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EXPLANATORY NOTES ON
THE DEFINITION OF BREEDER
UNDER THE 1991 ACT OF THE UPOV CONVENTION

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*to be considered by the Administrative and Legal Committee Advisory Group
at its sixth session, to be held in Geneva on October 18, 2011*

Note for Draft version

Strikethrough (highlighted) indicates deletion from the text of document UPOV/EXN/BRD Draft 3, in accordance with the agreement of CAJ-AG at its fifth session.

Underlining (highlighted) indicates insertion to the text of document UPOV/EXN/BRD Draft 3, in accordance with the agreement of CAJ-AG at its fifth session.

Footnotes will be retained in published document.

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

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EXPLANATORY NOTES ON THE DEFINITION OF BREEDER
UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on the definition of “Breeder” under the 1991 Act of 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.

DEFINITION OF BREEDER CONTAINED IN ARTICLE 1(IV) OF
THE 1991 ACT OF THE UPOV CONVENTION

(a) Relevant article of the 1991 Act of the UPOV Convention

2. The definition of breeder provided in Article 1(iv) of the 1991 Act of the UPOV Convention, is reproduced below:

<p style="text-align: center;">1991 Act of the UPOV Convention</p> <p style="text-align: center;">Article 1</p> <p style="text-align: center;">Definition</p> <p>(iv) “breeder” means</p> <ul style="list-style-type: none">- the person who bred, or discovered and developed, a variety,- the person who is the employer of the aforementioned person or who has commissioned the latter’s work, where the laws of the relevant Contracting Party so provide, or- the successor in title of the first or second aforementioned person, as the case may be;

(b) Entitlement to a breeder’s right

3. Only the breeder as defined in Article 1(iv) of the 1991 Act of the UPOV Convention is entitled to be granted a breeder’s right. The 1991 Act of the UPOV Convention provides, under its Article 21(1)(iii), that “[e]ach Contracting Party shall declare a breeder’s right granted by it null and void when it is established [...] (iii) that the breeder’s right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.”

(c) Person

4. The term “person” in Article 1(iv) of the 1991 Act of the UPOV Convention should be understood to embrace both physical and legal persons.

(d) Elements of the Definition of Breeder

5. The three elements of the definition of breeder are explained in the following paragraphs.

(i) *The person who bred, or discovered and developed, a variety*

6. In accordance with the first indent of Article 1(iv) of the 1991 Act of the UPOV Convention, the definition of “breeder” includes

“- the person who bred, or discovered and developed, a variety”.

7. The UPOV Convention makes no restriction with regard to the methods or techniques by which a new variety is “bred.”

8. 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. “In the 1991 Act, ‘discovery’ describes the activity of ‘selection within natural variation’ while ‘development’ describes the process of ‘propagation and evaluation.’”¹

~~9. Examples of “discovered and developed” include:~~

~~the discovery of a plant in a population, and multiplication of that individual plant to obtain a variety that differs from the initial population;~~

~~the discovery of a mutant in a population, and multiplication of that individual mutant to obtain a variety that differs from the initial population.^a~~

(ii) *Employer*

~~109.~~ In accordance with the second indent of Article 1(iv) of the 1991 Act of the UPOV Convention, where the person who bred, or discovered and developed, a variety is an employee, the employer, or the person who has commissioned the latter’s work, may be the person entitled to obtain a breeder’s right, where the applicable law so provides.

(iii) *Successor in title*

~~110.~~ In accordance with the third indent of Article 1(iv) of the 1991 Act of the UPOV Convention, the breeder may be the “successor in title” of: the person who bred, or discovered and developed, a variety; or the person who is the employer of the person who discovered and developed a variety or who has commissioned the latter’s work, where the laws of the relevant member of the Union so provide. A person may, for example, become the “successor in title” by law, will, gift, sale or exchange, where the law of the relevant member of the Union so provides.

[End of document]

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At the fifth session of the CAJ-AG, it was agreed that the examples should be revised, in consultation with interested experts. On the basis of that consultation, the examples have been deleted.

¹ See last sentence of paragraph 16 of document “The Notion of Breeder and Common Knowledge in the Plant Variety Protection System Based Upon the UPOV Convention”, adopted by the Council at its nineteenth extraordinary session on April 19, 2002 (Annex to document C(Extr.)/19/2 Rev.), available at http://www.upov.int/en/about/pdf/c_extr_19_2_rev.pdf.