

ARTICLE

Contact us:

■ **Bolotov & Partners LLP**
Almaty Residence BC, 6 floor
60 Auezov St., Almaty 050008
Republic of Kazakhstan
+7 (727) 357 23 80
info@BolotovIP.com
www.BolotovIP.com

January 2016

Protection of Plant Varieties of Foreign Breeding



Yuri Bolotov

Managing
Partner
Trademark &
Patent Attorney
Member of the
Chamber of legal
advisers

Since the Republic of Kazakhstan law on the protection of selective breeding achievements was enacted in 1999, the system of protection - including plant varieties - has not been noticeably amended. Currently, the issue of Kazakhstan acceding to the International Convention on the Protection of New Varieties of Plants [1] (convention) is discussing.

At various conferences, a popular opinion has been that the acceding of Kazakhstan to the convention would enable Kazakh breeders to protect plant varieties in other countries for a token fee without substantive examination. Foreign breeders would also be entitled to protection in Kazakhstan, based on the results of examination carried out under an international treaty in a country party to the convention.

In order to see if Kazakhstan acceding to the convention gives an impetus to developing a national system of legal protection of new plant varieties, we've reviewed the convention and RK Law "On the Protection of Selective Breeding Products" of July 13, 1999, No. 422-I (selective breeding law). Also here we investigate the question of exclusive right use to a new plant variety by foreign breeders in the Republic of Kazakhstan.

Kazakhstan Acceding to International Convention on Protection of New Varieties of Plants 1961 (as revised in Geneva in 1972, 1978, 1991)

In November 2007, this issue was vigorously discussed at such government agencies as the RK Ministry of Agriculture and the Committee for

Intellectual Property Rights under the RK Ministry of Justice (the committee). Speaking on Kazakhstan acceding to the convention, conference delegates emphasize that local breeders would be entitled to legal protection of new plant varieties abroad, based on results of examination carried out in a contracting party, as well as foreign breeders in Kazakhstan.

Accordingly, expenses related to patenting plant varieties would be reduced. Would foreign breeders get protection in Kazakhstan, based on the results of examination carried out in any other contracting party? We would like to specify the underlying principles of the convention.

1. National treatment exists for individuals, residents and legal entities existing in a contracting party.
2. Patentability signs of selective breeding products have been unified.
3. Convention priority exists for filing application in any contracting party.
4. Provided is the minimum duration for protecting a plant variety.
5. A breeder's scope of rights has been unified (holder of exclusive right to new plant variety).

The convention has no provisions making its contracting parties accept the results of examination of a plant variety in a contracting party. Article 32 of the convention creates the prerequisites necessary for its contracting parties to closer cooperate in protecting new plant varieties: Members of the Union reserve the right to conclude among themselves special agreements for the protection of varieties, insofar as such agreements do not contravene the provisions of this Convention.

Such agreements may provide for arrangements to conduct examination by one patent agency for another, and to accept the results of such examinations. Note that such possibility as provided for by the convention has been implemented.

In principle, such interstate agreements on the provision of services by a patent agency to another patent agency, and on the acceptance of examination results of a country's patent agency for another country's agency, can be entered into outside the convention.

However, making such agreements under the convention ensures:

1. Contracting parties provide protection to those selective breeding products that comply with the patentability parameters of novelty, distinctness, uniformity and stability.

2. Contracting parties have developed a procedure for carrying out the test on Distinctness - «D», Uniformity - «U» and Stability - «S» (the DUS test), and though it is not a peremptory requirement of the convention to fulfill the recommendation of such testing, the procedure lays down a foundation for examining new plant varieties. When dealing with the general introduction to the examination of distinctness, uniformity and stability, and associated documents adopted pursuant thereto, note that said documents are approved by the Council of the International Union on the Protection of New Plant Varieties (union) that consists of representatives of all member-states of the Union.

Given the foregoing, the acceding to the convention is undoubtedly a step forward. However, it does not mean that the situation in new plant variety protection in Kazakhstan will immediately and significantly change, and that plant varieties bred outside Kazakhstan will be granted protection in Kazakhstan based on the results of DUS testing carried out in another contracting party. After Kazakhstan joins the convention, it will have a long way to go to create a system of closer cooperation with other contracting parties in protecting new plant varieties.

We believe we can say that new plant varieties are adequately protected in Kazakhstan today, and that this can be proven by the following. Regarding the scope of a patent holder's rights, we may say it corresponds to that provided for by the convention for the breeder. Given that the breeder and patent holder may be different, the selective breeding law provides a right for the plant variety breeder to be called as such arising out of his inalienable personal non-property right. The breeder is entitled to compensation from the patent holder for the use of his selective breeding products throughout the life of the patent. The selective breeding law provides for the minimum size of such compensation.

The Kazakh legislation and the convention provide for the temporary legal protection of a new plant variety. The duration of protection complies with convention provisions. Also, a patent's validity can be extended at the patent holder's request. Note that under the selective breeding law, these are novelty, distinctness, uniformity and stability. Foreign entities and individuals currently enjoy the same rights as Kazakh natural and legal individuals.

In Kazakhstan, the Committee and the State Commission for the Testing of New Varieties of Agricultural Plants (commission) are in charge of plant variety protection. The commission examines new plant varieties as to substance, and based on its opinion, the committee grants a patent. Note

that the priority of an application filed with the National Institute for Intellectual Property under the committee can be established as the date of filing the original application in a contracting party.

Accordingly, the basic principles of the convention are present in the Kazakh legislation of selective breeding achievements, and local and foreign plant varieties enjoy legal protection sufficient enough to comply with international norms.

Using the Exclusive Right to Selective Breeding Products

As noted in various publications on the protection of selective breeding achievements, the system of protection created in Kazakhstan is based on two fundamentals: civil and administrative, which is reflected in how selective breeding products - specifically, new plant varieties - are used.

For a selective breeding achievement to be used in Kazakhstan it must be recorded in the State Register of Selective Breeding Achievements Accepted for Production (state register). It means that no seeds of agricultural plants are allowed for sale or planting, unless they have been tested and recorded in the state register.

The question arises whether or not plant varieties bred elsewhere that are intended to be grown in Kazakhstan or in case plant fruits or other plant parts imported to Kazakhstan need to be recorded in the state register. To answer that question, we need to know what "accepted for production" means.

Under Clause 7 of the Rules for the Maintenance of the State Register of Selective Breeding Achievements Accepted for Production, approved by Order No. 317 issued by the Minister of Agriculture of Kazakhstan on 05.10.01 (state register rules), there is list of information to be entered into the state register. Among other things, the register should specify those Kazakhstan provinces as determined by official testing, where the serviceability of a selective breeding product (yield, pest and disease resistance) is the most effective - meaning the plant varieties recorded in the state register have been selected for growth in Kazakhstan.

Under state register rules, plant varieties shall be recorded in it based on the results of official testing. Under the selective breeding law and the RK law on seed breeding, No. 385-11 of Feb. 8, 2003, (seed breeding law), official testing is testing for their serviceability. Serviceability testing is aimed to determine the practicability and effectiveness of growing a particular plant variety in a particular Kazakhstan province. Along with the words "accepted for production," the seed breeding law makes use of the

term "promising" (perceptiveness).

It's possible to suppose that the conclusion is clear - plant varieties accepted for growing in Kazakhstan are recorded in the state register. Accordingly, where plant fruits bred elsewhere are imported to Kazakhstan with the aim of selling either to a bulk buyer or a retailer, there is no need to record such in the state register.

However, Clause 2 of Article 19 of the seed breeding law reads, "Seeds of agricultural plants whose varieties are recorded in the state register may be imported to and exported from the Republic of Kazakhstan . . ."

Under the selective breeding law, "Seeds mean reproductive and vegetative organs of plants used for plant variety reproduction: seeds proper, fruits, multiple fruits, stems, spikelets, planting stock, bulbs, tubers, cuttings, meristems, etc."

Thus, under the selective breeding law, fruits are seeds, and under Article 19 of the seed breeding law can be imported to Kazakhstan, provided their plant variety is recorded in the state register.

To clarify the situation, let's look at the definition of seeds under the seed breeding law: "Seeds mean reproductive and vegetative organs of plants used for plant variety reproduction: seeds proper, fruits, multiple fruits, stems, spikelets, planting stock, bulbs, tubers, cuttings, meristems, etc."

So, fruits are regarded as seeds, if intended for reproduction of a plant variety (are able to produce progeny having the same morphological characters). For example, in the case of an apple tree in seed reproduction, the maternal characters of a variety do not repeat themselves, while the possibility of edible fruits is slim. In the case of an apple tree, the seed stock is planting stock and grafts.

Also there is such a notion as "sowing/planting conditions," and to be capable of variety reproduction, any seed stock must meet sufficient sowing conditions.

Given the multitude of families, genera and species of plants, we think it is unacceptable to determine the possibility of reproduction of a plant variety using a particular organ of the plant to allow importation of its fruits to Kazakhstan, if the plant is not recorded in the state register. Therefore, it's our understanding that the selective breeding law should specify that where plant fruits (or other parts of the plant) are imported to Kazakhstan for purposes other than variety reproduction, there is no need to record

such in the state register.

For example, the Agriculture Ministry of Kazakhstan is of the view that where seeds, fruits, multiple fruits, stems, spikelets, planting stock, bulbs, tubers, cuttings, meristems, etc., are imported to Kazakhstan for purposes other than variety reproduction, the same are not seeds and not regulated by the seed breeding law.

Accordingly, we can conclude that importation of foreign bred fruits grown outside Kazakhstan for selling to the end consumer is subject to phytosanitary measures only, provided the fruits fall under the relevant category. In such a case, such products shall be imported under a phytosanitary certificate rather than an entry in the state register.

Where foreign-bred plant seeds are imported to Kazakhstan with the purpose of selling and sowing, these must be recorded in the state register.

[Yuri Bolotov and Natalia Shapovalova - Urist Law Magazine– May 2008](#)