



INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
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EXPLANATORY NOTES ON NOVELTY
UNDER THE UPOV CONVENTION

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to be considered by correspondence
by the Administrative and Legal Committee*

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EXPLANATORY NOTES ON NOVELTY
UNDER THE UPOV CONVENTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on “Novelty” 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. Section I of these Explanatory Notes provides guidance on the Novelty provisions contained in Article 6 of the 1991 Act of the UPOV Convention and Article 6(1)(b) and Article 38 of the 1978 Act of the UPOV Convention. Section II provides guidance on the examination of Novelty, as required under Article 12 of the 1991 Act of the UPOV Convention and Article 7 of the 1978 Act of the UPOV Convention.

Note for Draft version

Footnotes will be retained in published document

Endnotes are background information for the CAJ when considering this draft and will not appear in the final, published document

SECTION I: NOVELTY PROVISIONS

(a) *Relevant articles of the UPOV Convention*

3. Section I provides guidance on certain aspects of the Novelty provisions contained in Article 6 of the 1991 Act of the UPOV Convention and Article 6(1)(b) and Article 38 of the 1978 Act of the UPOV Convention, which are reproduced below:

1991 Act of the UPOV Convention

Article 6

Novelty

(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.

(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.

(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.

Article 6(1)(b) and Article 38 of the **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:

[...]

(b) At the date on which the application for protection in a member State of the Union is filed, the variety

(i) must not—or, where the law of that State so provides, must not for longer than one year—have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) not have been offered for sale or marketed, with the agreement of the breeder, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection.

Article 38

Transitional Limitation of the Requirement of Novelty

Notwithstanding the provisions of Article 6, any member State of the Union may, without thereby creating an obligation for other member States of the Union, limit the requirement of novelty laid down in that Article, with regard to varieties of recent creation existing at the date on which such State applies the provisions of this Convention for the first time to the genus or species to which such varieties belong.

(b) *Material of the variety*

1991 Act of the UPOV Convention: Article 6 (1)

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) [...]

1978 Act of the UPOV Convention: Article 6 (1)(b)

At the date on which the application for protection in a member State of the Union is filed, **the variety**

(i) [...]

4. As clarified in the 1991 Act of the UPOV Convention, the Novelty provisions concern propagating and harvested material of the variety.

5. Discussions have taken place in UPOV with regard to the novelty of varieties which are inbred (parent) lines of hybrid varieties. In particular, some UPOV members consider that hybrid seed can be considered as "harvested material" of the parent lines of the hybrid concerned. In those cases, the sale or otherwise disposal of hybrid seed to others, by or with the consent of the breeder, for purposes of exploitation of the variety is relevant for the novelty of the parent lines of the hybrid. The Administrative and Legal Committee (CAJ) of UPOV concluded that the basic view on this issue seemed to be that the novelty of the parent lines was lost by the exploitation of the hybrid variety beyond the relevant period (see Section I, paragraph (d)), whilst accepting that different UPOV members had a different position^a. The reason for adopting the view that the novelty of the parent lines was lost by the exploitation of the hybrid variety beyond the relevant period was to ensure that the breeder could not enjoy further *de facto* protection of the hybrid variety, after the expiration of its protection, by subsequently obtaining protection for the parent lines. In the case of simple hybrids, such an approach could result in *de facto* protection for the hybrid being extended by 20 or 40 years and, in the case of more complex hybrids, even longer, e.g. 80 years in the case of three-way hybrids.

(c) *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)*

1991 Act of the UPOV Convention: Article 6 (1)

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) [...]

1978 Act of the UPOV Convention: Article 6 (1)(b)

(b) At the date on which the application for protection in a member State of the Union is filed, the **variety**

(i) must not—or, where the law of that State so provides, must not for longer than one year—have been **offered for sale or marketed, with the agreement of the breeder**, in the territory of that State, and

(ii) not have been **offered for sale or marketed, with the agreement of the breeder**, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection.

6. 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 breeder¹, for purposes of exploitation of the variety. Thus, the following acts can 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 of material other than propagating or harvested material of the variety;
- (iv)^b sale or disposal of to others that forms part of an agreement for the transfer of the rights in the variety;

¹ 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).

- (v)^c sale or disposal of to others that forms part of an agreement under which a person multiplies propagating material of the variety concerned on behalf of the breeder, provided that the property in the multiplied material reverts to the breeder, and provided that the multiplied material is not used for the production of another variety;
- (vi)^d 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;
- (vii)^e sale or disposal of to others that forms part of the fulfillment of a statutory or administrative obligation, in particular concerning biological security or the entry of varieties in an official catalogue of varieties admitted to trade; and
- (viii)^f 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 (v) to (vii) above, provided that the said material is sold or disposed of without variety identification for the purposes of consumption.

*(d) Relevant periods***1991 Act** of the UPOV Convention: Article 6(1)

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.

1978 Act of the UPOV Convention: Article 6(1)(b)

At the date on which the application for protection **in a member State of the Union** is filed, the variety

(i) must **not—or**, where the law of that State so provides, must **not for longer than one year**—have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) **not** have been offered for sale or marketed, with the agreement of the breeder, **in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees**, including, in each case, their rootstocks, **or for longer than four years in the case of all other plants.**

[...]

7. 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 longer evaluation needed for these types of plants.

8. 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/index.htm>).

(e) *Varieties of recent creation*

1991 Act of the UPOV Convention: Article 6 (2)

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.

1978 Act of the UPOV Convention: Article 38

Notwithstanding the provisions of Article 6, any member State of the Union may, without thereby creating an obligation for other member States of the Union, limit the requirement of novelty laid down in that Article, with regard to varieties of recent creation existing at the date on which such State applies the provisions of this Convention for the first time to the genus or species to which such varieties belong.

9. 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^g. 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.

10. 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.

(f) *Schematic summary*

11. The following schematic is intended to provide an overview of the requirements for a variety to satisfy the condition of Novelty under the UPOV Convention: the **NOVELTY** condition **IS SATISFIED** if the answer to **ANY** of the questions is **NO**.

Question	case 1	case 2	case 3	case 4	case 5	case 6
The act concerned propagating or harvested material of the variety?	Yes	Yes	Yes	Yes	Yes	No
The material was sold or otherwise disposed of to others?	Yes	Yes	Yes	Yes	No	Yes
The material was sold or otherwise disposed of to others with the consent of the breeder?	Yes	Yes	Yes	No	-	Yes
The material was sold or otherwise disposed of to others for purposes of exploitation of the variety?	Yes	Yes	No	Yes	-	Yes
The sale or other disposal occurred earlier than: 1 year before the filing date in the territory where the application was filed; OR 6 years (trees/vines) or 4 years (other crops), before the filing date, in another territory?	Yes	No	Yes	Yes	-	Yes
NOVELTY CONDITION SATISFIED?	NO	YES	YES	YES	YES	YES

SECTION II:
EXAMINATION FOR COMPLIANCE WITH THE NOVELTY CONDITION

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

1991 Act of the UPOV Convention

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.

1978 Act of the UPOV Convention

Article 7: Official Examination of Varieties; Provisional Protection

(1) Protection shall be granted after examination of the variety in the light of the criteria defined in Article 6. Such examination shall be appropriate to each botanical genus or species.

(2) For the purposes of such examination, the competent authorities of each member State of the Union may require the breeder to furnish all the necessary information, documents, propagating material or seeds.

[...]

13. 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), Item 8, provides the following request for information^h:

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] / [offered for sale or marketed, with the agreement of the breeder] (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 _____

14. 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.

[End of document]

^a see documents CAJ/41/5, CAJ/41/ 5Add., CAJ/41/9, CAJ/43/6 and CAJ/43/8.

^b UPOV Publication No. 842 "Model Law on the Protection of New Varieties of Plants" (UPOV Model Law) proposes the listing of six cases that should not be prejudicial to novelty: this is based on number (ii)

^c UPOV Model Law proposes the listing of six cases that should not be prejudicial to novelty: this is based on number (iii)

^d UPOV Model Law proposes the listing of six cases that should not be prejudicial to novelty: this is based on number (iv)

^e UPOV Model Law proposes the listing of six cases that should not be prejudicial to novelty: this is based on number (v)

^f UPOV Model Law proposes the listing of six cases that should not be prejudicial to novelty: this is based on number (vi)

^g The guidance on the duration of protection for varieties of recent creation in the draft Explanatory Notes on Novelty Under the UPOV Convention is a departure from the guidance provided by the UPOV Model Law, which anticipates the possibility of a period of protection which would be shorter than the minimum period stated in the UPOV Convention. The UPOV Model Law states as follows:

Article 56

Protection of Known Varieties

(1) Notwithstanding Article 6, a breeder's right may also be granted for a variety that is no longer new on the date of entry into force of this Law in respect of the relevant species, subject to the following conditions:

(a) the application shall be filed within the year following the said date; and

(b) the variety must

(i) have been entered in the National Catalogue of Varieties Admitted to Trade or in a register of varieties held by a professional organization recognized by the Office, on the advice of the Council, for the purposes of this Article,

(ii) have been the subject of a breeder's right in a Contracting Party, or be the subject of an application in a Contracting Party, provided that the application subsequently leads to the granting of the breeder's right, or

(iii) be the subject of proof acceptable to the Office concerning the date on which the variety ceased to be new under the provisions of Article 6.

(2) **The duration of the breeder's right granted under this Article shall be calculated from the date of the entry referred to in paragraph (1)(b)(i), above, the date of the grant of the breeder's right referred to in paragraph (1)(b)(ii), above, or the date upon which the variety ceased to be new referred to in paragraph (1)(b)(iii), above. Where relevant, the earliest of those dates shall be used.**

[...]

The UPOV Model Law guidance has not been used because, with regard to the duration of protection, the UPOV Convention does not make specific provision for varieties of recent creation. The minimum duration of protection is set out in Article 19 of the 1991 Act and Article 8 of the 1978 Act of the UPOV Convention.

^h to be finalized according to adopted version of document TGP/5 Section 2/2.