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EXPLANATORY NOTES ON
EXCEPTIONS TO THE BREEDER'S RIGHT
UNDER THE UPOV CONVENTION

*Document prepared by the Office of the Union
to be considered by the Administrative and Legal Committee
at its fifty-eighth session to be held in Geneva on October 27 and 28, 2008*

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EXPLANATORY NOTES ON EXCEPTIONS TO THE BREEDER'S RIGHT
UNDER THE UPOV CONVENTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on “Exceptions to the Breeder’s Right” 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. Section I of these Explanatory Notes provides guidance on the provisions for the compulsory exceptions to the breeder’s right provided in Article 15 (1) of the 1991 Act of the UPOV Convention, and in Article 5 (3) of the 1978 Act of the UPOV Convention. Section II provides guidance on the optional exception **(the “farmer’s privilege”^a)** provided in Article 15 (2) of the 1991 Act of the UPOV Convention.

Note for Draft version

Footnotes will be retained in published document

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

Highlighted / underlined and ~~striketrough~~ text: changes proposed by the CAJ to text considered at its fifty-seventh session on April 10, 2008

SECTION I: COMPULSORY EXCEPTIONS TO THE BREEDER'S RIGHT

(a) *Relevant articles of the UPOV Convention*

1991 Act of the UPOV Convention

Article 15

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,
 - (ii) acts done for experimental purposes and
 - (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

[.....]

1978 Act of the UPOV Convention

Article 5

Rights Protected; Scope of Protection

[.....]

- (3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

[.....]

3. Article 15 (1) of the 1991 Act of the UPOV Convention and Article 5 (3) of the 1978 Act of the UPOV Convention provide for "compulsory" exceptions to the plant breeder's right. References to relevant articles in subsections (b), (c) and (d) of Section I and in Section II should be understood as references to the 1991 Act of the UPOV Convention.

(b) *Acts done privately and for non-commercial purposes*^b

4. 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

5. 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.

6. 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 the said saving of seed is for commercial purposes, for example, if 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 (see Section II).

Acts possibly falling within the scope of the exception

7. 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.

(c) *Acts done for experimental purposes*

8. The breeder’s right does not extend to the use of the protected variety for experimental purposes.

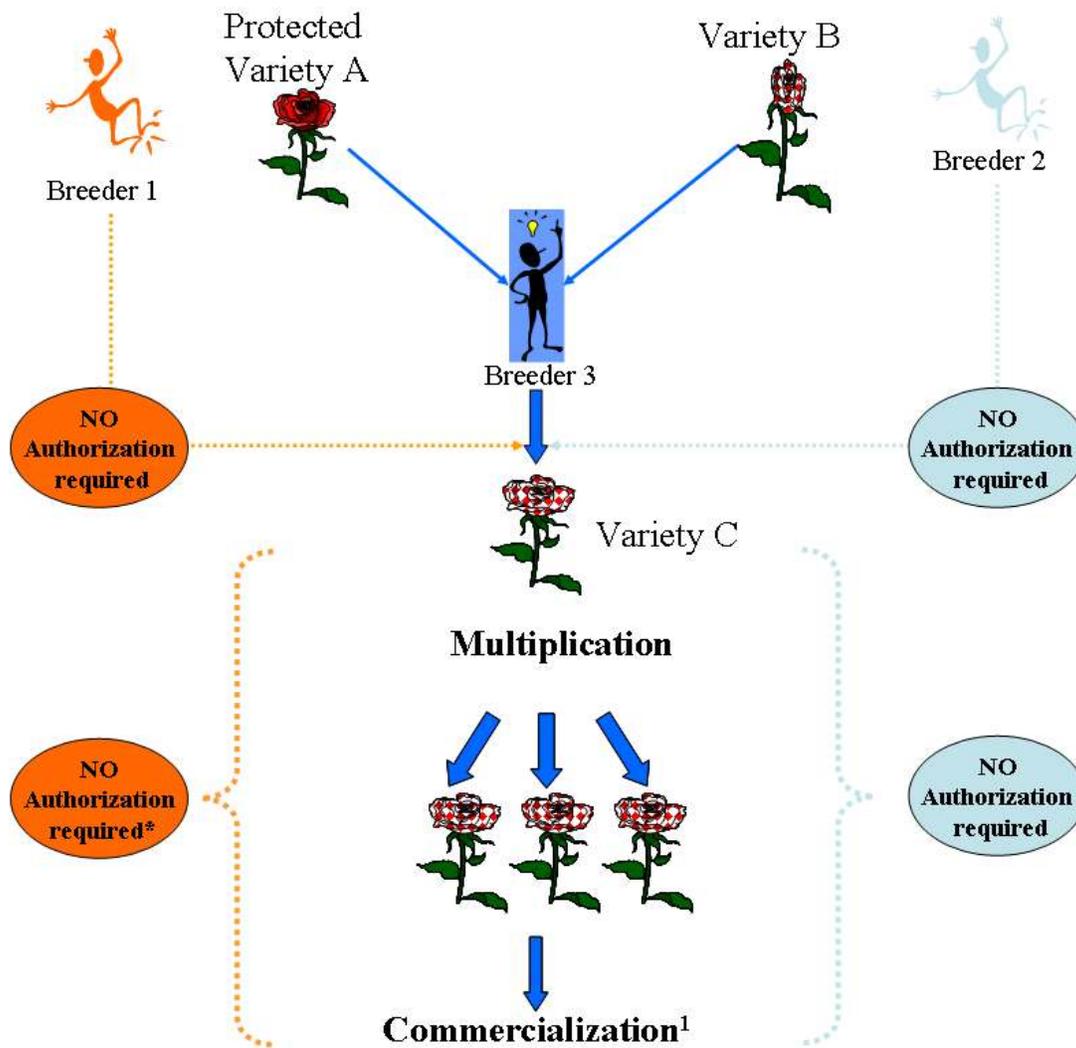
(d) *Article 15(1)(iii): the “breeder’s exemption”^c*

9. The exception under Article 15(1)(iii) states that the breeder’s right shall not extend to “acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.”. This is a fundamental element of the UPOV system of plant variety protection known as the “breeder’s exemption”, whereby there are no restrictions on the use of protected varieties for the purpose of breeding new plant varieties.

10. The second part of Article 15(1)(iii) “and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.” clarifies that, except for the varieties included in Article 14(5), i.e., essentially derived varieties; varieties which are not clearly distinguishable of the protected variety and varieties whose production requires the repeated use of the protected variety, the commercialization¹ of the new varieties obtained does not require the authorization of the title holder of the protected variety used to create those new varieties.

11. The following scheme illustrates a hypothetical situation where a breeder uses a protected variety A and a non-protected variety B for the breeding of a new variety C. The scheme demonstrates that no authorization is required to breed variety C. Furthermore, the commercialization of variety C would not require the authorization of the breeder of variety A except where variety C was an essentially derived variety, or was a variety that required the repeated use of the protected variety A or was a variety which was not clearly distinguishable from the protected variety A (see Article 14 (5) of the 1991 Act of the UPOV Convention).

¹ In this document the term “commercialization” is used to cover the acts included in Article 14(1) to (4) of the 1991 Act of the UPOV Convention.



* Except for:

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.^d

SECTION II: THE OPTIONAL EXCEPTION TO THE BREEDER'S RIGHT

*(a) Relevant provisions of the UPOV Convention***1991 Act of the UPOV Convention****Article 15****Exceptions to the Breeder's Right**

[.....]

(2) [*Optional exception*] Notwithstanding Article 14², 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).

(b) Deciding on a “farmer's privilege”^a the inclusion of the optional exception^e

12. Article 15 (2) is an “optional” provision as clarified by the wording “ ... each contracting Party may ... ”. Thus, it is a matter for each member to decide whether it would be appropriate to incorporate the option provided in Article 15 (2). The purpose of the following paragraphs is to provide guidance to those members of the Union which decide to incorporate a “farmer's privilege”^a the optional exception into their legislation.

13. When considering the way in which the farmer's privilege^a optional exception 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.”

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

² Article 14 “Scope of the Breeder's Right”

15. 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)

16.^f That wording indicates that the ~~farmer’s privilege^a~~ optional exception may be considered to relate to selected 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 relating to Article 15 (2) of the Diplomatic Conference of 1991 (see above), the wording also indicates that it may be considered inappropriate to introduce ~~a farmer’s privilege^a~~ the optional exception for agricultural or horticultural sectors, such as fruit, ornamentals and vegetables, where it has not been a common practice for the harvested material to be used as propagating material.

(c) *“Reasonable limits and safeguarding of the legitimate interests of the breeder”*

17.^g Subsection (b) explains that ~~a farmer’s privilege^a~~ the optional exception may be introduced for selected crops. In respect of such crops, the UPOV Convention, Article 15(2) states:

“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 [...].” (underlining added for emphasis)

18.^h For those crops where ~~a farmer’s privilege^a~~ the optional exception is introduced: 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, or a combination of such factors, amongst others, might be considered.

Type of varietyⁱ

19. Where it is decided to introduce ~~a farmer’s privilege^a~~ the optional exception for a particular crop or species, it is possible to specify only certain types of varieties for which ~~the farmer’s privilege^a~~ it would be applicable. For example, authorities might decide not to extend the ~~farmer’s privilege^a~~ optional exception 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^a~~ the optional exception for such types of varieties.

Size of holding / crop area^j / crop value

20. Examples of factors which might be used to establish reasonable limits and to safeguard the legitimate interests of the breeder are the size of the farmer’s holding, the area of crop concerned grown by the farmer, or the value of the harvested crop. 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.

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. Assessment of whether such an approach 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.

Proportion or amount of harvested crop^k

21. An example of 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 the crop concerned which would be the subject of the ~~farmer's privilege^a~~ optional exception. Thus, for example, a member of the Union could choose to 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^a~~ optional exception applies could 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 could also be expressed as a maximum acreage which may be planted using the harvested crop.

Changing situations^l

22. 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 could lead to changes in the level of harvested material used for further propagation. Thus, a member of the Union 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.

Remuneration

23. For those crops where ~~a farmer's privilege^a~~ the optional exception is introduced, a requirement to provide remuneration to breeders might be considered as a means of safeguarding the legitimate interests of the breeders.

(d) *Farmer's holding^m*

24. The farmer's privilege^a optional exception is restricted to the following permission:

“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)

The wording of the Convention clarifies that the farmer's privilege^a optional exception relates to the use of the product of the harvest by the farmer on his own holding. Thus, for example, the farmer's privilege^a optional exception does not extend to propagating material which was produced on the holding of another farmer.

(e) *Implementation of the optional exception in Article 15(2)ⁿ*

25. The inclusion of the farmer's privilege^a optional exception in the 1991 Act of the UPOV Convention recognizes that, for some crops, there has been a common practice of farmers saving the product of the harvest for propagating purposes, 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^a the optional exception 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.

26. 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 might be an important means of ensuring successful implementation.

27. 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^a the optional exception, 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.

28. In addition, authorities drafting legislation are invited to contact the Office of the Union for information on examples of legislation of members of the Union which may be of most relevance for their particular circumstances.

^a The CAJ, at its fifty-seventh session on April 10, 2008, agreed that the optional exception of Article 15(2) of the UPOV Convention should not be referred to as “farmer’s privilege”.

^b Paragraphs 5, 6 and 7 provide examples agreed by the CAJ at its fifty-first session on April 7, 2005. The underlined text was added in reply to a clarification for “commercial purposes” of the second example requested by Argentina and Colombia (see paragraphs 3 and 4 of the Annex to document CAJ/51/3 and paragraphs 39 to 60 of document CAJ/51/6 “Report”).

^c This section is based on paragraph 17 of the Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention of Biological Diversity (CBD), adopted by the Council of UPOV at its thirty-seventh ordinary session on October 23, 2003 and on the content of Module 8 of the UPOV Distance Learning Course DL-205.

^d At the fifty-seventh session of the CAJ on April 10, 2008, the Delegation of the Netherlands observed that Variety C appeared to be the result of a single crossing of Varieties A and B, which would make it unrealistic that it could be considered to be an essentially derived variety. The Delegation proposed that the graphic be clarified to avoid confusion.

^e The text of paragraphs 13 to 16 was agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraphs 11 to 14 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

^f Changed from the original text of paragraph 14 of the Annex to document CAJ/51/3, in line with discussions in the relevant UPOV bodies when examining laws.

^g Paragraph introduced at the request of the CAJ-AG at its second session on October 26, 2007. The CAJ-AG has not reviewed the text.

^h Paragraph 18 contains the first sentence of paragraph 17 of the Annex to document CAJ/51/3 which was agreed by the CAJ at its fifty-first session on April 7, 2005.

ⁱ The text of paragraph 19 was agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraph 15 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

^j The text of paragraph 20 was agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraph 18 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

^k The text of paragraph 21 was agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraph 19 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

^l The text of paragraph 22 was agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraph 20 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

^m The text of paragraph 24 was agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraph 6 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

ⁿ The text of paragraphs 25, 26 and 27 were agreed by the CAJ at its fifty-first session on April 7, 2005 (see paragraphs 7, 8 and 9 of the Annex to document CAJ/51/3 and paragraphs 61 to 66 of document CAJ/51/6 “Report”).

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