

To the Vice Secretary-General of UPOV
Mr. P. Button

Subject: Explanatory Notes on Acts in Respect of Harvested Material (draft 7)

Dear Mr. Button,

In relation to the draft mentioned above I would like to make the following remarks.

Art. 14 (2) of UPOV 1991 is in particular relevant in the following cases.

1. Unauthorized reproduction of the protected variety in the territory where the PBR is in force.
2. Unauthorized export of (propagating material of) the variety from a territory where the PBR is in force to a territory where the PBR is not in force (where the variety may or may not be multiplied) and re-import of the harvested product.

In those cases the PBR holder will try to stop (further) marketing of the harvested material in the territory where the PBR is in force without his conditions being met.

Especially in cases meant under 2 art. 14 (2) of the UPOV Convention needs some clarification. That is the very reason for the Explanatory Notes concerning harvested material.

The present draft is certainly helpful. However it may not give a clear answer to the question whether article 14 (2) is applicable to (e.g.) imported flowers, grown from propagating material that was exported without authorization to a territory where the PBR for the variety concerned is not in force. Courts of justice, taking note of the Explanatory Notes, might reason that "the acts consist of growing the flowers and, since that was done in a territory where the PBR is not in force, they are not unauthorized acts."

It might be helpful when the Explanatory Notes explain that unauthorized export (from a territory where the PBR is in force) of propagating material constitutes an unauthorized act in the territory where the PBR is in force, e.g. in an additional sentence reading:

"It should be noted that unauthorized export of propagating material from the territory where the PBR is in force is such unauthorized act."

Yours sincerely,
Krieno Fikkert
Member of the delegation of the Netherlands