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**EXPLANATORY NOTES ON ACTS IN RESPECT OF
HARVESTED MATERIAL UNDER THE UPOV CONVENTION**

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EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on the scope of the breeder's right concerning acts in respect of harvested material (Article 14(2) of the 1991 Act and Article 5(4) of the 1978 Act) 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. In order to provide coherent guidance concerning the provisions on acts in respect of harvested material (Article 14(2) of the 1991 Act and Article 5(4) of the 1978 Act), these Explanatory Notes also explain the relationship between those provisions and the provisions that a breeder may make his authorization subject to conditions and limitations (Article 14(1)(b) of the 1991 Act and Article 5(2) of the 1978 Act) and the exhaustion of the breeder's right (Article 16 of the 1991 Act). These Explanatory Notes are structured as follows:

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| Section I: | Conditions and limitations with respect to the breeder's authorization in respect of propagating material |
| Section II: | Acts in respect of harvested material |
| Section III: | Relationship between the scope of the breeder's right in respect of harvested material and exhaustion of the breeder's right |

Note for Draft version

Footnotes will be retained in published document

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

SECTION I: CONDITIONS AND LIMITATIONS WITH RESPECT TO THE BREEDER'S AUTHORIZATION IN RESPECT OF PROPAGATING MATERIAL

3. The UPOV Convention establishes the right of the breeder to make his authorization, for acts in respect of propagating material, subject to conditions and limitations as follows:

<p>1991 Act of the UPOV Convention</p> <p>Article 14</p> <p>Scope of the Breeder's Right</p> <p>(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:</p> <ul style="list-style-type: none"> (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. <p>(b) The breeder may make his authorization subject to conditions and limitations.</p>
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<p>1978 Act of the UPOV Convention</p> <p>Article 5</p> <p>Conditions Required for Protection</p> <p>(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for</p> <ul style="list-style-type: none"> - the production for purposes of commercial marketing - the offering for sale - the marketing <p>of the reproductive or vegetative propagating material, as such, of the variety.</p> <p>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.</p> <p>(2) The authorisation given by the breeder may be made subject to such conditions as he may specify.</p>
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4. Whilst the *authorization* of the breeder concerns the acts in respect of the propagating material, the UPOV Convention does not restrict the *conditions and limitations* to the propagating material. Thus, for example, a breeder may authorize the propagation of his

variety on the condition that a remuneration is paid on the basis of the value of the harvested product (or products made directly from harvested material of the variety). This example is provided in order to distinguish between the right of the breeder to attach *conditions which may relate to the harvested material* as part of his *authorization for acts in respect of propagating material* (Article 14(1)(b) of the 1991 Act and Article 5(2) of the 1978 Act) and the requirement for the breeder's *authorization in respect of harvested material* obtained through the unauthorized use of propagating material of the protected variety, where the breeder has not had reasonable opportunity to exercise his right in relation to the propagating material (Article 14(2) of the 1991 Act and Article 5(4) of the 1978 Act).

SECTION II: ACTS IN RESPECT OF THE HARVESTED MATERIAL*(a) Relevant articles***Article 14(2)** of the **1991 Act** of the UPOV Convention

(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 5(4) of the **1978 Act** of the UPOV Convention

(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.

5. Thus, Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the **unauthorized use** of propagating material **and** that the breeder must not have had **reasonable opportunity** to exercise his right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity" and then provide some illustrative examples of where it might be considered that the breeder's right extends to acts in respect of harvested material.

(b) *Unauthorized use*

6. Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the **unauthorized use** of propagating material and that the breeder must not have had reasonable opportunity to exercise his right in relation to the said propagating material.

7. "Unauthorized use" refers to the acts in respect of the propagating material that require the authorization of the breeder (Article 14(1) of the 1991 Act and Article 5(1) of the 1978 Act), but where no such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where the breeder's right has been granted and is in force.

8. It is important to distinguish between the breeder's "authorization", which is exclusively related to the breeder's right (Article 14(1) of the 1991 Act and Article 5(1) of the 1978 Act), and the breeder's "consent", which is not dependent of the existence of a breeder's right. Hence, acts in other territories might be without the consent of the breeder but might not constitute "unauthorized use" in relation to the territory where the breeder's right was granted. Nevertheless, the breeder's right requires authorization for certain acts which concern other territories, for example exporting or importing of propagating material. Furthermore, as explained in Section I, the authorization of the breeder in respect of propagating material may be subject to certain conditions and limitations which concern acts in other territories.

(c) *Reasonable opportunity*

9. Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the unauthorized use of propagating material and that the breeder must not have had **reasonable opportunity to exercise his right** in relation to the said propagating material.

10. The term "his right", in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned. A breeder can only exercise his right in the territory concerned. Thus, "reasonable opportunity to exercise his right" in relation to the propagating material means a reasonable opportunity *in the territory concerned* to exercise his right in relation to the propagating material. Furthermore, in particular, it does not mean a reasonable opportunity to *obtain a right*, for example in another territory.

11. The provisions under Article 14(2) of the 1991 Act constitute what has been called a "cascade" effect. The notion of "cascade" implies that breeders can only exercise their right in relation to the harvested material if they have not been able to exercise their right in relation to the propagating material.

(d) *Illustrative examples*

12. The following examples have been provided to illustrate some situations where a breeder may be considered to be able to exercise his right in relation to harvested material because the harvested material has been obtained through the unauthorized use of propagating material and the breeder has not had reasonable opportunity to exercise his right in relation to the said propagating material:

Example 1

Variety 1 is protected in Country A. Propagating material of variety 1 is exported without the breeder's authorization to Country B. In Country B protection is available for the genus or species to which the variety 1 belongs but there is no plant breeder's right for variety 1. Variety 1 is then propagated in Country B and the harvested material exported to Country A.

13. In Example 1, the breeder can exercise his right on the imported harvested material in Country A because:

- (i) there was unauthorized export of propagating material; and
- (ii) the breeder did not have a reasonable opportunity to exercise his right in Country A in relation to the propagating material grown in Country B.

Example 2

Variety 2 is protected in Country X. In Country X, an exception under Article 15(2) of the 1991 Act is applicable for variety 2, with a limit on the maximum percentage of the harvested crop which the farmer is allowed to use for further propagation. The farmer uses more than the permitted maximum percentage for propagating purposes. Relevant information on this "unauthorized use" of propagating material is not disclosed by the farmer or available to the breeder at the time of the propagation.

14. In Example 2, the breeder can exercise his right on the harvested material in Country X because:

- (i) there was unauthorized production or reproduction (multiplication); and
- (ii) the breeder did not have a reasonable opportunity to exercise his right in relation to the propagating material.

Example 3

Variety 3 is protected in Country Y. Variety 3 is a variety of a small-grained cereal crop, in which the harvested grain can also be used as propagating material. Harvested grain is exported to Country Z as harvested grain: the breeder's authorization is not obtained for the export of that grain as propagating material. However, the grain is subsequently used as propagating material in Country Z. Harvested grain of variety 3 is then imported back into Country Y.

15. In Example 3, the breeder can exercise his right on the imported harvested material in Country Y because:

- (i) there was unauthorized export of propagating material (although it was not declared as propagating material); and
- (ii) the breeder did not have a reasonable opportunity to exercise his right in Country Y in relation to the propagating material grown in Country Z.

SECTION III: RELATIONSHIP BETWEEN THE SCOPE OF THE BREEDER'S RIGHT
IN RESPECT OF HARVESTED MATERIAL AND EXHAUSTION OF THE BREEDER'S
RIGHT

16. Article 16 of the 1991 Act of the UPOV Convention contains the following provisions on the exhaustion of the breeder's right:

Article 16 of the 1991 Act: 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.

(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.

17. The provisions on the exhaustion of the breeder's right reflect the scope of the breeder's right, as set out in Article 14 of the 1991 Act of the UPOV Convention. The provisions specify that the breeder's right is exhausted when material of the protected variety (or of a variety covered by the protection) has been sold or otherwise marketed by the breeder or with his consent in the territory of the member of the Union concerned, unless there is further propagation of the variety (Article 16(1)(i)) or the enabling of further propagation in a country which does not protect varieties of the plant genus or species to which the variety belongs (Article 16(1)(ii)).

18. Thus, the provisions on the exhaustion of the breeder's right, clarify that the rights granted in Article 14 can only be exercised once in each propagation of the variety. However, Article 16(1)(i) and (ii) clarify that the breeder's right is not exhausted if there is further propagation of the variety (Article 16(1)(i)) or the enabling of further propagation in a country which does not protect varieties of the plant genus or species to which the variety belongs (Article 16(1)(ii)).

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