



INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
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EXPLANATORY NOTES ON
ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

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Strikethrough (highlighted) indicates deletion from the text of document UPOV/EXN/HRV Draft 4, in accordance with agreement of CAJ-AG at its fourth session.

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Footnotes will be retained in published document.

Endnotes are background information to help in the consideration of 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

1. 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.

2. In order to provide coherent guidance concerning the provisions on acts in respect of harvested material (Article 14(2) of the 1991 Act), these Explanatory Notes also explain the relationship between those provisions and the provisions on the exhaustion of the breeder's right (Article 16 of the 1991 Act). These Explanatory Notes are structured as follows:

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|-------------|--|
| Section I: | Acts in respect of harvested material |
| Section II: | Relationship between the scope of the breeder's right in respect of harvested material and exhaustion of the breeder's right |

SECTION I: ACTS IN RESPECT OF HARVESTED MATERIAL(a) Relevant articles**Article 14(2)** 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.

[...]

3. 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.

^a(b) Harvested material

4. 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.

5. 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 harvested material has the potential to be used as propagating material (see "Illustrative examples").

~~(b)~~(c) Unauthorized use of propagating material

6. “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.

~~(e)~~(d) Reasonable opportunity

7. 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.

8. 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, “reasonable opportunity to exercise his right” in relation to the propagating material means a reasonable opportunity *in the territory concerned* to exercise his right in relation to the propagating material. Furthermore, in particular, “reasonable opportunity to *exercise his right*” does not mean a reasonable opportunity to *obtain a right*, for example in another territory.

~~(d)~~(e) Illustrative examples

9. The following examples have been provided to illustrate some situations where a breeder may be considered to be able to exercise his right in relation to harvested material because the harvested material has been obtained through the unauthorized use of propagating material and the breeder has not had reasonable opportunity to exercise his right in relation to the said propagating material.

Example 1: Unauthorized export of propagating material, as such, to a territory without a plant variety protection system

Variety 1 is protected in Country A. Propagating material of variety 1 is exported without the breeder’s authorization to Country B. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country A. Country B does not grant and protect breeders’ rights. Variety 1 is then propagated in Country B and ~~the~~ harvested material imported into Country A.

10. In Example 1, the breeder can exercise his right on the imported harvested material in Country A because:

- (i) there was unauthorized use (i.e. export) of propagating material; and
 - (ii) the breeder did not have a reasonable opportunity to exercise his right in Country A in relation to the propagating material exported to Country B.
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Example 32: Unauthorized export of propagating material, ostensibly as harvested material, to a territory without a plant variety protection system

Variety 2 is protected in Country C. Harvested material (e.g. grain, plants, flowers etc.) of variety 2 is exported to Country D; ~~and~~ the breeder's authorization is not obtained for the export of that material as propagating material. However, the material is subsequently used as propagating material (e.g. as seed, cuttings etc.) in Country D (Country D does not grant and protect breeders' rights). Harvested material of variety 2 is then imported into Country C. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country C.

11. In Example 32, the breeder can exercise his right on the imported harvested material in Country C because:

(i) there was unauthorized use (export) of propagating material. Irrespective of whether the material was exported to Country D without the intention for it to be used as propagating material, the material was, in fact, used as propagating material. Thus, there was unauthorized export of propagating material to Country D; and

(ii) the breeder did not have a reasonable opportunity to exercise his right in Country C in relation to the propagating material exported to Country D.

Example 23: Unauthorized export of propagating material, as such, to a territory where the variety is not protected

Variety 3 is protected in Country E. Propagating material of variety 3 is exported without the breeder's authorization to Country F. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country E. In Country F, protection according to the UPOV Convention is available for the genus or species to which the variety 3 belongs, but there is no plant breeder's right for variety 3. Variety 3 is then propagated in Country F and ~~the~~ harvested material imported into Country E.

12. In Example 23, the breeder can exercise his right on the imported harvested material in Country E because:

(i) there was unauthorized use (i.e. export) of propagating material; and

(ii) the breeder did not have a reasonable opportunity to exercise his right in Country E in relation to the propagating material exported to Country F.

Example 4: Unauthorized export of propagating material, ostensibly as harvested material, to a territory where the variety is not protected

Variety 4 is protected in Country G. Harvested material (e.g. grain, plants, flowers etc.) of variety 4 is exported to Country H; ~~and~~ the breeder's authorization is not obtained for the export of that material as propagating material. However, the material is subsequently used as propagating material in Country H. In Country H, protection according to the UPOV Convention is available for the genus or species to which ~~the~~ variety 4 belongs, but there is no plant breeder's right for variety 4. Harvested material

of variety 4 is then imported into Country G. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country G.

13. In Example 4, the breeder can exercise his right on the imported harvested material in Country G because:

(i) there was unauthorized use (export) of propagating material. Irrespective of whether the material was exported to Country H without the intention for it to be used as propagating material, the material was, in fact, used as propagating material. Thus, there was unauthorized export of propagating material to Country H; and

(ii) the breeder did not have a reasonable opportunity to exercise his right in Country G in relation to the propagating material exported to Country H.

^bExample 5: Unauthorized export of propagating material, as such, to a territory where the variety is not protected and subsequent export to a third territory

Variety 5 is protected in Country I. Propagating material of variety 5 is exported without the breeder's authorization to Country J. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country I. In Country J, protection according to the UPOV Convention is available for the genus or species to which variety 5 belongs, but there is no plant breeder's right for variety 5. Propagating material of variety 5 is then exported from Country J to Country K. Country K does not grant and protect breeders' rights. Variety 5 is then propagated in Country K and harvested material imported into Country I.

14. In Example 5, the breeder can exercise his right on the imported harvested material in Country I because:

(i) there was unauthorized use (i.e. export) of propagating material. Irrespective of whether the material was exported to Country J without the intention for it to be used as propagating material, the material was, in fact, used as propagating material. Thus, there was unauthorized export of propagating material to Country J; and

(ii) the breeder did not have a reasonable opportunity to exercise his right in Country I in relation to the propagating material that was exported to Country J.

^cExample 6: Unauthorized export of propagating material after authorized propagation

Variety 6 is a cut-flower rose that is protected in Country L. The breeder of variety 6 authorizes a propagator in Country L to produce 50,000 plants of variety 6 for sale for cut-flower production. The propagator produces 50,000 plants, which are sold to a grower in Country L. The grower in Country L plants 25,000 plants, but sells 25,000 plants to a grower in Country M for cut-flower production, where variety 6 is not protected. However, the grower in Country M uses the 25,000 plants to propagate further plants of variety 6 and harvested material (cut-flowers) from those propagated plants is then imported into Country L. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country L.

15. In Example 6, the breeder can exercise his right on the imported harvested material in Country L because:

(i) there was unauthorized use (export) of propagating material. Irrespective of whether the material was exported to Country M without the intention for it to be used as propagating material, the material was, in fact, used as propagating material. Thus, there was unauthorized export of propagating material to Country M; and

(ii) the breeder did not have a reasonable opportunity to exercise his right in Country L in relation to the propagating material exported to Country M.

Example 57: Unauthorized propagation by farmer on own holding

Variety 7 is protected in Country N. In Country N, there is an exception under Article 15(2) of the 1991 Act, but that exception is not applicable for the species to which variety 7 belongs. A farmer uses some of the harvested material of variety 7 for propagating purposes. The breeder did not have a reasonable opportunity to exercise his right on the propagating material.

16. In Example 57, the breeder can exercise his right on the harvested material in Country N because:

(i) there was unauthorized use (i.e. production or reproduction (multiplication)); and

(ii) the breeder did not have a reasonable opportunity to exercise his right in relation to the propagating material

Example 68: Propagation beyond authorized limit by farmer on own holding

Variety 8 is protected in Country O. In Country O, an exception under Article 15(2) of the 1991 Act is applicable for variety 8, with a limit on the amount of the harvested material which the farmer is allowed to use for propagating purposes. The farmer uses more than the permitted amount for propagating purposes. The breeder did not have a reasonable opportunity to exercise his right on the propagating material.

17. In Example 68, the breeder can exercise his right on the harvested material in Country O because:

(i) there was unauthorized use (i.e. production or reproduction (multiplication)); and

(ii) the breeder did not have a reasonable opportunity to exercise his right in relation to the propagating material.

18. In addition, it should be noted that, in Examples 1 to 8, above, the breeder's right was not exhausted because there was further propagation of the variety in question after the material of the variety had been sold or otherwise marketed by the breeder or with his consent in the territory where the variety was protected (see Section II "Relationship between the Scope of the Breeder's Right in respect of Harvested Material and Exhaustion of the Breeder's Right").

**SECTION II: RELATIONSHIP BETWEEN THE SCOPE OF THE BREEDER'S RIGHT
IN RESPECT OF HARVESTED MATERIAL AND EXHAUSTION
OF THE BREEDER'S RIGHT**

19. Article 16 of the 1991 Act of the UPOV Convention contains the following provisions on the exhaustion of the breeder's right:

Article 16 of the 1991 Act: 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.

20. The provisions on the exhaustion of the breeder's right reflect the scope of the breeder's right, as set out in Article 14 of the 1991 Act of the UPOV Convention. The provisions specify that the breeder's right is exhausted when material of the protected variety (or of a variety covered by the protection) has been sold or otherwise marketed by the breeder or with his consent in the territory of the member of the Union concerned, unless there is further propagation of the variety (Article 16(1)(i)) or 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 (Article 16(1)(ii)).

21. Thus, the provisions on the exhaustion of the breeder's right, clarify that the rights granted in Article 14 can only be exercised once in each propagation of the variety. However, Article 16(1)(i) and (ii) clarify that the breeder's right is not exhausted if there is further propagation of the variety (Article 16(1)(i)) or an export enabling further propagation in a country which does not protect varieties of the plant genus or species to which the variety belongs (Article 16(1)(ii)).

22. The following examples have been provided to illustrate some situations where a breeder's right may be considered to be exhausted.

Example 1: Sale of propagating material

Variety 'Alpha' is protected in Country I. Seed of variety 'Alpha' is sold by the breeder to a seed merchant in Country I. The seed merchant then sells that seed to a second seed merchant in Country I.

23. In Example 1, the breeder's right is exhausted at the point of sale to the first seed merchant, because material of variety 'Alpha' was sold or otherwise marketed by the breeder or with his consent in Country I and there was no further propagation of the variety nor any export of material of the variety, which enabled the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs. Thus, the sale of seed of variety 'Alpha' to the second seed merchant did not require the authorization of the breeder.

Example 2: Export of harvested material

Variety 'Beta' is protected in Country II. Seed of variety 'Beta' is sold by the breeder to a grower in Country II who produces grain that is exported to Country III. Country III is a UPOV member that offers protection to all plant genera and species. Flour made from the grain of 'Beta' is imported into Country II.

24. In Example 2, the breeder's right is exhausted at the point of sale to the grower in Country II, because material of variety 'Beta' was sold or otherwise marketed by the breeder or with his consent in Country II and there was no further propagation of the variety nor any export of material of the variety, which enabled the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs. Thus, the import of flour of variety 'Beta' into Country II did not require the authorization of the breeder.

Example 3: Sale of propagating material with authorization for propagation

Variety 'Gamma' is a cut-flower rose that is protected in Country IV. The breeder of variety 'Gamma' provides propagating material to a propagator in Country IV with authorization to produce 50,000 plants of variety 'Gamma' for sale for cut-flower production. The propagator produces 50,000 plants, which are sold to a grower in Country IV. The grower in Country IV uses the 50,000 plants for cut-flower production.

25. In Example 3, the breeder's right is exhausted on the 50,000 plants produced by the propagator, because material of variety 'Gamma' was sold or otherwise marketed by the breeder or with his consent in Country IV and there was no further propagation of the variety nor any export of material of the variety, which enabled the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs. Thus, the sale of plants by the propagator to the grower in Country IV did not require the authorization of the breeder.

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- ^a Additional explanation in response to the request of the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA), in its letter of November 4, 2009, after the fourth session of the CAJ-AG (see document CAJ-AG/09/4/4 “ Report”, paragraph 17).
- ^b Example developed in response to the proposal of the International Seed Federation (ISF) (see document CAJ-AG/09/4/4 “Report”, paragraphs 15 and 17).
- ^c Example developed in response to comments of CIOPORA, in its letter of November 4, 2009, after the fourth session of the CAJ-AG (see document CAJ-AG/09/4/4 “ Report”, paragraph 17).

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