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UNION INTERNATIONALE  
POUR LA PROTECTION  
DES OBTENTIONS  
VÉGÉTALES  
  
GENÈVE, SUISSE

UNIÓN INTERNACIONAL  
PARA LA PROTECCIÓN  
DE LAS OBTENCIONES  
VEGETALES  
  
GINEBRA, SUIZA

INTERNATIONAL UNION  
FOR THE PROTECTION  
OF NEW VARIETIES  
OF PLANTS  
  
GENEVA, SWITZERLAND

POSITION OF THE INTERNATIONAL UNION  
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)  
CONCERNING DECISION VI/5 OF THE CONFERENCE  
OF THE PARTIES TO THE CONVENTION  
ON BIOLOGICAL DIVERSITY (CBD)

*communicated to the Secretariat of the CBD*

as adopted by the Council

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## Background

*This document supersedes the memorandum prepared by the Office of the Union on the genetic use restriction technologies (GURTs) and sent to the CBD, dated January 10, 2003.*

*In its decision VI/5, adopted at its sixth session held in The Hague in April 2002, the Conference of the Parties to the CBD invited UPOV to examine, in the context of its work, the specific intellectual property implications of GURTs, particularly in respect of indigenous and local communities, and to further study their potential impacts on small farmers, indigenous and local communities and on farmers' rights. UPOV was also invited to study the applicability of existing, or the need to develop new, legal mechanisms to address the application of GURTs.*

*UPOV has not to-date, in the context of its work or otherwise, examined substantively the intellectual property implications of GURTs, as identified in the decision above. However, UPOV would like to take the opportunity of this invitation to comment on the need for breeders to have a system of protection to be able to recover their investment and to receive incentives in order to be able to continue their breeding activities. In this respect, UPOV notes that the UPOV Convention provides an effective and well balanced system for the protection of new plant varieties which assures the breeders interest. Where effective systems of protection are in place, breeders may not have to rely on other systems of protection.*

*With respect to varieties containing GURTs, it should be noted that such varieties may be granted plant breeders' rights if they satisfy the conditions.*

## Summary

*Breeders need to recover their investment and to receive incentives in order to be able to continue their breeding activities. The introduction of a legal framework according to the International Convention for the Protection of New Varieties of Plants (UPOV Convention) is a suitable approach to encourage the breeding of new varieties of plants for the benefit of society. In this respect, UPOV notes that the UPOV Convention provides an effective and well balanced system for the protection of new plant varieties which assures the breeders interest. Where effective systems of protection are in place, breeders may not have to rely on other systems of protection.*

## Introduction

1. The following sections highlight the key features of the UPOV Convention, and which UPOV considers appropriate to provide an effective and well-balanced system for the protection of new varieties of plants. All references to the UPOV Convention in this document refer to the 1991 Act of the UPOV Convention.

2. The development of improved varieties demands a considerable investment in terms of human and financial resources. Sustainable breeding programs require a return of the investment through the commercialization of the resulting varieties. Protection of intellectual property rights on new plant varieties according to the UPOV Convention facilitates such a return by providing a legal basis to prevent, under well-defined conditions, unauthorized exploitation of plant varieties by others.

3. The UPOV Convention provides a legal basis for the protection of new plant varieties. The UPOV Convention is a *sui generis* system for plant variety protection tailored for this purpose, reflecting the specific features of the subject of protection, which is a new plant variety, and the circumstances under which this plant variety is used. The scope of protection under the UPOV Convention has been carefully defined to provide an incentive for breeders to develop new varieties of plants beneficial for both farmers and consumers. A key feature of the UPOV system is that protected varieties, as a most important plant genetic resource, may be freely used by the worldwide community of breeders for further breeding. The UPOV Convention, furthermore, provides for an option for saving of seed by farmers in some situations. The protection given under the UPOV Convention can be analyzed under the following parameters:

- subject of the protection/extension of the protection,
- acts covered by the protection (1991 Act),
- materials covered by the protection,
- duration of the protection,
- exceptions,
- restriction to protection/compulsory licensing.

## Subject of the Protection/Extension of the Protection

4. Under the UPOV Convention, a protection title can only be granted to a plant variety, which is 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 and which satisfies the criteria established in the UPOV Convention. The protection granted to a variety does not extend to other varieties, except in the case of:

- (i) varieties, which are essentially derived from the initial protected variety, where the protected variety is not itself an essentially derived variety;
- (ii) varieties which are not clearly distinguished from the protected variety; and
- (iii) varieties whose production requires the repeated use of the protected variety.

#### Acts Covered by the Protection (1991 Act)

5. The nature of the right granted by the UPOV Convention is that the following acts with respect to the propagating material of the protected variety 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.

6. Furthermore, subject to the exceptions to, and exhaustion of, the breeder's right, the acts referred to 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.

7. In addition, each Contracting Party may provide that, subject to the exceptions to, and exhaustion of, the breeder's right, the acts referred to in respect of products made directly from harvested material of the protected variety falling within the provisions for harvested material mentioned above 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.

#### Materials Covered by the Protection

8. As stated in paragraph 5 above, plant variety protection according to the UPOV Convention covers the propagating material of the protected varieties, such as seeds, bulbs, tubers, seedlings, etc.

#### Duration of the Protection

9. Under the UPOV Convention (1991 Act), the breeder's right is granted for a fixed period, which 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.

### Exceptions

10. Under the UPOV Convention, 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.

The exclusion of acts done privately and for non-commercial purposes is of particular relevance for subsistence farmers who use plant varieties for their own food production. The research exemption and the breeders' exemption, as mentioned in (ii) and (iii) above, are important features of the UPOV Convention, which provide for the established practice amongst breeders whereby varieties produced by other breeders may be used for breeding new varieties.

11. Under the UPOV Convention, each member 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 protected 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. This provision enables each member of UPOV to decide, according to its own national circumstances, on whether or not, and to what extent, to recognize the practice of farmers to use a part of the harvest derived from the protected variety for the next year's planting, known as "farmers' privilege."

### Restriction to Protection/Compulsory Licensing

12. The UPOV Convention provides that a member may restrict the free exercise of a breeder's right for public interest. This provision allows a Government, for example in the case of an unforeseeable disaster in a country, to take measures to provide farmers with such planting material, as is necessary to reestablish the agricultural production, by limiting the exercise of the breeder's right.

[End]