

Administrative and Legal Committee**CAJ/77/5****Seventy-Seventh Session
Geneva, October 28, 2020****Original: English
Date: August 18, 2020*****to be considered by correspondence*****HARVESTED MATERIAL***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance***EXECUTIVE SUMMARY**

1. The purpose of this document is to present information and proposals from members of the Union concerning the term “unauthorized use of propagating material”, in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention and to propose a way forward to identify substantive matters with proposals for consideration by the Administrative and Legal Committee in 2021.

2. The CAJ is invited to:

(a) note the information and proposals received in reply to UPOV Circular E-19/232, as reproduced in Annexes I to III to this document; and

(b) invite the Office of the Union to consult the members of the Union that provided information and proposals in reply to Circular E-19/232, in order to explore how to provide guidance on the term “unauthorized use of propagating material”, including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as a basis to present a proposal for consideration by the CAJ at its seventy-eighth session.

3. The structure of this document is as follows:

EXECUTIVE SUMMARY	1
BACKGROUND	2
INFORMATION AND PROPOSALS CONCERNING THE TERM “UNAUTHORIZED USE OF PROPAGATING MATERIAL”, IN RELATION TO TREES, IN ARTICLE 14(2) OF THE 1991 ACT OF THE UPOV CONVENTION.....	2
ANNEX I INFORMATION AND PROPOSALS FROM THE EUROPEAN UNION IN RESPONSE TO UPOV CIRCULAR E-19/232	
ANNEX II INFORMATION AND PROPOSALS FROM JAPAN IN RESPONSE TO UPOV CIRCULAR E-19/232 Appendix: Proposal of Japan for the Revision of UPOV/EXN/HRV/1	
ANNEX III INFORMATION AND PROPOSALS FROM THE RUSSIAN FEDERATION IN RESPONSE TO UPOV CIRCULAR E-19/232	

BACKGROUND

4. The CAJ, at its seventy-sixth session¹, agreed the matters in the following paragraphs (see below extracts from document CAJ/76/9 "Report", paragraphs 18 to 20):

"18. The CAJ noted the suggestion by Japan to develop guidance on the term 'unauthorized use of propagating material', in Article 14(2) of the 1991 Act of the UPOV Convention.

"19. The CAJ agreed to include an item in the agenda for the seventy-seventh session of the CAJ to be held on October 28, 2020, to consider a document with information and proposals from CAJ members and observers concerning the term 'unauthorized use of propagating material', in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention.

"20. The CAJ agreed that the Office of the Union should invite members and observers to provide information and make proposals by correspondence on the term 'unauthorized use of propagating material', in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention. Based on the proposals received by correspondence, the Office of the Union would prepare a document identifying substantive matters with proposals for consideration at the seventy-seventh session of the CAJ, to be held on October 28, 2020."

INFORMATION AND PROPOSALS CONCERNING THE TERM "UNAUTHORIZED USE OF PROPAGATING MATERIAL", IN RELATION TO TREES, IN ARTICLE 14(2) OF THE 1991 ACT OF THE UPOV CONVENTION

5. In accordance with the request of the CAJ, at its seventy-sixth session (see Background above), on December 23, 2019, the Office of the Union issued UPOV Circulars E-19/232 and E-19/233 to the designated persons of members and observers in the CAJ, respectively, with an invitation to provide information and make proposals on the term "unauthorized use of propagating material", in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as follows:

"To assist in the analysis of the information and proposals, it would be helpful if the contributions could be structured according to the following:

- information on issues arising with regard to "unauthorized use of propagating material", in relation to trees;
- information on any explanation of the term "unauthorized use of propagating material" used in the territory (e.g. breeders' practices, guidance, contract clauses);
- case law;
- proposals on how to elaborate the term "unauthorized use of propagating material".

6. In reply to UPOV Circular E-19/232, the Office of the Union received information and proposals from the European Union, Japan and the Russian Federation, which are reproduced in Annexes I to III to this document.

7. The CAJ may wish to invite the Office of the Union to consult the members of the Union that provided information and proposals in reply to Circular E-19/232, in order to explore how to provide guidance on the term "unauthorized use of propagating material", including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as a basis to present a proposal for consideration by the CAJ at its seventy-eighth session.

8. *The CAJ is invited to:*

(a) note the information and proposals received in reply to UPOV Circular E-19/232, as reproduced in Annexes I to III to this document; and

(b) invite the Office of the Union to consult the members of the Union that provided information and proposals in reply to Circular E-19/232, in order to explore how to provide guidance on the term "unauthorized use of propagating material", including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as a basis to present a proposal for consideration by the CAJ at its seventy-eighth session.

[Annexes follow]

¹ Held in Geneva on October 30, 2019.

INFORMATION AND PROPOSALS FROM THE EUROPEAN UNION IN RESPONSE
TO UPOV CIRCULAR E-19/232

INFORMATION AND PROPOSALS CONCERNING THE TERM “UNAUTHORIZED USE OF PROPAGATING
MATERIAL” IN RELATION TO TREES, IN ARTICLE 14(2) OF THE 1991 ACT OF THE UPOV CONVENTION

Contents

1.	<u>Introduction</u>	2
2.	<u>Information on issues arising with regard to “unauthorized use of propagating material”, in relation to trees</u>	2
3.	<u>Information on any explanation of the term “unauthorized use of propagating material” used in the territory (e.g. breeders’ practices, guidance, contract clauses)</u>	3
4.	<u>Case law</u>	2
5.	<u>Proposals on how to elaborate the term “unauthorized use of propagating material”</u>	3

1. Introduction

By Circular E-19/232 of 23 December 2019, the UPOV Office requested CAJ members and observers to submit information and proposals concerning the term “unauthorized use of propagating material”, in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention. The request followed a suggestion of Japan to develop guidance on the said issue. The CAJ agreed to include an item on the agenda of the seventy-seventh session of the CAJ to be held on October 28, 2020, to consider a document with information and proposals from CAJ members and observers concerning the term “unauthorized use of propagating material”, in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention.

To assist in the analysis of the information and proposals, the UPOV Office asked CAJ members and observers to structure the contributions as follows:

- Information on issues arising with regard to “unauthorized use of propagating material”, in relation to trees;
- Information on any explanation of the term “unauthorized use of propagating material” used in the territory (e.g. breeders’ practices, guidance, contract clauses);
- Case law;
- Proposals on how to elaborate the term “unauthorized use of propagating material”.

2. Information on issues arising with regard to “unauthorized use of propagating material”, in relation to trees

Under Article 13(3) of Council Regulation No 2100/94 of 27 July 1994 on Community plant variety rights (hereinafter the ‘Basic Regulation’) the system of authorization required from the breeder in respect of acts on the propagating material of a protected variety, apply to harvested material subject to the following two conditions:

- the harvested material has been obtained through the unauthorized use of the propagating material, and
- the breeder must not have had reasonable opportunity to exercise his right in relation to the said propagating material.

In relation to trees, these fall under the concept of propagating material, as defined under Article 5(3) of the ‘Basic Regulation’, “entire plants or parts of plants as far as such parts are capable of producing entire plants” (See also UPOV Explanatory notes on propagating material under the UPOV Convention UPOV/EXN/PPM/1 of 6 April 2017 with examples of factors that have been considered by members of the Union in relation to whether material is propagating material https://www.upov.int/edocs/expndocs/en/upov_exn_ppm.pdf).

The use of propagating material shall be interpreted in relation to one of the acts listed under Article 14(1)(a) of the 1991 Act of the UPOV Convention, which are subject to the authorization of the breeder. As confirmed by the Court of Justice of the EU in case No C-176/18: “*it is apparent from the travaux préparatoires relating to Article 14(1)(a) of the UPOV Convention that the use of propagating material for the purpose of producing a harvest was explicitly excluded from the scope of that provision which establishes the conditions for the application of primary protection, which corresponds to that of Article 13(2) of Regulation No 2100/94. Therefore, under Article 14(1)(a) of the UPOV Convention, the breeder may not prohibit the use of variety constituents for the sole purpose of producing an agricultural harvest, but merely acts leading to the reproduction and propagation of the protected variety*” (See Judgement of the CJEU, case No C-176/18, paras. 37, 38, http://curia.europa.eu/juris/document/document_print.jsf?docid=221803&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=1447930).

The said provisions define the effects of CPVRs establish a cumulative protection scheme which consist of a primary right covering the propagating material and a secondary right covering the harvested material. Harvested material in relation to trees may be fruits which are not capable of producing other plants of the same variety.

Thus, Art. 13(2) Basic Regulation does not prohibit per se the exploitation of plant varieties to produce fruits. The right holder can, however, exercise its rights under Art. 13(3) Basic Regulation with regard to the latter as harvested material. This is due to the fact that the terms “production or reproduction” in Article 13(2)(a) Basic Regulation should be read as these words are commonly understood. “Production or reproduction” is not commonly used to refer to harvested material, but to variety constituents. Planting and harvesting fruits does not constitute “production or reproduction” of the protected variety within the meaning of this provision, as also confirmed by the legislative history of the provision.

3. Information on any explanation of the term “unauthorized use of propagating material” used in the territory (e.g. breeders’ practices, guidance, contract clauses)

The Office has no information on breeders’ practices or contractual clauses.

4. Case law

By request for preliminary ruling of the Spanish Supreme Court (Judgment of the CJEU of 19.12.2019 in case No C-176/18, Request for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), Club de Variedades Vegetales Protegidas (CVVP) vs. Mr. Adolfo Juan Martínez Sanchis), the Supreme Court asked whether the use of variety constituents (e.g. the trees) by the farmer for the production of harvested material (e.g. the fruits) should fall within the scope of the holder’s rights under Article 13(2) BR (the so called ‘primary right’), so that the holder’s authorization is required irrespective of whether the conditions of Article 13(3) BR have been met (the so called ‘secondary right’). If the answer to this question is affirmative, the titleholder can bring action against the farmer directly without having to fulfil the conditions (e.g. the ‘cascade principle) foreseen under Article 13(3) BR.

The last question refers to the interrelation between the protection of harvested material and the notion of unauthorized use when the alleged conduct has taken place during the period between the application date and the granting date (e.g. the provisional protection).

The judgement highlights the distinction between the primary protection concerning variety constituents and the secondary protection afforded to harvested material, which has subsidiary nature, as it can be invoked only when said harvest material is obtained through unauthorised use of the variety constituents and when the holder did not have the opportunity to exercise his rights on the propagating material.

The Court interpreted the notion of ‘production or reproduction’ in relation to variety constituents in their usual meaning. Production refers to propagation of variety constituents by means of vegetative propagation (by grafting inter alia), and multiplication of variety constituents refers to generating new genetic material. In the case at hand no production or reproduction of variety constituents took place since the farmer allegedly purchased seedlings from a nursery and planted them for production of the fruits. The fruits of clementine trees were not deemed to be variety constituents, as they cannot produce entire plants or parts of plants (as in case of grafting). Therefore, the use of variety constituents (trees) for the production of fruits is not prohibited under Article 13(2) BR as primary protection against the farmer.

On the contrary, having excluded that the planting of trees and the harvest of their fruits falls under the definition of production or reproduction of variety constituents of a protected variety, they are considered as production of harvest material, thus covered by the secondary protection provided under Article 13(3) BR. Therefore, the enforcement of the PVR against harvested material has to follow the cascade principle, namely that the harvest material was obtained by unauthorised use and provided that the holder did not have the opportunity to exercise his rights on the propagating material.

5. Proposals on how to elaborate the term “unauthorized use of propagating material”

The European Union supports the interpretation of the Court of Justice in case No C-176/18 referred to under point 4 above.

[Annex II follows]

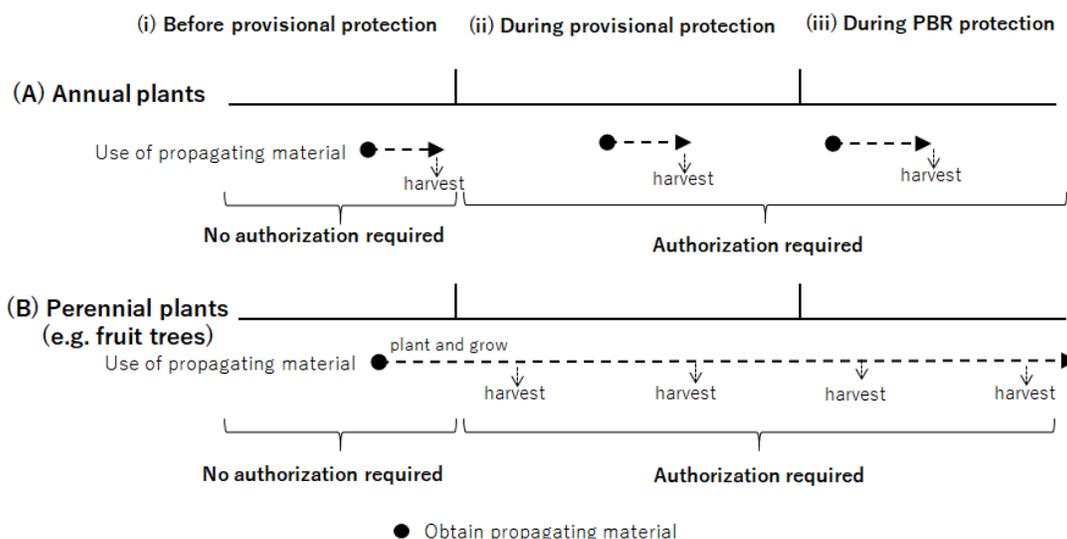
INFORMATION AND PROPOSALS FROM JAPAN IN RESPONSE TO UPOV CIRCULAR E-19/232

(4) — Harvested material**(i) “unauthorized use of propagating material”, particularly in relation to fruit trees**

Article 14(2) of the 1991 Act of the UPOV Convention requires that, in order for the breeder’s right to extend to acts in respect of harvested materials, 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 propagation material.

The Explanatory Notes on Acts in respect of Harvested Material under the 1991 Act of the UPOV Convention (UPOV/EXN/HRV/1) explains that “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 such authorization was not obtained.

A question is raised on whether the term “**use of propagating material**” covers continued ‘**planting and growing (cultivation)**’ of the propagating material which is beyond the acts listed in Article 14(1)(a) (i) to (vii). This is important particularly for the fruit tree cases where propagating material was obtained during the period of no protection, and the cultivation of the propagating material continues to take place to produce fruits during the period of protection (including provisional protection). These situations are illustrated below.



As illustrated, in the case of for annual plants (A), the breeder can exercise his right every time grower obtains or reproduces propagating materials, once the protection is provided.

On the other hand, in case of perennial plants, such as fruit tree (B), the breeder would not have any opportunity to exercise his right over propagating material, if the grower planted and grew the propagating material which was obtained before the protection was provided (before the authorization is required). Under such circumstances, it is important for the breeder to exercise his right over harvested material that would be obtained over the years through the use (planting and growing, i.e., cultivation) of the propagating material after the protection is provided. In this case, “use of propagating material” should cover the meaning ‘planting and growing (cultivation)’ which is not included in the acts listed in Article 14(1)(a) (i) to (vii).

This case sometimes happens in foreign countries because longer-grace period of novelty is applied for application in those countries. For example, the material of a protected fruit variety obtained in country A in a way the breeder’s right is not exhausted is exported, without the authorization of the right holder, to country B where breeder’s right is not yet provided. The material could then be freely reproduced, and the material is used to produce fruits (harvested material) for many years after right is granted in country B.

If the scope of ‘unauthorized use’ is limited only to the acts as listed in Article 14(1)(a)(i) to (vii) as in the Explanatory Notes (UPOV/EXN/HRV/1), the breeder would not be able to do anything to exercise his right to safeguard his legitimate interests for fruit tree cases, as a result, the breeder would lose the chance to recover his breeding investment.

(ii) information on any explanation of the term “unauthorized use of propagating material” used in the territory (e.g. breeders’ practices, guidance, contract clauses)

There is no guidance and contract clauses.

(iii) case law;

There is no relevant case law.

(iv) proposals on how to elaborate the term “unauthorized use of propagating material”.

Given the issue mentioned (i), above, Japan would like to propose that wording of ‘use’ should be clearly explained in paragraph 5 and 7 of the UPOV/EXN/HRV/1, as provided in **[Appendix 1]** to this document, as such, ‘**use**’ in Article 14(2) of the 1991 Act covers meaning of ‘**planting and growing (cultivation)**’ of the propagating material, in addition to the ‘acts’ of the Article 14(1)(a)(i) to (vii), particularly in case of fruit trees.

This proposal is supported by the following evidences:

(a) It is clear that there is different meaning between ‘acts’ listed in the Article 14(1)(a)(i) to (vii) and ‘use’ referred to in Article 14(2) because obtaining (production) of harvested material from propagating material would be carried out not only by the ‘acts’ of the Article 14(1)(a)(i) to (vii) but also by such acts ‘planting and growing (cultivation)’ of the propagating material, as illustrated in (i), above. In this context, subjects of two verbs ‘acts’ and ‘use’ are different, i.e., the subject of ‘acts’ of the Article 14 (1)(a)(i) to (vii) would be mainly propagators while subject of “use of propagating material” would be mainly growers;

(b) Since the UPOV Convention stipulates both 'use' and 'acts' in the same provision in Article 14(2), the definition and scope of these two terms should be different. In other words, If the "unauthorized use" is equal to unauthorized acts referred to in items (i) to (vii) of paragraph (1)(a) in its meaning, the term 'acts' should be used instead of the term "use" in the UPOV Convention. In other part of the Convention, the term "use" is used, reading "varieties whose production requires the repeated use of the protected variety" (Article 14(5)(iii)), whose meaning is mainly 'planting and growing (cultivation) and crossing.' It is natural to understand that the term "use" has similar meaning in the UPOV Convention;

(c) At the Diplomatic Conference for the Revision of the UPOV Convention in March, 1991 (Geneva), its Working Group on Article 14(1)(a) and (b) has agreed "obtained through unauthorized use of propagating material" with the understanding that it means 'provided that the breeder had not authorized the use of propagating material for the purpose of producing that harvested material'; and

Summary Minutes of the Plenary Meeting of the Diplomatic Conference, Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants - Geneva 1991 (UPOV/PUB/346)

1529.4 (Continued from 954) Concerning Article 14(l)(b), the Working Group had been conscious of the fact that the decision had been taken to remove the square brackets from the last clause appearing in the Basic Proposal. It therefore proposed a system in which the harvested material of the protected variety could be the basis of a royalty collection where two conditions were met: (i) that the breeder had not authorized the use of propagating material for the purpose of producing that harvested material: and (ii) that the breeder had had no reasonable opportunities to exercise his right in relation to the propagating material.

(d) Assuming that "unauthorized use" is equal to "unauthorized acts referred to in items Article 14(1)(a)(i) to (vii)" in its meaning, the breeder cannot exercise his right over harvested material in a such case where a person who had authorization to use the propagating material for conditioning purpose only (which is the act of Article 14(1)(a)(ii)) but he planted and grew the propagating material to produce harvested material without consent of the breeder. This is because there existed no unauthorized acts listed in the Article 14(1)(a)(i) to (vii) were carried out by the said person in respect of the propagating material.

[Appendix follows]

Proposal of Japan for the Revision of UPOV/EXN/HRV/1

Strikethrough (highlighted in grey) indicates deletion from the text of document UPOV/EXN/HRV/1, proposed by Japan.

Underlining (highlighted in grey) indicates insertion to the text of document UPOV/EXN/HRV/1, proposed by Japan

EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION (UPOV/EXN/HRV/1)**ACTS IN RESPECT OF HARVESTED MATERIAL****(a) Relevant article**

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".

(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.

(c) Unauthorized use of propagating material***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.

In relation to “unauthorized use” of propagating material, the acts such as planting and growing (cultivation) the propagating material of the protected variety for the purpose of producing harvested material would also require the authorization of breeder.

Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating material and the relevant acts such as planting and growing (cultivation) the propagating material for the purpose of producing harvested material in the territory concerned, where such authorization was not obtained.

6. For example, in the territory of a member of the Union where a breeder’s right has been granted and is in force, unauthorized export of propagating material would be an unauthorized act.

Conditions and limitations

7. 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) and the relevant acts that are not undertaken in accordance with the conditions and limitations established by the breeder.

For example, if the breeder puts conditions and limitations to produce harvested material in authorizing his right in respect of propagating material, the production of harvested material would be an unauthorized use.

8. Document UPOV/EXN/CAL “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”, provides guidance concerning the conditions and limitations to which the breeder’s authorization may be subject, for acts in respect of propagating material under the UPOV Convention.

Compulsory exceptions to the breeder’s right

9. 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

10. Article 15(2) of the 1991 Act of the UPOV Convention [Optional exception] 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.

11. 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 included in the scope of the breeder's right and were not covered by the optional exception in the legislation of the member of the Union concerned. In particular, "unauthorized use" would refer to acts that did not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception.

(d) Reasonable opportunity to exercise his right

12. 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 had a "reasonable opportunity" to exercise their rights in relation to the propagating material.

13. The term "his right", in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned (see paragraph 4 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*.

[Annex III follows]

INFORMATION AND PROPOSALS FROM THE RUSSIAN FEDERATION IN RESPONSE TO UPOV
CIRCULAR E-19/232

HARVESTED MATERIAL

The provisions of Article 14 (2) of the 1991 Act of the UPOV Convention [*Acts in respect of the harvested material*] allow the breeder of a protected variety to claim compensation for his lost profits for a batch of propagating material produced/imported without authorization/a license to use/sow the said propagating material to grow of harvested material.

The breeder has had no reasonable opportunity to exercise his right in relation to the used propagating material and he is given the opportunity under the Article above to assert his right in relation to the grown batch of harvested material.

The territory/country of the breeder's right enforcement to the variety and the territory of production of the disputed batch of harvested material must be the same.

The breeder's claim for compensation for lost profits may be resolved by agreement of the parties or in court. The respondent is a person Who used for sowing the variety propagating material had been grown/imported without his authorization/license.

Article 14 (2) of the UPOV Convention is a measure to prevent violations of the breeder's right concerning *acts in respect of harvested material*.

The Russian Federation does not see any particular differences in the application of Article 14 (2) to trees (for example, Apple varieties). Seedlings of protected Apple varieties in the territory of the "breeder's right" enforcement must be produced/imported, commercialized by the breeder or by the licensee.

However, the breeder of the Apple variety in this case does not have the right to claim the apples (harvested material) of the variety grown in this garden annually.

In the case of laying a garden With seedlings grown / imported into a protected territory without the breeder' authorization, a court decision may provide not only monetary compensation to the breeder for lost benefits and moral damage, but also an administrative fine to the gardener, including to oblige him to root out the planting, guided by national law.

[End of Annex III and of document]