

**Date:** September 28, 2007**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

GENEVA

DRAFT**CONDITIONS OF PROTECTION UNDER THE UPOV CONVENTION****(ARTICLE 5 OF THE 1991 ACT, ARTICLE 6 OF THE 1978 ACT)**

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to be considered by the Administrative and Legal Committee Advisory Group
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EXPLANATORY NOTES ON CONDITIONS OF PROTECTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on “Conditions of Protection” under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

2. These Explanatory Notes provide guidance on the following aspects of conditions of protection:

Section I: Relevant articles of the UPOV Convention

Section II: Person entitled to protection (breeder);

Section III: Conditions for protection:

- (a) novelty, distinctness, uniformity and stability (“DUS”) and denomination;
- (b) formalities and fees; and
- (c) no other conditions

Note for Draft version

Footnotes will be retained in published document

SECTION I: RELEVANT ARTICLES OF THE UPOV CONVENTION

1991 Act of the UPOV Convention

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.

1978 Act of the UPOV Convention

Article 6

Conditions Required for Protection

(1) The breeder shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

- (a) [... (distinctness)]
- (b) [... (novelty)]
- (c) [... (uniformity)]
- (d) [... (stability)]
- (e) The variety shall be given a denomination as provided in Article 13.

(2) Provided that the breeder shall have complied with the formalities provided for by the national law of the member State of the Union in which the application for protection was filed, including the payment of fees, the grant of protection may not be made subject to conditions other than those set forth above.

SECTION II: PERSON ENTITLED TO PROTECTION (BREEDER)

3. The 1978 Act of the UPOV Convention, Article 6 (1) states that “*The breeder* shall benefit from the protection provided for in this Convention when the following conditions are satisfied:”. The 1991 Act of the UPOV Convention, Article 1(v), specifies that “‘breeder’s right’ means the right of *the breeder* provided for in this Convention”.

4. Thus, the UPOV Convention clarifies that a breeder’s right shall only be granted to the breeder^{1 2} of a variety. The 1991 Act of the UPOV Convention, Article 21(1)(iii) further clarifies that each member of the Union shall declare a breeder’s right granted by it null and void when it is established “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.”.

¹ the definition of “breeder” in Article 1(iv) of the 1991 Act of the UPOV Convention is:

- 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”.

² 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).

SECTION III: CONDITIONS FOR PROTECTION

(a) *Novelty, Distinctness, Uniformity and Stability (“DUS”) and Denomination*

5. Guidance on novelty, DUS and denomination is provided in the following documents:

- (i) Novelty: “Explanatory Notes on Novelty under the UPOV Convention” (document [UPOV/EXN/NOV Draft 1])
- (ii) DUS: “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: see http://www.upov.int/en/publications/tg-rom/tg001/tg_1_3.pdf) and its associated “TGP” documents (see http://www.upov.int/en/publications/tgp/index_tgp.htm)
- (iii) Denomination: Explanatory Notes on Variety Denominations under the UPOV Convention (document UPOV/INF/12/1: see http://www.upov.int/en/publications/pdf/inf_12_1.pdf)

(b) *Formalities and Fees*

6. The UPOV Convention, (Article 5(2) of the 1991 Act and Article 6(2) of the 1978 Act) explains that the applicant³ must comply with the formalities provided for by the law of the member of the Union with whose authority the application has been filed and that he must pay the required fees.

7. The full text of Article 5(2) of the 1991 Act and Article 6(2) of the 1978 Act (see paragraph (c) “No Other Conditions”) means that any formalities must not introduce further conditions for protection beyond the conditions of novelty, DUS and designation by a denomination.

³ The “applicant” should be the “breeder” according to the definition of “breeder” in Article 1(iv) of the 1991 Act of the UPOV Convention which is:

- 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”.

(c) No Other Conditions

8. The UPOV Convention clarifies that the grant of protection may not be made subject to conditions other than those of novelty, DUS and designation by a denomination.

Article 5(2) of the **1991 Act** of the UPOV Convention

(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.

Article 6(2) of the **1978 Act** of the UPOV Convention

(2) Provided that the breeder shall have complied with the formalities provided for by the national law of the member State of the Union in which the application for protection was filed, including the payment of fees, **the grant of protection may not be made subject to conditions other than those set forth above.**

9. The UPOV Convention recognizes, in particular, that members of the Union may have measures to regulate within their respective territories the production, certification and marketing of material of varieties or the importing or exporting of such material. However, the UPOV Convention (see Article 18 of the 1991 Act and Article 14 of the 1978 Act, below) clarifies that the breeder's right must be independent of such measures and that, furthermore, such measures shall not affect the application of the provisions of the UPOV Convention.

Article 18 of the **1991 Act** of the UPOV Convention

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.

Article 14 of the **1978 Act** of the UPOV ConventionProtection Independent of Measures Regulating Production,
Certification and Marketing

(1) The right accorded to the breeder in pursuance of the provisions of this Convention shall be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and propagating material.

(2) However, such measures shall, as far as possible, avoid hindering the application of the provisions of this Convention.

10. There are a range of measures which can regulate the production and marketing of material of varieties, whether specifically related to varieties as such (e.g. an official register

of varieties admitted to trade, seed certification etc.), or measures which affect plant material whether in the form of a variety or not (e.g. phytosanitary measures, environmental and biosafety regulations etc.). Nevertheless, as explained above, the UPOV Convention requires that the breeder's right shall be independent of any such measures and that such measures shall not affect the application of the provisions of the Convention (see Article 18 of the 1991 Act and Article 14 of the 1978 Act). Furthermore, the UPOV Convention requires that such measures shall not introduce additional conditions for the grant of protection (see Article 5(2) of the 1991 Act and Article 6(2) of the 1978 Act).

11. Thus, for example, with respect to requirements which might need to be fulfilled for the inclusion of a variety in an official register of varieties admitted to trade, (e.g. National List, Official Catalogue etc.) any requirement for agronomic or commercial value must not be introduced as an additional condition for the grant of a breeder's right. Furthermore, since the legislation on measures regulating commerce and the legislation dealing with the grant of breeders' rights pursue different objectives, it is appropriate to include them in different legislation, although such legislation should be compatible and mutually supportive.

12. UPOV supports the view that other international measures which regulate plant material and the UPOV Convention should be mutually supportive. In particular, UPOV supports the view that the Convention on Biological Diversity (CBD) and relevant international instruments dealing with intellectual property rights, including the UPOV Convention, should be mutually supportive. In that respect, 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)" (see http://www.upov.int/en/news/2003/pdf/cbd_response_oct232003.pdf). The following elements of that reply are provided as guidance with regard to a mutually supportive implementation of the CBD and the UPOV Convention:

"Disclosure of Origin

"7. The requirement for "distinctness" in the UPOV Convention 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 knowledge 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.

"9. Thus, if 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.

“Benefit-Sharing

“Breeder’s Exemption

“12. UPOV would be concerned if any mechanism to claim the sharing of revenues were to impose an additional administrative burden on the authority entrusted with the grant of breeders’ rights and an additional financial obligation on the breeder when varieties are used for further breeding. Indeed, such an obligation for benefit sharing would be incompatible with the principle of the breeder’s exemption established in the UPOV Convention whereby acts done for the purpose of breeding other varieties are not, under the UPOV Convention, subject to any restriction and the breeders of protected varieties (initial varieties) are not entitled to financial benefit-sharing with breeders of varieties developed from the initial varieties, except in the case of essentially derived varieties (EDV). Furthermore, a benefit sharing mechanism within the legislation to grant breeder’s rights, would seem to tax only “protected” varieties and, instead of creating incentive mechanisms to develop new varieties, may provoke the opposite effect, whereby breeders would not develop new varieties or would not seek protection (favoring a legally insecure environment).

“13. The Food and Agriculture Organization of the United Nations (FAO), at its 31st Conference, on November 3, 2001, adopted the International Treaty on Plant Genetic Resources for Food and Agriculture. This Treaty (Article 13.2. (d)(ii)) recognizes the concept of the breeder’s exemption, in that breeders are excepted from financial benefit-sharing whenever their products are “available without restriction to others for further research and breeding ...”.

[...]”

[End of document]