



UPOV/EXN/HRV Draft 6
ORIGINAL: English
DATE: September 26, 2011

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

DRAFT

EXPLANATORY NOTES ON
ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION

Document prepared by the Office of the Union

*to be considered by
the Administrative and Legal Committee Advisory Group (CAJ-AG) at its sixth session,
to be held on October 18, 2011*

Note for Draft version

Strikethrough (highlighted) indicates deletion from the text of document UPOV/EXN/HRV Draft 5 Corr., in accordance with agreement of the CAJ-AG at its fifth session.

Underlining (highlighted) indicates insertion to the text of document UPOV/EXN/HRV Draft 5 Corr.:

- (a) in accordance with agreement of the CAJ-AG at its fifth session;
- (b) as explained by endnotes, to reflect comments from the Russian Federation.

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.

CONTENTS

**EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION3**

PREAMBLE 3

~~**SECTION I**~~ *ACTS IN RESPECT OF HARVESTED MATERIAL* 4

(a) *Relevant articles* 4

(b) *Harvested material* 4

(c) *Unauthorized use of propagating material* 5

(d) ~~*Exercise his right Reasonable opportunity*~~ 5

(e) *Illustrative examples* 5

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:~~

~~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** 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.

(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 at least some forms of harvested material ~~has~~ have the potential to be used as propagating material (see "Illustrative examples").

(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.

(d) Exercise his right ~~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 in the territory concerned. ~~Furthermore, in particular, “reasonable opportunity to exercise his right” does not mean a reasonable opportunity to obtain a right, for example in another territory. It is a matter for each member of the Union to determine what constitutes “reasonable opportunity” to exercise his right.~~

(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.

[moved paragraph (see below deleted paragraph 19)] In addition, it should be noted that, in the following examples, the breeder’s right is not exhausted because there is further propagation of the variety in question after the material of the variety has been sold or otherwise marketed by the breeder or with his consent in the territory where the variety is protected [(see documents CAJ AG/10/5/4 and CAJ-AG/11/6/5)]”.

^a[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 and the. ~~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 ~~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.]

^a [Example 2: 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 2, 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.]

^a [Example 3: 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 harvested material imported into Country E.

12. In Example 3, 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.]

^a [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 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~~ ~~and 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.]

^a [Example 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~~ ~~and 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.]

^a [Example 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 and 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 7: 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 on his own holding and the breeder did not have a reasonable opportunity to exercise his right on the propagating material.~~

16. In Example 7, 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 8: Propagation beyond authorized limit by farmer on his 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 on his own holding and the breeder did not have a reasonable opportunity to exercise his right on the propagating material.~~

17. In Example 8, 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.

^bExample 9: harvested material produced in the territory unprotected is imported, with consent of the breeder, into the territory protected

Variety 9 is protected in Country P, but propagating material of the variety is not produced there, because the variety belongs to a genus/species that does not grow in the territory of Country P (e.g. orchid, banana, orange etc.). Harvested material of Variety 9 (flower cutting, fruit of banana, orange etc.) is produced in Country R, where there is no protection of the variety and, imported into protection Country P regularly under license granted by the breeder.

18. In Example 9, the breeder can exercise his right on acts in respect of the harvested material in Country P because:

(i) the breeder did not have a reasonable opportunity to exercise his right in relation to the propagating material in the territory protected by the reason of its production absence there:

(ii) he has right in relation to harvested material imported into territory protected, i.e. in Country P.

19. 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).

[End of document]

^a The Russian Federation considers that the formulation of these examples “contravene provision of Article 16(1) of the UPOV Convention, because they may cover the situations of production of harvested material from propagating material, that has been marketed by a breeder or with his consent, what is not a violence of PBR (breeder’s right)” (see letter to the Office of the Union of September 23, 2011, from Mr. Y. Rogovskiy which has been posted in the CAJ-AG section of the UPOV website).

^b Example provided by the Russian Federation (see letter to the Office of the Union of September 23, 2011, from Mr. Y. Rogovskiy which has been posted in the CAJ-AG section of the UPOV website).