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DRAFT

EXPLANATORY NOTES ON
PROPAGATION AND PROPAGATING MATERIAL

Document prepared by the Office of the Union^a

*to be considered by the Administrative and Legal Committee Advisory Group
at its eighth session, to be held in Geneva on October 25, 2013*

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EXPLANATORY NOTES ON PROPAGATION AND PROPAGATING MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on propagation and 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.

PROPAGATION AND PROPAGATING MATERIAL

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

Article 1

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

(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

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

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

(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

[...]

(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

(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

[...]

(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.

[...]

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

1. Whether material is propagating material is a matter of fact but also of intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user). 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. In particular, the explanation in Article 14(2) and in Article 16(2)(ii) of the 1991 Act of the UPOV Convention that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material.

2. 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.”

3. The following, non-exhaustive, list of factors^b might be considered in deciding 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;
 - (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);
- and
- (v) whether the plant material is suitable for reproducing the variety unchanged.

[End of document]

^a Extract from document CAJ-AG/12/7/7 “Report”:

“79. The CAJ-AG considered document CAJ-AG/12/7/4, the comments as set out in paragraph 5 and the presentations and views expressed by CIOPORA and ISF.

“80. The CAJ-AG agreed that the Office of the Union should prepare a draft “Explanatory Note on Propagation and Propagating Material Under the 1991 Act of the UPOV Convention” for consideration at its eighth session. The basis of the Explanatory Note would be:

- (a) to explain forms of material that could be propagating material, including an explanation on the basis of document UPOV/EXN/HRV Draft 8 that “some forms of harvested material have the potential to be used as propagating material”, in a similar way to that explained in the “Model Law on the Protection of New Varieties of Plants” (“Model Law” - UPOV Publication No. 842), Section 1.19;
- (b) to provide a non-exhaustive list of factors that might be considered in deciding whether material is propagating material, such as:
 - (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;
 - (iv) the intention on the part of those concerned (producer, seller, buyer, user); and
 - (v) whether the plant material is suitable for reproducing the variety unchanged.

“81. It was noted that the list above was a tentative, initial list that would require further consideration. It was also agreed that, in the preparation of the draft Explanatory Note by the Office of the Union, CIOPORA and ISF should be invited to provide additional factors.”

^b The International Seed Federation (ISF) replied that it did not wish to offer any additional factors. The reply of the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) is provided at the CAJ-AG/13/8 section of the UPOV website: http://www.upov.int/meetings/en/details.jsp?meeting_id=29783.