Date: 24.07.2014

To: UPOV Office
E-mail: upov.mail@upov.int
Attention: Mr. Peter Button, Vice Secretary-General

From: Y. Rogovskiy, Deputy Chairman
STATE COMMISSION OF THE RUSSIAN FEDERATION
FOR SELECTION ACHIEVEMENTS TEST AND PROTECTION
E-mail: gossort@gossort.com

Subj.: Comments under document upov_exn_hrv_2_draft_1

Please, find enclosed files: “Ru_comments_upov_exn_hrv_2_draft_1.doc” and “CAJ-AG_13_8_3 comment_RF_25.10.13 UPOV.docx” with comments of the Russian Federation concerning harvested material.

Thank you for your attention.

Y. Rogovskiy, Deputy Chairman

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To: UPOV Office July 24, 2014.
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Attention: Mr. Peter Button, Vice Secretary-General

Subj.: Comments under document upov_exn_hrv_2_draft_1

Dear Mr. Button,

Please, note below our comments under document upov_exn_hrv_2_draft_1.

1. It should be applicable in the document considered to explain those acts occurred in the territory of variety protection lead to the case when a breeder has his right for harvested material. It is necessary to mean that the right on acts in respect of a batch of the harvested material may arise next year when carrying out unauthorized acts with propagating material. Additionally, explanations (examples) concerning variants of exercise of the right arisen on acts in respect of the harvested material should be made.

Authorization on acts with propagating material is provided by the license agreement containing corresponding conditions and limitations. Any conditions or limitations on acts in respect of harvested material must not be in the license agreement. The right on acts in respect of a certain batch of harvested material arises in case only when a factual evidence of production of the batch of harvested material from unauthorized usage of propagating material is available. Production of such an illegal counterfeit propagating material means one has been produced/ imported in/into the protection country without authorization.

In cases where the court establishes the breeder's right on the harvested material in accordance with Article 14(2) of the UPOV Convention such measures as confiscation of the harvested material in favor of the breeder, payment compensation for his material and moral damage, etc. are applicable.

It should be refused attempts to base breeder's right on harvested material produced out of the territory of protection of the variety concerned. Implementation of the breeder's right should be provided by the national legislation.

It should be used in text of the document considered ***"in the protection territory"*** or ***"in the territory where breeder's right has been granted and is in force"*** instead of *"in the territory concerned"* by the reason below.

Explanation

Acts in respect of propagating material of variety protected are covered by the scope of the breeder's right and require compulsory authorization of breeder. Carrying out of such acts without authorization is an infringement. The breeder has right to make claim on the infringer and compensate his material damages juridically. And in case only where the breeder had no reasonable opportunity to make the claim he will have his right on the harvested material

produced from the propagating material next year. Whether the breeder had the opportunity to exercise his right on the propagating material produced illegally previous year should be established by the court. Evidence of the opportunity absence should be provided by the breeder.

2. Highlighted text in paragraph 4 of the document should be deleted.

Explanation

It supposes addition unreasonable extends of the breeder's right on imported harvested material produced in the territory (in country) where no protection of the variety is.

National Lists (NLs) formed under applications of domestic and foreign breeders contain varieties both as protected and unprotected in the given country. Thus, production of any material of varieties unprotected is not forbidden and does not require any agreement/authorization of the breeder's right owners in the territory of the third countries. "Unauthorized acts" can be occurred in the territory only where they form the scope of the breeder's right and cannot be occurred "elsewhere, in accordance with Article 16 of the 1991 Act."

3. Paragraph 5 of the document should be excluded.

Explanation

There no reason in the paragraph to display text of Article 16 of the UPOV Convention concerning exhaustion of the breeder's right on acts in respect of material of variety protected of a concrete batch of propagating material.

Infringement of the Article provisions in the territory of protection (further propagating of the variety in question or export without authorization (in case it is required)) entails claim making on the person-infringer in the territory of the protection country.

4. Paragraph 6 should be deleted because *this paragraph text does not contain acts in respect of harvested material.*

5. Paragraph 7 should be deleted on the following base.

Unauthorized export in the country where is no protection of the genus/species is really an infringement (Alternative 1). But responsibility for the infringement should bear the person-exporter of the material (see paragraph 2). It is no bases to expand the breeder's right on harvested material imported in protection country from the country-importer one or more years ago.

6. Paragraph 8 should be excluded.

Explanation

The text does not contain acts with harvested material. The breeder has no right to limit acts in respect of a legal propagating material (Article 16 of the UPOV Convention). Any limitation in a license agreement concerning volume and cost of harvested material produced should be declared null and void.

Non-compliance with the authorization conditions and limitations on acts in respect of propagating material should entail responsibility of a licensee but does not impose responsibility on a low-abiding manufacturer. As a rule breeder knows the licensee infringed conditions of the authorization granting.

7. Paragraph 9 should be excluded.

Explanation

The paragraph text does not contain acts with harvested material. The person who purchases propagating material from a licensee and uses it to produce a new batch of the propagating material without license is an infringer of the breeder's right on acts in respect of

propagating material but not in respect of harvested material or conditions and limitations stipulated by the breeder.

8. Paragraphs 10, 11, 12 should be excluded.

Explanation

The paragraphs texts do not contain acts in respect of harvested material. It is no reason to consider provisions of the UPOV Convention articles regulating acts in respect of propagating material. Infringements written in those paragraphs should be considered within acts in respect of propagating material.

9. Wording in paragraph 13"… *in the territory concerned*» should be replaced with **"… *in the territory where breeder's right has been granted and is in force"*** .

10. Our observations concerning unreasonableness of examples of document CAJ-AG/13/8/3 distributed among the participants of the 8-th session of CAJ-AG (see file CAJ-AG_13_8_3 comment RF_25.10.13 UPOV.docx attached) are also actual for examples of the document considered.

Nevertheless, please, note some additional remarks/explanations below concerning the examples worded in document upov_exn_hrv_2_draft_1.

10.1. Illustrations 1(a) and 1 (b) in Example 1 should be deleted.

10.2 (a) Text "The right is not exhausted because material of the variety has not been sold or otherwise marketed with the breeder's consent in Country A." in Illustration 2(a) of Example 2 should be deleted because it repeats written above.

10.2 (b) There is no reason to develop particular examples on varieties propagated by sexual and vegetative way in Illustration 2(b) of the Example and subsequently because the varieties both are "propagating material" under the UPOV Convention.

10.3. Alternative (a) of Illustration 3(a) in Example 3 should be deleted. For Alternative (b) in the Example would be applicable the following wording:
"The breeder of Variety 1 has no right on acts in respect of harvested material imported in Country A from Country D. There were no infringements of the breeder's right there. Export of the variety material from Country A did not require the breeder's authorization as breeder's right on that batch of material of the variety had been exhausted (see Article 16(1)(ii)). Propagating and manufacturing of the harvested material in Country D does not require the breeder's authorization because of protection absence of Variety 1 there. Import of harvested material in country of protection is not forbidden by the UPOV Convention."

10.4. Alternative (a) in Illustration 4(a) of Example 4 should be deleted.
The following wording would be suitable for Alternative (b):
"*The breeder of Variety 1 has no right on acts in respect of harvested material imported in Country A from Country C. There were no infringements of the breeder's right there. Any acts in respect of the variety material are not forbidden. Import of harvested material in protection country is not forbidden by the UPOV Convention."*

10.5. Example 5 should be deleted because acts in respect of that variety material in protection country have been formulated incorrectly in the example and, unreasonable conclusion concerning breeder's right availability on harvested material imported has been made.

Explanation

The breeder when granting his authorization to a seed grower ("propagator") for seedling manufacturing of Variety 2 must not have the right to limit acts of the seed grower in respect of quantity of seedlings produced by him and, also to set limitations concerning conditions of the seedlings realization (considering antimonopoly law of market relations such limitations within Article 14(1)(b) are inadmissible).

Situation written in Example 5 is the case when the breeder's right exhaustion on the material produced by the seed grower is occurred. Authorization for export by the seed grower himself produced or by a person purchased the seedlings in Country D is not required.

Authorization for import of cuttings of Variety 2 in Country A for the purpose of final usage (for bouquets) is not required (Article 16(1)). When importing cut flowers of Variety 2 in Country A to use for further propagating the breeder's right arises on a batch of the "propagating material" imported under Article 14(1)(vi).

In case of absence of protection for genus/species to which Variety 2 belongs in Country D the right (authorization) for export of the seedlings of Variety 2 should be received by the person purchased the seedlings for export and, when exporting without authorization the person bears responsibility for infringement of the breeder's right on acts in respect of propagating material.

10.6. Text "The breeder's right is not … in question" (see Article 16(1)(i))" in Example 6 should be deleted.

Explanation

There is not a question about the breeder's right exhaustion in Example 6 but about exception of the right: the farmer has exceeded the agreed quota on usage of harvested material as propagating material in his own holding (Article 15(2).

The breeder should prove absence of a reasonable opportunity to exercise his right. If the reasonable opportunity absence is not proved the breeder's right is not extend on acts in respect of harvested material and the right consists of the claim for infringement of actions in respect of propagating material.

10.7. It would be more applicable Example 7 to state in the following edition: *"Variety 3 is protected in Country A. There is no exception under Article 15(2) of the 1991 Act for species to which Variety 3 belongs. A farmer without the breeder's knowledge and authorization uses propagating or harvested material of Variety 3 purchased to manufacture propagating material for usage it as propagating material in his own holding. The fact of the harvested material manufacturing has been revealed next year. The breeder has proved he had not had a reasonable opportunity to make a claim on the farmer when manufacturing the propagating material. In this case the breeder's right is extended on the harvested material manufactured by the farmer."*

Thank you for attention.

Sincerely yours,

Y. Rogovskiy,
Deputy Chairman

CAJ-AG session ,Geneva, 25.10.2013

Comments of the Russian Federation under document CAJ-AG/13/8/3

Mr.Y. Rogovsky, Deputy Chairman, Head of Methodology Department
of the State Commission of the Russian Federation
for Selection Achievements Test and Protection.

Dear colleagues!
I ask some minutes of your attention to share my observations under the document mentioned above. Thank you in advance.

I would like to note that according to the UPOV Convention breeder's right (further PBR) operates in the territory only where this PBR has been registered. First of all, provisions of Article 14 (2) (acts in respect of harvested material), means application of sanctions to the person-grower of propagating material (seeds).

E.g. if the farmer has grown up seeds illegally and next year produced from them a harvested material for sale, it is the case, when the breeder had no "reasonable opportunity" **in time** (i.e., in a year of production of seeds) to detect infringers of his rights.

Next year (when producing harvested material), the breeder according to Article 14 (2) has the right to demand from infringers compensation of his corresponding losses. The national legislation should provide all conditions for the protection of the PBR infringed.

It is observed in the document unreasonable PBR expansion on an imported harvested material into PVP country. The reference is made to absence of "reasonable opportunity" of the breeder to control acts in respect of seeds (propagating material) in the territory without PVP.

Extractions from documents CAJ/XXIII/8 and CFJ/XXIV/6 are only protocol materials of preparatory discussions in the period before 1991 Diplomatic Conference for the UPOV Convention revision and cannot be the basis for development any Explanatory notes, on harvested material in particular.
It is necessary to be guided only by the text of the 1991 Act of the UPOV Convention. *(It would be also useful to address to the UPOV Model PVP Law of 1993 г. and to comments to it).*

Examples in the given document encourage claims of a breeder to expansion of PBR on the harvested material produced in PVP territories where the breeder **did not intend or any more had no right** (e.g., by the reason of loss of novelty of a variety) to register his PBR for the variety.

It is necessary to take into consideration the fact that the breeder is interested in increase of export of seeds and harvested material of the variety as his income depends on the export value from the PVP country.

Provisions of the 1991 Act of the UPOV Convention should not be interpreted in the Explanatory notes in such a manner that production of a harvested material for export is included in the scope of the breeder's right in

another country. Those countries where the given genus and species are protected should not depend on unreasonable Explanatory notes contained in the document concerned.

And now let's look at the Examples of the document.

Example 1.

As there is no PVP Law in Country B it is no reason to make any explanations under the country.

Whether the breeder has right in Country A on harvested material imported from Country B depend on if he will be able to provide arguments that he had no opportunity to apply sanctions to the exporter of the seeds and also those arguments that an imported batch of harvested material from Country B had been produced from the batch of the seeds exported from Country A.

Example 2.

Everything worded in Example 2 is the same one as in Example 1 because the exported harvested material could be used as propagating material (seeds).

Situations in **Examples 3 and 4** are the similar those in **Examples 1 and 2** since there is no protection for genus and species to which Variety 1 belongs in Countries B and C. UPOV membership of Country C changes nothing. The information that Variety 1 is not protected in Country C changes nothing too.

Examples 5 and 6.

There is protection of genus and species to which Variety 1 belonds in country D. Absence of protection of Variety 1 in country D changes nothing. There is PBR exhaustion under Article 16 (1) (ii).

Example 7.

The situation in country F is the similar as ones in Examples 5 and 6. There is PBR exhaustion on exported batch of seeds.

Example 8.

There were no infringements when exporting of saplings from Country H. Country 1 provides protection for genus and species to which Variety 3 belongs. Protection absence for the variety does not change anything.

If cut flowers in Country H are used as propagating material the breeder can exercise his right on the import of cutting into Country H.

Example 9.

It would be appropriate to write:

"Breeder of Variety 1 has PBR in Country A. However propagating material of Variety 1 is not grown up in Country A and, the breeder has no opportunity to exercise his right on acts in respect of propagating naterial.

In this case the breeder has PBR in the country on all batches of imported harvested material of the variety.

I have no objects under Examples 10 and 11.