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EXPLANATORY NOTES ON
PROPAGATING MATERIAL 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 seventy-second session, to be held in Geneva on October 26 and 27, 2015**Disclaimer: this document does not represent UPOV policies or guidance*Note for Draft version

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Underlining (highlighted) indicates insertion to the text of document UPOV/EXN/PPM/1 Draft 4, agreed by the CAJ at its seventy-first session (unless otherwise indicated).

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 PROPAGATING MATERIAL
UNDER ~~THE 1991 ACT OF~~ THE UPOV CONVENTION

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on propagating material under ~~the 1991 Act~~ of 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.

PROPAGATING MATERIAL

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

1991 Act of the UPOV Convention

Article 1

Definitions

For the purposes of this Act:

[...]

- (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
- 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;

[...]

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.

Article 8

Uniformity

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its **propagation**, it is sufficiently uniform in its relevant characteristics.

Article 9

Stability

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated **propagation** or, in the case of a particular cycle of **propagation**, at the end of each such cycle.

Article 14

Scope of the Breeder's Right

(1) [Acts in respect of the **propagating material**] (a) Subject to Articles 15 and 16, the following acts in respect of the **propagating material** of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of **propagating material** of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said **propagating material**.

[...]

Article 15

Exceptions to the Breeder's Right

[...]

(2) [*Optional exception*] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for **propagating** purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

Article 16

Exhaustion of the Breeder's Right

(1) [*Exhaustion of right*] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

- (i) involve further **propagation** of the variety in question or
- (ii) involve an export of material of the variety, which enables the **propagation** of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of "material"*] For the purposes of paragraph (1), "material" means, in relation to a variety,

- (i) **propagating material** of any kind,
- (ii) harvested material, including entire plants and parts of plants, and
- (iii) any product made directly from the harvested material.

[...]

Article 20

Variety Denomination

[...]

(7) [*Obligation to use the denomination*] Any person who, within the territory of one of the Contracting Parties, offers for sale or markets **propagating material** of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

[...]

1978 Act of the UPOV Convention

Article 5

Rights Protected; Scope of Protection

(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative **propagating material**, as such, of the variety.

Vegetative **propagating material** shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as **propagating material** in the production of ornamental plants or cut flowers.

[...]

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:

[...]

(c) The variety must be sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative **propagation**.

(d) The variety must be stable in its essential characteristics, that is to say, it must remain true to its description after repeated reproduction or **propagation** or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.

[...]

Article 7**Official Examination of Varieties; Provisional Protection**

[...]

(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.

[...]

Article 10**Nullity and Forfeiture of the Rights Protected**

[...]

(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or **propagating material** capable of producing the variety with its characteristics as defined when the protection was granted.

(3) The right of the breeder may become forfeit if:

(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or **propagating material**, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or

[...]

Article 13**Variety Denomination**

[...]

(7) Any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative **propagating material** of a variety protected in that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

[...]

Article 14**Protection Independent of Measures Regulating Production, Certification and Marketing**

(1) The right accorded to the breeder in pursuance of the provisions of this Convention shall be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and **propagating material**.

[...]

(b) Factors that might be considered in relation to propagating material

1. Propagating material encompasses reproductive and vegetative propagating material. The UPOV Convention does not provide a definition of "propagating material". ~~This following~~ section provides guidance on factors that might be considered in relation to whether material is propagating material.^a

~~2. Whether material is propagating material is a matter of fact but may also include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user) and depends on the definition of propagating material in the law of the member of the Union concerned. For example, the intention of the producer, seller or supplier is not the only relevant aspect, but also the intention of the buyer, recipient or user of material. Thus, even though one party might have not anticipated that material would be used for propagation, another concerned party might have the intention to use the material for propagation.~~

3. The 1978 Act of the UPOV Convention, Article 5 (1) (reproduced below for ease of reference) clarifies that material is considered to be propagating material if it used as such, even if it is a type of material that is not normally marketed for the purpose of propagation:

~~Article 5 (1) of the 1978 Act of the UPOV Convention~~

~~“(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for~~

~~the production for purposes of commercial marketing~~

~~the offering for sale~~

~~the marketing~~

~~of the reproductive or vegetative propagating material, as such, of the variety.~~

~~Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.”~~

4.2. Taking into account the definition of propagating material in the law of the member of the Union concerned, if applicable, the following, non-exhaustive, list of factors, and/or combination of factors, might be considered in deciding determining whether material is propagating material:

- (i) whether the material has been used to propagate the variety;
- (ii) whether the material is capable of producing entire plants of the variety;
- (iii) whether there has been a custom/practice of using the material for that purpose or, as a result of new developments, there is a new custom/practice of using the material for that purpose;
- (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);
or
- (v^a) if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is “propagating material”.

[End of document]

^a Note from the UPOV Office: paragraph 1 has been moved from section (a) to section (b).