, ‘benefit-sharing’, ‘commercialisation’, ‘derivatives’, ‘provider’, ‘user’, ‘stakeholder’, ‘ex situ collection’ and ‘voluntary nature’. The key objective of the guidelines was ‘to assist Parties in developing an overall access and benefit-sharing strategy and in identifying the steps involved in the process of obtaining access to genetic resources and sharing benefits’. In addressing the role of intellectual property in implementing access and benefit-sharing arrangements the Ad Hoc Open-Ended Working Group recommended that the COP ‘invite’ countries to disclose the country of origin of genetic resources in applications for intellectual property ‘as a possible contribution to tracking compliance’ with the obligations under the CBD of prior informed consent and the mutually agreed terms to access genetic resources. Further information gathering about intellectual property and access and benefit sharing was also recommended and a role envisioned for WIPO in developing model intellectual property clauses for negotiation of mutually agreed terms in contractual agreements.

As ‘merely the first step on a long and complex process to secure access and benefit-sharing’ under the CBD, the sixth COP adopted the Bonn Guidelines as voluntary guidelines that apply to all genetic resources covered by the CBD (except human genetic resources), in a manner that is ‘coherent and mutually supportive of the work of relevant international agreements and institutions’ and ‘without prejudice’ to the International Treaty on Plant Genetic Resources for Food and Agriculture. The sixth COP ‘invited’ countries ‘to use the Guidelines when developing and drafting

---

75 UNEP/CBD/COP/4/27, above n 66, p 132.
77 UNEP/CBD/COP/5/4, above n 76, pp 31-32.
80 UNEP/CBD/COP/5/23, above n 68, p 21.
81 UNEP/CBD/COP/5/23, above n 68, pp 197-198.
83 UNEP/CBD/COP/6/6, above n 82, pp 14 and 15.
84 UNEP/CBD/COP/6/6, above n 82, p 16.
85 UNEP/CBD/COP/6/6, above n 82, p 36.
86 UNEP/CBD/COP/6/6, above n 82, pp 36-38.
88 UNEP/CBD/COP/6/20, above n 87, pp 60-62 and 253-269 (Bonn Guidelines).
89 UNEP/CBD/COP/6/20, above n 87, pp 60-62 and 253-269 (Bonn Guidelines), cl 9.
90 UNEP/CBD/COP/6/20, above n 87, pp 60-62 and 253-269 (Bonn Guidelines), cl 10.
91 UNEP/CBD/COP/6/20, above n 87, pp 60-62 and 253-269 (Bonn Guidelines), cl 10.
legislative, administrative or policy measures on access and benefit-sharing, and contracts and other
arrangements under mutually agreed terms for access and benefit-sharing.\footnote{\textsuperscript{92}}

The form of the Bonn Guidelines was primarily as a practical guide:

> to assist Parties in developing an overall access and benefit-sharing strategy, which may
be part of their national biodiversity strategy and action plan, and in identifying the steps
involved in the process of obtaining access to genetic resources and sharing benefits.\footnote{\textsuperscript{93}}

The outcome of the Bonn Guidelines has been to operationalize the CBD’s access and benefit-
sharing provisions turning opaque diplomatic language in the text of the CBD into workable and
practical principles and processes, albeit not part of the binding text of the CBD:

The Guidelines have two main aims:

1. To guide countries as providers in setting up their own national legislative,
administrative or policy measures for access and benefit-sharing, such as
recommending the elements that should make up a prior informed consent (PIC)
procedure.

2. To assist providers and users in the negotiation of mutually agreed terms (MAT), by
providing examples of what elements should be included in these agreements.\footnote{\textsuperscript{94}}

With broad participation and involvement among stakeholders there was also broad support for the Bonn
Guidelines, and a formal basis for the subsequent elaboration and negotiation of a binding international
regime on access to genetic resources and benefit-sharing in the form of a Protocol – the Nagoya
Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from
their Utilization to the Convention on Biological Diversity (Nagoya Protocol).\footnote{\textsuperscript{95}}

6. Conclusions

UPOV 1991 provides the Council with very broad powers including ‘in general, take all necessary
decisions to ensure the efficient functioning of the Union’.\footnote{\textsuperscript{96}} Under this power the Council has
promulgated a range of instruments about the meanings and processes under UPOV 1991 including
and so on. These are classical ‘soft law’ instruments because they encourage Contracting Parties to
implement UPOV 1991 in particular ways while not altering the binding obligations set out in the formal
text of UPOV 1991. This suggests that an instrument promulgated by the Council to elaborate the EDV
provisions in UPOV 1991 is a ‘soft law’ approach to finding useful directions to Contracting Parties

The case study of the CBD’s Bonn Guidelines illustrates the elegance of ‘soft law’ in dealing with a deeply
contested and intractable issue of intellectual property in access and benefit-sharing arrangements.
While the Bonn Guidelines do not commit Contracting Parties to particular intellectual property standards
they have provided guidance about how intellectual property might be taken into account in implementing
the CBD’s objective. Most importantly, however, the Bonn Guidelines were a major step in canvassing the
potential for agreements about access and benefit sharing and formed the basis for future negotiation of
the Nagoya Protocol. The key learnings in developing the Bonn Guidelines were:

\footnote{\textsuperscript{92} UNEP/CBD/COP/6/20, above n 87, p 253.}
\footnote{\textsuperscript{93} UNEP/CBD/COP/6/20, above n 87, pp 60-62 and 253-269 (Bonn Guidelines), cl 12.}
\footnote{\textsuperscript{94} Secretariat of the Convention on Biological Diversity, \textit{The Bonn Guidelines}, Factsheet (Secretariat of the Convention on
August 2013).}
\footnote{\textsuperscript{95} Conference of the Parties to the Convention on Biological Diversity, \textit{Report of the Tenth Meeting of the Conference of the
\textsuperscript{96} International Convention for the Protection of New Varieties of Plants, Article 26(5)(x).}
1. Frame the issue from the perspective as one of the many issues that need to be resolved rather than as a barrier issue that requires participants to definitively determine their positions on any particular issue.
2. Harness the existing bureaucratic machinery that has existing reporting deadlines to drive and regularly benchmark progress.
3. Actively collect materials form all stakeholders likely to be affected and interested in the problems and solutions.
4. Establish different groupings (working parties, expert panels, and the like) to address particular contentious issues and actively seek out experts to provide information, directions and solutions.
5. Prepare the formal outcomes and recommendations in a way that does not finally decide issues where there remain differences, such as key terms, key processes and key conclusions.
6. Make the final outputs broadly informative, flexible and as part of an evolving process rather than and end of discussions and developments.

As the analysis in this paper shows, ‘soft law’ is eminently possible under UPOV 1991 and the Council has sufficient powers and the machinery to promulgate appropriate ‘soft law’ instruments that could be useful to plant breeders, courts and others as authoritative sources for interpreting and applying the UPOV 1991 EDV standards.


BONN GUIDELINES ON ACCESS TO GENETIC RESOURCES AND FAIR AND EQUITABLE SHARING OF THE BENEFITS ARISING OUT OF THEIR UTILIZATION

I. GENERAL PROVISIONS A.

Key features

1. These Guidelines may serve as inputs when developing and drafting legislative, administrative or policy measures on access and benefit-sharing with particular reference to provisions under Articles 8(j), 10 (c), 15, 16 and 19; and contracts and other arrangements under mutually agreed terms for access and benefit-sharing.
2. Nothing in these Guidelines shall be construed as changing the rights and obligations of Parties under the Convention on Biological Diversity.
3. Nothing in these Guidelines is intended to substitute for relevant national legislation.
4. Nothing in these Guidelines should be interpreted to affect the sovereign rights of States over their natural resources.
5. Nothing in these Guidelines, including the use of terms such as ‘provider’, ‘user’, and ‘stakeholder’, should be interpreted to assign any rights over genetic resources beyond those provided in accordance with the Convention.
6. Nothing in these Guidelines should be interpreted as affecting the rights and obligations relating to genetic resources arising out of the mutually agreed terms under which the resources were obtained from the country of origin.
7. The present Guidelines are voluntary and were prepared with a view to ensuring their:
   (a) Voluntary nature: they are intended to guide both users and providers of genetic resources on a voluntary basis;
   (b) Ease of use: to maximize their utility and to accommodate a range of applications, the Guidelines are simple;
   (c) Practicality: the elements contained in the guidelines are practical and are aimed at reducing transaction costs;
   (d) Acceptability: the Guidelines are intended to gain the support of users and providers;
   (e) Complementarity: the Guidelines and other international instruments are mutually supportive;
Evolutionary approach: the Guidelines are intended to be reviewed and accordingly revised and improved as experience is gained in access and benefit-sharing;

Flexibility: to be useful across a range of sectors, users and national circumstances and jurisdictions, guidelines should be flexible;

Transparency: they are intended to promote transparency in the negotiation and implementation of access and benefit-sharing arrangements …

Appendix I

SUGGESTED ELEMENTS FOR MATERIAL TRANSFER AGREEMENTS

Material transfer agreements may contain wording on the following elements …

B. Access and benefit-sharing provisions

1. Description of genetic resources covered by the material transfer agreements, including accompanying information …
4. Whether intellectual property rights may be sought and if so under what conditions …

Appendix II

MONETARY AND NON-MONETARY BENEFITS

1. Monetary benefits may include, but not be limited to …

   (i) Joint ownership of relevant intellectual property rights.