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DRAFT

EXPLANATORY NOTES ON  
ACTS IN RESPECT OF HARVESTED MATERIAL  
UNDER THE 1991 ACT OF THE UPOV CONVENTION

*Document prepared by the Office of the Union*

*to be considered by the Administrative and Legal Committee Advisory Group  
by correspondence*

Note for Draft version

**Strikethrough (highlighted)** indicates deletion from the text of document UPOV/EXN/HRV Draft 6, as agreed by the CAJ-AG at its sixth session.

**Underlining (highlighted)** indicates insertion to the text of document UPOV/EXN/HRV Draft 6, as agreed by the CAJ AG at its sixth 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 ACTS IN RESPECT OF HARVESTED MATERIAL  
UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on the scope of the breeder's right concerning acts in respect of harvested material (Article 14(2) of the 1991 Act) 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.

ACTS IN RESPECT OF HARVESTED MATERIAL

(a) Relevant article

**Article 14** of the **1991 Act** of the UPOV Convention

(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.

[...]

1. Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the **unauthorized use** of propagating material **and** that the breeder must not have had **reasonable opportunity** to exercise his right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity" and then provide some illustrative examples of where it might be considered that the breeder's right extends to acts in respect of harvested material.

(b) Harvested material

2. The UPOV Convention does not provide a definition of harvested material. However, Article 14(2) of the 1991 Act refers to "[...] harvested material, *including entire plants and parts of plants*, obtained through the unauthorized use of propagating material of the protected variety [...]", thereby indicating that harvested material includes entire plants and parts of plants obtained through the use of propagating material.

3. 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 at least some forms of harvested material have the potential to be used as propagating material (see "illustrative examples").

(c) Unauthorized use of propagating material <sup>Endnote 1</sup>

Acts in respect of propagating material

4. "Unauthorized use" refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder's right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder's right has been granted and is in force.

5. With regard to "unauthorized use", Article 14(1)(a) of the 1991 Act of the UPOV Convention states that "Subject to Articles 15 [Exceptions to the Breeder's Right] and 16 [Exhaustion of the Breeder's Right], 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.

Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating material in the territory concerned, where such authorization was not obtained.

#### *Conditions and limitations*

6. Article 14(1)(b) of the 1991 Act of the UPOV Convention further states that “[t]he breeder may make his authorization subject to conditions and limitations”. Thus, subject to Articles 15 and 16, “unauthorized use” also refers to the acts listed in Article 14(1)(a) (i) to (vii) that are not undertaken in accordance with the conditions and limitations established by the breeder.

7. Document UPOV/EXN/CAL “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”, explains that:

“2. [...] The conditions and limitations according to which a breeder may authorize the acts in respect of the propagating material are a matter for the breeder to decide.

“3. For illustrative purposes, examples of conditions and limitations which a breeder might include are:

- (i) remuneration – level of remuneration (e.g. linked to quantity of propagating material, area sown with the propagating material, amount or value of material produced from the propagating material etc.), timing and method of payment, etc.;
  - (ii) period of authorization;
  - (iii) method by which the authorized acts may be undertaken (e.g. method of production or reproduction, export routes etc.);
  - (iv) quality and quantity of material to be produced;
  - (v) territory(ies) covered by the authorization for export;
  - (vi) conditions under which the person authorized may license/sub-license other parties to conduct the authorized acts on their behalf;
- etc.”

#### *Compulsory exceptions to the Breeder’s Right*

8. Document UPOV/EXN/EXC “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention”, Section I “Compulsory Exceptions to the Breeder’s Right”, 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. “Unauthorized use” would not refer to acts covered by Article 15 (1) of the 1991 Act of the UPOV Convention.

#### *Optional exception to the Breeder’s Right*

9. Article 15 of the 1991 Act of the UPOV Convention [Exceptions to the Breeder’s Right] states that “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)”. Document UPOV/EXN/EXC “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention”, Section II “The Optional Exception to the Breeder’s Right”, provides guidance on the optional exception provided in Article 15 (2) of the 1991 Act of the UPOV Convention.

10. Where a member of the Union decides to incorporate this optional exception into its legislation, “unauthorized use” would not refer to acts that were covered by the optional exception. However, subject to Articles 15 (1) and 16, “unauthorized use” would refer to acts that were not covered by the optional exception in the legislation of the member of the Union concerned.

(d) Exercise his right

11. The provisions under Article 14(2) of the 1991 Act mean that breeders can only exercise their rights in relation to the harvested material if they have not been able to exercise their rights in relation to the propagating material.

12. 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, “exercise his right” in relation to the propagating material means to exercise his right in relation to the propagating material *in the territory concerned*. It is a matter for each member of the Union to determine what constitutes “reasonable opportunity” to *exercise his right*.

~~(e) Illustrative examples~~ <sup>Endnote i</sup>

[End of document]

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At its sixth session, held in Geneva on October 18, 2011, the CAJ-AG noted that the illustrative examples could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion. It agreed that the illustrative examples should be replaced by a general explanation of "unauthorized use of propagating material", on the basis of the cases provided in the illustrative Examples 1 to 8. The CAJ-AG noted that Example 9 did not make reference to unauthorized use of propagating material (see document CAJ-AG/11/6/7 "Report", paragraph 10).