



INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

DRAFT

GUIDANCE
FOR THE PREPARATION OF LAWS
BASED ON THE 1991 ACT OF THE UPOV CONVENTION

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to be considered by the Administrative and Legal Committee
at its fifty-ninth session to be held in Geneva on April 2, 2009*

Note for Draft version

Endnotes provide background information for the CAJ when considering the draft version, not to be retained in the approved version of the document.

Highlighted text in square brackets in Part I of the document and **footnotes** to be retained in the published version of the document (see Introduction).

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INTRODUCTION

1. The document “Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention” (guidance document) is intended to provide assistance to States/intergovernmental organizations wishing to draft a law in accordance with the 1991 Act of the UPOV Convention. The guidance document is relevant for future members of UPOV and members of UPOV bound by an earlier Act of the UPOV Convention wishing to draft a law in accordance with the 1991 Act. The guidance document contains two parts:

Part I: Example text for Articles for consideration in the preparation of laws based on the 1991 Act of the UPOV Convention; and

Part II: Notes based on information materials concerning certain Articles of the 1991 Act of the UPOV Convention.

Part I: Example text for Articles for consideration in the preparation of laws based on the 1991 Act of the UPOV Convention

2. Part I of the guidance document follows, where possible, the structure, content and numbering of the corresponding Articles of the 1991 Act of the UPOV Convention. The presentation of Part I of the guidance document is explained in the following paragraphs.

3. The highlighted text in square brackets is intended for drafters involved in the preparation of laws and identifies the following:

(i) text to be completed (e.g. [name of the State/Intergovernmental Organization] or [name of the authority]);

(ii) optional provisions of the 1991 Act of the UPOV Convention (e.g. [(2) [Varieties of recent creation] or [(2) [Optional exception]]);

(iii) provisions of the 1991 Act of the UPOV Convention providing for a minimum level and/or a choice (e.g. see Article 13 on provisional protection and Article 19 on the duration of the breeder’s right);

(iv) cross references in the relevant example provisions of Part I of the document to the corresponding explanations in Part II of the document (e.g. Genera and Species to be Protected [NOTES – ARTICLE 3]);

(v) numbering of provisions that might need to be modified (e.g. in the example text corresponding to Article 15(1)(iii) of the 1991 Act of the UPOV Convention “acts done for the purpose of breeding other varieties, and, except where the provisions of Article [14(5)] apply, acts referred to in Article [14(1) to (4)] in respect of such other varieties.”).

4. The title of the specific provisions of the 1991 Act of the UPOV Convention relevant for intergovernmental organizations have been kept in Part I of the guidance document. The contents of those provisions, and, if appropriate, the corresponding explanations can be found in Part II of the guidance document.

5. Numbers corresponding to the example text for Articles 23 to 27 in Part I of the guidance document, which do not correspond to the number of Articles of the 1991 Act of the UPOV Convention, are preceded by an asterisk. A corresponding footnote has been added for this purpose in the relevant Articles of Part I of the guidance document.

6. Information materials on (i) how to become a member of UPOV and accede to the 1991 Act of the UPOV Convention or (ii) how to ratify, or accede to, the 1991 Act of the UPOV Convention (for members of UPOV only) are available upon request.

Part II: Notes based on information materials concerning certain Articles of the 1991 Act of the UPOV Convention

7. Part II of the guidance document contains notes based on information materials concerning certain Articles of the 1991 Act of the UPOV Convention (e.g. Council documents, explanatory notes, distance learning material). Part II of the guidance document will be updated to reflect any development in the contents and/or the status of the source. In particular, the following explanatory notes have been:

- (a) adopted by the Council
 - Explanatory Notes on Variety Denominations under the UPOV Convention (document UPOV/INF/12/1);
- (b) approved by the CAJ by correspondence on October 24, 2008 (see document CAJ/58/6)
 - Explanatory Notes on the Right of Priority under the UPOV Convention (document UPOV/EXN/PRI Draft 1)
 - Explanatory Notes on Provisional Protection under the UPOV Convention (document UPOV/EXN/PRP Draft 1)
 - Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL Draft 1)
 - Explanatory Notes on the Cancellation of the Breeder's Right under the UPOV Convention (document UPOV/EXN/CAN Draft 1);
- (c) approved by the CAJ at its fifty-eighth session on October 27 and 28, 2008 (see document CAJ/58/6) on the basis of documents
 - Explanatory Notes on Essentially Derived Varieties under the UPOV Convention (document UPOV/EXN/EDV Draft 2)
 - Explanatory Notes on Exceptions to the Breeder's Right under the UPOV Convention (document UPOV/EXN/EXC Draft 3)
 - Explanatory Notes on Novelty under the UPOV Convention (document UPOV/EXN/NOV Draft 2).

8. The proposed structure of the guidance document allows cross references between Parts I and II. A future electronic version would enable electronic links between Part I and Part II.

**PART I:
EXAMPLE TEXT FOR ARTICLES FOR CONSIDERATION
IN THE PREPARATION OF LAWS BASED ON
THE 1991 ACT OF THE UPOV CONVENTION**

[TITLE OF THE DRAFT LAW]

CHAPTER I
DEFINITIONS

**Article 1
Definitions**

[NOTES – ARTICLE 1]

For the purposes of this Law:

- (i) “breeder” means
 - the person who bred, or discovered and developed, a variety,
 - [the person who is the employer of the aforementioned person or who has commissioned the latter’s work,] or
 - the successor in title of the first [or second] aforementioned person, as the case may be;
- (ii) “breeder’s right” means the right of the breeder provided for in this Law ;
- (iii) “variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be
 - defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
 - distinguished from any other plant grouping by the expression of at least one of the said characteristics and
 - considered as a unit with regard to its suitability for being propagated unchanged;
- (iv) “[name of the authority]”;
- (v) “UPOV” means the International Union for the Protection of New Varieties of Plants founded by the International Convention for the Protection of New Varieties of Plants of 1961 and further mentioned in the Act of 1972, the Act of 1978 and in the 1991 Act;
- (vi) “member of UPOV ” means a State party to the UPOV Convention of 1961 / Act of 1972 or the Act of 1978 or a Contracting Party to the 1991 Act;
- [(vii) “territory”] (for intergovernmental organizations)

CHAPTER II
GENERAL

Article 2
Purpose

[NOTES – ARTICLE 1(ix)]

- (1) The purpose of this Law is to grant and protect breeders' rights.
- (2) The [name of the authority] is the authority entrusted with the task of granting breeders' rights.

Article 3
Genera and Species to be Protected

[NOTES – ARTICLE 3]

(Option 1)

[This Law shall be applied on the date of its coming into force to all plant genera and species.]

(Option 2)

[This Law shall be applied to the plant genera and species designated by [decisions of the Minister/the regulations], and by the expiration of a period of [five]/[10] years from the date of coming into force of this Law at the latest, to all plant genera and species.]

Article 4
National Treatment

[NOTES – ARTICLE 4]

[(1)] [*Treatment*] Without prejudice to the rights specified in this Law, nationals of a member of UPOV as well as natural persons resident and legal entities having their registered offices within the territory of a member of UPOV shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of [name of the State/Intergovernmental Organization] the same treatment as is accorded by this Law to the nationals of [name of the State/Intergovernmental Organization]. The said nationals, natural persons or legal entities of a member of UPOV shall comply with the conditions and formalities imposed on the nationals of [name of the State/Intergovernmental Organization].

[(2)] [*"Nationals"*] For the purposes of the preceding paragraph, "nationals" means, where the member of UPOV is a State, the nationals of that State and, where the member of UPOV is an intergovernmental organization, the nationals of the States which are members of that organization.

CHAPTER III
CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT

Article 5
Conditions of Protection

[NOTES – ARTICLE 5]

(1) [*Criteria to be satisfied*] The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

(2) [*Other conditions*] The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article [20], that the applicant complies with the formalities provided for in this Law and that he pays the required fees.

Article 6
Novelty

[NOTES – ARTICLE 6]

[(1)] [*Criteria*] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of **[name of the State/Intergovernmental Organization]** earlier than one year before the date of filing of the application and

(ii) in a territory other than that of **[name of the State/Intergovernmental Organization]** earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

[(2)] [*Varieties of recent creation*] (optional provision - see NOTES – ARTICLE 6(2))

[(3)] [*“Territory” in certain cases*] (for members of UPOV which are member States of one and the same intergovernmental organization)

Article 7
Distinctness

[NOTES – ARTICLE 7]

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

Article 8
Uniformity

[NOTES – ARTICLE 8]

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Article 9
Stability

[NOTES – ARTICLE 9]

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

CHAPTER IV

APPLICATION FOR THE GRANT OF THE BREEDER'S RIGHT

Article 10
Filing of Applications

[NOTES – ARTICLE 10]

(1) The filing date of the application for a breeder's right shall be the date of receipt of the application duly filed as prescribed by [this Law/the regulations/decisions of the Minister].

(2) [*Independence of protection*] The [name of the authority] shall not refuse to grant a breeder's right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other State or intergovernmental organization.

Article 11
Right of Priority

[NOTES – ARTICLE 11]

(1) [*The right; its period*] Any breeder who has duly filed an application for the protection of a variety in one of the members of UPOV (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the [name of the authority], enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.

(2) [*Claiming the right*] In order to benefit from the right of priority, the breeder shall, in the application filed with the [name of the authority], claim the priority of the first application. The [name of the authority] shall require the breeder to furnish, within a period of [not less than three months] from the filing date of the application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that first application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

(3) [*Documents and material*] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time, after such rejection or withdrawal, in which to furnish, to the [name of the authority], any necessary information, document or material required for the purpose of the examination under Article [12].

(4) [*Events occurring during the period*] Events occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such events shall also not give rise to any third-party right.

Article 12
Examination of the Application

[NOTES – ARTICLE 12]

Any decision to grant a breeder's right shall require an examination for compliance with the conditions under Articles [5 to 9]. In the course of the examination, the [name of the authority] may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the [name of the authority] may require the breeder to furnish all the necessary information, documents or material as specified in [this Law/the regulations/decisions of the Minister].

Article 13
Provisional Protection

[NOTES – ARTICLE 13]

- (1) Provisional protection is provided 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.
- (2) ["Measures to be specified"]

CHAPTER V
THE RIGHTS OF THE BREEDER

Article 14
Scope of the Breeder's Right

[NOTES – ARTICLE 14]

(1) [*Acts in respect of the propagating material*] (a) Subject to Articles [15] and [16], the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [*Acts in respect of the harvested material*] Subject to Articles [15] and [16], the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[3] [*Acts in respect of certain products*] [optional provision] Subject to Articles [15] and [16], the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph [(2)] through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.]

[4] [*Possible additional acts*] (optional provision – see NOTES –ARTICLE 14(4))

[5] [*Essentially derived and certain other varieties*] (a) The provisions of paragraphs [(1) to (4)] shall also apply in relation to

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety (“the initial variety”) when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Article 15 Exceptions to the Breeder’s Right

[NOTES – ARTICLE 15]

[(1)] [*Compulsory exceptions*] The breeder’s right shall not extend to

(i) acts done privately and for non-commercial purposes,

(ii) acts done for experimental purposes and

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article [14(5)] apply, acts referred to in Article [14(1) to (4)] in respect of such other varieties.

[(2)] [*Optional exception*] (see NOTES – ARTICLE 15(2))

Article 16
Exhaustion of the Breeder's Right

[NOTES – ARTICLE 16]

(1) [*Exhaustion of right*] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article [14(5)], which has been sold or otherwise marketed by the breeder or with his consent in the territory of the [name of the State/Intergovernmental Organization], or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question or

(ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of "material"*] For the purposes of paragraph [(1)], "material" means, in relation to a variety,

(i) propagating material of any kind,

(ii) harvested material, including entire plants and parts of plants, and

(iii) any product made directly from the harvested material.

[(3)] [*"Territory" in certain cases*] [for members of UPOV which are member States of one and the same intergovernmental organization]

Article 17
Restrictions on the Exercise of the Breeder's Right

[NOTES – ARTICLE 17]

(1) [*Public interest*] Except where expressly provided in this Law, the free exercise of a breeder's right shall not be restricted for reasons other than of public interest.

(2) [*Equitable remuneration*] When any such restriction has the effect of the [Minister/competent authority] authorizing a third party to perform any act for which the breeder's authorization is required, the breeder shall receive equitable remuneration.

Article 18
Measures Regulating Commerce

[NOTES – ARTICLE 18]

The breeder's right is independent of any measure to regulate the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Law.

Article 19
Duration of the Breeder's Right

[NOTES – ARTICLE 19]

The breeder's right shall be granted for a period of [period to be specified] from the date of the grant of the breeder's right. For trees and vines, the said period shall be [period to be specified] from the said date.

CHAPTER VI
VARIETY DENOMINATION

Article 20
Variety Denomination

[NOTES – ARTICLE 20]

(1) [*Designation of varieties by denominations; use of the denomination*] The variety shall be designated by a denomination which will be its generic designation. Subject to paragraph [(4)], no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

(2) [*Characteristics of the denomination*] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of UPOV, an existing variety of the same plant species or of a closely related species.

(3) [*Registration of the denomination*] The denomination of the variety shall be submitted by the breeder to the [name of the authority]. If it is found that the denomination does not satisfy the requirements of paragraph [(2)], the [name of the authority] shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the [name of the authority] at the same time as the breeder's right is granted.

(4) [*Prior rights of third persons*] Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph [(7)], is obliged to use it, the [name of the authority] shall require the breeder to submit another denomination for the variety.

(5) [*Same denomination in all members of UPOV*] A variety must be submitted to all members of UPOV under the same denomination. The [name of the authority] shall register the denomination so submitted, unless it considers the denomination unsuitable. In the latter case, it shall require the breeder to submit another denomination.

(6) [*Information concerning variety denominations*] The [name of the authority] ensures that the authorities of the members of UPOV are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the [name of the authority].

(7) [*Obligation to use the denomination*] Any person who offers for sale or markets propagating material of a variety protected within the territory of [State/Intergovernmental Organization] is obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph [(4)], prior rights prevent such use.

(8) [*Indications used in association with denominations*] When a variety is offered for sale or marketed, it is permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

CHAPTER VII

NULLITY AND CANCELLATION OF THE BREEDER'S RIGHT

Article 21
Nullity of the Breeder's Right

[NOTES – ARTICLE 21]

(1) [*Reasons of nullity*] The breeder's right shall be declared null and void when it is established

(i) that the conditions laid down in Articles [6 or 7] were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles [8 or 9] were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.

(2) [*Exclusion of other reasons*] No breeder's right shall be declared null and void for reasons other than those referred to in paragraph [(1)].

Article 22
Cancellation of the Breeder's Right

[NOTES – ARTICLE 22]

(1) [*Reasons for cancellation*] (a) The breeder's right [may] be cancelled if it is established that the conditions laid down in Articles [8 or 9] are no longer fulfilled.

(b) Furthermore, the breeder's right [may] be cancelled if, after being requested to do so and within the prescribed period,

(i) the breeder does not provide the [name of the authority] with the information, documents or material deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force, or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) [*Exclusion of other reasons*] No breeder's right shall be cancelled for reasons other than those referred to in paragraph [(1)].

CHAPTER VIII
IMPLEMENTATION OF THE LAW AND FINAL PROVISIONS

Article *23
Enforcement of Breeders' Rights

[NOTES – ARTICLE 30(1)(i)]

The following legal remedies shall be available for the enforcement of breeders' rights:

[...]

Article *24
Supervision

[NOTES – ARTICLE 30(1)(i)]

Supervision over the implementation of this Law [and the regulations/decisions adopted according this Law], shall be performed by the [Ministry/Inspectors/competent authority].

The following administrative measures and sanctions shall apply in case of breach of the Law [and the regulations/decisions]: [...]

Article *25
Publication

[NOTES – ARTICLE 30(1)(iii)]

The public shall be informed through the regular publication of information concerning

- applications for and grants of breeders' rights, and
- proposed and approved denominations.

* Numbers of Articles which do not correspond to the number of Articles of the 1991 Act of the UPOV Convention are preceded by an asterisk.

Article *26

[Regulations] and/or [Decisions of the Minister]

[NOTES – ARTICLE 30]

The [competent authority/Minister] may make regulations or issue decisions for any matter required for the implementation of this Law, in particular:

- (1) Procedural matters concerning applications for the grant of breeders' rights;
- (2) Matters concerning variety denominations;
- (3) Matters concerning examination of applications for the grant of breeders' rights;
- (4) Publication requirements;
- (5) Opposition procedures;
- (6) Appeals;
- (7) Schedule of fees; and
- (8) Data to be included in the registers concerning breeders' rights.

Article *27

Entry into force

This Law shall enter into force on [...].

* Numbers of Articles which do not correspond to the number of Articles of the 1991 Act of the UPOV Convention are preceded by an asterisk.

**PART II: NOTES BASED ON INFORMATION MATERIALS CONCERNING
CERTAIN ARTICLES OF THE 1991 ACT OF THE UPOV CONVENTION**

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**PART II:
NOTES BASED ON INFORMATION MATERIALS CONCERNING
CERTAIN ARTICLES OF THE 1991 ACT
OF THE UPOV CONVENTION**

NOTES ON ARTICLE 1 DEFINITIONS

Article 1(iv) “breeder”

(iv) “breeder” means

- **the person who bred, or discovered and developed, a variety,**
- **the person who is the employer of the aforementioned person or who has commissioned the latter’s work, where the laws of the relevant Contracting Party so provide, or**
- **the successor in title of the first or second aforementioned person, as the case may be;**

[Explanatory notes under development]ⁱ

Article 1(vi) “variety”

(vi) “variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,**
- distinguished from any other plant grouping by the expression of at least one of the said characteristics and**
- considered as a unit with regard to its suitability for being propagated unchanged;**

[Explanatory notes under development]ⁱⁱ

Article 1(viii) “territory”

(viii) “territory”, in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies;

Article 6(3) concerning “Novelty” and Article 16(3) concerning “Exhaustion of the Breeder’s Right” of the 1991 Act of the UPOV Convention contain provisions on “‘Territory’ in certain Cases”.

Article 1(ix) “authority”

(ix) “authority” means the authority referred to in Article 30(1)(ii);

[see Article 2 of Part I of this document]

Article 30(1)(ii) of the 1991 Act of the UPOV Convention requires that a member of UPOV shall maintain an authority entrusted with the task of granting breeders’ rights or shall entrust the said task to an authority maintained by another member of UPOV.

NOTES ON ARTICLE 3 GENERA AND SPECIES TO BE PROTECTED

(1) [*States already members of the Union*] Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978 and,

(ii) at the latest by the expiration of a period of five years after the said date, to all plant genera and species.

(2) [*New members of the Union*] Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 15 plant genera or species and,

(ii) at the latest by the expiration of a period of 10 years from the said date, to all plant genera and species.

1.1 If the State or Intergovernmental Organization concerned does not apply the Law to all plant genera and species, the minimum requirement on the date of the entry into force of the 1991 Act of the UPOV Convention is to apply the Law to:

1.1.1 A State already member of UPOV

the plant genera and species to which it applies, on the said date, the provisions of the previous Act of the UPOV Convention and by the expiration of five years to all plant genera and species (see Article 3(1)(i) and (ii) of the 1991 Act);

1.1.2 A new member of UPOV

fifteen (15) genera and species and by the expiration of 10 years to all plant genera and species (see Article 3(2)(i) and (ii) of the 1991 Act).

1.2 Where the legislation of the member of the Union concerned provides protection to all plant genera and species, it may be beneficial to provide clarification with respect to whether fungi, algae and bacteria are considered to be covered by the legislation.

NOTES ON ARTICLE 4 NATIONAL TREATMENT

(1) [*Treatment*] Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party.

(2) [*"Nationals"*] For the purposes of the preceding paragraph, "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States which are members of that organization.

[Explanatory notes under development]ⁱⁱⁱ

NOTES ON ARTICLE 5 CONDITIONS OF PROTECTION

(1) [*Criteria to be satisfied*] The breeder’s right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

(2) [*Other conditions*] The grant of the breeder’s right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 20, that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

In relation to the provisions under Article 5(2) of the 1991 Act of the UPOV Convention, at its thirty-seventh ordinary session on October 23, 2003, the Council of UPOV adopted the “Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD)” http://www.upov.int/en/news/2003/pdf/cbd_response_oct232003.pdf (paragraphs 7 to 11 are reproduced below).

“Disclosure of origin

“7. The requirement for “distinctness” in the UPOV Convention¹ means that protection shall only be granted after an examination to determine if the variety is clearly distinguishable from all other varieties, whose existence is a matter of common knowledge² at the date of filing of the application, regardless of the geographical origin. Furthermore, the UPOV Convention provides that, if it is discovered that a breeder’s right has been granted for a variety that was not distinct, that right shall be declared null and void.

“8. The breeder is usually required, in a technical questionnaire that accompanies his application for protection, to provide information concerning the breeding history and genetic origin of the variety. UPOV encourages information on the origin of the plant material, used in the breeding of the variety, to be provided where this facilitates the examination mentioned above, but could not accept this as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability and a suitable denomination and does not allow any further or different conditions for protection. Indeed, in certain cases, for technical reasons, applicants may find it difficult, or impossible, to identify the exact geographic origin of all the material used for breeding purposes.

¹ Reference to the UPOV Convention in this document should be understood as a reference to the latest Act of the UPOV Convention (the 1991 Act). The full text of the UPOV Convention can be found at:

<http://www.upov.int/en/publications/conventions/1991/act1991.htm>.

² The matter of common knowledge is considered further in UPOV document “The Notion of Breeder and Common Knowledge” (C(Extr.)/19/2 Rev.). This document can be found at: http://www.upov.int/export/sites/upov/en/news/2003/pdf/cbd_response_oct232003.pdf.

“9. [I]f a country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection. A separate mechanism from the plant variety protection legislation, such as that used for phytosanitary requirements, could be applied uniformly to all activities concerning the commercialization of varieties, including, for example, seed quality or other marketing related regulations.

“Prior Informed Consent

“10. With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, UPOV encourages the principles of transparency and ethical behavior in the course of conducting breeding activities and, in this regard, the access to the genetic material used for the development of a new variety should be done respecting the legal framework of the country of origin of the genetic material. However, the UPOV Convention requires that the breeder’s right should not be subject to any further or different conditions than the ones required to obtain protection. UPOV notes that this is consistent with Article 15 of the CBD, which provides that the determination of the access to genetic resources rests with the national governments and is subject to national legislation. Furthermore, UPOV considers that the competent authority for the grant of the breeder’s rights is not in a position to verify whether the access to genetic material has taken place in accordance with the applicable law in this field.

“Summary

“11. Since the legislation on access to genetic material and the legislation dealing with the grant of breeders’ rights pursue different objectives, have different scopes of application and require a different administrative structure to monitor their implementation, UPOV considers that it is appropriate to include them in different legislation, although such legislation should be compatible and mutually supportive.”

NOTES ON ARTICLE 6 NOVELTY

[see also NOTES – ARTICLE 12 for guidance on the “Examination for compliance with the Novelty Condition”]

Article 6(1)^{iv}

(1) [Criteria] The variety shall be deemed to be new if, at the date of filing of the application for a breeder’s right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety [...].

Material of the variety

1.1 As provided in the 1991 Act of the UPOV Convention, the novelty provisions concern propagating and harvested material of the variety.

Sale or otherwise disposal of to others, by or with the consent of the breeder, for purposes of exploitation of the variety (offering for sale and marketing, with the agreement of the breeder)

1.2 The 1991 Act of the UPOV Convention clarifies that novelty is only affected where there is sale or disposal of to others (or offering for sale or marketing in respect of the 1978 Act), of propagating or harvested material of the variety, by or with the consent of the breeder³, for purposes of exploitation of the variety.

1.3 The following acts may be considered not to result in the loss of novelty:

(i) trials of the variety not involving sale or disposal of to others for purposes of exploitation of the variety (clarified in 1978 Act);

(ii) sale or disposal of to others without the consent of the breeder;

(iii) sale or disposal of to others that forms part of an agreement for the transfer of rights to the successor in title;

(iv) sale or disposal of to others that forms part of an agreement under which a person multiplies propagating material of a variety on behalf of the breeder where that agreement requires that the property in the multiplied material reverts to the breeder;

(v) sale or disposal of to others that forms part of an agreement under which a person undertakes field tests or laboratory trials, or small-scale processing trials, with a view to evaluating the variety;

³ The term “breeder” should be understood as defined in Article 1(iv) of the 1991 Act of the UPOV Convention:

- the person who bred, or discovered and developed, a variety,
- the person who is the employer of the aforementioned person or who has commissioned the latter’s work, where the laws of the relevant Contracting Party so provide, or
- the successor in title of the first or second aforementioned person, as the case may be”

The term “person” in Article 1(iv) of the 1991 Act of the UPOV Convention should be understood as embracing both physical and legal persons (e.g. companies).

(vi) sale or disposal of to others that forms part of the fulfillment of a statutory or administrative obligation, in particular concerning biosafety or the entry of varieties in an official catalogue of varieties admitted to trade;

(vii) sale or disposal of to others of harvested material which is a by-product or a surplus product of the creation of the variety or of the activities referred to in items (iv) to (vi) above, provided that the said material is sold or disposed of without variety identification for the purposes of consumption; and

(viii) disposal of to others for the purposes of displaying the variety at an official, or officially recognized, exhibition.

Article 6(1)

(1) [Criteria] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

Relevant periods

1.4 The different periods for selling or disposing of the variety for purposes of exploitation of the variety in the territory of the member of the Union where the application is filed and in other territories without affecting the novelty have been established in recognition of the lengthy nature of the evaluation by the breeder of the variety in each territory in order to take a decision to seek protection. The longer period for trees and vines takes into consideration the slower growth and multiplication for these types of plants.

1.5 UPOV has had an exchange of information on the notion of trees and vines for the purposes of the provisions on novelty and the duration of protection (Article 19 of the 1991 Act and Article 8 of the 1978 Act). That exchange demonstrated that there were different interpretations of the notion of trees and vines and that it would not be possible to establish a classification at the UPOV level. Information on the notion of trees and vines for individual members of the Union can be obtained by consulting the relevant legislation of the members of the Union concerned (see UPOV website: <http://www.upov.int/en/publications/npvlaws/>).

Article 6(2) [optional provision]

(2) [*Varieties of recent creation*] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or disposal to others described in that paragraph took place earlier than the time limits defined in that paragraph.

Varieties of recent creation

2.1 The “transitional” provision for varieties of recent creation is an optional provision. The aim of the transitional novelty provision is to enable the protection of varieties which have been created shortly before protection becomes available for the first time, but which do not fall within the period for novelty set out in Article 6(1)(i) of the 1991 Act. One approach taken by members of the Union which have chosen to introduce that provision, is to have the same time period, for selling or disposing of the variety for purposes of exploitation of the variety, in the territory of the member of the Union as for varieties in territories other than the member of the Union concerned, i.e. four years or, in the case of trees or of vines, six years. In cases where a transitional provision is introduced, it is appropriate to place a time limit for breeders to claim the benefits of the transitional provision.

2.2 The provisions on the transitional novelty regime for varieties of recent creation can be included in the law that provides for the first time plant variety protection in line with the UPOV Convention. For those members where protection is limited to a list of plant genera and species, it is possible to include a provision for a transitional novelty regime when protection becomes available to additional genera or species, or to all plant genera and species.

Article 6(3)

(3) [*“Territory” in certain cases*] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

NOTES ON ARTICLE 7 DISTINCTNESS

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

Guidance on the examination of distinctness can be found in the following documents:

- Document TG/1/3 “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants” (“General Introduction”)
(http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf);
- Document TGP/4/1 “Constitution and Maintenance of Variety Collections”
(http://www.upov.int/en/publications/tgp/documents/tgp_4_1.pdf);
- Document TGP/9/1 “Examining Distinctness”
(http://www.upov.int/en/publications/tgp/documents/tgp_9_1.pdf).

NOTES ON ARTICLE 8 UNIFORMITY

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Guidance on the examination of uniformity can be found in the “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants” (document TG/1/3 “General Introduction”) (http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf) and in document TGP/10 “Examining Uniformity” (<http://www.upov.int/en/publications/tgp>).

NOTES ON ARTICLE 9 STABILITY

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Guidance on the examination of stability can be found in the “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants” (document TG/1/3 “General Introduction”) (http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf).

NOTES ON ARTICLE 10 FILING OF APPLICATIONS

(1) [*Place of first application*] The breeder may choose the Contracting Party with whose authority he wishes to file his first application for a breeder's right.

(2) [*Time of subsequent applications*] The breeder may apply to the authorities of other Contracting Parties for the grant of breeders' rights without waiting for the grant to him of a breeder's right by the authority of the Contracting Party with which the first application was filed.

(3) [*Independence of protection*] No Contracting Party shall refuse to grant a breeder's right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other State or intergovernmental organization.

1.1 The UPOV Model Form for the Application for Plant Breeders' Rights (document TGP/5 "Experience and Cooperation in DUS Testing" Section 2), provides guidance for the development of application forms for breeders' rights (http://www.upov.int/en/publications/tgp/documents/tgp5_section_2_2.pdf).

1.2 For the UPOV Technical Questionnaire to be Completed in Connection with an Application for Plant Breeders' Rights see document TGP/5 "Experience and Cooperation in DUS Testing" Section 3 (http://www.upov.int/en/publications/tgp/documents/tgp5_section3-1.pdf).

NOTES ON ARTICLE 11 RIGHT OF PRIORITY

Article 11(1)^v

(1) [*The right; its period*] Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the “first application”) shall, for the purpose of filing an application for the grant of a breeder’s right for the same variety with the authority of any other Contracting Party (the “subsequent application”), enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.

1.1 The UPOV Convention provides for a right of priority of 12 months, based upon an earlier application for the protection of the same variety with another UPOV member, whereby a subsequent application is treated as if it were filed on the filing date of the first application. At the end of these explanatory notes on Article 11 there is an illustration with hypothetical examples providing different scenarios concerning the right of priority.

1.2 The date of filing of the first application refers to the date of receipt of the first application duly filed as prescribed by the legislation of the member of the Union concerned.

Novelty and the Right of Priority

1.3 The right of priority has the effect that in relation to the periods for selling or disposing of the variety for purposes of exploitation of the variety without affecting the novelty (Article 6(1)(i) and (ii) of the 1991 Act of the UPOV Convention), the date of filing of the first application with the authority of a member of UPOV (“member of UPOV A”) is taken as the date of a subsequent application filed with the authority of another member (“Subsequent application filed in member of UPOV B”). Therefore, the provisions of Article 6(1) of the 1991 Act of the UPOV Convention would have the following effect:

Subsequent application: Novelty

First Application: Member A

Submission of a subsequent application: Member B

The variety shall be deemed to be new if, at the [date of filing of the first application for protection of the variety in member of UPOV A], propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of [member of UPOV B] earlier than one year before the [date of filing in member of UPOV A (first application)] and

(ii) in a territory other than that of [member of UPOV B] earlier than four years or, in the case of trees or of vines, earlier than six years before the [date of filing in member of UPOV A (first application)].

Distinctness and the Right of Priority

1.4 In respect of the compliance with the condition of distinctness, the right of priority has the following effect: the filing of applications for other varieties in any territory after the filing date of the first application in a member of UPOV (“member of UPOV A”) will not render the existence of those varieties a matter of common knowledge for subsequent applications. Therefore, the provisions of Article 7 of the 1991 Act of the UPOV Convention would have the following effect:

Subsequent application: Distinctness

First Application: Member A

Submission of a subsequent application: Member B

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application [for protection of the variety in member of UPOV A]. In particular, the filing of an application for the granting of a breeder’s right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder’s right or to the entering of the said other variety in the official register of varieties, as the case may be.

1.5 In many cases, the right of priority would not have any different consequences with regard to distinctness because other varieties, which were the subject of applications in any territory after the filing date of the first application, would have to consider the variety which was the subject of the first application as a variety whose existence was a matter of common knowledge from the date of filing of the first application.

1.6 However, the right of priority has a particular consequence in a case where the first application in a UPOV member A does not lead to the granting of a breeder’s right or to the entering in an official register of varieties (e.g. rejection or withdrawal of the first application). In such a case, and if a right priority has been successfully claimed in a subsequent application, the variety would still be considered to be a variety of common knowledge from the date of filing of the first application. In the absence of a right of priority, the variety would only become a variety of common knowledge at the date of filing of the subsequent application (if the subsequent application led to the granting of a breeder’s right or to the entering in an official register of varieties).

Variety Denominations and the Right of Priority

1.7 If, at the filing date of the first application, the application proposes a variety denomination, that proposed variety denomination will be considered as part of the “prior right” for purposes of the variety denomination requirements (see Article 20(2) and (4) of the 1991 Act and Article 13(2) and (4) of the 1978 Act). Therefore, if in subsequent applications for the same variety, the same denomination is submitted, subsequent applications will be treated, for purposes of the variety denomination requirements, as if they had been filed on the filing date of the first application (see “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/INF/12/1 – Explanatory Note 4 (b) and (c)) concerning prior rights and the registration of variety denominations).

Article 11(2)

(2) [*Claiming the right*] In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, within a period of not less than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

2.1 In order to benefit from the right of priority, the breeder needs to claim the priority of the first application in the subsequent application. If the breeder does not claim priority, the subsequent application would be considered as filed on the application date of the subsequent application.

2.2 The UPOV Convention states that the breeder shall have a period of at least three months, computed from the filing date of the subsequent application, to send a copy of the documents which constitute the first application. The exact period (not less than 3 months) is to be specified in the legislation of the member of the Union concerned.

2.3 The UPOV Model Form for the Application for Plant Breeders' Rights (document TGP/5 "Experience and Cooperation in DUS Testing" – <http://www.upov.int/en/publications/tgp>), Item 7, provides the following basis for breeders to claim priority:

7. Priority is claimed in respect of the application filed in (State / Intergovernmental Organization) (first application) _____ on (date) _____ under the denomination _____

An official copy of the first application, including the date of filing, is requested as a certification⁴ of priority

⁴ Within the prescribed time limit (minimum 3 months)

Article 11(3)

(3) [Documents and material] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any necessary information, document or material required for the purpose of the examination under Article 12, as required by the laws of that Contracting Party.

Expiration of the period of priority

3.1 The breeder shall be allowed a period of two years after the expiration of the period of priority (i.e. two years and 12 months after the filing date of the first application) in which to furnish to the authority any necessary information, document or material required for the purpose of the examination.

UPOV member A	First application Filing date: May 15, 2004	
UPOV member B	Subsequent application Filing date: February 13, 2005 (priority claimed)	For the purpose of the examination under Article 12, the breeder is allowed a period of two years after the expiration of the period of priority to furnish, to the authority any necessary information, document or material: May 15, 2007

Rejection or withdrawal of the first application

3.2 The UPOV Convention provides that, where the first application is rejected or withdrawn, the breeder shall be allowed an “appropriate time” after such rejection or withdrawal to furnish any necessary information, document or material required for the purpose of examination. In deciding on an “appropriate time”, the authority may take into account factors which might have an influence on the time needed by the breeder for the submission of information, document or material. Thus, a particular time might not be fixed in the law.

The following hypothetical examples provide an illustration of different scenarios concerning the right of priority:

UPOV member A	First application Filing date: May 15, 2004	
UPOV member B	Subsequent application Filing date: February 13, 2005 (priority claimed)	Priority recognized (application date in B within the period for claiming priority and priority was claimed in the application filed in B) Application in UPOV member B is treated as if it was filed at the filing date in UPOV member A, i.e. May 15, 2004
UPOV member C	Subsequent application Filing date: May 10, 2005 (priority not claimed)	No priority (application date in C within the period for claiming priority, but priority was not claimed in the application filed in C) (see paragraph (2)) Filing date in UPOV member C is May 10, 2005
UPOV member D	Subsequent application Filing date: June 10, 2005 (priority claimed)	No priority (application date in D beyond the period for claiming priority) Filing date in UPOV member D is June 10, 2005

NOTES ON ARTICLE 12 EXAMINATION OF THE APPLICATION

Any decision to grant a breeder’s right shall require an examination for compliance with the conditions under Articles 5 to 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.

1. *Novelty*

1.1 The UPOV Convention requires an examination for compliance with the Novelty condition as follows:

1.2 As explained in the UPOV Convention, for the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material. In that respect, the authority may request the breeder to furnish all the necessary information for the examination of novelty in the application form. The UPOV Model Form for the Application for Plant Breeders’ Rights (document TGP/5 “Experience and Cooperation in DUS Testing” Section 2 – <http://www.upov.int/en/publications/tgp/>), Item 8, provides the following request for information:

8. The variety has been [sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety]⁵ / [offered for sale or marketed, with the agreement of the breeder]⁶ (Authority to delete as appropriate) in [territory of application]:

not yet for the first time (date) _____
under the denomination _____

and in other territories: _____

not yet for the first time (territory and date) _____
under the denomination _____

⁵ Article 6(1) of the 1991 Act.

⁶ Article 6(1)(b) of the 1978 Act.

1.3 Article 30(1)(iii) of the 1991 Act requires that each member of the Union ensures that the public is informed through the regular publication of information concerning applications for and grants of breeders’ rights. The process of publishing information concerning applications allows for objections to be raised with the authority concerning compliance with the novelty condition.

2. *Distinctness, Uniformity and Stability (DUS)*

Guidance on the examination of distinctness, uniformity stability can be found in the following documents:

2.1 “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants” (document TG/1/3 “General Introduction”) (http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf).

2.2 “Arrangements for DUS Testing” (document TGP/6) <http://www.upov.int/en/publications/tgp/>.

3. *Experience and Cooperation in DUS Testing*

3.1 Cooperation with regard to DUS testing is an important benefit of the UPOV system. The UPOV Convention (Article 12 of the 1991 Act) requires that a variety be examined for compliance with the distinctness, uniformity and stability criteria. The 1991 Act then clarifies that, “In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out”. That wording indicates that an authority of a member of the Union may, for example, use one or more of the following arrangements:

(a) *the authority conducts growing trials, or other tests, itself;*

(b) *the authority arranges for another party / other parties to conduct the growing trials or other tests;*

In such an arrangement, another party could include, for example, another authority, an independent institute or the breeder.

(c) *the authority takes into account the results of growing trials, or other tests, which have already been carried out.*

This possibility allows for members of the Union to accept DUS reports on varieties already examined by another member of the Union. Such an approach is encouraged as an important means of minimizing the time for DUS examination and minimizing the cost of DUS examination by reducing duplication.

3.2 To facilitate cooperation in DUS testing as considered appropriate by members of the Union, UPOV has developed TGP/5 “Experience and Cooperation in DUS Testing” <http://www.upov.int/en/publications/tgp/>, which contains the following sections:

	<i>INTRODUCTION</i>
<i>Section 1</i>	<i>Model Administrative Agreement for International Cooperation in the Testing of Varieties</i>
<i>Section 2</i>	<i>UPOV Model Form for the Application for Plant Breeders' Rights</i>
<i>Section 3</i>	<i>Technical Questionnaire to be Completed in Connection with an Application for Plant Breeders' Rights</i>
<i>Section 4</i>	<i>UPOV Model Form for the Designation of the Sample of the Variety</i>
<i>Section 5</i>	<i>UPOV Request for Examination Results and UPOV Answer to the Request for Examination Results</i>
<i>Section 6</i>	<i>UPOV Report on Technical Examination and UPOV Variety Description</i>
<i>Section 7</i>	<i>UPOV Interim Report on Technical Examination</i>
<i>Section 8</i>	<i>Cooperation in Examination</i>
<i>Section 9</i>	<i>List of Species in Which Practical Knowledge has Been Acquired or for Which National Test Guidelines Have Been Established</i>
<i>Section 10</i>	<i>Notification of Additional Characteristics</i>
<i>Section 11</i>	<i>Examples of Policies and Contracts for Material Submitted by the Breeder</i>

3.3 Section 1 “Model Administrative Agreement for International Cooperation in the Testing of Varieties” provides a model agreement for cooperation between authorities.

3.4 An administrative agreement based on the Model Administrative Agreement is not a prerequisite for all aspects of international cooperation and, in particular, the utilization by members of the Union of existing DUS reports provided by authorities of other members of the Union would not necessarily require the use of such an agreement. However, in cases where such an agreement is not in place, members of the Union requesting existing DUS reports are nevertheless encouraged to use the model form in Section 5 “UPOV Request for Examination Results and UPOV Answer to the Request for Examination Results”.

NOTES ON ARTICLE 13 PROVISIONAL PROTECTION

Each Contracting Party shall provide measures designed 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. Such measures shall have the effect that the holder of a breeder’s right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application.

The period^{vi}

1.1 The UPOV Convention provides that the period of protection (Article 19 of the 1991 Act and Article 8 of the 1978 Act) is counted from the date of grant of a breeder’s right. The 1991 Act of the UPOV Convention requires that provisional protection is provided to the breeder during the period between the filing or publication of the application for the grant of the breeder’s right and the grant of that right.

1.2 A member of the Union may provide in its legislation that the measures of provisional protection (see below notes on “The measures”) shall only take effect in relation to persons whom the breeder has notified of the filing of the application. Such a notification may be considered to be fulfilled in relation to all persons when the law has retained the date of the publication as the initial date for provisional protection, because publication is generally recognized as a notification mechanism of third parties.

The measures

2.1 Article 13 of the 1991 Act of the UPOV Convention provides that members of UPOV bound by the 1991 Act shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application and the grant of the breeder’s right. Those measures require that the holder of the breeder’s right is “at least” entitled to equitable remuneration from any person who, during that period, carries out acts which, once the right has been granted, would require the breeder’s authorization as provided in Article 14 of the 1991 Act of the UPOV Convention.

2.2 The use of the text “at least” clarifies that it is possible, for example, that the provisions on provisional protection in the law governing breeders’ rights provide the holder of the breeder’s right with the full scope of the breeder’s right.

2.3 Provisional protection is valid only in relation to acts that would require the breeder’s authorization “once the right is granted”, i.e., if the right is not granted, provisional protection is not applicable.

NOTES ON ARTICLE 14 SCOPE OF THE BREEDER'S RIGHT

Article 14(1) and (2)

(1) [*Acts in respect of the propagating material*] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),**
- (ii) conditioning for the purpose of propagation,**
- (iii) offering for sale,**
- (iv) selling or other marketing,**
- (v) exporting,**
- (vi) importing,**
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.**

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [*Acts in respect of the harvested material*] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[Explanatory notes under developement]^{vii}

Article 14(3) and (4) [Optional provisions]

(3) [*Acts in respect of certain products*] Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(4) [*Possible additional acts*] Each Contracting Party may provide that, subject to Articles 15 and 16, acts other than those referred to in items (i) to (vii) of paragraph (1)(a) shall also require the authorization of the breeder.

NOTES ON “ESSENTIALLY DERIVED VARIETIES”^{viii}**Article 14(5)****Section I: Provisions of Essentially Derived Varieties***(a) Relevant Provisions of the 1991 Act of the UPOV Convention***THE RIGHTS OF THE BREEDER****Article 14****Scope of the Breeder’s Right**

[...]

(5) [*Essentially derived and certain other varieties*] *(a)* The provisions of paragraphs (1) to (4)* shall also apply in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

[...]

(b) For the purposes of subparagraph *(a)(i)*, a variety shall be deemed to be essentially derived from another variety (“the initial variety”) when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

* The provisions in Article 14(1) to (4) of the 1991 Act of the UPOV Convention are:

(1) [*Acts in respect of the propagating material*] *(a)* Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) Defining an essentially derived variety

1. The Convention does not provide clarification of terms such as “predominantly derived” or “essential characteristics”. However, the Convention provides certain examples of some ways in which an essentially derived variety may be obtained (Article 14(5)(c): “Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.”).

2. The use of the word “may” in Article 14(5)(c) indicates that those ways may not necessarily result in an essentially derived variety. In addition, the Convention clarifies that those are examples and do not exclude the possibility of an essentially derived variety being obtained in other ways.

3. Essentially derived varieties are obtained, either directly or indirectly, from a variety which is called the “initial variety”. In the example in Figure 1, variety B is an essentially derived variety from variety A and is predominantly derived from variety A. Essentially derived varieties can also be indirectly obtained from an initial variety. In the example in Figure 2, Variety C is essentially derived from Initial Variety ‘A’, but is predominantly derived from variety B.

4. Irrespective of whether variety C has been obtained directly from the initial variety A or not, it is an essentially derived variety from variety A if it fulfills the definition stated in Article 14(5)(b).

5. Another example of an indirect way in which it might be possible to obtain an essentially derived variety from an initial variety could be the use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid.

6. The relationship between the initial variety (variety A) and an essentially derived variety (varieties B and C) is irrespective of whether a plant breeder’s right has been granted to varieties A, B or C. Variety A will always be the initial variety for varieties B and C, and varieties B and C will always be essentially derived varieties from variety A. However, if the initial variety is protected, that will have certain consequences in relation to the essentially derived varieties B and C (see section (c)).

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [*Acts in respect of the harvested material*] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) [*Acts in respect of certain products*] Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(4) [*Possible additional acts*] Each Contracting Party may provide that, subject to Articles 15 and 16, acts other than those referred to in items (i) to (vii) of paragraph (1)(a) shall also require the authorization of the breeder.

Figure 1: Variety A is not an EDV from any other variety

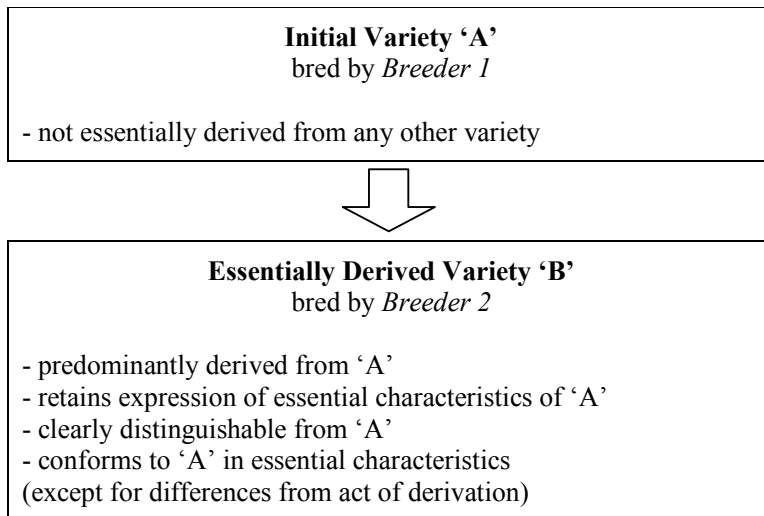
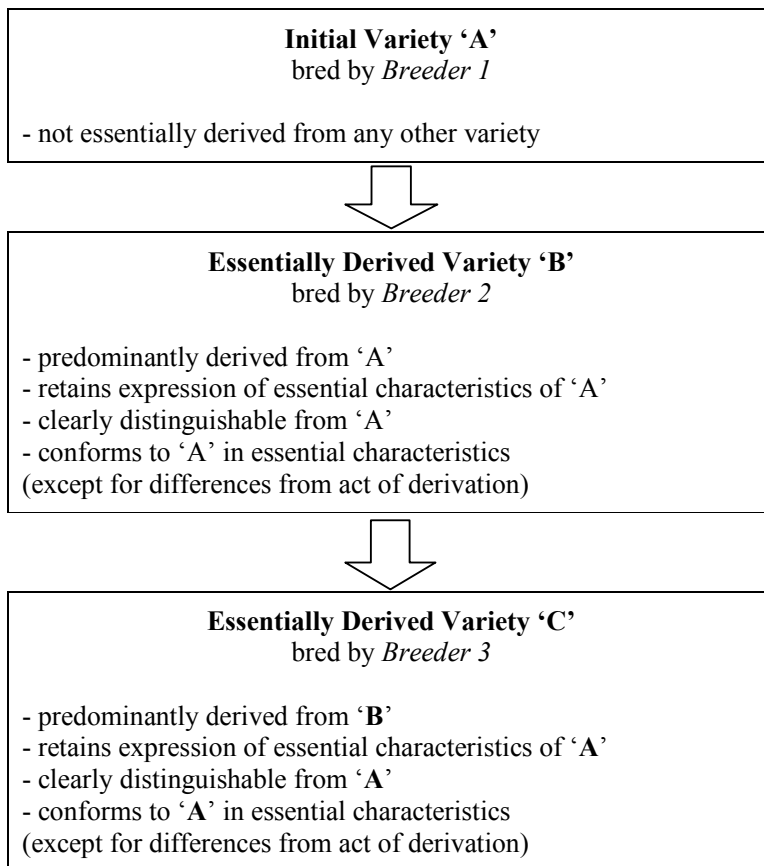


Figure 2: EDV C predominantly derived from EDV B



(c) *Scope of the Breeder’s Right with Respect to Initial Varieties and Essentially Derived Varieties*

Article 14(5)(a)(i)

(5) [Essentially derived and certain other varieties] (a) The provisions of paragraphs (1) to (4) shall also apply in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

7. Essentially derived varieties are eligible for plant breeders’ rights in the same way as for any variety, if they fulfill the conditions established in the Convention (see Article 5 of the 1991 Act of the UPOV Convention). If an essentially derived variety is protected, it is necessary to obtain the authorization of the breeder of the essentially derived variety as provided in Article 14(1) of the UPOV Convention. However, the provisions of Article 14(5)(a)(i) extend the scope of the right set out in Article 14(1) to (4) of the protected initial variety to essentially derived varieties. Therefore, if variety A is a protected initial variety, the acts included in Article 14(1) to (4) concerning essentially derived varieties require the authorization of the titleholder of variety A. In this document the term “commercialization” is used to cover the acts included in Article 14(1) to (4). Thus, when there is a plant breeder’s right on both the initial variety (variety A) and an essentially derived variety (variety B), the authorization of both the breeder of the initial variety (variety A) and the breeder(s) of the essentially derived variety (variety B) is required for the commercialization of the essentially derived variety (variety B).

8. Once the plant breeder’s right of the initial variety (variety A) has ceased, the authorization of the breeder of the initial variety is no longer required for the commercialization of variety B. In such a situation, and if the plant breeder’s right of the essentially derived variety is still valid, only the authorization of the breeder of the essentially derived variety would be required for the commercialization of variety B. Furthermore, if the initial variety was never protected, only the authorization of the breeder of the essentially derived variety would be required for the commercialization of variety B.

Summary

9. Figures 3 and 4 provide a summary of the situation described above. It is important to note that the scope of the breeder’s right is only extended to essentially derived varieties in respect of a protected initial variety. In that regard, it should also be noted that a variety which is essentially derived from another variety cannot be an initial variety (see Article 14(5)(a)(i)). Thus, in Figure 3, the rights of Breeder 1 extend to EDV ‘B’ and EDV ‘C’. However, although EDV ‘C’ is predominantly derived from EDV ‘B’, Breeder 2 has no rights as far as EDV ‘C’ is concerned. Another important aspect of the provision on essential derivation is that no rights extend to essentially derived varieties if the initial variety is not protected. Thus, in Figure 4, if Variety ‘A’ was not protected or if ‘A’ is no longer protected (e.g. because of expiration of the period of protection, or cancellation or nullification of the plant breeders’ rights), the authorization of Breeder 1 would no longer be required to be able to commercialize varieties ‘B’ and ‘C’.

Figure 3: Initial Variety protected and EDVs protected`

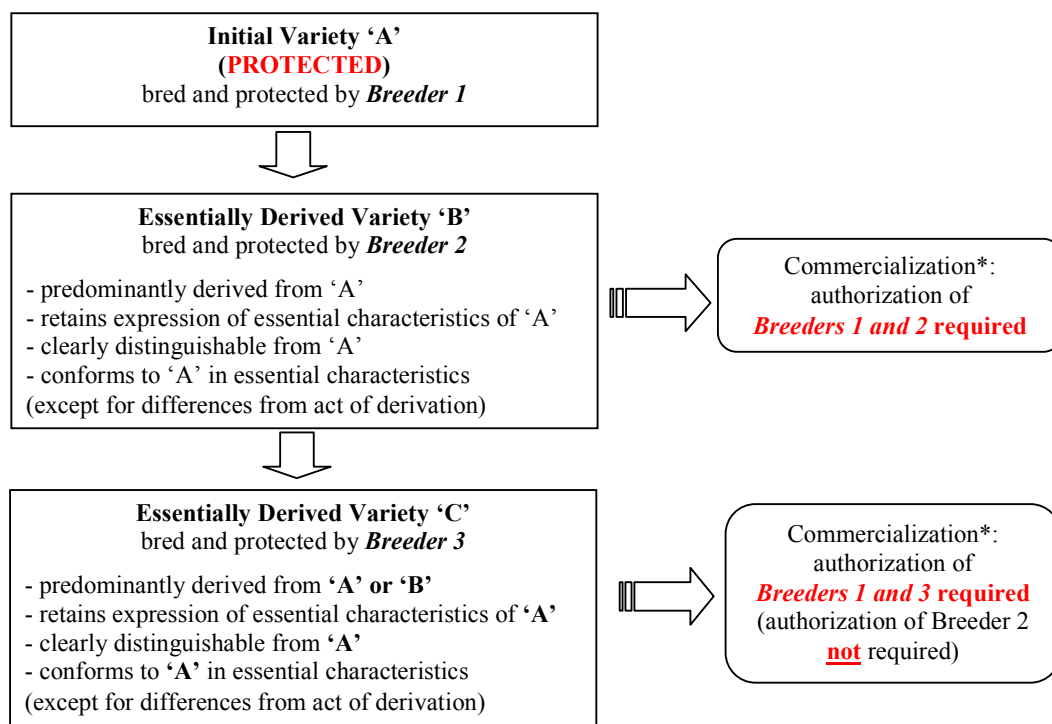
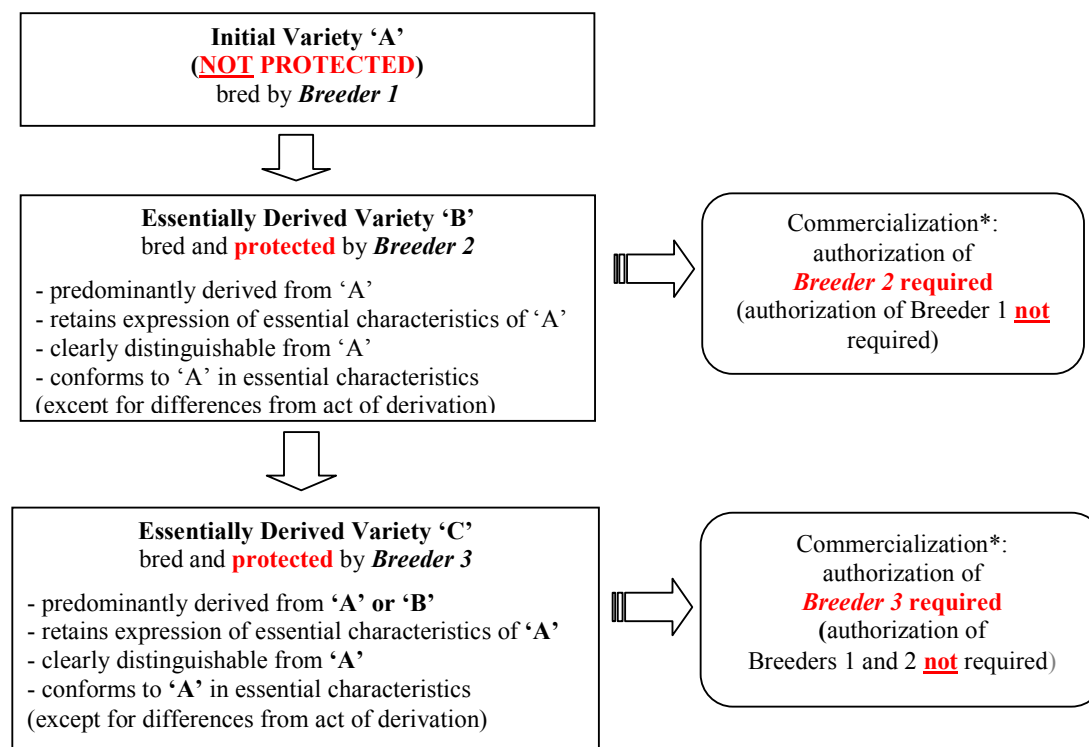


Figure 4: Initial Variety NOT protected and EDVs protected



* "Commercialization" encompasses the acts concerning a protected variety which require the authorization of the breeder according to Article 14(1) to (4) of the 1991 Act of the UPOV Convention.

(d) *Transition from an earlier Act to the 1991 Act of the UPOV Convention*

10. Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention are able to offer the benefits of the 1991 Act to varieties which were protected under an earlier law. Thus, it is possible for members of the Union to offer the scope of protection provided by Article 14(5) to varieties which were granted protection under an earlier law. However, it should be noted that the conferring of the new scope of rights on a previously protected initial variety could impose new requirements concerning the commercialization* of essentially derived varieties, for which the breeder's authorization was not previously required.

11. One means of dealing with such a situation is the following: for varieties for which protection was granted under the earlier law and for which there is a remaining period of protection which falls under the new law, to limit the scope of rights on a protected initial variety to essentially derived varieties whose existence was not a matter of common knowledge at the time that the new law came into effect. With respect to varieties whose existence is a matter of common knowledge, the General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants (Document TG/1/3) explains the following:

“5.2.2 Common Knowledge

5.2.2.1 Specific aspects which should be considered to establish common knowledge include, among others:

(a) commercialization of propagating or harvested material of the variety, or publishing a detailed description;

(b) the filing of an application for the grant of a breeder's right or for the entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be;

(c) existence of living plant material in publicly accessible plant collections.

5.2.2.2 Common knowledge is not restricted to national or geographical borders.”

* “Commercialization” encompasses the acts concerning a protected variety which require the authorization of the breeder according to Article 14(1) to (4) of the 1991 Act of the UPOV Convention.

Section II: Assessment of Essentially Derived Varieties

12. A decision on whether to grant protection to a variety does not take into account whether the variety is essentially derived or not: the variety will be protected if the conditions for protection as set out in Article 5 of the UPOV Convention are fulfilled (novelty, distinctness, uniformity, stability, variety denomination, compliance with formalities and payment of fees). If it is subsequently concluded that the variety is an essentially derived variety, the breeder of that essentially derived variety still has all the rights conferred by the UPOV Convention. However, the breeder of the protected initial variety will *also* have rights in that variety irrespective of whether the essentially derived variety is protected or not.

13. With regard to establishing whether a variety is an essentially derived variety, a common view expressed by members of the UPOV is that the existence of a relationship of essential derivation between protected varieties is a matter for the holders of plant breeders' rights in the varieties concerned.

UPOV has established a section on its website (ABOUT UPOV: Legal Resources: Jurisprudence: http://www.upov.int/en/about/legal_resources/case_laws) where case law relevant to plant breeders' rights, including case law concerning essentially derived varieties, is published.

NOTES ON ARTICLE 15 EXCEPTIONS TO THE BREEDER’S RIGHT

Article 15(1)(i)^{ix}

- (1) [Compulsory exceptions] The breeder’s right shall not extend to**
(i) acts done privately and for non-commercial purposes,

The following notes are intended to illustrate some acts which may be covered by the exception and some which may not:

1.1 Acts possibly not falling within the scope of the exception

1.1.1 The wording of Article 15(1)(i) indicates that acts which are *both* of a private nature *and* for non-commercial purposes are covered by the exception. Thus, non-private acts, even where for non-commercial purposes, may be outside the scope of the exception.

1.1.2 Furthermore, the wording indicates that private acts which are undertaken for commercial purposes do not fall within the exception. Thus, a farmer saving his own seed of a variety on his own holding might be considered to be engaged in a private act, but could be considered not to be covered by the exception if the said saving of seed is for commercial purposes. A separate optional exception (see Article 15(2)) has been created within the Convention to address farm-saved seed (see Explanatory Notes on Article 15(2)).

1.2 Acts possibly falling within the scope of the exception

The wording of Article 15(1)(i) suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden (i.e. no material of the variety being provided to others), since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example “subsistence farming”, where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder’s right, and farmers who conduct these kinds of activities freely benefit from the availability of protected new varieties.

Article 15(1)(iii)^x

**(1) [Compulsory exceptions] The breeder’s right shall not extend to
[...]**

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

The “Breeder’s exemption”

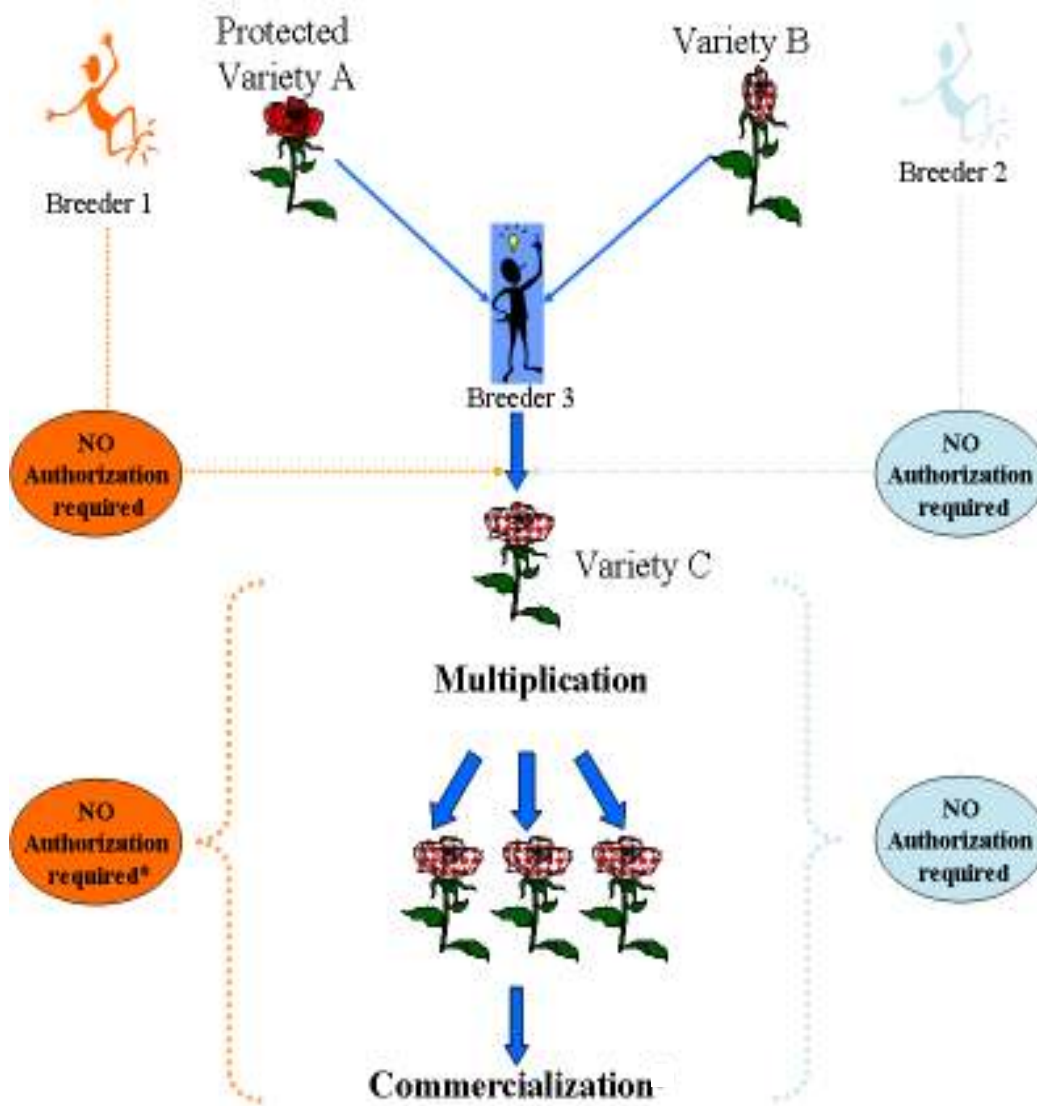
1.3 The exception under Article 15(1)(iii) states that the breeder’s right shall not extend to “acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.”. This is a fundamental element of the UPOV system of plant variety protection known as the “breeder’s exemption”, whereby there are no restrictions on the use of protected varieties for the purpose of breeding new plant varieties.

1.4 The second part of Article 15(1)(iii) “and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.” clarifies that, except for the varieties included in Article 14(5), i.e., essentially derived varieties; varieties which are not clearly distinguishable of the protected variety and varieties whose production requires the repeated use of the protected variety, the commercialization⁴ of the new varieties obtained does not require the authorization of the title holder of the protected variety used to create those new varieties.

1.5 The following scheme illustrates a hypothetical situation where a breeder uses a protected variety A and a non-protected variety B for the breeding of a new variety C. The scheme demonstrates that no authorization is required to breed variety C. Furthermore, the commercialization of variety C would not require the authorization of the breeder of variety A except where variety C was an essentially derived variety, or was a variety that required the repeated use of the protected variety A or was a variety which was not clearly distinguishable from the protected variety A (see Article 14(5) of the 1991 Act of the UPOV Convention).

⁴ In this document the term “commercialization” is used to cover the acts included in Article 14(1) to (4) of the 1991 Act of the UPOV Convention.

Scheme for the “breeder’s exemption”



* Except for:

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.

Article 15(2)^{xi}

(2) [Optional exception] Notwithstanding Article 14⁵, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

2.1 *Deciding on implementing the optional exception*

2.1.1 Article 15(2) is an “optional” provision as clarified by the wording “... each contracting Party may ...”. Thus, it is a matter for each member to decide whether it would be appropriate to incorporate the option provided in Article 15(2). The purpose of the following paragraphs is to provide guidance to those members of the Union which decide to incorporate the optional exception into their legislation.

2.1.2 When considering the way in which the optional exception might be implemented, the Diplomatic Conference of 1991 (see page 63 of UPOV Publication No. 346(E) “Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants”) developed the following recommendation:

“The Diplomatic Conference recommends that the provisions laid down in Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, should not be read so as to be intended to open the possibility of extending the practice commonly called ‘farmer’s privilege,’ to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned.”

2.1.3 The Diplomatic Conference recommendation indicates that the optional exception was aimed at those crops where, for the member of the Union concerned, there was a common practice of farmers saving harvested material for further propagation.

2.1.4 Article 15(2) states that “each Contracting Party may, [...] restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).” (underlining added for emphasis)

2.1.5 That wording indicates that the optional exception may be considered to relate to selected crops where the product of the harvest is used for propagating purposes, for example small-grained cereals where the harvested grain can equally be used as seed i.e. propagating material. Taken together with the recommendation relating to Article 15(2) of the Diplomatic Conference of 1991 (see above), the wording also indicates that it may be considered inappropriate to introduce the optional exception for agricultural or horticultural sectors, such as fruit, ornamentals and vegetables, where it has not been a common practice for the harvested material to be used as propagating material.

⁵ Article 14 “Scope of the Breeder’s Right”

2.2 “Reasonable limits and safeguarding of the legitimate interests of the breeder”

2.2.1 Subsection (b) explains that the optional exception may be introduced for selected crops. In respect of such crops, the UPOV Convention, Article 15(2) states:

“Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right [...]” (underlining added for emphasis)

2.2.2 For those crops where the optional exception is introduced; in relation to the introduction of reasonable limits and the safeguarding of the legitimate interests of the breeder within plant breeders’ rights legislation, the factors below, or a combination of such factors, amongst others, might be considered.

Type of variety

2.2.3 Where it is decided to introduce the optional exception for a particular crop or species, it is possible to specify only certain types of varieties for which it would be applicable. For example, authorities might decide not to extend the optional exception to certain types of varieties, e.g. hybrid varieties or synthetic varieties. This allows authorities to take into account whether there has been a common practice of farmers saving harvested material for further propagation and whether it would be appropriate to introduce the optional exception for such types of varieties.

Size of holding / crop area / crop value

2.2.4 Examples of factors which might be used to establish reasonable limits and to safeguard the legitimate interests of the breeder are the size of the farmer’s holding the area of crop concerned grown by the farmer, or the value of the harvested crop. Thus, “small farmers” with small holdings (or small areas of crop) might be permitted to use farm-saved seed to a different extent and with a different level of remuneration to breeders than “large farmers”. However, the size of holding (or crop area) determining a small farm may differ when considering reasonable limits and safeguarding the legitimate interests of the breeder for each member of the Union.

Example:

In country A, farmers with holdings (or a crop area) of less than 10 ha might only account for 5% of production of crop X. Thus, in country A, the setting of a level of 10 ha for a small farmer and allowing small farmers to pay a reduced or zero remuneration for crop X might only have a small impact on overall remuneration to breeders. Conversely, in country B, farmers with holdings (or crop areas) of less than 10 ha of crop X might account for 90% of production. Thus, in country B, the setting of a level of 10 ha for a small farmer and allowing small farmers to pay a reduced or zero remuneration for crop X would have a large impact on overall remuneration to breeders. Assessment of whether such an approach would be within reasonable limits and subject to safeguarding the legitimate interests of the breeder would need consideration in relation to the relevant legislation for the member of the Union concerned.

Proportion or amount of harvested crop

2.2.5 An example of another factor which might be considered in relation to reasonable limits and safeguarding the legitimate interests of the breeder is the proportion, or amount, of the crop concerned which would be the subject of the optional exception. Thus, for example, a member of the Union could choose to specify the maximum percentage of the harvested crop which the farmer may use for further propagation. The specified percentage might be varied in relation to the size of farm (or crop area) and/or the level of remuneration, as a percentage of standard remuneration, specified in relation to the proportion of farm-saved seed used by a farmer. Furthermore, the amount of the harvested crop to which the optional exception applies could be fixed in relation to the quantity of propagating material of the protected variety originally obtained by the farmer, by the amount appropriate to plant on the farmer's holding, or the amount to be reasonably consumed by the farmer and his dependents. The amount could also be expressed as a maximum acreage which may be planted using the harvested crop.

Changing situations

2.2.6 Plant variety protection encourages the introduction of new varieties and this may, in itself, lead to changes in the level of harvested material used for further propagation (farm-saved seed) of the crop concerned. Furthermore, evolution of farming practices and breeding and propagation methodologies, as well as economic developments could lead to changes in the level of harvested material used for further propagation. Thus, a member of the Union could, for example, limit the level of farm-saved seed to those levels which had been common practice before the introduction of plant variety protection.

Remuneration

2.2.7 For those crops where the optional exception is introduced, a requirement to provide remuneration to breeders might be considered as a means of safeguarding the legitimate interests of the breeders.

2.3 *Farmer's holding*

2.3.1 The optional exception is restricted to the following permission:

“farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).” (underlining added for emphasis)

2.3.2 The wording of the Convention clarifies that the optional exception relates to the use of the product of the harvest by the farmer on his own holding. Thus, for example, the optional exception does not extend to propagating material which was produced on the holding of another farmer.

2.4 *Implementation of the optional exception in Article 15(2)*

2.4.1 The inclusion of the optional exception in the 1991 Act of the UPOV Convention recognizes that, for some crops, there has been a common practice of farmers saving the product of the harvest for propagating purposes, and this provision allows each member of the Union to take account of this practice and the issues involved on a crop-by-crop basis, when

providing plant variety protection. The use of the words “within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder” is consistent with an approach whereby, if the optional exception is implemented, it is done in a way which does not undermine the incentives provided by the UPOV Convention for breeders to develop new varieties.

2.4.2 It is emphasized that it is a matter for each member of the Union to decide if, and how, it wishes to implement Article 15(2). Amongst the factors which may be considered are the impact on breeding, the costs and mechanisms required for implementation and the overall economic impact on agriculture. Consultation with the interested parties, notably breeders and farmers, to assess such effects might be an important means of ensuring successful implementation.

2.4.3 Over time, factors such as the evolution of farming practices and breeding and propagation methodologies, as well as economic developments may require modification of any implementing mechanism of the optional exception, in order to ensure that optimal benefits from plant variety protection are obtained by the member of the Union concerned. Therefore, it may be beneficial within some legal frameworks to include provisions which will enable such updating in a practical way.

2.4.4 In addition, authorities drafting legislation are invited to contact the Office of the Union for information on examples of legislation of members of the Union which may be of most relevance for their particular circumstances.

NOTES ON ARTICLE 16 EXHAUSTION OF THE BREEDER’S RIGHT

(1) [*Exhaustion of right*] The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question or

(ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of “material”*] For the purposes of paragraph (1), “material” means, in relation to a variety,

(i) propagating material of any kind,

(ii) harvested material, including entire plants and parts of plants, and

(iii) any product made directly from the harvested material.

(3) [*“Territory” in certain cases*] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

[Explanatory notes under development]^{xii}

NOTES ON ARTICLE 17 RESTRICTIONS ON THE EXERCISE
OF THE BREEDER'S RIGHT

(1) [*Public interest*] Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest.

(2) [*Equitable remuneration*] When any such restriction has the effect of authorizing a third party to perform any act for which the breeder's authorization is required, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

[Explanatory notes under development]^{xiii}

NOTES ON ARTICLE 18 MEASURES REGULATING COMMERCE

The breeder’s right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.

In relation to the provisions under Article 18 of the 1991 Act of the UPOV Convention, at its thirty-seventh ordinary session on October 23, 2003, the Council of UPOV adopted the “Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD)” (paragraph 9 is reproduced below) http://www.upov.int/en/news/2003/pdf/cbd_response_oct232003.pdf).

“9. [I]f a country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection. A separate mechanism from the plant variety protection legislation, such as that used for phytosanitary requirements, could be applied uniformly to all activities concerning the commercialization of varieties, including, for example, seed quality or other marketing related regulations.”

NOTES ON ARTICLE 19 DURATION OF THE BREEDER’S RIGHT

(1) [*Period of protection*] **The breeder’s right shall be granted for a fixed period.**

(2) [*Minimum period*] **The said period shall not be shorter than 20 years from the date of the grant of the breeder’s right. For trees and vines, the said period shall not be shorter than 25 years from the said date.**

1.1 The period of protection shall not be less than 20 years and not less than 25 years for trees and vines.

1.2 The period of protection starts from the date of grant (see also NOTES – ARTICLE 13 “Provisional Protection”).

NOTES ON ARTICLE 20 VARIETY DENOMINATION

Article 20(1)

(1) [*Designation of varieties by denominations; use of the denomination*] (a) The variety shall be designated by a denomination which will be its generic designation.

(b) Each member of the Union shall ensure that, subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

1.1 Article 5(2) of the 1991 Act of the UPOV Convention requires that the variety is designated by a denomination. Paragraph (1) provides for the denomination to be the generic designation of the variety, and subject to prior rights, no rights in the designation shall hamper the free use of the denomination of the variety, even after the expiration of the breeder's right. The obligation under paragraph (1) should be considered together with the obligation to use the variety denomination in respect of the offering for sale or marketing of propagating material of the variety (see paragraph (7)).

1.2 The obligation under paragraph (1) to allow for the use of the denomination in connection with the variety, even after the expiration of the breeder's right, is of relevance if the breeder of the variety is also the holder of a trademark which is identical to the variety denomination. It should be noted that where a name is registered as a trademark by a trademark authority, the use of the name as a variety denomination may transform the trademark into a generic name. In such cases, the trademark may become liable for cancellation⁶. In order to provide clarity and certainty in relation to variety denominations, authorities should refuse a variety denomination which is the same as a trademark in which the breeder has a right. The breeder may choose to renounce the trademark right prior to the submission of a proposed denomination in order to avoid its refusal.

⁶ WIPO Publication N°489 “WIPO Intellectual Property Handbook”

“Proper Use of Trademarks”

“2.397 Non-use can lead to the loss of trademark rights. Improper use can have the same result, however. A mark may become liable for removal from the Register if the registered owner has provoked or tolerated its transformation into a generic name for one or more of the goods or services in respect of which the mark is registered, so that, in trade circles and in the eyes of the appropriate consumers and of the public in general, its significance as a mark has been lost.

“2.398 Basically, two things can cause genericness: namely, improper use by the owner, provoking transformation of the mark into a generic term, and improper use by third parties that is tolerated by the owner. [...]

“2.400 The basic rule is that the trademark should not be used as, or instead of, the product designation. [...]

“2.404 However, it is not enough just to follow these rules: the trademark owner must also ensure that third parties and the public do not misuse his mark. It is specifically important that the trademark should not be used as or instead of the product description in dictionaries, official publications, journals, etc.”

Article 20(2)

(2) [*Characteristics of the denomination*] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of the Union, an existing variety of the same plant species or of a closely related species.

2.1 *Identification*

Provisions under paragraph (2) emphasize the “identification” role of the denomination. Bearing in mind that the main objective of the denomination is to identify the variety, sufficient flexibility should be given to incorporate evolving practices in designating varieties.

2.2 *Solely of figures*

2.2.1 Paragraph (2) states that the denomination may not consist “solely of figures” except where this is an “established practice” for designating varieties. The expression “solely of figures” refers to variety denominations consisting of numbers only (e.g. 91150). Thus, denominations containing both letters and figures are not subject to the “established practice” requirement (e.g. AX350).

2.2.2 In the case of denominations consisting “solely of figures,” the following non-exhaustive elements may assist the authorities to understand what might be considered to be “established practice”:

(a) for varieties used within a limited circle of specialists, the established practice should reflect that specialist circle (e.g. inbred lines);

(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. *Medicago*, *Helianthus*).

2.3 *Liable to mislead or to cause confusion*

Paragraph (2) states that the denomination must not be liable to “mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder.” These aspects are considered below.

2.3.1 Characteristics of the variety

The denomination should not:

(a) convey the impression that the variety has particular characteristics which, in reality, it does not have;

Example: a variety denomination “dwarf” for a variety which is of normal height, when a dwarfness trait exists within the species, but is not possessed by the variety.

(b) refer to specific characteristics of the variety in such a way that the impression is created that only the variety possesses them, whereas in fact other varieties of the species in question also have or may have the same characteristics; for example where the denomination consists solely of descriptive words that describe attributes of the variety that other varieties in the species may also possess.

Example 1: “Sweet” for a fruit variety;

Example 2: “Large white” for a variety of chrysanthemum.

(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case;

Example: a denomination which is similar to that of another variety of the same species or closely related species, e.g. “Southern cross 1”; “Southern cross 2”; etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case.

2.3.2 Value of the variety

The denomination should not consist of, or contain, comparative or superlative designations.

Example: a denomination which includes terms such as “Best”, “Superior”, “Sweeter”.

2.3.3 Identity of the variety

(a) As a general recommendation, a difference of only one letter or one number may be considered to be liable to mislead or cause confusion concerning the identity of the variety, except where the:

(i) difference of one letter provides for a clear visual or phonetic difference, e.g. if it concerns a letter at the beginning of a word:

Example 1: in the English language, ‘Harry’ and ‘Larry’ would not cause confusion; However, ‘Bough’ and ‘Bow’ might cause confusion (in phonetic terms);

Example 2: in the Japanese and Korean languages there is no difference between “L” and “R” sounds, thus “Lion” and “Raion” are exactly the same although these are distinguishable for English mother tongue speakers;

(ii) denominations consist of a combination of letters and figures;

(iii) denominations consist “solely of figures”.

(b) The use of a denomination which is similar to that used for a variety of another species or genera in the same denomination class (see section 2.5) may cause confusion.

(c) In order to provide clarity and certainty in relation to variety denominations, the re-use of denominations is, in general, discouraged, since the re-use of a denomination, even where that relates to a variety which no longer exists (see section 2.4.2) may, nevertheless, cause confusion. In some limited cases an exception may be acceptable, for example a variety which was never commercialized, or was only commercialized in a limited way for a very short time. In those cases, a suitable period of time after discontinued commercialization of the variety would be required before the re-use of the denomination in order to avoid causing confusion in relation to the identity and/or the characteristics of the variety.

2.3.4 Identity of the breeder

The variety denomination should not mislead or cause confusion concerning the identity of the breeder.

2.4 *Different from an existing variety of the same plant species or of a closely related species*

2.4.1 Paragraph (2) states that the denomination must be “different” from an existing variety of the same plant species or a closely related species.

2.4.2 The following explanation is for the purposes of variety denominations and without prejudice to the meaning of a “variety whose existence is a matter of common knowledge” in Article 7 of the 1991 Act. In general, the re-use of denominations is discouraged but, under exceptional circumstances (see section 2.3.3(c)), the denomination of an old variety could, in principle, be registered for a new variety.

2.5 *Variety denomination classes: a variety denomination should not be used more than once in the same class*

2.5.1 For the purposes of providing guidance on the third (see section 2.3.3(b)) and fourth sentences of paragraph 2 of Article 20 of the 1991 Act, variety denomination classes have been developed. A variety denomination should not be used more than once in the same class. The classes have been developed such that the botanical taxa within the same class are considered to be closely related and/or liable to mislead or to cause confusion concerning the identity of the variety.

2.5.2 It is recommended that the UPOV Plant Variety Database (“UPOV-ROM”) is used in the process to check if, in the territory of any member of the Union, the proposed denomination is different from denominations of existing varieties of the same genus or, if appropriate, variety denomination class (see NOTES – ARTICLE 20(2), LIST OF CLASSES). Attention is drawn to the “General Notice and Disclaimer” of the UPOV-ROM to ensure that the information contained in the UPOV-ROM is considered in an appropriate way.

[UPOV Variety Denomination Classes follow]

UPOV VARIETY DENOMINATION CLASSES:
A VARIETY DENOMINATION SHOULD NOT BE USED
MORE THAN ONCE IN THE SAME CLASS

For the purposes of providing guidance on the third and fourth sentences of paragraph 2 of Article 20 of the 1991 Act, variety denomination classes have been developed. A variety denomination should not be used more than once in the same class. The classes have been developed such that the botanical taxa within the same class are considered to be closely related and/or liable to mislead or to cause confusion concerning the identity of the variety.

The variety denomination classes are as follows:

- (a) General Rule (one genus / one class): for genera and species not covered by the following List of Classes, a genus is considered to be a class;
- (b) Exceptions to the General Rule (list of classes):
 - (i) classes within a genus: List of classes: Part I;
 - (ii) classes encompassing more than one genus: List of classes: Part II.

LIST OF CLASSES

Part I

Classes within a genus

	<u>Botanical names</u>	<u>UPOV codes</u>
Class 1.1	Brassica oleracea	BRASS_OLE
Class 1.2	Brassica other than Brassica oleracea	other than BRASS_OLE
Class 2.1	Beta vulgaris L. var. alba DC., Beta vulgaris L. var. altissima	BETAA_VUL_GVA; BETAA_VUL_GVS
Class 2.2	Beta vulgaris ssp. vulgaris var. conditiva Alef. (syn.: B. vulgaris L. var. rubra L.), B. vulgaris L. var. cicla L., B. vulgaris L. ssp. vulgaris var. vulgaris	BETAA_VUL_GVC; BETAA_VUL_GVF
Class 2.3	Beta other than classes 2.1 and 2.2.	other than classes 2.1 and 2.2
Class 3.1	Cucumis sativus	CUCUM_SAT
Class 3.2	Cucumis melo	CUCUM_MEL
Class 3.3	Cucumis other than classes 3.1 and 3.2	other than classes 3.1 and 3.2
Class 4.1	Solanum tuberosum L.	SOLAN_TUB
Class 4.2	Solanum other than class 4.1	other than class 4.1

LIST OF CLASSES (Continuation)

Part II

Classes encompassing more than one genus

	<u>Botanical names</u>	<u>UPOV codes</u>
Class 201	Secale, Triticale, Triticum	SECAL; TRITL; TRITI
Class 202	Panicum, Setaria	PANIC; SETAR
Class 203*	Agrostis, Dactylis, Festuca, Festulolium, Lolium, Phalaris, Phleum and Poa	AGROS; DCTLS; FESTU; FESTL; LOLIU; PHALR; PHLEU; POAAA
Class 204*	Lotus, Medicago, Ornithopus, Onobrychis, Trifolium	LOTUS; MEDIC; ORNTP; ONOBR; TRFOL
Class 205	Cichorium, Lactuca	CICHO; LACTU
Class 206	Petunia and Calibrachoa	PETUN; CALIB
Class 207	Chrysanthemum and Ajanía	CHRY5; AJANI
Class 208	(Statice) Goniolimon, Limonium, Psylliostachys	GONIO; LIMON; PSYLL_
Class 209	(Waxflower) Chamelaucium, Verticordia	CHMLC; VERTI; VECHM
Class 210	Jamesbrittania and Sutera	JAMES; SUTER
Class 211	Edible Mushrooms Agaricus bisporus Agaricus blazei Agrocybe cylindracea Auricularia auricula Auricularia polytricha (Mont.) Sacc. Dictyophora indusiata (Ventenat:Persoon) Fischer Flammulina velutipes Ganoderma lucidum (Leyss:Fries) Karsten Grifola frondosa Hericiu m erinaceum Hypsizig us marmoreus Hypsizig us ulmarius Lentinula edodes Lepista nuda (Bulliard:Fries) Cooke Lepista sordida (Schumacher:Fries) Singer Lyophyllum decastes Lyophyllum shimeji (Kawamura) Hongo Meripilus giganteus (Persoon:Fries) Karten Mycoleptonoides aitchisonii (Berkeley) Maas Geesteranus Naematoloma sublateritium Panellus serotinus Pholiota adiposa Pholiota nameko Pleurotus cornucopiae var.citrinooleatus Pleurotus cystidiosus Pleurotus cystidiosus subsp. Abalonus Pleurotus eryngii Pleurotus ostreatus Pleurotus pulmonarius Polyporus tuberaster (Jacquin ex Persoon) Fries Sparassis crispa (Wulfen) Fries Tricholoma giganteum Masee	AGARI_BIS AGARI_BLA AGROC_CYL AURIC_AUR AURIC_POL DICTP_IND FLAMM_VEL GANOD_LUC GRIFO_FRO HERIC_ERI HYPSI_MAR HYPSI_ULM LENTI_ELO LEPIS_NUD LEPIS_SOR LYOPH_DEC LYOPH_SHI MERIP_GIG MYCOL_AIT NAEMA_SUB PANEL_SER PHLIO_ADI PHLIO_NAM PLEUR_COR PLEUR_CYS PLEUR_CYS_ABA PLEUR_ERY PLEUR_OST PLEUR_PUL POLYO_TUB SPARA_CRI MACRO_GIG

* Classes 203 and 204 are not solely established on the basis of closely related species.

Article 20(3)

(3) [*Registration of the denomination*] The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the authority at the same time as the breeder's right is granted.

3.1 If the authority has found no grounds for refusal under paragraph (2), and knows of no grounds for refusal under paragraph (4), the proposed denomination shall be registered, published and communicated to the authorities of the other members of the Union.

3.2 In the event of prior rights (paragraph (4)) or other grounds for refusal, any interested person may file an objection to the registration. The authorities of the other members of the Union may submit observations (see Explanatory Notes on paragraph (6)).

3.3 Relevant objections and observations should be communicated to the applicant. The applicant should be given the opportunity to reply to the observations. If the authority considers the denomination unsuitable within its territory, it will require the breeder to submit another denomination. Failure to submit a proposal within the prescribed period should entail the rejection of the application.

3.4 The examination of the proposed denomination and of the other conditions for the protection of the variety are procedures which should be undertaken in parallel in order to ensure that the denomination can be registered at the time the breeder's right is granted.

Article 20(4)

(4) [*Prior rights of third persons*] Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

4. In deciding on the suitability of the proposed denomination and examining objections and observations in relation to prior rights of third persons, the following are intended to assist authorities.

(a) An authority should not accept a variety denomination if a prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder's right law, trademark law or any other intellectual property legislation. It is the responsibility of the title holder of a prior right to assert his rights through the available objection or court procedures. However, authorities are encouraged to make prior searches in relevant publications (e.g. official gazettes) and databases (e.g. UPOV-ROM) to identify prior rights for variety denominations. They may also make searches in other registers, such as trademark registers, before accepting a variety denomination.

(b) The notion of prior rights should include those rights which are in force, in the territory concerned, at the time of publication of the proposed denomination. For rights whose duration starts at the filing date of the application, the filing dates are those relevant for prior right considerations, provided those applications lead to the granting of rights.

(c) In the case of two conflicting proposed variety denominations (see paragraph (2)) in the same or different territories, the one with an earlier publication date should be retained and the relevant authority should request the breeder, whose proposed denomination was or might have been published at a later date, to submit another denomination.

(d) If, after the granting of a breeder’s right, it is discovered that there was a prior right concerning the denomination which would have resulted in the rejection of the denomination, the denomination should be cancelled and the breeder should propose another suitable denomination for the variety. Article 22(1)(b)(iii) of the 1991 Act states that, if the breeder does not propose another suitable denomination, the authority may cancel the breeder’s right.

(e) The following items provide some guidance on what might constitute a “prior right”, the exercise of which may prevent the use of the proposed denomination:

- (i) A trademark may be considered as a prior right when the proposed denomination is identical to a trademark registered for an identical good. For all practical purposes, such identity of goods is most likely to occur in respect of trademarks registered for goods under Class 31 of the Nice Classification⁷, although it is recalled that, in certain countries, trademarks may also be protected on the basis of use and without registration. If the trademark and proposed denomination are not identical, but similar, the trademark, in some cases, may constitute a prior right, the exercise of which may prevent the use of the proposed denomination, and the breeder may be required to propose another denomination. If, in spite of the similarity between the proposed denomination and the trademark, the exercise of the latter will not prevent the use of the proposed denomination, the denomination may be accepted; rejections of denominations by the authority on the basis of similarity to a trademark will, in general, result from oppositions of trademark holders, observations of authorities responsible for trademark registration, or judgments from a competent court. In cases of mere similarity or small likelihood of association by users, waivers granted to breeders by prior trademark right holders could be a suitable solution.
- (ii) If the proposed denomination is identical with or similar to a well-known mark, it may be unsuitable, even if the well-known mark applies to goods other than those appearing in Class 31 of the Nice Classification⁸;

⁷ Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of June 15, 1957, as revised in Stockholm on July 14, 1967, and Geneva on May 13, 1977, and amended on September 28, 1979.

⁸ Well-known marks are protected by the Paris Convention for the Protection of Industrial Property (Article 6*bis*) and the Agreement on Trade-Related Aspects on Intellectual Property Rights (Article 16.2 and 3 of the TRIPS Agreement). See also the 1999 WIPO Joint Recommendation Concerning Provisions on the Protection of Well-known Marks.

- (iii) Prior rights might also concern trade names⁹ and names of famous persons;
- (iv) Names and abbreviations of intergovernmental organizations, which are excluded by international conventions from use as trademarks or parts of trademarks, are not suitable as variety denominations¹⁰;
- (v) Prior rights concerning appellations of origin and geographical indications (e.g. “Scotch”) may exist under national legislation on grounds of common law or registration¹¹;
- (vi) In certain cases, prior rights in geographical names (e.g. names of cities or States) may exist; however, there is no general rule on these cases and assessment should be based on the probatory material presented on a case-by-case basis.

⁹ Article 8 of the Paris Convention.

¹⁰ This recommendation includes names and abbreviations notified pursuant to Article 6ter of the Paris Convention.

¹¹ Articles 22 to 24 of the TRIPS Agreement provide for an obligation for WTO Members to protect geographical indications; the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration sets up international registration procedures for appellations of origin in the States party to that Agreement.

Article 20(5)

(5) [*Same denomination in all members of the Union*] A variety must be submitted to all members of the Union under the same denomination. The authority of each member of the Union shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.

5.1 This provision reflects the importance of a single variety denomination for the effective operation of the UPOV system.

5.2 *Paragraph (5)* provides clear directions both for breeders and authorities:

(a) In relation to subsequent applications of the same variety, the breeder must submit in all members of the Union the denomination that was submitted with the first application. An exception to the above obligation might be appropriate when the proposed denomination is refused by one authority before the denomination is registered by any of the other members of the Union, in which case the breeder is encouraged to submit a new denomination to all authorities in order to obtain a single denomination in all territories.

(b) The essential obligation under paragraph (5) is that authorities should accept the denomination that was submitted and registered with the first application, unless such denomination is unsuitable in their territory (see section 5.3). On that basis, although certain provisions on variety denominations allow for authorities to develop individual guidance concerning best practices, the obligation under paragraph (5) should be given priority, unless there is direct conflict with the provisions of the UPOV Convention. In that respect, it is also recommended to avoid any narrow interpretation of the provisions of the UPOV Convention and related guidance or best practices, which could lead to the unnecessary refusal of variety denominations and, consequently, the unnecessary creation of synonyms for a variety;

(c) Due to different alphabetic scripts or systems of writing, it may be necessary to transliterate or transcribe the submitted denomination to enable its registration in another territory. In such cases, both the variety denomination submitted in the application and its transliteration or transcription are regarded as the same denomination. However, a translation would not be considered as the same denomination.

5.3 Whilst a degree of flexibility is appropriate, the following non-exhaustive list may assist the authorities in deciding what is unsuitable. A proposed denomination may be refused by an authority of a member if it transpires that, despite best endeavors (see section 5.5), in its territory

- (a) it does not conform to the provisions in paragraphs (2) and (4); or
- (b) it is contrary to public policy.

5.4 In order to permit the correct identification of a variety registered with different denominations due to exceptional cases (see section 5.3 above), in different territories, a regional or international synonym register may be developed by UPOV and/or by some members of the Union.

5.5 To reduce the risk of a variety denomination being considered to be unsuitable within a territory in which protection is to be sought, members of the Union are encouraged to make available to other authorities and breeders, the criteria, guidance and best practices which they apply for variety denominations. In particular, authorities are encouraged to make available any electronic search functions which they use in the examination of denominations in a form which would allow the on-line checking of a proposed variety denomination, against databases of relevant varieties and, in particular, the UPOV Plant Variety Database. Members of the Union may also choose to provide customized variety denomination checking services. Members of the Union are encouraged to use the UPOV website to provide information on, and links to, such resources.

Article 20(6)

(6) [*Information among the authorities of members of the Union*] The authority of a member of the Union shall ensure that the authorities of all the other members of the Union are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

6.1 Provisions of paragraph (6) indicate the importance of cooperation and exchange of information among authorities.

6.2 The obligation to inform other members of the Union of matters concerning variety denominations relies on the exchange of official gazettes and other means of publication. It is recommended that the layout of the official gazette be based on the UPOV Model Plant Breeder's Right Gazette (document UPOV/INF/5), in particular, the chapters containing information on variety denominations, should be appropriately identified in the table of contents. However, the UPOV Plant Variety Database is an important mechanism by which to maximize the availability of information for members of the Union concerning variety denominations in a practical form.

6.3 Paragraph (6) provides for the possibility for a member of the Union to make observations if it considers that a proposed denomination in another member of the Union is unsuitable. In particular with respect to the provisions of paragraph (5), the authority should take into account all observations made by the authorities of other members when deciding on the suitability of a proposed denomination. If the observations refer to an obstacle for approval which, according to the provisions on variety denominations under the UPOV Convention, applies to all members, then the proposed denomination should be refused. If the observation refers to an obstacle to approval only in the member of the Union which has transmitted the observation (e.g. prior trademark right within that territory), the applicant should be informed accordingly. If it is envisaged that protection will be applied for, or if it can be expected that reproductive or propagating material of the variety will be marketed in the territory of the member of the Union which has transmitted the observation, the authority examining the proposed denomination should request the applicant to propose another denomination.

6.4 The authorities making observations and the authority conducting the examination should, as far as possible, endeavor to reach an agreement on the acceptability of a variety denomination.

6.5 It is recommended that a communication of the final decision be addressed to any authority which has transmitted an observation.

6.6 Authorities are encouraged to send information on variety denominations to authorities dealing with the protection of other rights (e.g. authorities responsible for registering trademarks).

6.7 A model form for observations on proposed denominations submitted in another member of the Union can be seen in NOTES – ARTICLE 20(6), MODEL FORM FOR OBSERVATIONS. A model form for a reply to observations can be seen in NOTES – ARTICLE 20(6), MODEL REPLY TO OBSERVATIONS. Copies of these communications should be sent at the same time to the authorities of the other members of the Union.

[Model Form for Observations on Proposed Variety Denominations
Submitted to Another Member of the Union follows]

Model Form for Observations on Proposed Variety Denominations Submitted
to Another Member of the Union

From:

Your ref.

Our ref.

Observations on a Submitted Variety Denomination

To:

Submitted Variety Denomination: _____

Genus/Species (Botanical name): _____ UPOV Code: _____

Gazette: _____
(number/year)

Applicant: _____

Observations: _____

If the observations refer to a trademark or another right, name and address of the holder thereof (if possible):

Copies sent to the authorities of the other members of the Union

Date: _____ Signature: _____

[Model Reply to Observations on Proposed Variety Denominations
Submitted to Another Member of the Union follows]

Model Reply to Observations on Proposed Variety Denominations
Submitted to Another Member of the Union

From:

Your ref.

Our ref.

Reply to Observations on a Submitted Variety Denomination

To:

In reply to your objection to the denomination [.....] for the variety of [Botanical name/UPOV code], we wish to inform you that:

1. In our opinion there is sufficient difference between the names and both in writing and pronunciation. Therefore the [authority] sees no reason to reject the denomination.
2. The [authority] accepted this denomination and no objections were received during the prescribed period after publishing.
3. This variety has been registered under this name on
4. First publication as proposed denomination in
5. The applicant has been requested for another denomination.
6. This is the same variety.
7. Application on the variety has been withdrawn/rejected.
8. The applicant has withdrawn the proposed denomination for the variety.
9. Other

Copies sent to the authorities of the other members of the Union

Date: _____

Signature: _____

Article 20(7)

(7) [*Obligation to use the denomination*] Any person who, within the territory of one of the members of the Union, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

7. If it is found that prior rights of a third party prevent the use of the registered variety denomination, the authority shall require the breeder to submit another denomination. Article 22(1)(b)(iii) of the 1991 Act provides that the breeder's right may be cancelled if "the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination."

Article 20(8)

(8) [*Indications used in association with denominations*] When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

NOTES ON ARTICLE 21 NULLITY OF THE BREEDER'S RIGHT^{xiv}

(1) [*Reasons of nullity*] Each Contracting Party shall declare a breeder's right granted by it null and void when it is established

(i) that the conditions laid down in Articles 6 or 7 were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 or 9 were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.^{12]}

(2) [*Exclusion of other reasons*] No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).

1.1 When a breeder's right is declared null and void, it is equivalent to pronouncing that it was an invalid right and should not have been granted in the first instance. In contrast, a breeder's right which is cancelled was valid until the date of cancellation and was, in particular, valid at the time of granting (see Explanatory Notes on the Cancellation of the Breeder's Right under the UPOV Convention (document UPOV/EXN/CAN Draft 1) reproduced in NOTES – ARTICLE 22).

1.2 The use of the word "shall" clarifies that the competent authority must declare the breeder's right null and void if the criteria set out in Article 21(1) of the 1991 Act of the UPOV Convention are met.

¹² See Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD Draft 1).

NOTES ON ARTICLE 22 CANCELLATION OF THE BREEDER'S RIGHT^{xv}

(1) [Reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force, or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) [Exclusion of other reasons] No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

1.1 The cancellation of a breeder's right means that, from a given date, the breeder's right is no longer valid and the authorization of the breeder of the variety is no longer required for any of the acts which are covered by the scope of the breeder's right. A breeder's right which has been cancelled was valid until the date of cancellation and was, in particular, valid at the time of granting. In contrast, when a breeder's right is declared null and void, it is equivalent to pronouncing that it was an invalid right and should not have been granted in the first instance (see Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL Draft 1) in NOTES – ARTICLE 21).

1.2 Under the 1991 Act of the UPOV Convention, if the reasons for cancellation apply, the competent authority "may" cancel the breeder's right, i.e. there is no automatic obligation to cancel. Subject to applicable legislation, the competent authority may take into account the particular circumstances and may decide to cancel a breeder's right or may, for example, provide additional time to remedy the situation.

1.3 Article 22(1)(b)(iii) of the 1991 Act of the UPOV Convention provides that the breeder's right may be cancelled if "the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination". The explanatory notes corresponding to paragraph (4) of Article 20 of the 1991 Act ("Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/1) reproduced in NOTES – ARTICLE 20) provide guidance on situations in which the variety denomination might be cancelled.

NOTES ON ARTICLE 30 IMPLEMENTATION OF THE CONVENTION

[see Articles *23 to *26 of Part I of this document]

(1) [*Measures of implementation*] 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.

(2) [*Conformity of laws*] It shall be understood that, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organization must be in a position, under its laws, to give effect to the provisions of this Convention.

Enforcement of Breeders' Rights

1.1 “[...] (i) provide for appropriate legal remedies for the effective enforcement of breeders' rights;”^{xvi}

[see Articles *23 and* 24 of Part I of this document]

1.1.1 While the UPOV Convention requires members of the Union to provide for appropriate legal remedies for the effective enforcement of breeders' rights, it is a matter for breeders to enforce their rights.

1.1.2 The following enforcement measures might be considered:

(a) Civil measures

(i) provisional measures, pending the outcome of a civil action, to prevent or stop an infringement of the breeder's right, and/or to preserve evidence (e.g. collect samples of infringing material from greenhouses);

(ii) measures to allow a civil action to prohibit the committing, or continuation of the committing, of an infringement of the breeder's right;

(iii) measures to provide adequate damages to compensate the loss suffered by the holder of the breeder's right and to constitute a deterrent to further infringements;

(iv) measures to allow destruction or disposal of infringing material;

- (v) measures to provide payment by the infringer of the expenses of the holder of the breeder's right (e.g. attorney's fees);
- (vi) measures to require an infringer to provide information to the holder of the breeder's right on third persons involved in the production and distribution of infringing material.

(b) Customs measures

Importation

- (i) measures to allow suspension by the customs authorities of the release into free circulation, forfeiture, seizure or destruction of material which has been produced in contravention of the breeder's right;

Exportation

- (ii) measures to allow the suspension by the customs authorities of the release of the infringing material destined for exportation.

(c) Administrative measures

- (i) civil measures (see above (a)) as a result of administrative procedures;
- (ii) administrative sanctions or fines in relation to non-compliance with provisions on, or misuse of variety denominations.

(d) Criminal measures

Criminal actions and penalties in cases of wilful violation of the breeder's right on a commercial scale.

(e) Measures resulting from alternative dispute settlement mechanisms

Civil measures (see above (a)) obtained as a result of alternative dispute settlement mechanisms (e.g. arbitration).

- 1.2 “[...] (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;*”

[see Article 2 of Part I of this document]

Article 1(ix) of the 1991 Act of the UPOV Convention concerning “Definitions” provides that “‘authority’ means the authority referred to in Article 30(1)(ii)”. Article 30(1)(ii) of the 1991 Act of the UPOV Convention requires that a member of UPOV shall maintain an authority entrusted with the task of granting breeders’ rights or shall entrust the said task to an authority maintained by another member of UPOV.

- 1.3 “[...] (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.*”

[see Article *25 of Part I of this document]

The obligation to 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 relies on the publication of official gazettes and other means of publication. It is recommended that the layout of the official gazette be based on the UPOV Model Plant Breeder’s Right Gazette (document UPOV/INF/5).

- ⁱ To be updated according to latest draft/approved text of document UPOV/EXN/BRD/Draft 1.
- ⁱⁱ To be updated according to latest draft/approved text of document UPOV/EXN/VAR/Draft 1.
- ⁱⁱⁱ See paragraphs 37 and 38 of document CAJ/58/6.
- ^{iv} Text approved by the CAJ on October 27 and 28, 2008 (documents CAJ/58/6 and UPOV/EXN/NOV Draft 2).
- ^v Text approved by the CAJ by correspondence (documents CAJ/58/6 and UPOV/EXN/PRI Draft 1).
- ^{vi} Text approved by the CAJ by correspondence (documents CAJ/58/6 and UPOV/EXN/PRP Draft 1).
- ^{vii} To be updated according to latest draft/approved text of document UPOV/EXN/HRV/Draft 2.
- ^{viii} Text approved by the CAJ on October 27 and 28, 2008 (documents CAJ/58/6 and UPOV/EXN/EDV Draft 2).
- ^{ix} Text approved by the CAJ on October 27 and 28, 2008 (documents CAJ/58/6 and UPOV/EXN/EXC Draft 3).
- ^x Text approved by the CAJ on October 27 and 28, 2008 (documents CAJ/58/6 and UPOV/EXN/EXC Draft 3).
- ^{xi} Text approved by the CAJ on October 27 and 28, 2008 (documents CAJ/58/6 and UPOV/EXN/EXC Draft 3).
- ^{xii} To be updated according to latest draft/approved text of document UPOV/EXN/HRV/Draft 2.
- ^{xiii} See paragraphs 37 and 38 of document CAJ/58/6.
- ^{xiv} Text approved by the CAJ by correspondence (documents CAJ/58/6 and UPOV/EXN/NUL Draft 1).
- ^{xv} Text approved by the CAJ by correspondence (documents CAJ/58/6 and UPOV/EXN/CAN Draft 1).
- ^{xvi} To be updated according to latest draft/approved text of document UPOV/EXN/ENF/Draft 2.

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