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To: UPOV Office
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Attention: Mr. P. Button, Vice Secretary-General

August 31, 2016.

Subj: Document UPOV/EXN/EDV/2 Draft 7:
Comments and Suggestions from the Russian Federation

Dear Mr. Button,

After careful review of the document UPOV/EXN/EDV/2 Draft 7 (further – the Draft), we herewith provide our comments and suggestions.

Being another project on the revision of document UPOV/EXN/EDV/1 adopted by the UPOV Council in 2009 the examined Draft in our opinion does not eliminate all issues regarding the application of provisions of Article 14(5)(a)(i), 14(5)(b) and 14(5)(c) of the 1991 Act of the UPOV Convention on essentially derived varieties (EDVs).

In other words, explanatory notes should contain brief but comprehensive information concerning concrete provisions of the Convention and should not refer to irrelevant information on the topic, as well as texts that require separate additional explanations.

Please see below our particular remarks.

1. Paragraph 1 with the reference to the resolution of the Diplomatic Conference on the revision of the UPOV Convention should be excluded from the preamble. We find it inappropriate to mention the appeal to the Secretary-General of UPOV *to start* the development of guidance on Article 14(5) "*immediately*" *quarter of a century* after the Diplomatic Conference was held.

2. Since the first and the second sentences of paragraph 2 are of similar meaning, we recommend to leave only the second sentence added by the phrase "... in accordance with the 1991 Act of the UPOV Convention".

3. Paragraph 3 should be removed as outlined information is available in the table of contents on page 2.

4. Information not related to specific regulation of the breeder's right on EDVs should be REMOVED in paragraph 4, namely:

- the words "~~**THE RIGHTS OF THE BREEDER**~~" (above **Article 14**);

- footnote (*) with the provisions of Article 14(1) to (4) of the 1991 Act of the UPOV Convention;
- subparagraphs (ii) and (iii) in paragraph 14(5).
The information is excess in the document.

The relevant provisions of the 1991 Act of the UPOV Convention in respect of EDVs should not be divided into subsections (a) and (b).

5. Paragraphs 4 and 5 should be removed, because the wording of the explanations in respect of Article 14(5((b)(i) is excessively complicated.

6. Paragraph 6 should be removed while:

It is impossible to make determination of a new variety derived based on the need of examination of additional characteristics that are absent in DUS Test Guidelines (such as "*performance*", "*value of the variety*", "*characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient or user*", "*characteristics that are essential for the variety as a whole*"). Such kind of characteristics should not be included in DUS Test Guidelines for different crops and species.

7. Paragraph 7 should be removed while:

The first phrase states "…"*it is clearly distinguishable from the initial variety"...is concerned only with varieties that are clearly distinguishable, in accordance with Article 7…*" However, there is no additional explanation for understanding needed. The second sentence on the possibility of application of Article 14(5)(a)(ii) "*if the variety is "not clearly distinguishable in accordance with Article 7 from the protected variety*" is wrong. Article 14(5)(a)(ii) has no reference to EDVs!

8. There are unacceptable conditions for EDVs in paragraphs 8, 9, 10, 11 therefore, the paragraphs should be removed.

9. The text of Article 14(5)(c) has already been mentioned in paragraph 1. Thus, paragraph 12 should be removed as well.

10. The first sentence in paragraph 13 should be removed, since the words "*may be obtained*" in Article 14(5)(c) should be understood as examples of methods for obtaining derived varieties. Instead of wording "In addition, the Convention clarifies …" the second sentence in paragraph 13 should rather start as follows: "The phrase "*for example*" in Article 14(5)(c) means … ".

11. Paragraphs 14 and 15 should be removed because we find it inappropriate to continuously complicate the process of determination of EDVs.

12. Paragraph 17 should be removed as there is no reason to set the difference between the terms "*essentially derived variety*" and "*predominantly derived variety*". Both terms refer to EDVs.

13. Paragraphs 18 and 19 should be removed as their content replicates the information contained in paragraph 16.

14. Paragraph 20 as amended by ESA and ISF should be rejected. Our comments on this matter have been sent earlier.*

* A new edition of Item 20 of document UPOV/EXN/EDV/2 Draft 7 under the joint ISF/ESA suggestion sets up that hybrids can be considered as essentially derived varieties (EDVs) from one of parents' lines what is inappropriate. Hybrids belong to the varieties whose production requires the repeated use of protected varieties / lines. This concerns Article 14(5)(a)(iii) of the UPOV Convention but not Article 14(5)(a)(i). A hybrid and each of its parent lines are independent objects of protection and can be used on a general basis (without ties) as initial varieties when developing EDVs.

15. As the Article 14(5)(a)(i) is already quoted in paragraph 1 there is no necessity to repeat it in paragraph 21(c).

16. It would be reasonable to supplement the paragraph 25 with sub-paragraph 25.1 (place it after the Figure 4) as follows:

"25.1. The breeder of the protected derived variety may obtain an authorization for commercialization of the variety (issue of licenses to the third parties on behalf of the breeder) in the form of exclusive license agreement with the breeder of initial variety".

Justification:
Elimination to need obtaining authorization from the breeder of the initial variety for commercialization of a variety derived by third parties (each independently) simplifies the use of derived varieties in the territory protected.

17. The words in paragraph 26 *"...in the territory concerned"* to be replaced with words "...in the same territory".

Justification:
The word "*concerned*" might be followed by questions. The territory to which the breeder's right applies should be the same for both varieties.

18. Paragraph 26 should be supplemented with subparagraph 26.1. as follows:

"26.1. In case of discrepancy between initial and the derived varieties' protection territories the breeder's right for the initial variety is extended to imported material of derived variety in the protection territory of the initial variety".

Justification:
The provision of Article 14(1)(a)(vi).

19. Paragraph 27 to be written as follows:

"27. Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention should cover the extension of the provisions of Article 14(5) to the generally known varieties".

Justification:
Members of the Union acceding to the 1991 Act of the Convention under paragraph 27 of the current draft are encouraged to choose whether to extend the provisions of Article 14(5) to the generally known before the date of accession to the 1991 Act varieties. We believe there shouldn't be dual approaches used. All members of the Union acceding to the 1991 Act should follow the provisions of Article 14(5) of the 1991 Act concerning all protected varieties regardless of the date of registration.

20. Paragraph 28 should be removed as its content does not refer to the subject.

21. The Section II "ASSESSMENT OF ESSENTIALLY DERIVED VARIETIES" to be removed.

Justification:
We believe there is no need to complicate the provision of determination of the essentially derived varieties as there are responsible authorities and relevant examinations of the varieties for such

purposes. Therefore we kindly ask you to take our suggestions below into consideration.

22. Section II to be written as follows:

"Section II "Registration of protected initial variety's rights' extension to essentially derived varieties"

29. An applicant (breeder) shall indicate the history of breeding (creation) of the variety in the application materials (the application form) for granting the breeder's right or application materials (the application form) for including the variety in the National List. At the stage of preliminary examination of the application the competent authority of the member of the Union examines the completeness of the information on the new variety and requests additional information if applicable.

30. A request to determine variety to the category "essentially derived varieties" and to denomination of the initial variety is prepared by the authority based on the information containing the origin of the variety and DUS examination, and is published in the official Bulletin.

31. Comments on the application materials submitted within six months after the publication are to be agreed with stakeholders.

32. The decision of competent authority concerning the determination of variety to the category of essentially derived varieties and denomination of the initial variety may be appealed in accordance with national legislation.

34.5. In the case of the protection of the initial variety in the territory of the member of the Union, the competent authority requests to submit a license agreement with the breeder of the initial variety about the conditions commercialization of the propagating material of EDV when registering the breeder's right for EDV.

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34.6. Interrelation between essentially derived varieties (protected and unprotected by private right) and the protected initial variety is reflected by the competent authority by publishing in the official Bulletin the information about varieties used in own territory, including the UPOV website."

35. A provision similar to paragraph 34 should be developed in respect of varieties which production requires multiple usage of protected variety (Article 14(5)(a)(iii)).

Thank you for your attention.

Yours sincerely,

Viktor I. Startcev,
Deputy Chairman