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ADMINISTRATIVE AND LEGAL COMMITTEE

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**DRAFT EXPLANATORY NOTES ON ARTICLE 15(1)(i) AND (2) OF
THE 1991 ACT OF THE UPOV CONVENTION:
ACTS DONE PRIVATELY AND FOR NON-COMMERCIAL PURPOSES
AND PROVISIONS ON FARM-MADE SEED**

Document prepared by the Office of the Union

1. At its forty-eighth session, on October 20 and 21, 2003, the Administrative and Legal Committee (CAJ) agreed to seek to elaborate a document in the form of draft explanatory notes on the exceptions under Article 15(1)(i) and (2) of the 1991 Act of the UPOV Convention which could serve as guidance in the drafting of national laws concerning those exceptions (see paragraph 117 of document CAJ/48/7). It was also agreed that the document should be developed on the basis of the table of contents in the Annex to document CAJ/48/3 incorporating the comments and suggestions received from members and observers at the above session (see paragraphs 103 to 116 of document CAJ/48/7).
2. The Annex to this document presents draft explanatory notes on the exceptions under Article 15(1)(i) and (2) on that basis.

3. *The CAJ is requested to consider and comment on the proposed “Draft Explanatory Notes on Article 15(1)(i) and (2) of the 1991 Act of the UPOV Convention: Acts done privately and for non-commercial purposes and provisions on farm-saved seed” reproduced in the Annex to this document.*

[Annex follows]

DRAFT EXPLANATORY NOTES
ON THE
1991 ACT OF THE UPOV CONVENTION

Introduction

1. The only binding obligations for members of the Union are those contained in the text of the International Convention for the Protection of New Varieties of Plants (the UPOV Convention) itself, and this document must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned. The objective of these draft explanatory notes is to explain the scope and to provide examples on the implementation of the compulsory exception under Article 15(1)(i) and the optional exception under Article 15(2) of the 1991 Act of the UPOV Convention.

Article 15(1)(i) of the 1991 Act of the UPOV Convention

Exceptions to the Breeder's Right

(1) [*Compulsory exceptions*] The breeder's right shall not extend to

(i) acts done privately and for non-commercial purposes,

2. The following sections are intended to illustrate some of the acts which are covered by the exception and some which are not:

Acts possibly not falling within the scope of the exception

3. The wording of Article 15(1)(i) means that, in order to fall within the scope of the exception, the acts must *both* be of a private nature *and* for non-commercial purposes. Thus, non-private acts, even where for non-commercial purposes, do not fall within the exception. In that respect, a party providing propagating material of a variety to another party might be considered not to be engaged in a private act, regardless of whether there is any form of payment for the material and, therefore, would not be covered by the exception. Furthermore, private acts which are undertaken for commercial purposes do not fall within the exception. Thus, a farmer saving his own seed of a variety on his own holding might be considered to be engaged in a private act, but would not be undertaking this act for non-commercial purposes if, for example, he subsequently sold harvested material of the variety. Such acts would not fall within the exception. A separate optional exception (see Article 15(2)) has been created within the Convention to address farm-saved seed.

Acts possibly falling within the scope of the exception

4. The exception allows, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden, i.e. no material of the variety being provided to others, since this would constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by himself, would fall within the meaning of private and non-commercial. Therefore, activities, including for example "subsistence farming", where these constitute acts done privately and for non-commercial purposes, are excluded from the scope of the breeder's right, and farmers, who conduct this kind of activities freely, benefit from the availability of protected new varieties.

Article 15(2) of the 1991 Act of the UPOV Convention

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).

5. Article 15(2) of the 1991 Act of the UPOV Convention provides an optional exception (the farmer's privilege) which permits members of the Union to exclude, subject to certain conditions, farm-saving of seed from the scope of the breeder's right and to adopt solutions which are specifically adapted to their agricultural circumstances.

6. The inclusion of this optional exception recognizes that, for some crops, there has been a common practice of farmers saving their own seed, and this provision allows each member of the Union to take account of this practice and the issues involved on a crop-by-crop basis, when providing variety protection. Nonetheless, the use of the words "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" recognizes that, if a farmer's privilege is introduced, it should be done in a way which does not undermine the incentives, provided by the UPOV Convention, for breeders to develop new varieties.

7. Any implementation of Article 15(2) requires careful consideration of the effects of its implementation within each territory and on a crop-by-crop basis; a universal formula is not appropriate. Consultation with the interested parties, notably breeders and farmers, to assess such effects is an important means of ensuring successful implementation.

8. Factors such as the evolution of farming practices and breeding and propagation methodologies, as well as economic developments may require modification of any implementing mechanism of a farmer's privilege over time, in order to ensure that optimal benefits from plant variety protection are obtained by the member of the Union concerned. The legal framework should include provisions which will enable such updating in a practical way.

9. The following sections examine relevant factors which might be taken into account when considering if and how to implement a farmer's privilege. The first section considers factors which can be used to determine for which crops a farmer's privilege might be appropriate. The second section examines factors which might be used to determine what would be "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" for those crops for which a farmer's privilege is introduced. The third section considers where the farmer's privilege, if introduced, can be exercised. The fourth section refers to the mechanisms, where appropriate, for remunerating the breeder where the farmer's privilege is implemented:

Determining crops for which the farmers' privilege might be appropriate

(a) *Common practice*

10. When considering the way in which the farmer's privilege might be implemented, the Diplomatic Conference of 1991 (see page 63 of UPOV Publication No. 346(E) "Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants") developed the following recommendation:

"The Diplomatic Conference recommends that the provisions laid down in Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, should not be read so as to be intended to open the possibility of extending the practice commonly called 'farmer's privilege,' to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned."

11. This recommendation clarifies that the consideration of the farmer's privilege should be restricted to those crops where there has been a common practice of farmers saving harvested material for further propagation. Within those crops, consideration should be given to whether the introduction of a farmer's privilege could be done "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder", in order that the incentives for breeders to develop new varieties, as provided by the UPOV Convention, would be retained.

(b) *Use of the product of the harvest for propagating purposes*

12. Article 15(2) states that "each Contracting Party may, [...] 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)." (underlining added for emphasis)

13. This wording clarifies that the farmer's privilege is restricted to those crops where the product of the harvest is used for propagating purposes, a typical example being small-grained cereals where the harvested grain can equally be used as seed i.e. propagating material. The wording also indicates that it is not the intention to introduce a farmer's privilege for crops where the harvested material is not used for propagating material (e.g. fruit, cut-flowers etc.). Taken together with the recommendation of the Diplomatic Conference (see (a) above), this means that the farmer's privilege should be considered only where it has been common practice for the product of the harvest to be used for propagating purposes.

(c) *Type of variety*

14. Where it is decided that a farmer's privilege should be introduced for a particular crop or species, it is possible to specify only certain types of varieties for which the farmer's privilege would be applicable. For example, in crops for which there is a farmer's privilege, authorities might decide not to extend the farmer's privilege to hybrid varieties or synthetic varieties. In the same way as for crops in general, such decisions take into account whether the introduction of a farmer's privilege for such varieties could be done within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder and whether

there has been a common practice of farmers saving harvested material for further propagation.

Reasonable limits and safeguarding of the legitimate interests of the breeder

15. For those crops where it is decided that a farmer's privilege would be appropriate, consideration needs to be given to what would constitute reasonable limits and safeguarding of the legitimate interests of the breeder for each crop. The factors below, *inter alia*, might be considered. These factors are intended for illustrative purposes and authorities should bear in mind the need for any system to be practical in its operation.

(a) *Size of holding / crop area*

16. One factor which might be used to establish reasonable limits is the size of the farmer's holding, or alternatively the area of crop concerned grown by the farmer. Thus, "small farmers" with small holdings (or small areas of crop) may be permitted to use farm-saved seed to a different extent and with a different level of remuneration to breeders than large farmers. However, the size of holding (or crop area) for a small farmer would need to be considered in each territory, individually, to safeguard the legitimate interests of the breeder. For example, in country A farmers with holdings (or a crop area) of less than 10 ha might only account for 5% of production of crop X. Thus, in country A, the setting of a level of 10 ha for a small farmer and allowing small farmers to pay a reduced or zero royalty for crop X might only have a small impact on overall remuneration to breeders. Conversely, in country B, farmers with holdings (or crop areas) of less than 10 ha of crop X might account for 90% of production. Thus, in country B the setting of a level of 10 ha for a small farmer and allowing small farmers to pay a reduced or zero royalty for crop X would have a large impact on overall remuneration to breeders and consequently may not safeguard the legitimate interests of the breeder.

17. The size of holding (or crop area) might be used to create different categories of farmers which would be required to provide different levels of remuneration to the breeder, e.g. farmers with very small holdings (or crop areas) being exempted from any remuneration and other categories paying a proportion of the normal seed royalty, the full royalty or not being covered by the exemption.

(b) *Proportion or amount of harvested crop*

18. A further factor which might be considered in relation to reasonable limits is the proportion or amount of a crop which would be the subject of the farmer's privilege. Thus, for example, the authority may specify the maximum percentage of the harvested crop which the farmer may use for further propagation. The specified percentage might be varied in relation to the size of farm (or crop area) and the level of remuneration, as a percentage of standard royalty, might also be varied in relation to the proportion of farm-saved seed used by a farmer. Furthermore, the amount of the harvested crop, to which the farmer's privilege applies, may be fixed in relation to the quantity of propagating material of the protected variety originally obtained by the farmer. The amount may also be expressed as a maximum acreage which may be planted using the harvested crop.

19. The introduction of plant variety protection encourages the introduction of new varieties and this may, in itself, lead to changes in the level of harvested material used for further propagation (farm-saved seed) of the crop concerned. Furthermore, evolution of farming practices and breeding and propagation methodologies, as well as economic developments may lead to changes in the level of harvested material used for further propagation. Thus, authorities may wish to limit the level of farm-saved seed to those levels which had been common practice before the introduction of plant variety protection.

Farmers on their own holdings

20. In relation to those crops and varieties for which a farmer's privilege is introduced, the farmer's privilege is restricted to the permission for "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)."

21. The wording of the Convention clarifies that, under the farmer's privilege, the product of the harvest must not be used other than by the farmer on his own holding. Thus, under the farmer's privilege, a farmer is not permitted to transfer the product of the harvest to another farmer for that other farmer to use for propagating purposes. For example, where farmers, each with their own holdings, belong to a cooperative the farmer's privilege does not permit those farmers to exchange farm-saved seed (product of the harvest) for propagation by other farmers belonging to the same cooperative.

Mechanisms for breeders' remuneration

22. The introduction of the farmer's privilege means that it may be necessary to create new mechanisms for remunerating breeders. It is a matter for each authority to consider the most effective method of remuneration. With regard to the collection of the remuneration, there are many possibilities including, *intè alia* , direct collection from farmers, collection via on-farm seed processors and collection of a royalty on the harvested material at the first point of delivery.

[End of Annex and of document]