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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP**Seventh Session
Geneva, October 29 and 30, 2012**

EXPLANATORY NOTES ON PROPAGATION AND PROPAGATING MATERIAL

Document prepared by the Office of the Union

1. The purpose of this document is to recall the discussions concerning the possible development of guidance on the notion of "Propagation and propagating material" and to consider whether to pursue the development of such guidance.

BACKGROUND

2. The Administrative and Legal Committee Advisory Group (CAJ-AG), at its fifth session held in Geneva on October 18 and on the afternoon of October 19, 2010, considered document UPOV/EXN/HRV Draft 5 "Explanatory Notes on Acts in Respect of Harvested Material Under the 1991 Act of the UPOV Convention". Mr. Edgar Krieger, Secretary General, International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), in his letter of October 4, 2010,¹ concerning document UPOV/EXN/HRV Draft 5, wrote that "it seems advisable to suspend the discussion about the Explanatory Note on Harvested Material and first start a discussion and draft an Explanatory Note on 'Propagation and Propagating Material'. The term 'propagation' should be included in such new Explanatory Note, too, because also this term is not understood in the same way within the industry and the related circles". The Annex to that letter provided a compilation of the "definitions of propagating material in the PBR laws of selected UPOV members (the texts of the laws are taken from the UPOV website in English language)"

3. The representative of CIOPORA, at the sixty-second session of the CAJ, held in Geneva on October 19, 2010, referred to the first part of the fifth session of the CAJ-AG, in the context of discussions on document UPOV/EXN/HRV "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention", in which CIOPORA had requested the development of explanatory notes on "propagation and propagating material" (see document CAJ/62/9 "Report", paragraph 13).

4. The Chair of the CAJ, at the sixty-second session of the CAJ, recalled that the CAJ-AG would continue discussions on document UPOV/EXN/HRV "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention", at its fifth session, on the afternoon of October 19, 2010. She noted that the request made by CIOPORA would be considered by the CAJ-AG and the conclusions of the CAJ-AG on those matters would be reported to the CAJ at its sixty-third session, to be held in Geneva on April 7, 2011 (see document CAJ/62/9 "Report", paragraph 14).

5. The CAJ-AG, at its fifth session, 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

¹ A copy of the letter is available at http://www.upov.int/export/sites/upov/restrict/en/caj-ag/caj_ag_10_5/ciopora_hrv_oct_4_2010.pdf

its sixty-third session. 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).

6. The CAJ, at its sixty-third session held in Geneva on April 7, 2011, 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 the CAJ-AG at its sixth session in October 2011 (see document CAJ/63/10 "Report", paragraph 35).

7. The CAJ-AG, at its sixth session, held in Geneva on October 18, 2011, considered document CAJ-AG/11/6/6, the Annex to which provided a synopsis of references to "propagation" and "propagating material" in the laws notified by the members of the Union, as far as they provided guidance on the terms "propagation" or "propagating material". In addition, the CAJ-AG considered the comments of the Russian Federation and the European Seed Association (ESA), and the presentations made by CIOPORA and the International Seed Federation (ISF) at the session. In addition to the information provided in the Annex to document CAJ-AG/11/6/6, the CAJ-AG noted that the legislation of the European Union provided that "[a] plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as 'variety constituents.'"

8. The CAJ-AG noted that CIOPORA was of the view that propagating material should "cover entire plants or parts of plants as far as such parts are capable of producing entire plants" and that ISF preferred an explanation of propagating material in terms such as "capable of" or "can", and not "intended for" or "used for".

9. The CAJ-AG noted that many plant cells have the potential to regenerate a whole plant ("totipotency") and agreed that there was a risk that the use of certain terms to define propagating material could be interpreted in a way that would cover virtually any harvested material. In that regard, the CAJ-AG agreed that any guidance on propagating material would need to be consistent with the provisions for harvested material in the 1991 Act of the UPOV Convention.

10. The CAJ-AG agreed that the Office of the Union should invite proposals for the development of guidance on the notion of "Propagation and propagating material", with due regard to the comments of the CAJ-AG in paragraph 9 above, for consideration by the CAJ-AG at its seventh session in October 2012 (see document CAJ-AG/11/6/7 "Report", paragraphs 25 to 28).

11. The CAJ, at its sixty-fifth session, held in Geneva on March 29, 2012, considered documents CAJ/65/2 "Development of information materials concerning the UPOV Convention" and CAJ-AG/11/6/7 "Report". In relation to the wording concerning propagation and propagating material in the first sentence of paragraph 18 of document CAJ/65/2, in particular the term "risk", the CAJ noted the request of CIOPORA for a more neutral wording to be used in future. The CAJ further noted the report on the work of the CAJ-AG at its sixth session as provided in document CAJ-AG/11/6/7 "Report" and summarized in paragraphs 5 to 19 of document CAJ/65/2 (see paragraphs 7 to 10 above).

MATTERS FOR CONSIDERATION

12. In order to facilitate the consideration of the CAJ-AG on the possible development of guidance on the notion of "Propagation and propagating material" that would be consistent with the provisions for harvested material in the 1991 Act of the UPOV Convention, the Annex to this document present extracts from the 1991 Act of the UPOV Convention that refer to propagation, propagating material or harvested material.

13. The Council at its forty-third ordinary session, held in Geneva on October 22, 2009, adopted document UPOV/INF/6/1 "Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention", noting that document UPOV/INF/6/1 would replace the "Model Law on the Protection of New Varieties of Plants" ("Model Law" - UPOV Publication No. 842) (see document C/43/17 "Report", paragraphs 24 and 25). Document UPOV/INF/6 does not contain guidance on the notion of "Propagation and propagating material".

14. With regard to possible guidance on the notion of “Propagation and propagating material”, the Model Law, stated as follows in its commentary:

“1.16 Propagating material and harvested material. - No attempt has been made in the Model Law to define these terms. Drafting definitions capable of covering all possible situations satisfactorily is probably a risky endeavor; it is preferable to rely on common sense and case law.”

“1.19 ‘Propagating material’ undoubtedly means parts of plants used to produce new plants (for example seeds, cuttings and grafts), as well as whole plants used for planting (for example, rooted cuttings, runners and young plants grown from seed). Their end-use is a matter of fact but also of intention on the part of those concerned (producer, seller, buyer, user): the production of beet seeds is seed production, whereas bean seeds can be used for consumption or sowing.”

15. The CAJ-AG is invited to consider the possible development of guidance on the notion of “Propagation and propagating material”.

[Annex follows]

ANNEX

EXTRACTS FROM 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

Article 1

Definitions

For the purposes of this Act:

- (vi) "variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be
- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
 - distinguished from any other plant grouping by the expression of at least one of the said characteristics and
 - considered as a unit with regard to its suitability for being **propagated** unchanged;

[...]

Article 6

Novelty

(1) [*Criteria*] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, **propagating** or **harvested material** of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

[...]

Article 8

Uniformity

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its **propagation**, it is sufficiently uniform in its relevant characteristics.

[...]

Article 9

Stability

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated **propagation** or, in the case of a particular cycle of **propagation**, at the end of each such cycle.

Article 14

Scope of the Breeder's Right

(1) *[Acts in respect of the **propagating material**]* (a) Subject to Articles 15 and 16, the following acts in respect of the **propagating material** of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of **propagation**,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) *[Acts in respect of the **harvested material**]* Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of **harvested material**, including entire plants and parts of plants, obtained through the unauthorized use of **propagating material** of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said **propagating material**.

(3) *[Acts in respect of certain products]* Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from **harvested material** of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said **harvested material** shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said **harvested material**.

[...]

Article 15

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).

[...]

Article 16

Exhaustion of the Breeder's Right

(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**.

[...]

CHAPTER VI

VARIETY DENOMINATION

Article 20

Variety Denomination

(7) [*Obligation to use the denomination*] Any person who, within the territory of one of the Contracting Parties, offers for sale or markets **propagating material** of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

[End of Annex and of document]