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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Fifth Session
Geneva, October 18, 2010**

**OBJECTIVES OF THE POSSIBLE DEVELOPMENT OF A DOCUMENT
ON THE EXHAUSTION OF THE BREEDER'S RIGHT UNDER
THE 1991 ACT OF THE UPOV CONVENTION**

Document prepared by the Office of the Union

Background

1. At the sixty-first session of the Administrative and Legal Committee (CAJ) held in Geneva on March 25, 2010, the CAJ considered document CAJ/61/3 "Development of information materials concerning the UPOV Convention". Document CAJ/61/3 contained the following proposal concerning the development of "Explanatory Notes on the Exhaustion of the Breeder's Right under the 1991 Act of the UPOV Convention" (document CAJ/61/3, paragraphs 31 and 32):

"31. The CAJ-AG, at its fourth session, during the consideration of the "Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention" (document UPOV/EXN/CAL Draft 1), agreed to propose to the CAJ, at its sixty-first session, the development of a separate document on exhaustion of the breeder's right. The CAJ-AG agreed that one of the aspects to be considered was whether the breeder's right would be exhausted if the conditions and limitations on which the breeder's authorization was granted were not met (see paragraph 27 of this document and paragraph 20 of document CAJ-AG/09/4/4 "Report").

“32. Based on the considerations by the CAJ-AG, at its fourth session (see paragraph 31 of this document [document CAJ/61/3]), and subsequent reflection by the Office of the Union with the Chair of the CAJ, it is proposed to develop “Explanatory Notes on the Exhaustion of the Breeder’s Right under the 1991 Act of the UPOV Convention” (document UPOV/EXN/EXH Draft 1). Subject to the endorsement of the CAJ, at its sixty-first session, it is proposed that document UPOV/EXN/EXH Draft 1 be presented for consideration by the CAJ-AG at its fifth session.”

2. The Chair of the CAJ, at its sixty-first session, considered that one possibility would be to develop a general document on the exhaustion of intellectual property rights and to explain the differences between national, regional and international exhaustion. She added that it might also be possible to include suitable examples of the exhaustion of the breeder’s right in such a document. She proposed that the purpose of such a document be considered by the CAJ-AG at its fifth session and that the conclusions of the CAJ-AG be reported to the CAJ.

3. The CAJ, at the sixty-first session, agreed to request the CAJ-AG, at its fifth session, to consider the objectives of the possible development of a document on the Exhaustion of the Breeder’s Right under the 1991 Act of the UPOV Convention (see document CAJ/61/11 “Report on the Conclusions”, paragraph 32).

4. Prior to the consideration of the objectives of the possible development of a document on the Exhaustion of the Breeder’s Right under the 1991 Act of the UPOV Convention, the CAJ-AG may wish to note: (a) the available guidance on Article 16 of the 1991 of the UPOV Convention adopted by the Council ; and(b) the guidance on Article 16 of the 1991 of the UPOV Convention under development.

(a) Guidance on Article 16 of the 1991 of the UPOV Convention adopted by the Council

5. Document “Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention” (document [UPOV/INF/6/1](#)), which was adopted by the Council on October 22, 2009, contains the following example provision for drafting a law in accordance with Article 16 of the 1991 of the UPOV Convention:

**“Article 16
Exhaustion of the Breeder’s Right**

[NOTES – 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 [\[name of the State/Intergovernmental Organization\]](#), 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 members of UPOV which are member States of one and the same intergovernmental organization]”

6. The Notes concerning Article 1(viii) “territory” of the 1991 Act of the UPOV Convention in document UPOV/INF/6/1 provide the following:

“Article 1(viii) “territory”

“(viii)“territory”, in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies;

“Article 6(3) concerning “Novelty” and Article 16(3) concerning ‘Exhaustion of the Breeder’s Right’ of the 1991 Act of the UPOV Convention contain provisions on ‘Territory’ in certain Cases”.

7. The Notes concerning Article 16 “Exhaustion of the Breeder’s Right” of the 1991 Act of the UPOV Convention in document UPOV/INF/6/1 provide the following:

“(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.”

(b) Guidance on Article 16 of the 1991 of the UPOV Convention under development

8. Document UPOV/EXN/HRV Draft 5 Corr. “Explanatory Notes on Acts in Respect of Harvested Material under the UPOV Convention”, which will be considered by the CAJ-AG at its fifth session, in its Section II “Relationship between the scope of the breeder’s right in respect of harvested material and exhaustion of the breeder’s right” (see paragraphs 19 to 25 of document UPOV/EXN/HRV Draft 5 Corr.) contains guidance on Article 16 of the 1991 Act of the UPOV Convention, as well as some examples that have been provided to illustrate some situations where a breeder’s right may be considered to be exhausted.

9. *The CAJ-AG is invited to:*

(a) note available guidance on Article 16 of the 1991 of the UPOV Convention adopted by the Council or under development; and

(b) express its views concerning the objectives of the possible development of a document on the Exhaustion of the Breeder’s Right under the 1991 Act of the UPOV Convention.