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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Second Session
Geneva, October 26, 2007**

ADDENDUM

ARTICLE 14(2) OF THE 1991 ACT: ACTS IN RESPECT OF HARVESTED MATERIAL
(ARTICLE 5(4) OF THE 1978 ACT); AND ARTICLE 16 OF THE 1991 ACT:
EXHAUSTION OF THE BREEDER'S RIGHT

Document prepared by the Office of the Union

On October 19, 2007, the Office of the Union received a contribution from the Services of the European Commission in reply to Circular E-475 of May 8, 2007, requesting materials concerning "Acts in respect of harvested material" and "Exhaustion of the breeder's right". The above-mentioned contribution is reproduced in the Annex to this document.

[Annex follows]

ANNEX

Comments received from the Services of the European Commission to the legal issues raised in the UPOV Circular Letter of May 8, 2007 (Ref. E-475) concerning the notions of “Materials concerning acts in respect of harvested material” and “Exhaustion of the breeder’s right” contained in the 1991 UPOV Convention (October 19, 2007)*

Question (a)(i): difference between the opportunity, for the breeder, to “exercise his right” and the “opportunity to obtain a right” in the context of Article 14(2):

- It should be mentioned firstly that Article 14(2) does not refer to the possibility of obtaining a right but speaks of the breeder having reasonable possibility to exercise his right.
- The use of the term “exercise” rather than the term “obtain” demonstrates that in the case mentioned in Article 14(2), the breeder does not obtain an additional right in relation to that exercised through the authorization mentioned in paragraph 1 and at the beginning of paragraph 2. In reality, this is the same right: that which the breeder obtains in return for his research and development work in the creation of a new variety. There are cases where the breeder may exercise his right directly by giving his authorization, including in the case of the use of the harvested material. There are also situations where the breeder has no direct control over the use of the variety he/she has developed, since he/she has been unable to give his authorization for this use, and for which it is fair that he/she may, by means other than the authorization mentioned in paragraph 1 and at the beginning of paragraph 2, exercise his right in a reasonable manner. The reference, at the end of Article 14(2), to “the reasonable possibility for the breeder to exercise her/her right” does not therefore give the breeder a new right (which would imply the use of the term “obtain a right”) but allows the breeder to exercise his right in a manner other than in accordance with the authorization mentioned in paragraph 1 and in the first part of the sentence in paragraph 2.

Question (a)(ii): to consider “reasonable opportunity” to exercise the breeder’s right in relation to farm-saved seed

Article 14(2) offers the breeder the possibility, where his variety is used without authorization, to exercise his right in a different manner. The use of farm-saved seed generally forms part of this context owing to the fact that the user of the variety is not going to perform a commercial transaction to acquire seeds of this variety but uses the harvested material. He/she does not therefore in most cases request the breeder’s authorization in accordance with the first part of the sentence in paragraph 2. However, that does not relieve him/her of the obligation to discharge the right belonging to the breeder and the breeder must be able to exercise his right in a different manner, with respect for the principle of proportionality “reasonably”.

* Original received in French (available upon request).

Question (b): clarification of the terms “unauthorized use of propagating material” in relation to Article 14(2)

The expression “unauthorized use” as mentioned in Article 14(2) does not mean that use of the variety is illegal. It must be assessed in view of the authorization indicated in paragraph 1 and in the first part of the sentence in paragraph 2, and thus refers to the cases where the breeder has not given his authorization to perform certain acts listed in paragraph 1, in which case he/she may, according to paragraph 2, exercise his right otherwise in a reasonable manner.

Question (c): it is difficult to understand the sense of the question: would it be possible for the UPOV Office to reformulate the question?

Question (d): consideration of the definition of material under Article 16(2)(iii) and the optional provision of the scope of the breeder’s right in Article 14(3) (“acts in respect of certain products”) of the 1991 Act

Article 16 describes the acts for which the exercise of the breeder’s right is exhausted, i.e. the acts which are not subject to the exercise of the breeder’s right.

Paragraph 2 defines the term “material” as follows: (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.

Owing to the first paragraph of this Article, the breeder’s right does not extend to the acts concerning the materials of the variety protected by a breeder’s right, described in paragraph 2, unless such acts involve: (i) “*further propagation of the variety in question*” or (ii) “*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 (...)*”.

Article 14(3), however, provides for the possibility for the Contracting Parties to the UPOV Convention, subject to Articles 15 and 16, to extend the exercise of the breeder’s rights to the products made directly from harvested material of the protected variety covered by the provisions of paragraph 2. This possibility for extension of the breeder’s right applies subject to Articles 15 and 16. It should therefore be deduced that the cases of exhaustion of the breeder’s rights mentioned in Article 16 also apply in the case where the Contracting Party decides to extend the breeder’s rights to the situations described in Article 14(3). Thus, the extension of the breeder’s rights to the products made directly from harvested material of the protected variety covered by the provisions of paragraph 2 applies only to the acts which involve further propagation of the variety in question or 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 (...).

Question (e): Clarification of the territorial scope of the exhaustion of the breeder’s right in Article 16(1) and (3) of the 1991 Act.

Article 16 relating to the exhaustion of the breeder’s right provides that the breeder’s right does not extend to the acts concerning material which has been sold or marketed in a different manner on the territory of the Contracting Party concerned by the breeder or with his consent unless such acts involve (i) “*further propagation of the variety in question*” or

(ii) *“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(...)”*.

Paragraph 3 provides that “in certain cases” 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.

The territorial scope of the exhaustion of the breeder’s right is therefore the territory of the Contracting Party on which the commercial transaction has taken place, concerning material or material derived from a protected variety. Where appropriate, paragraph 3 allows us to consider that the territory in question is that of the intergovernmental organization which groups together several Contracting Parties.

[End of Annex and of document]