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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE

**Seventy-Second Session
Geneva, October 26 and 27, 2015**

ADDENDUM TO:
HARVESTED MATERIAL

Document prepared by the Office of the Union

Disclaimer: this document does not represent UPOV policies or guidance

1. The Annexes to this document contain the presentation made by Argentina and the latest version of the presentations made by the European Union and the Russian Federation on harvested material during the seventy-second session of the Administrative and Legal Committee (CAJ) (in English only).

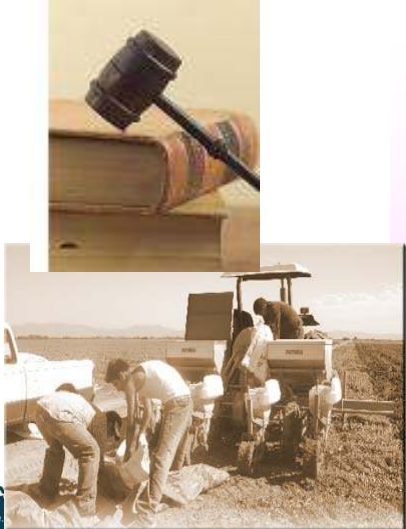
2. *The CAJ is invited to note the presentations made by Argentina, the European Union and the Russian Federation on harvested material reproduced in the Annexes to this document .*

[Annexes follow]

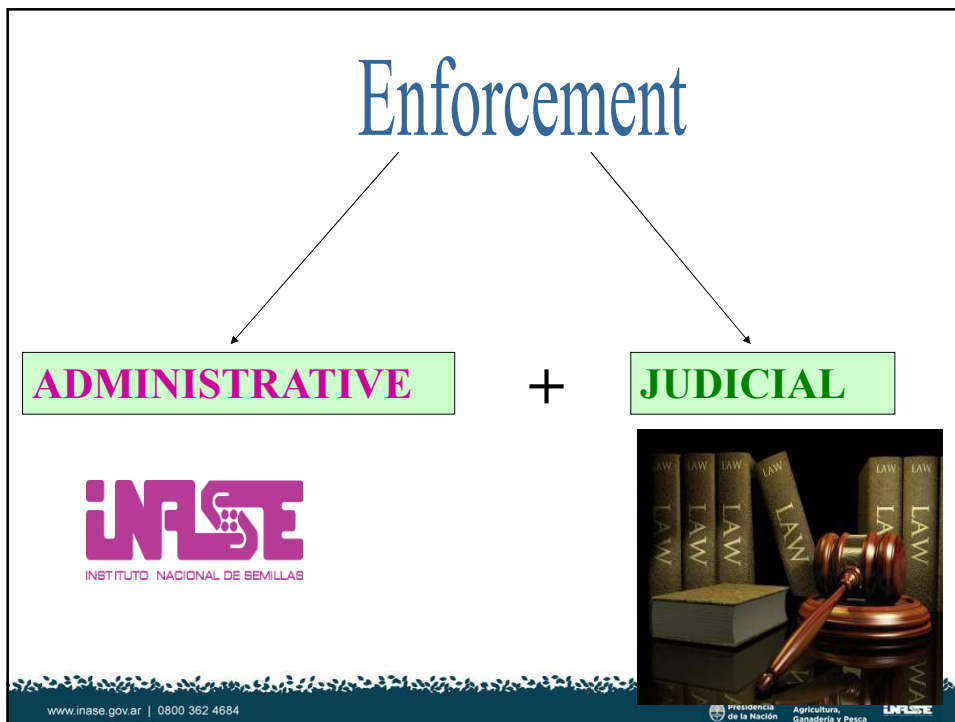
INASE
INSTITUTO NACIONAL DE SEMILLAS

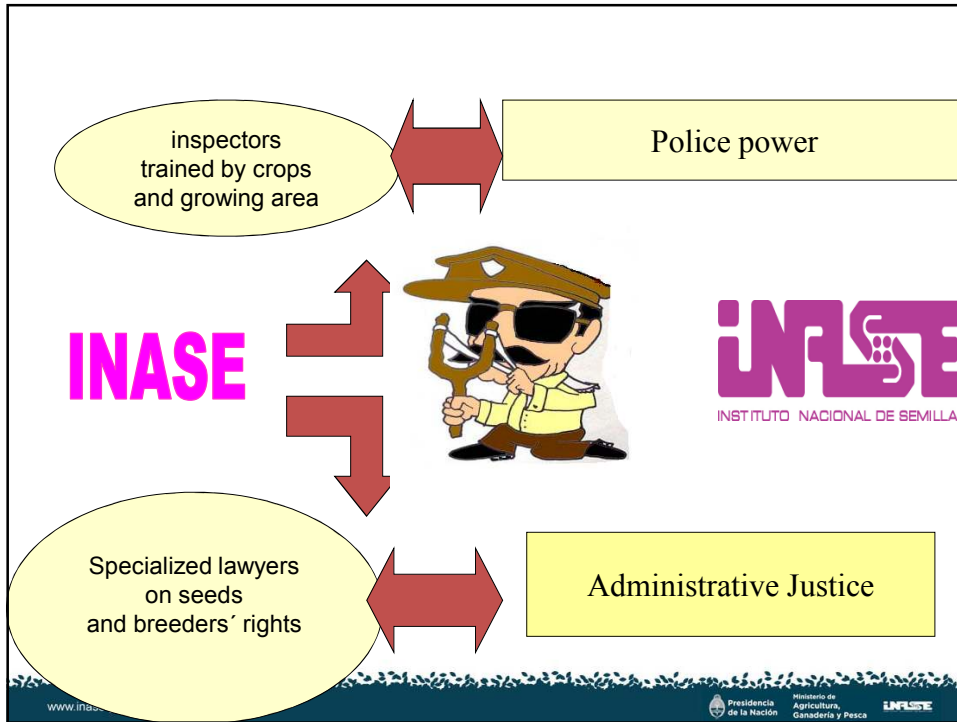
Article 41 Decree 2183/91

- The breeders' rights mean that prior authorization shall be required in relation to the protected variety



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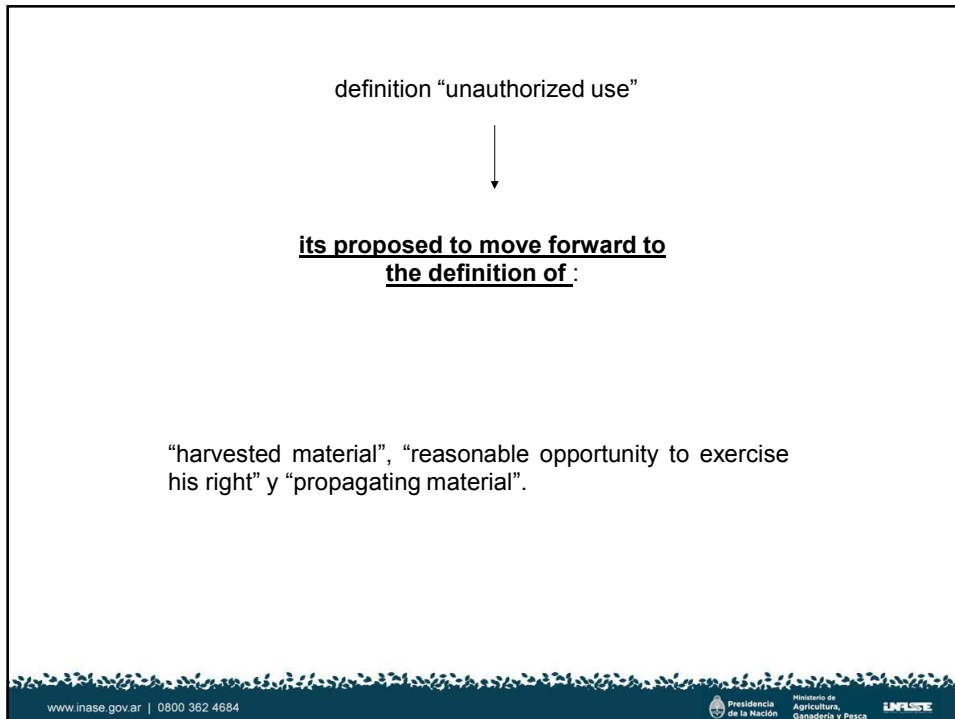
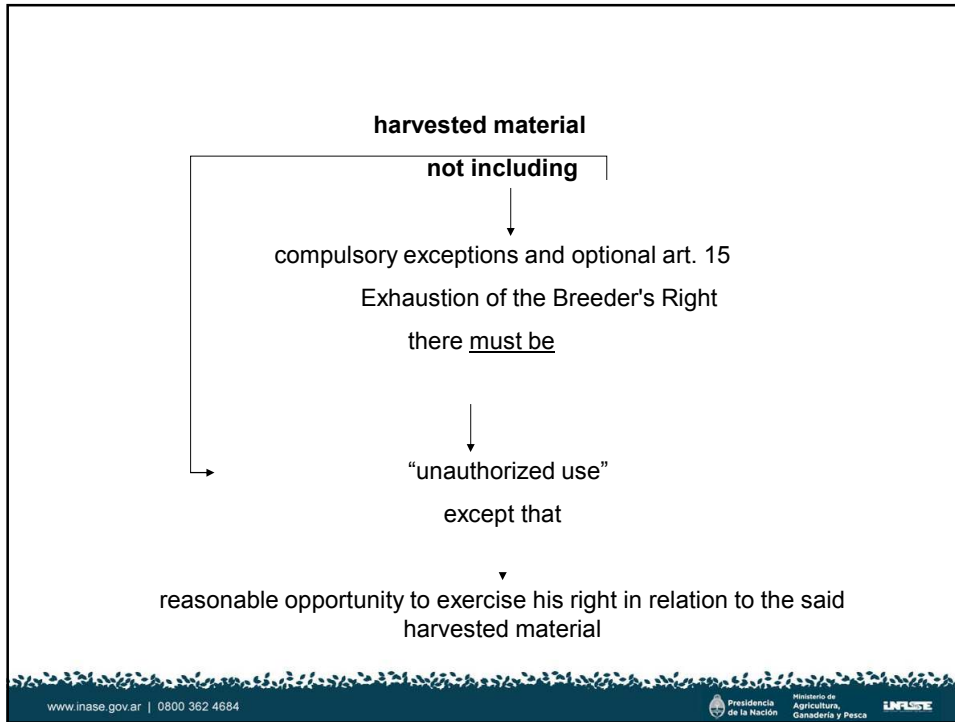




This complex block features the INASE logo at the top right, with the text "INSTITUTO NACIONAL DE SEMILLAS" below it. On the left, a large magnifying glass is positioned over the text "Authorization of the breeder". Below this, there are four distinct images: a photograph of people working in a field with a tractor, labeled "Multiply seeds"; a cartoon illustration of a man in a suit holding a stack of money, labeled "National commerce"; a photograph of a large blue cargo ship, labeled "Exporting and importing"; and a small, partially visible image of a ship's deck.

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SPECIFIC COMMENTS REGARDING THE
DOCUMENT **UPOV/EXN/HR/V1**

unauthorized use, reasonable opportunity to exercise his right

there is not an unambiguous statement



Harvested material: The note says that is not defined but adds , however, that may include whole plants or parts of plants

No extensive interpretations of the material of reproduction or multiplication of the protected variety should be done
Point 3 should be eliminated.

Regarding point 6 all acts should be mentioned in Article 14 or deleted not to create confusion about the acts involved.

It is proposed to include conditions and restrictions to the right of the breeder in point 6 added in document UPOV/EXN/CAL
"Conditions and limitations"

5. a) there should be clarified what is considered to be a reasonable exercise of the right

point 13 turns out to be confusing

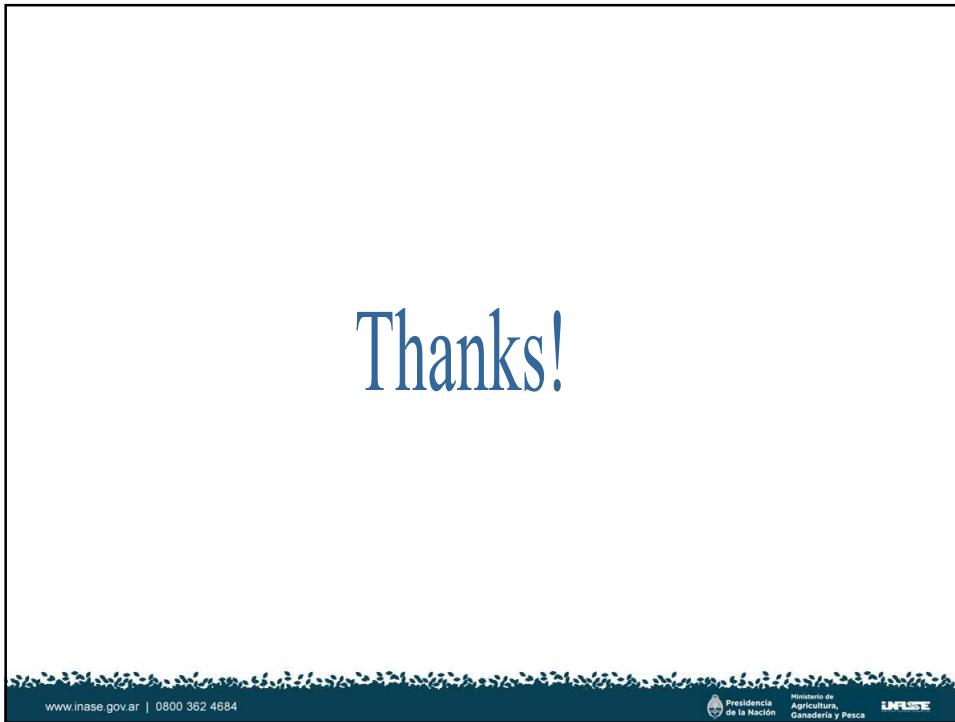
In Argentina " reasonable opportunity to exercise his right " means that the breeder has made some effective action "

there should not be confusion between the optional right to save and use seed of farmers with "non authorized Use"

Non authorized use and reasonable exercise of rights



Know the situation in the country where the material has been planted.



[Annex II follows]



Harvested Material

European Commission – DG Sante E2
CPVO
72nd session of CAJ - UPOV
Geneva, 26 and 27 October 2015



Legal basis for the EU system on plant variety rights

**Regulation (EC) No 2100/94 of 27 July 1994
on Community plant variety rights (BR or Basic
Regulation)**

JO 1.9.1994 – L 227/1-30



Harvested material:

- **It refers to all products of the harvest obtained from the use of variety constituents of a protected variety;**
- **It includes, dependent on the variety in question, fruits, vegetables, flowers, cereal grains, fodder, and fibre.**



Article 13(2) BR deals with the rights of the holder of a CPVR

Acts in respect of which the authorization of the holder of a CPVR is required:

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community (EU);
- (f) importing to the Community (EU);
- (g) stocking for any of the purposes mentioned in (a) to (f).



Article 13(3) BR

According to Article 13(3) BR, the acts in respect of variety constituents ("primary right") which require the authorization of the holder of a CPVR, shall apply in respect of harvested material ("secondary right"), subject to the following **2** cumulative conditions.

Article 13(3) BR



Only

1. if the harvested material was obtained through the **unauthorized use** of variety constituents of the protected variety,
- and**
2. If the holder did not had **reasonable opportunity to exercise his right** in relation to the variety constituents of the protected variety.

Articles 13(2) and 27(2) BR



The holder of a CPVR may make his authorization in respect of the acts mentioned under Article 13(2) subject to conditions and limitations (license agreements).

Article 27(2) BR: the holder may invoke the rights conferred by a CPVR against a person enjoying the right of exploitation (licensee) who contravenes any of the conditions or limitations attached to his exploitation right.

Article 94(1) BR



Whoever effects one of the **acts set out in Article 13(2) BR without being entitled to do so** (either as an effect of contractual or non-contractual liability) in respect of a variety for which a CPVR has been granted may be sued for **infringement.**

Article 16 BR



Under Article 16 BR there is no exhaustion of CPVR when the acts on the material of the protected variety:

(a) involve further propagation of the variety in question, except where such propagation was intended when the material was disposed of;

or

(b) involve an export of variety constituents into a third country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported materials is for final consumption purposes.



Where there is no exhaustion of right pursuant to Article 16, letters (a) or (b) BR,

the holder of a CPVR can bring an action for infringement against acts carried out without his authorization, such as when the imported material results from unauthorized further propagation in a third country or when the material results from material exported to a third country where there is no system of PVR for the plant genus or species to which the variety belongs.



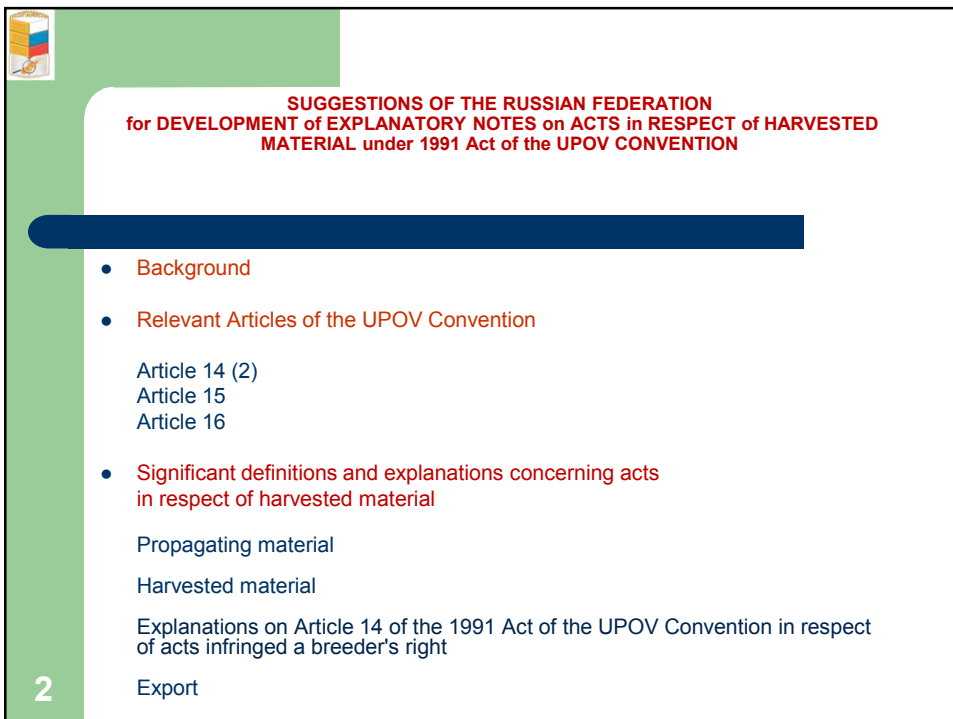
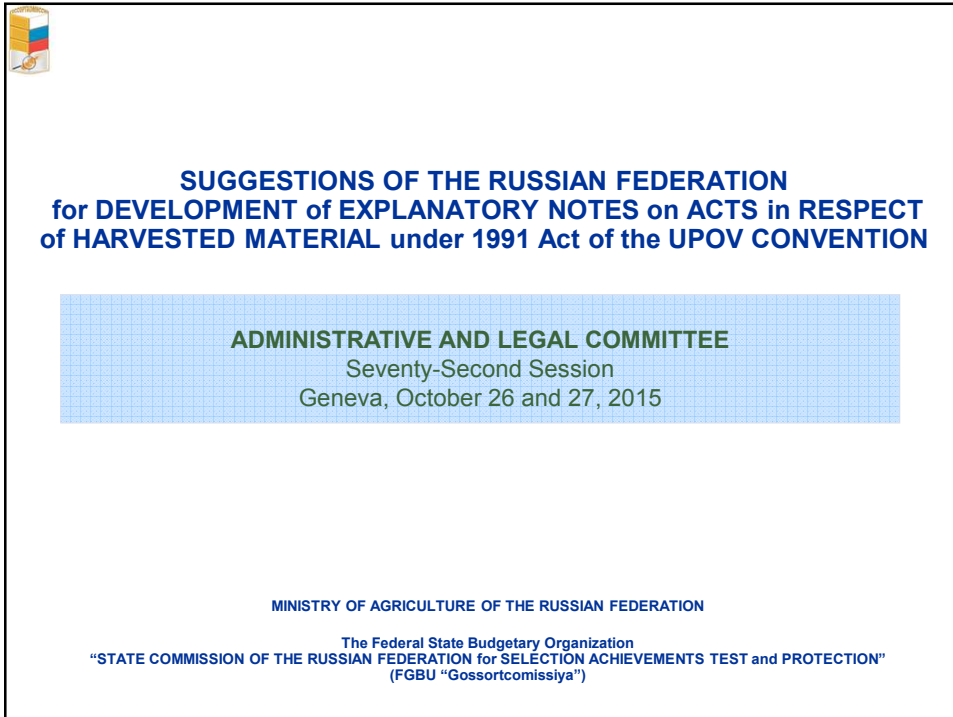
Judgment of the CJEU of 20.10.2011 in case C-140/10 (Paras. 41, 43)


Since the protection enjoyed by the holder of a CPVR must not be excessive, an infringement of any clause of a licensing contract does not always result in violation of the holder's consent.

There is no exhaustion of the holder's right where the breach of a condition or limitation of a licensing agreement relate directly to essential features of the CPVR.

Acts of disposal of the material for further propagation are essential features of the CPVR and the possible breach thereof prevents exhaustion of the right.

[Annex III follows]






•Background

It is our deep conviction that **Article 14(2)** [Acts in respect of the harvested material] of the 1991 Act was **misinterpreted in all drafts** of document **UPOV/EXN/HRV** considered at CAJ and CAJ-AG meetings during the period 2007 – 2013, including the last one (UPOV/EXN/HRV/2 Draft 2 of September 9, 2014).

Those drafts **texts** and **examples** **definitely** displayed necessity of **breeder's authorization** for using of propagating material of a variety protected **to grow harvested material** including in the territory **unprotected**.


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•Background (continuation)

We consider **TIME OUT** in discussion of a regular draft of the document suggested by the UPOV Office in 2015. was the **right decision**.


4



•**Background** (continuation)

The Russian Federation proposes **to start** writing Explanatory Notes on Article 14(2) **all over again** basing on Articles 14, 15 and 16 of the 1991 Act **without searching** evidence of acts of “*unauthorized use of propagating material*” and “*reasonable opportunity to exercise his right*”.

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•**Relevant Articles of the 1991 Act of the UPOV Convention**

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. ...

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•Relevant Articles of the 1991 Act of the UPOV Convention

Article 15 Exceptions to the Breeder's Right


(1) *[Compulsory exceptions]* The breeder's right shall not extend to

- (i) acts done privately and for non-commercial purposes,
- (ii) acts done for experimental purposes and
- (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

(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).

[...]

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•Relevant Articles of the 1991 Act of the UPOV Convention

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.

(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.


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• **Significant definitions and explanations concerning acts in respect of harvested material**

1. Propagating material (seeds, material of propagation) is:
plants and parts of plants
produced and used for the reproduction of new generations of plants of the given variety.

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• **Significant definitions and explanations concerning acts in respect of harvested material**


1. Propagating material (continuation)

1.1. Propagating material of variety may be represented by:

- ◆ **several successive reproductions (generations of reproductive parts) of plant**
- ◆ **entire plant (seedling, seedlings) and vegetative parts of plants (tubers, rhizomes, bulbs, cuttings, etc.)**
- ◆ **material obtained from the crossing of parental varieties (hybrids of the first generation).**



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- Significant definitions and explanations concerning acts in respect of harvested material


1. Propagating material (continuation)

1.2. The scope of the breeder's right in accordance with Article 14(1) involves permission granting (a license = breeder's authorization) to the third parties for certain acts, including export, in respect of propagating material.

The authorization is usually issued for a number of years or for the whole duration of breeder's rights caused by economic obligations to the right owner.




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- Significant definitions and explanations concerning acts in respect of harvested material

1. Propagating material (continuation)

1.3. All batches of propagating material of a variety, produced or imported by the third parties into the territory protected, should be covered by the breeder's authorization.




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- Significant definitions and explanations concerning acts in respect of harvested material

1. Propagating material (continuation)

1.4. Production of any batch of propagating material in the territory protected **without** breeder's authorization is an **infringement**.




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- Significant definitions and explanations concerning acts in respect of harvested material


1. Propagating material (continuation)



1.5. Optional exception to the breeder's right (Article 15.2) provides a farmer of a country protected, when meeting the national law, **to use** harvested material, **grown** by him on his **OWN** holding, **for propagation purposes**.





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- Significant definitions and explanations concerning acts in respect of harvested material


1. Propagating material (continuation)

1.6. The farmer infringed the national legislation provisions (exceeded a quota of a variety propagation on his holding) is an infringer of the breeder's right and, on base of right owner's action at law in court should be held liable for infringement of the breeder's right.



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- Significant definitions and explanations concerning acts in respect of harvested material

1. Propagating material (continuation)

1.6. (continuation) Infringements (acts beyond the conditions of the “farmer’s privilege”) can be identified by the right owner as when conditioning harvested material (act in respect of propagating material) and later when manufacturing of harvested material. Both cases constitute an infringement under Article 15(2) and national legislation. The infringer is the farmer in this case.



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- **Significant definitions and explanations concerning acts in respect of harvested material**


1. Propagating material (continuation)

1.7. The farmer used the **harvested material** obtained on his own holding to sow it on the holding and, that material belonged to genus or species **not** constituted a “farmer's privilege”.

Since the **infringer** of manufacture of propagating material has been identified (specified person, like the **farmer**), the **liability** may be **brought** under Article 14.1. **but** not under Article 15.2.




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- **Significant definitions and explanations concerning acts in respect of harvested material**

2. Harvested material
(plant material) – plants and parts of plants produced and used for purposes **other than reproduction** of new plants of a variety (for final consumption).



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• Significant definitions and explanations concerning acts in respect of harvested material

2. Harvested material (continuation)

2.1. Harvested material can be represented by:

◆ Entire plants and vegetative parts of plants	• <i>perennial plants sown or planted</i>
◆ Reproductive parts of perennial plants	• fruits, berries for food purposes
◆ Finite generation of the reproductive parts of the plant	• <i>grain for food purposes, seed of sunflower for oil</i>




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• Significant definitions and explanations concerning acts in respect of harvested material

2. Harvested material (continuation)

2.2. The breeder's right is NOT extended on harvested material manufactured from **authorized** (legal) batch of **propagating material**. The right **EXHAUSTION** becomes due to **authorization** of acts in respect of the **Propagating material**.



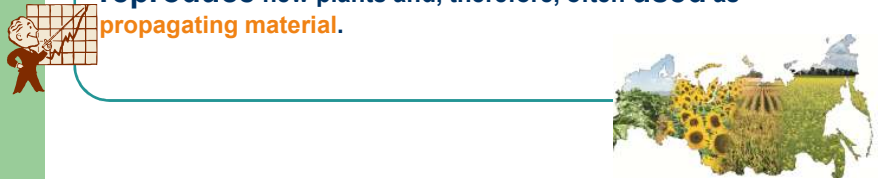
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• Significant definitions and explanations concerning acts in respect of harvested material

2. Harvested material (continuation)

2.3. Harvested material (grain, tubers, bulbs etc.) are able to reproduce new plants and, therefore, often used as propagating material.



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• Significant definitions and explanations concerning acts in respect of harvested material

3. Explanations on Article 14 of the 1991 Act of the UPOV Convention in respect of acts infringing a breeder's right

3. Article 14(2) considered is **solely** intended to control **illegal** (without the breeder's authorization) **acts** with **propagating material** (production or reproduction, import, sale or other marketing).

Those batches of **propagating material** not covered by the breeder's right when manufacturing or importing, are used for the **illegal** production of **harvested products**. Such **propagating material** may comprise a **significant** part of the **propagating material** used in the territory protected.

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• **Significant definitions and explanations concerning acts in respect of harvested material**


3. Explanations on Article 14 of the 1991 Act of the UPOV Convention in respect of acts infringing a breeder's right (continuation)

3.1. In case where an **infringer of acts with propagating material is unknown** and, the breeder has had **NO** reasonable opportunity to **SUE** for acts with the **propagating material**.

Such circumstance **is** the **very case** when the breeder's right **may be prolonged** on the **harvested material** in the amount of items (i) - (vii) of paragraph (1)a) of Article 14(1).

Infringements disclosed in the next year (or later) under the facts of **manufacture of harvested products** in the territory protected from **propagating material not covered by the breeder's authorization** may constitute a **sizeable part** of **propagating material used**.

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• **Significant definitions and explanations concerning acts in respect of harvested material**


3. Explanations on Article 14 of the 1991 Act of the UPOV Convention in respect of acts infringing a breeder's right (continuation)

3.2. The wording "**unauthorized use of propagating material**" in Article 14(2) **means** "**use of propagating material manufactured without breeder's authorization**" (notably, using of **counterfeit propagating material**).

The breeder's right **is exhausted** on the batch of propagating material manufactured under the **breeder's authorization**.

The **breeder's right** on previous batch shall **not be prolonged** when manufacturing the **next generation of propagating material** and, the breeder **shall be required** the right on the new batch.


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•Significant definitions and explanations concerning acts in respect of harvested material

3. Explanations on Article 14 of the 1991 Act of the UPOV Convention in respect of acts infringing a breeder's right (continuation)


3.3. In cases where the **harvested material** produced using **counterfeit propagating material** purchased on the market (and it has been proven in court the breeder has had no opportunity **to sue the infringer at the stage of acts with propagating material**) the **right owner** has the option in accordance with Article 14(2):



to file a **claim** on a stage of harvested material manufactured and

to receive from infringer **compensation** for lost profit.


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•Significant definitions and explanations concerning acts in respect of harvested material

3. Explanations on Article 14 of the 1991 Act of the UPOV Convention in respect of acts infringing a breeder's right (continuation)

3.4. The right on compensation for the **lost profits** occurs by the **court decision** under consideration of the **claim of the right owner**, where the court finds that the breeder has **not had** reasonable opportunity to exercise his right in relation to the **production** of the respective batch of **propagating material** in the previous year.




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•Significant definitions and explanations concerning acts in respect of harvested material

4. Export

Export of material of the variety into a country where varieties of the given botanical genus or species are protected, but the variety is not protected, means that the breeder deliberately did not apply for the breeder's right granting in this country.



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•Significant definitions and explanations concerning acts in respect of harvested material


4. Export (continuation)

4.1. Export of material of the variety into a country where varieties of the botanical genus or species are not protected, with the exception of export for consuming purposes, is possible where the breeder's authorization is available only.

Usually, the breeder is interested in the maximum expansion of the area under his variety what in turn increases production of propagating material in the country of protection and royalties and, therefore, gives his permission for Export. Moreover, the Export of propagating material is an act covered by (vi) of Article 14(1) and, in most cases it is presented in the license contracts.



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•Significant definitions and explanations concerning acts in respect of harvested material

4. Export (continuation)

4.1. (continuation) **Export** of the variety material into the country **without authorization** means the **infringement** of the breeder's right in the territory protected and **grounds** for filing an action in court against the person committed the infringement (Export). The person / infringer is known.

In any case, **NO RIGHTS** shall be arisen for the breeder **in the territory unprotected**

There are a **large number** of **varieties unprotected** in the National Lists **applied** by the **breeders themselves**.



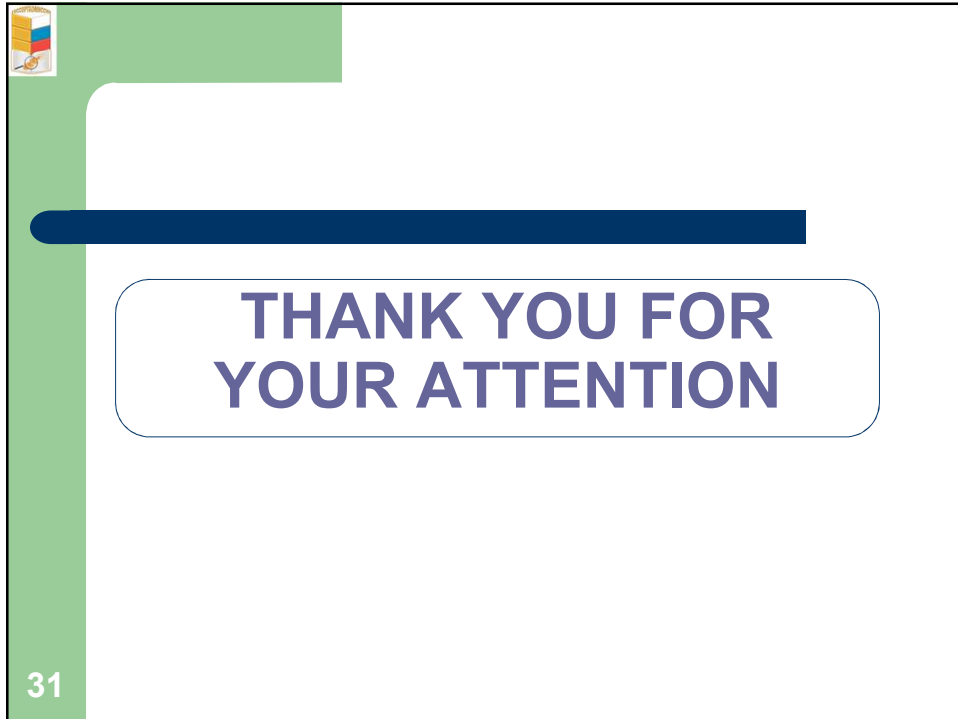
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The Federal State Budgetary Organization
**“STATE COMMISSION of the RUSSIAN
FEDERATION for SELECTION ACHIEVEMENTS
TEST and PROTECTION”**

Address: 107139 Orlikov pereulok, 1/11 Moscow Russia
Tel: +7 (495) 607-68-27
факс: (495) 411-83-66
E-mail: gossort@gossort.com

<http://www.gossort.com>



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