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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  
at its seventh session, to be held in Geneva on October 29 and October 30, 2012*

Note for Draft version

**Strikethrough (highlighted)** indicates deletion from the text of document UPOV/EXN/HRV Draft 6.

**Underlining (highlighted)** indicates insertion to the text of document UPOV/EXN/HRV Draft 6.

**Footnotes** will be retained in published document.

**Endnotes** are background information when considering 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

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.

ACTS IN RESPECT OF HARVESTED MATERIAL

(a) Relevant article

**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.

[...]

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" 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

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 ~~(see "Illustrative examples")~~.

(c) Unauthorized use of propagating material Endnote i Endnote ii

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.

Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating 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.<sup>Endnote iii</sup>

#### *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) that are not undertaken in accordance with the conditions and limitations established by the breeder.

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 of the 1991 Act of the UPOV Convention [Exceptions to the Breeder’s Right] 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 not covered by the optional exception in the legislation of the member of the Union concerned.

#### (d) 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 been able 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 6 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*. It is a matter for each member of the Union to determine what constitutes “reasonable opportunity” to *exercise his right*.

~~(e) — Illustrative examples~~ **Endnote 1**

[End of document]

At its sixth session, held in Geneva on October 18, 2011, the CAJ-AG noted that the illustrative examples could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion. It agreed that the illustrative examples should be replaced by a general explanation of "unauthorized use of propagating material", on the basis of the cases provided in the illustrative Examples 1 to 8. The CAJ-AG noted that Example 9 did not make reference to unauthorized use of propagating material (see document CAJ-AG/11/6/7 "Report", paragraph 10).

The Russian Federation (Mr. Y. Rogovskiy), by means of its letter to the Office of the Union of August 17, 2012, commented as follows:

1) We support the UPOV Office decision do not include Examples 1– 6 in the text of the Explanatory Notes because there were situations in those Examples concerning harvested material produced from propagating material marketed by a breeder or with his consent what should be not considered as the breeder's right infringement.

However Examples 7 and 8 of document Draft 6 illustrated cases of breeder's right occurrence for harvested material produced from unauthorized propagating material (or in excess of a volume authorized by the breeder). We think Examples 7 and 8 are appropriate to be included in Draft 7 of the Explanatory Notes.

We suppose Example we worded under the MODEL LAW ON THE PROTECTION OF NEW VARIETIES OF PLANTS of 1996 and, sent you before (September 23, 2011) may be appropriate in Draft 7 in the following wording, for example:

*Example 3: harvested material produced in the territory unprotected is imported, with consent the breeder, into the territory protected*

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

In Example 3, 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.

2) "Additional paragraphs 5-9 of Draft 7 do not carry any explanatory meaning. More over, paragraph 7 of the Draft 7 makes reference to document UPOV/EXN/CAL "EXPLANATORY NOTES ON CONDITIONS AND LIMITATIONS CONCERNING THE BREEDER'S AUTHORIZATION IN RESPECT OF PROPAGATING MATERIAL".

Paragraph 3.3.(i) of this document in turn contains argumentative wording:

"(i) remuneration – level of remuneration (e.g. linked to quantity of propagating material, area sown with the propagating material, amount or value of material produced from the propagating material etc.), timing and method of payment, etc."...

Result from this, that one of the base for level of remuneration is "amount or value of material produced from the propagating material" (but now this is already harvested material) and, the breeder allegedly has right to stipulate level of remuneration depends on value of harvested material (but not propagating material) produced by licensee, what is contrary to basic provisions of the UPOV Convention.

Remuneration may be paid annually (royalty) depends of annual sown area of a licensee, quantity of propagating material produced by him or propagating material cost, quantity or cost of propagating material sold by him (under genera or species for "the farmer's privilege") or one-time payment (lump-sum) without dependence from annual scope of acts in respect of propagating material.

Recommendations of Explanatory Notes should not be beyond the UPOV Convention."

The Netherlands (Mr. Krieno Fikkert), in his letter to the Office of the Union of August 23, 2012, commented as follows:

"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."