



CAJ-AG/11/6/2

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Sixth Session
Geneva, October 18, 2011**

EXPLANATORY NOTES

Document prepared by the Office of the Union

Introduction

1. The Administrative and Legal Committee (CAJ), at its fifty-second session, held in Geneva on October 24, 2005, agreed an approach for the preparation of information materials concerning the UPOV Convention, as explained in paragraphs 8 to 10 of document CAJ/52/4. The CAJ also agreed to the establishment of an advisory group to the CAJ ("CAJ-AG") to assist in the preparation of documents concerning such materials, as proposed in paragraphs 11 to 14 of document CAJ/52/4 (see paragraph 67 of document CAJ/52/5, Report).

2. The purpose of this document is to provide background information to assist the CAJ-AG in its consideration of the following draft Explanatory Notes at its sixth session to be held in Geneva on October 18, 2011:

- (a) UPOV/EXN/BRD: Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD Draft 4)
- (b) UPOV/EXN/HRV: Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV Draft 6)

Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD Draft 4)

3. The CAJ-AG, at its fifth session, held in Geneva on October 18, 2010 and on the afternoon of October 19, 2010 considered documents CAJ-AG/10/5/2 and UPOV/EXN/BRD Draft 3.

4. The CAJ-AG noted that paragraph 16 of document “The Notion of Breeder and Common Knowledge” (Document C(Extr.)/19/2 Rev.) provided guidance on the terms “discovery and development”. Document C(Extr.)/19/2 Rev., which was adopted by the Council at its nineteenth extraordinary session held in Geneva on April 19, 2002, was distributed to the CAJ-AG and posted in the CAJ-AG/10 section of the UPOV website (see document CAJ-AG/10/5/7 “Report”, paragraph 6).

5. The CAJ-AG agreed the following with regard to document UPOV/EXN/BRD Draft 3 (see document CAJ-AG/10/5/7 “Report”, paragraph 7):

Paragraph 8	to add, at the end of paragraph 8, the last sentence of paragraph 16 of document “The Notion of Breeder and Common Knowledge” (Document C(Extr.)/19/2 Rev.). Paragraph 8 would then read as follows: “With regard to ‘discovered and developed’, a discovery might be the initial step in the process of breeding a new variety. However, the term ‘discovered and developed’ means that a mere discovery, or find, would not entitle the person to obtain a breeder’s right. Development of a variety is necessary for a breeder to be entitled to obtain a breeder’s right. <u>In the 1991 Act, ‘discovery’ describes the activity of ‘selection within natural variation’ while ‘development’ describes the process of ‘propagation and evaluation.’</u> ”
Paragraph 9	examples to be revised, in consultation with interested experts
Paragraph 11	the last sentence of paragraph 11 to read as follows: “A person may, for example, become the ‘successor in title’ by law, will, gift, sale or exchange, <u>where the law of the relevant member of the Union so provides.</u> ”

6. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD Draft 4) for consideration by the CAJ-AG at its sixth session, to be held in October 2011 (see document CAJ-AG/10/5/7 “Report”, paragraph 8).

7. At the fifth session of the CAJ-AG, it was agreed that the examples in paragraph 9 of document UPOV/EXN/BRD Draft 4 should be revised, in consultation with interested experts (see paragraph 5, above). On the basis of that consultation, the examples have been deleted.

8. On October 12, 2011, comments on document UPOV/EXN/BRD Draft 3 were received from the European Coordination Via Campesina (ECVC). Those comments have been posted on the CAJ- AG section of the UPOV website.

9. The CAJ-AG is invited to consider document UPOV/EXN/BRD Draft 4.

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV Draft 6)

10. The CAJ-AG considered documents CAJ-AG/10/5/2 and UPOV/EXN/HRV Draft 5 Corr., the comments received from the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA) of October 4, 2010, which had been posted on the CAJ-AG section of the UPOV website and the comments received by the Delegation of the Russian Federation on October 18, 2010, which were distributed at the session and posted on the CAJ-AG section of the UPOV website (see document CAJ-AG/10/5/7 “Report”, paragraph 9).

11. The CAJ-AG considered the request made by CIOPORA for the development of explanatory notes on “propagation and propagating material” and agreed to report that request to the CAJ, at its sixty-third session, to be held on April 7, 2011. The CAJ-AG recalled that it was a matter for the CAJ to decide on the development of new explanatory notes (see document CAJ-AG/10/5/7 “Report”, paragraph 10). The CAJ at its sixty-third session noted the request made by CIOPORA and agreed to request the Office of the Union to prepare a document, on the basis of contributions received, on “propagation and propagating material” for consideration by CAJ-AG at its sixth session in October 2011 (see document CAJ/63/9 “Report on the Conclusions”, paragraph 34). Document CAJ-AG/11/6/6 “Propagation and Propagating Material” will be considered by the CAJ-AG under agenda item 7.

12. The CAJ-AG agreed the following concerning document UPOV/EXN/HRV Draft 5 Corr. (see document CAJ-AG/10/5/7 “Report”, paragraph 11):

General	to verify the translations in French, German and Spanish to reflect the specific wording of the Convention in those languages.
Section I (b), paragraph 5	Paragraph 5 to read as follows: “The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that <u>at least some forms of</u> harvested material has <u>have</u> the potential to be used as propagating material (see ‘Illustrative examples’).”
Section I (d) Title	to change the title from “Reasonable opportunity” to “Exercise his right”
Section I (d), paragraph 8	Paragraph 8 to read as follows: “The term ‘his right’, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 6 above): a breeder can only exercise his right in that territory. Thus, ‘ reasonable opportunity to exercise his right ’ in relation to the propagating material means a reasonable opportunity to exercise his right in relation to the propagating material <i>in the territory concerned</i> . Furthermore, in particular, ‘reasonable opportunity to exercise his right’ does not mean a reasonable opportunity to obtain a right, for example in another territory. It is a matter for each member of the Union to determine what constitutes a ‘reasonable opportunity’ to <i>exercise his right</i> .”

Section I (e), General	<p>the CAJ-AG agreed that the Office of the Union should continue consultations with the Delegation of the Russian Federation concerning examples 2, 3, 4, 5 and 6, in order to make the necessary amendments in the next version of the document</p> <p>subject to a review of examples 2, 3, 4, 5 and 6, as set out above, to amend the titles of the “Illustrative examples” in order to reflect, if appropriate, the changes below</p> <p>to delete “grant and” from the relevant places of the “Illustrative examples”</p>
Section I (e), paragraph 9	to move paragraph 18 after paragraph 9 and to amend the reference to Section II
Section I (e), Example 1	<p>Example 1 to read as follows:</p> <p><i>“Variety 1 is protected in Country A. Propagating material of variety 1 is exported without the breeder’s authorization to Country B and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country A. Country B does not grant and protect breeders’ rights. Variety 1 is then propagated in Country B and harvested material imported into Country A.”</i></p>
Section I (e), Example 2	<p>Example 2 to read as follows:</p> <p><i>“Variety 2 is protected in Country C. Harvested material (e.g. grain, plants, flowers etc.) of variety 2 is exported to Country D and the breeder’s authorization is not obtained for the export of that material as propagating material. However, the material is subsequently used as propagating material (e.g. as seed, cuttings etc.) in Country D (Country D does not grant and protect breeders’ rights). Harvested material of variety 2 is then imported into Country C. Tand the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country C.”</i></p> <p>the first sentence of paragraph 11 (i) of the Spanish version to read as follows: <i>“el producto de la cosecha se obtuvo por hubo utilización no autorizada (exportación) de material de reproducción o de multiplicación.”</i></p> <p>to delete the last sentence of paragraph 11 (i) as follows: <i>“Thus, there was unauthorized export of propagating material to Country D”</i></p>
Section I (e), Example 4	<p>Example 4 to read as follows:</p> <p><i>“Variety 4 is protected in Country G. Harvested material (e.g. grain, plants, flowers etc.) of variety 4 is exported to Country H and the breeder’s authorization is not obtained for the export of that material as propagating material. However, the material is subsequently used as propagating material in Country H. In Country H, protection according to the UPOV Convention is available for the genus or species to which the variety 4 belongs, but there is no</i></p>

	<p><i>plant breeder's right for variety 4. Harvested material of variety 4 is then imported into Country G.—T and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country G.</i></p> <p>to delete the last sentence of paragraph 13(i) as follows: “Thus, there was unauthorized export of propagating material to Country H”</p>
Section I (e), Example 5	<p>The first three sentences of Example 5 to read as follows:</p> <p><i>“Variety 5 is protected in Country I. Propagating material of variety 5 is exported without the breeder's authorization to Country J—and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country I. [...]”</i></p> <p>to delete the last sentence of paragraph 14(i) as follows: “Thus, there was unauthorized export of propagating material to Country J”</p>
Section I (e), Example 6	<p>The last two sentences of Example 6 to read as follows:</p> <p><i>“[...] However, the grower in Country M uses the 25,000 plants to propagate further plants of variety 6 and harvested material (cut-flowers) from those propagated plants is then imported into Country L—and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country L.”</i></p> <p>to delete the last sentence of paragraph 15(i) as follows: “Thus, there was unauthorized export of propagating material to Country M”</p> <p>Paragraph 15(ii) to read as follows: “the breeder did not have a reasonable opportunity to exercise his right in Country L in relation to the propagating material exported to Country M.”</p>
Section I (e), Example 7	<p>the last two sentences of Example 7 to read as follows:</p> <p><i>“[...] A farmer uses some of the harvested material of variety 7 for propagating purposes—on his own holdings and the breeder did not have a reasonable opportunity to exercise his right on the propagating material.”</i></p>
Section I (e), Example 8	<p>the last two sentences of Example 8 to read as follows:</p> <p><i>“[...] The farmer uses more than the permitted amount for propagating purposes—on his own holdings and the breeder did not have a reasonable opportunity to exercise his right on the propagating material.”</i></p>
Section II	<p>to delete Section II from document UPOV/EXN/HRV Draft 5 Corr., without prejudice to future considerations under agenda item 5(a) “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 CAJ-AG/10/5/4)”</p>

13. The CAJ agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (UPOV/EXN/HRV Draft 6) for consideration by the CAJ-AG at its sixth session, to be held in October 2011 (see document CAJ-AG/10/5/7 “Report”, paragraph 12).

14. At the fifth session of the CAJ-AG, it was agreed that the Office of the Union should continue consultations with the Delegation of the Russian Federation concerning examples 2, 3, 4, 5 and 6 of document UPOV/EXN/HRV Draft 5 Corr. in order to make the necessary amendments in the next version of the document (see paragraph 12, above). Subsequent to consultations, comments were received by the Delegation of the Russian Federation on September 30, 2011. Those comments have been posted on the CAJ- AG section of the UPOV website and have been reflected in document UPOV/EXN/HRV Draft 6 as specified in the endnotes to that document.

15. On October 12, 2011, comments on document UPOV/EXN/HRV Draft 5 Corr. were received from ECVC. Those comments have been posted on the CAJ- AG section of the UPOV website.

16. The CAJ-AG is invited to consider document UPOV/EXN/HRV Draft 6.

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