

Remarks under document UPOV/EXN/HRV Draft 5 Corr.
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Exceptional breeder's right (mentioned below as "PBR") *is directly extended on acts in respect of propagating material only and in the territory protected only*. Production by a farmer of harvested material (food, forage, raw materials) from a propagating material produced legally (by a breeder or a licensee) fall under exhaustion of PBR for the benefit of a society (Article 16(1) of the UPOV Convention).

Provision of Article 16(2) provides PBR on harvested material only that has been grown as a result of use of a counterfeit propagating material (grown or exported without authorization). The UPOV Convention provision provides the breeder to make claims to the persons evading from payment of royalty when producing or importing the propagating material.

Observance of PBR is possible in the territory protected only. Persons infringing the PBR are considered as infringers and they may be applied actions at law.

Let's analyze Examples in document UPOV/EXN/HRV Draft 5 Corr.

In Examples 1 and 2 variety material (it doesn't matter propagating or harvested) has been imported without breeder's authorization to a country where is no protection for genera/spices to which the variety in questions belongs. The claim should be shown the exporter (for export of the variety material without authorization), but not the importer of harvested material of the variety from the country where is no protection. Import of harvested material (and other production from it) in the territory protected is not fall under the scope of PBR. Therefore, Examples 1 and 2 should be excluded.

Examples 7 and 8 are applicable because they demonstrate situations where PBR is really infringed. Harvested material grown by farmer from the variety propagating material produced illegally (without authorization). Propagating material unauthorized could be:

- produced without the license / authorization or over the resolved quantity;
- imported illegally (from abroad);
- produced (or imported from abroad) as harvested material, but used as propagating material.

Harvested material grown in the territory protected from a counterfeit propagating material (without authorization) falls under provision of Article 14(2) of the UPOV Convention.

There are events in Examples 3, 4, 5 and 6, that do not meet provisions of Article 14(2) of the UPOV Convention. Under Article 16(1) export of legal material of the variety, that enables to propagate the variety in a country where is no protection for varieties of the given botanical genus or specie, and the variety is not protected itself, falls under PBR exhaustion, therefore no breeder's authorization is required.

I also suggest paragraph 18 and Section II of the document considered to exclude, as not concerning to provision of Article 14 (2).

I consider it is necessary to develop a separate document under Article 16 of the UPOV Convention "Exhaustion of the breeder's right" explaining, in particular, actions of breeder to use his PBR when issuing license/authorization for export of variety material that enables to propagate the variety in a country where is no protection for varieties of the given genus/specie.

I would like to remind our comments concerning acts in respect of harvested material have been addressed to the UPOV Office on October 24, 2008; on January 25, 2010 and on February 8, 2010.

Thank you for your attention.