



INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

DRAFT

EXPLANATORY NOTES ON PROVISIONAL PROTECTION
UNDER THE UPOV CONVENTION

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Note for Draft version

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

Highlighted text in square brackets and **footnotes** to be retained in the published version of the document.

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EXPLANATORY NOTES ON PROVISIONAL PROTECTION
UNDER THE UPOV CONVENTION^a

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on “Provisional 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 certain aspects of the provisions on provisional protection contained in Article 13 of the 1991 Act of the UPOV Convention and in Article 7(3) of the 1978 Act of the UPOV Convention.

SECTION I: PROVISIONS ON PROVISIONAL PROTECTION

3. The provisions on provisional protection contained in Article 13 of the 1991 Act of the UPOV Convention and Article 7(3) of the 1978 Act of the UPOV Convention are reproduced below:

1991 Act of the UPOV Convention

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.

1978 Act of the UPOV Convention

Article 7(3)

Provisional Protection

[...]

(3) Any member State of the Union may provide measures to protect the breeder against abusive acts of third parties committed during the period between the filing of the application for protection and the decision thereon.

SECTION II: CERTAIN ASPECTS OF THE PROVISIONS
ON PROVISIONAL PROTECTION

4. This section provides guidance on certain aspects of the provisions on provisional protection contained in Article 13 of the 1991 Act of the UPOV Convention and Article 7(3) of the 1978 Act of the UPOV Convention.

The period

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. [...] 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.

5. 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 filing¹ or publication of the application for the grant of the breeder's right and the grant of that right.²

6. 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

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.

7. 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

¹ Article 7(3) of the 1978 Act only refers to "the period between the filing of the application for protection and the decision thereon."

² Under Article 7(3) of the 1978 Act, provisional protection is an optional provision.

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.

8. 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.

9. 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.

10. The following example provision is intended to provide assistance to States/ intergovernmental organizations wishing to draft a provision on provisional protection in their laws in accordance with the 1991 Act of the UPOV Convention:^b

Article [13]³ Provisional Protection

[1] Provisional protection is provided to safeguard the interests of the breeder during the period between [the filing] / [the publication] of the application for the grant of a breeder's right and the grant of that right.

Example A

[2] The holder of a breeder's right [shall at least be entitled to equitable remuneration] from any person who, during the period provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article [14].

Example B

[2] The applicant is considered to be the holder of a breeder's right in relation to any person who, during the period provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article [14]. Legal action in respect of provisional protection can only be initiated after the right is granted.

[3] [Provisional protection shall only take effect in relation to persons whom the breeder has notified of the filing of the application.]

Paragraph (3) of the above example provision is not necessary if, in paragraph (1), the law has retained the date of the publication as the initial date for provisional protection (see above paragraph 6 of this document).

³ The highlighted text in square brackets is intended for drafters involved in the preparation of laws and identifies, as appropriate, text to be completed, numbering of provisions that might need to be modified, or provisions of the 1991 Act of the UPOV Convention providing for a choice.

- ^a Text approved by the CAJ by correspondence (documents CAJ/58/6 and UPOV/EXN/PRP Draft 1)
^b Text of paragraph 10 approved by the CAJ by correspondence on August 29, 2009 (Circular E-1042)

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