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DRAFT

EXPLANATORY NOTES ON
THE DEFINITION OF VARIETY
UNDER THE 1991 ACT OF THE UPOV CONVENTION

*Document prepared by the Office of the Union
to be considered by the Administrative and Legal Committee
at its sixty-first session to be held in Geneva on March 25, 2010*

Note for Draft version

Footnotes will be retained in published document.

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

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EXPLANATORY NOTES ON THE DEFINITION OF VARIETY
UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on the definition of “Variety” under the 1991 Act of the International Convention for the Protection of New Varieties of Plants. 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.

DEFINITION OF VARIETY CONTAINED IN ARTICLE 1(VI)
OF THE 1991 ACT OF THE UPOV CONVENTION

(a) Relevant Article of the 1991 Act of the UPOV Convention

2. The definition of variety provided in Article 1(vi) of the 1991 Act of the UPOV Convention is reproduced below:

<p style="text-align: center;">1991 Act of the UPOV Convention</p> <p style="text-align: center;">Article 1</p> <p style="text-align: center;">Definition</p> <p>(vi) “variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be</p> <ul style="list-style-type: none">- 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;

(b) Certain aspects of the definition of variety

3. The following paragraphs explain certain aspects of the definition of variety.

(i) *Plant grouping within a single botanical taxon of the lowest known rank*

4. The definition of “variety” under the 1991 Act of the UPOV Convention starts by stating that it is “a plant grouping within a single botanical taxon of the lowest known rank, ... ” thereby confirming that a variety may not, for example, consist of plants of more than one species.

5. The definition that a variety means a “plant grouping” clarifies that the following, for example, do not correspond to the definition of a variety:

- a single plant; (however, an existing variety may be represented by a single plant or part(s) of a plant, provided that such a plant or part(s) of the plant could be used to propagate the variety)^a
- a trait (e.g. disease resistance, flower color)
- a chemical or other substance (e.g. oil, DNA)
- a plant breeding technology (e.g. tissue culture).

(ii) Irrespective of whether the conditions for the grant of a breeder's right are fully met

6. The definition of “variety” in Article 1(vi) of the 1991 Act of the UPOV Convention specifies that a plant grouping within a single botanical taxon of the lowest known rank can be a variety, “irrespective of whether the conditions for the grant of a breeder’s right are fully met”. Thus, the definition of a “variety” is wider than “protectable variety”.

7. The definition of “variety” plays an important role in the context of the examination of distinctness. Article 7 of the 1991 Act of the UPOV Convention provides that “[t]he variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application.” The words “irrespective of whether the conditions for the grant of a breeder’s right are fully met” make it clear that varieties of common knowledge which are not protected may, nevertheless, still be varieties which correspond to the definition of variety in Article 1(vi), from which a “candidate variety” (a “variety” for which an application for a breeder’s right has been filed) must be clearly distinguishable. Guidance on varieties of common knowledge is provided in documents TG/1/3 “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants” and TGP/4/1 “Constitution and Maintenance of Variety Collections”.

8. In general, the authorities do not examine whether a “candidate variety” corresponds to the definition of a variety according to Article 1(vi) of the 1991 Act of the UPOV Convention. Authorities are required to examine whether the application for a breeder’s right meets the requirements for the grant of a breeder’s right including, in particular, whether the candidate variety is distinct, uniform and stable (DUS). A variety which fulfills the DUS criteria will meet the definition of variety. In general, in the case of a rejected application, the authorities will not indicate whether they consider that the candidate variety corresponds to the definition of a “variety” or not.

(iii) Defined by the expression of characteristics resulting from a given genotype or combination of genotypes

9. The notion of “combination of genotypes” covers, for example, synthetic varieties and hybrids.

(iv) Considered as a unit with regard to its suitability for being propagated unchanged

10. The UPOV Convention does not limit the means by which a variety can be propagated unchanged. In the case of some varieties, such as vegetatively propagated, self-pollinated and some cross-pollinated varieties, a variety may be propagated unchanged from the plants of the variety itself. In the case of some other varieties, for example hybrids and synthetic varieties, the variety may be propagated unchanged by a cycle of propagation that may involve plants other than those of the variety. Such a cycle of propagation may involve a simple cross of two parent lines (e.g. simple hybrid), or may involve a more complex cycle of propagation (e.g. three-way hybrids, synthetic varieties etc.). Some examples of methods of propagating varieties can be found in document TGP/7 “Development of Test Guidelines”, Annex 3 “Guidance Notes”, GN 31 “Information on method of propagating the variety” and GN 32 “Information on method of propagation of hybrid varieties” [cross ref.].

Notes

^a The CAJ-AG, agreed that the first indent of paragraph 5 should be modified to clarify that an existing variety may be represented by a single plant or part(s) of a plant provided that the plant or part(s) of the plant could be used to produce the variety. The CAJ-AG agreed that the text and discussions at the 1991 Diplomatic Conference should be taken into account in the development of that explanation. The proposal of the definition of variety at the Diplomatic Conference for the Revision of the international Convention for the Protection of New Varieties of Plants held in Geneva from March 4 to 19, 1991 (document DC/91/3) is reproduced below for information.

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RECORDS OF THE 1991 DIPLOMATIC CONFERENCE

BASIC PROPOSAL**CHAPTER I****DEFINITIONS****Article 1*****Definitions**

[.....]

(vi) "variety" means a group of plants, which group, irrespective of whether the conditions for the grant of a breeder's right are fully met,

- can be defined by the characteristics that are the expression of a given genotype or combination of genotypes and
- can be distinguished from other groups of plants of the same botanical taxon by at least one of the said characteristics.

A particular variety may be represented by several plants, a single plant or by one or several parts of a plant, provided that such part or parts can be used for the production of entire plants of the variety;

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