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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

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. A first draft of that document was presented to the CAJ at its fiftieth session, held in Geneva on October 18 and 19, 2004, where it was agreed that a new draft should be prepared, on the basis of the discussions, for consideration at its fifty-first session in April 2005.
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:*

(a) 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; and

(b) to invite members of the Union which implement Article 15(2) of the 1991 Act of the UPOV Convention, to present information for inclusion in the Appendix to the Annex to this document.

[Annex follows]

DRAFT EXPLANATORY NOTES
ON ARTICLE 15(1)(i) AND (2) OF 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 provide guidance and 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 acts which may be covered by the exception and some which may not:

Acts possibly not falling within the scope of the exception

3. The wording of Article 15(1)(i) indicates that acts which are *both* of a private nature *and* for non-commercial purposes are covered by the exception. Thus, non-private acts, even where for non-commercial purposes, may be outside the scope of the exception. In that respect, a party providing propagating material of a protected 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, not to be covered by the exception. Furthermore, the wording indicates that 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 could be considered not to be covered by the exception if, for example, he subsequently commercialized harvested material of the variety. 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 wording of Article 15(1)(i) suggests that it could allow, 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 may 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 that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example "subsistence farming", where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder's right, and farmers who conduct these kinds 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).

I. Introduction

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.

II. Farmers' Holdings

6. 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)." The wording of the Convention clarifies that the farmer's privilege relates to the use of the product of the harvest by the farmer on his own holding. Thus, the farmer's privilege may be considered not to extend to a transfer of the product of the harvest to another farmer for that other farmer to use for propagating purposes. In such a situation, where farmers, each with their own holdings, belonged to a cooperative, the farmer's privilege would not cover farmers transferring farm-saved seed (product of the harvest) for propagation by other farmers belonging to the same cooperative.

III. Varieties Covered

7. The inclusion of the farmer's privilege in the 1991 Act of the UPOV Convention 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 plant variety protection. The use of the words "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" is consistent with an approach whereby, if a farmer's privilege is implemented, it is done in a way which does not undermine the incentives provided by the UPOV Convention for breeders to develop new varieties.

8. It is emphasized that it is a matter for each member of the Union to decide if, and how, it wishes to implement Article 15(2). Amongst the factors which may be considered are the impact on breeding, the costs and mechanisms required for implementation and the overall economic impact on agriculture. Consultation with the interested parties, notably breeders and farmers, to assess such effects is an important means of ensuring successful implementation.

9. Over time, 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, in order to ensure that optimal benefits from plant variety protection are obtained by the member of the Union concerned. Therefore, it may be beneficial within some legal frameworks to include provisions which will enable such updating in a practical way.

10. The purpose of the following paragraphs is to illustrate some possible factors which may be taken into account when considering if, and how, to implement a farmer's privilege.

Crop sectors

11. 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."

12. The Diplomatic Conference recommendation indicates that the farmer's privilege was aimed at those crops where, for the member of the Union concerned, there has been a common practice of farmers saving harvested material for further propagation.

13. 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)

14. That wording indicates that the farmer's privilege may be considered to relate to crops where the product of the harvest is used for propagating purposes, for example small-grained cereals where the harvested grain can equally be used as seed i.e. propagating material. Taken together with the recommendation of the 1991 Diplomatic Conference (see above), the wording also indicates that it may be considered inappropriate to introduce a farmer's privilege for crops where it has not been a common practice for the harvested material to be used as propagating material (e.g. fruit, cut-flowers etc.).

Type of variety

15. Where it is decided to introduce a farmer's privilege 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, authorities might decide not to extend the farmer's privilege to certain types of varieties, e.g. hybrid varieties or synthetic varieties. This allows authorities to

take into account whether there has been a common practice of farmers saving harvested material for further propagation and whether it would be appropriate to introduce a farmer's privilege for such types of varieties.

IV. Reasonable Limits and Safeguarding of the Legitimate Interests of the Breeder

16. Where it is decided that a farmer's privilege would be appropriate, there are various factors which might be considered in relation to reasonable limits and safeguarding of the legitimate interests of the breeder. Members of the Union may take into account all their legislation which might impact on this matter, including that which is outside legislation on plant breeders' rights.

17. In relation to the introduction of reasonable limits and the safeguarding of the legitimate interests of the breeder within plant breeders' rights legislation, the factors below, *inter alia*, might be considered. These factors are intended for illustrative purposes, and authorities may bear in mind the need for any system to be practical in its operation.

(a) *Size of holding / crop area*

18. One factor which might be used to establish reasonable limits and to safeguard the legitimate interests of the breeder 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) might 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) determining a small farm may differ when considering reasonable limits and safeguarding the legitimate interests of the breeder for each member of the Union. 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 remuneration 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 remuneration for crop X would have a large impact on overall remuneration to breeders. Whether this impact would be within reasonable limits and subject to safeguarding the legitimate interests of the breeder would need consideration in relation to the relevant legislation for the member of the Union concerned.

(b) *Proportion or amount of harvested crop*

19. Another factor which might be considered in relation to reasonable limits and safeguarding the legitimate interests of the breeder is the proportion, or amount, of 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/or the level of remuneration, as a percentage of standard remuneration, specified 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 might be fixed in relation to the quantity of propagating material of the protected variety originally obtained by the farmer, by the amount appropriate to plant on the farmer's holding, or the amount to be reasonably

consumed by the farmer and his dependents. The amount might also be expressed as a maximum acreage which may be planted using the harvested crop.

20. 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 could, for example, limit the level of farm-saved seed to those levels which had been common practice before the introduction of plant variety protection.

21. Paragraphs 16 to 20, above, relating to possible limits and levels of remuneration indicate some of the ways in which the legitimate interests of the breeder might be safeguarded. Additional ways might include legal or other mechanisms to assist breeders to safeguard their legitimate interests in relation to propagating material covered by the farmer's privilege. With regard to mechanisms for the collection of remuneration, there are many possibilities including, *inter alia*, direct collection from farmers, collection via on-farm seed processors and collection of a remuneration on the harvested material at the first point of delivery.

22. The Appendix to this document presents a list of members of the Union which have implemented Article 15(2) of the 1991 Act of the UPOV Convention, and which have provided contact details and a website address where the relevant legislation and regulations can be found.

[Appendix follows]

APPENDIX

INFORMATION PROVIDED BY MEMBERS OF THE UNION CONCERNING
IMPLEMENTATION OF ARTICLE 15(2) OF THE
1991 ACT OF THE UPOV CONVENTION

Member of the Union	Contact Details	Website address
	<i>[To be completed with information to be provided by members of the Union]</i>	

[End of Appendix and of document]