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Subject: RE: Circular E-14/182 - Comments on draft Explanatory Notes
Date: Friday, July 11, 2014 4:28:30 PM
Attachments: [upov_exn_hrv_2_draft_1 -us comments.docx](#)

Dear Sir/Madam,
Please find our comments in the attached document.

Best regards,
Kitisri Sukhapinda

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From: mail, Upov [<mailto:upov.mail@upov.int>]
Sent: Wednesday, June 25, 2014 3:33 AM
To: mail, Upov
Subject: Circular E-14/182 - Comments on draft Explanatory Notes
Distribution: CAJ-AG
Copy to: CAJ
Subject: Comments on draft Explanatory Notes
UPOV Circular E-14/182 June 25, 2014

Madam,
Sir,

The purpose of this circular is to recall that the deadline for comments on the draft explanatory notes posted on the [CAJ-AG/13/8](#) section of the UPOV website has now passed (see circulars E-14/128, of May 12, 2014, E-14/136, of May 20, 2014, and E-14/143, of May 23, 2014, and the list of draft explanatory notes concerned, below).

In order for us to plan the preparation of new drafts of the relevant explanatory notes for consideration by the Administrative and Legal Committee Advisory Group (CAJ-AG) at its ninth session, to be held in Geneva on October 14 and 17, 2014, please could you let us know whether you are still planning to provide comments and, if so, by when (unless you have already done so).

[UPOV/EXN/CAN/2 DRAFT 1](#) Explanatory Notes on the Cancellation of the Breeder's Right under the 1991 Act of the UPOV Convention
[UPOV/EXN/EDV/2 DRAFT 4](#) Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
[UPOV/EXN/HRV/2 DRAFT 1](#) Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
[UPOV/EXN/NUL/2 DRAFT 1](#) Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention
[UPOV/EXN/PPM DRAFT 2](#) Explanatory Notes on Propagation and Propagating Material under the UPOV Convention
[UPOV/EXN/PRP/2 DRAFT 1](#) Explanatory Notes on Provisional Protection under the UPOV Convention
[UPOV/INF/12/5 DRAFT 1](#) Explanatory Notes on Variety Denominations under the UPOV Convention

Yours sincerely,
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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
by correspondence*

Disclaimer: this document does not represent UPOV policies or guidance

Note for Draft version

Except where stated otherwise:

Strikethrough (highlighted) indicates deletion from the text of document UPOV/EXN/HRV/1.

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Text for which different views have been expressed with regard to deletion is highlighted without strikethrough or underlining.

Alternative text is highlighted without strikethrough or underlining.

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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UPOV/EXN/HRV/2 Draft 1

ORIGINAL: English

DATE: May 12, 2014

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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 breeder¹ must not have had **reasonable opportunity** to exercise ~~his the~~ⁱ right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity".

(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.

Comment [pto1]: This paragraph is not relevant here and should be deleted. Harvested material may or may not potentially be used for propagating purpose. for example, fruit.

(c) Unauthorized use of propagating material

Acts in respect of propagating material

4. ^{ii and iii} "Unauthorized use" refers to the acts in respect of the propagating material that require the authorization of the ~~holder of the breeder's right~~ **breeder**¹ in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. ~~Thus, For example,~~ unauthorized acts ~~can only~~

Comment [pto2]: Other acts, such as conditioning and stocking are not mentioned here.

¹ "breeder" means

- the person who bred, or discovered and developed, a variety,
- the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or
- the successor in title of the first or second aforementioned person, as the case may be; (see Article 1 of the 1991 Act of the UPOV Convention)

occur in the territory of the member of the Union where a breeder's right has been granted and is in force ~~and in other territories~~ if, without the breeder's ~~consent~~ authorization, there is:

- (i) further propagation of the variety in question (see Article 16(1)(i) of the 1991 Act), or
- (ii) 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 (see Article 16(1)(ii) of the 1991 Act)

The breeder can enforce their right in the territory of the member of the Union where a breeder's right has been granted and is in force, against unauthorized acts which occurred ~~elsewhere in that territory~~, in accordance with Article 16 of the 1991 Act.

Comment [pto3]: In (ii), the unauthorized act is the "export" which occurs in the UPOV member country.

The corresponding acts in non-UPOV member countries do not require the breeder's authorization and therefore it is not proper to refer to them as "unauthorized acts" within the scope of the UPOV Convention.

5. ^{iv} Article 16(1) of the 1991 Act of the UPOV Convention [*Exhaustion of right*] states that:

"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."

5-6. 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(i) production or reproduction (multiplication),
- ⁱⁱ(ii) conditioning for the purpose of propagation,
- ⁱⁱⁱ(iii) offering for sale,
- ^{iv}(iv) selling or other marketing,
- ^v(v) exporting,
- ^{vi}(vi) importing,
- ^{vii}(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.

6-7. 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.

[Alternative text 1:

6-7. For example, unauthorized export of propagating material from the territory of a member of the Union where a breeder's right has been granted and is in force, 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, would be an unauthorized act.]^v

[Alternative text 2:

6-7. 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 material (propagating material of any kind; harvested material, including entire plants and parts of plants; or any product made directly from the harvested material²) that enables the propagation of the variety would be an unauthorized act.]ⁱⁱⁱ

Comment [pto4]: Para 7 and the alternatives seem redundant with para 4. Para 4 should be moved here.

² Article 16(2) of the 1991 Act of the UPOV Convention states that:

- "For the purposes of [Article 16] 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."

Conditions and limitations^{vi vii}

~~7-8.~~ 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.

~~8-9.~~ 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. ~~The infringement-unauthorized act of a breeder’s right shall may also-~~ be linked to non-contractual ~~responsibility acts~~. The act of an individual who purchases and produces propagating material from the breeder or his licensee, in breach of the conditions and limitations made by the breeder under a contract, ~~is may be~~ considered ~~as an offence-unauthorized act to the plant breeder’s right.~~ⁱⁱⁱ

Comment [pto5]: We may want to avoid discussing infringement here because we are focusing on “unauthorized act” not infringement. This part of the sentence should be deleted.

Compulsory exceptions to the breeder’s right

~~9-10.~~ 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

~~10-11.~~ Article 15(2) of the 1991 Act of the UPOV Convention [Optional exception] 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.

~~11-12.~~ 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 included in the scope of the breeder’s right and were not covered by the optional exception in the legislation of the member of the Union concerned. In particular, “unauthorized use” would refer to acts that did not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception.

(d) Reasonable opportunity to exercise his right

~~12-13.~~ 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 had a “reasonable opportunity” to exercise their rights in relation to the propagating material.

~~13-14.~~ The term “his right”, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 4 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.*^{ii and viii}

Alternative text

14. A variety can be exploited in the country in which it is protected by a breeder’s right without this taking the form, in that country, of production of propagating material or of a trade act related to such material, in other words, without the owner of the breeder’s right being able to exercise his right under Article 14(1). This is the case, for example, when the harvested material is imported. The aim of paragraph Article 14(2) is to give the holder the possibility of exercising his right in relation to the harvested material under the

circumstances defined in this particular paragraph. The text of Article 14(2) implies that, in any action for infringement, the defendant will have to prove that the plaintiff (the holder of the right) could reasonably have exercised the right at an earlier stage.^{ix}

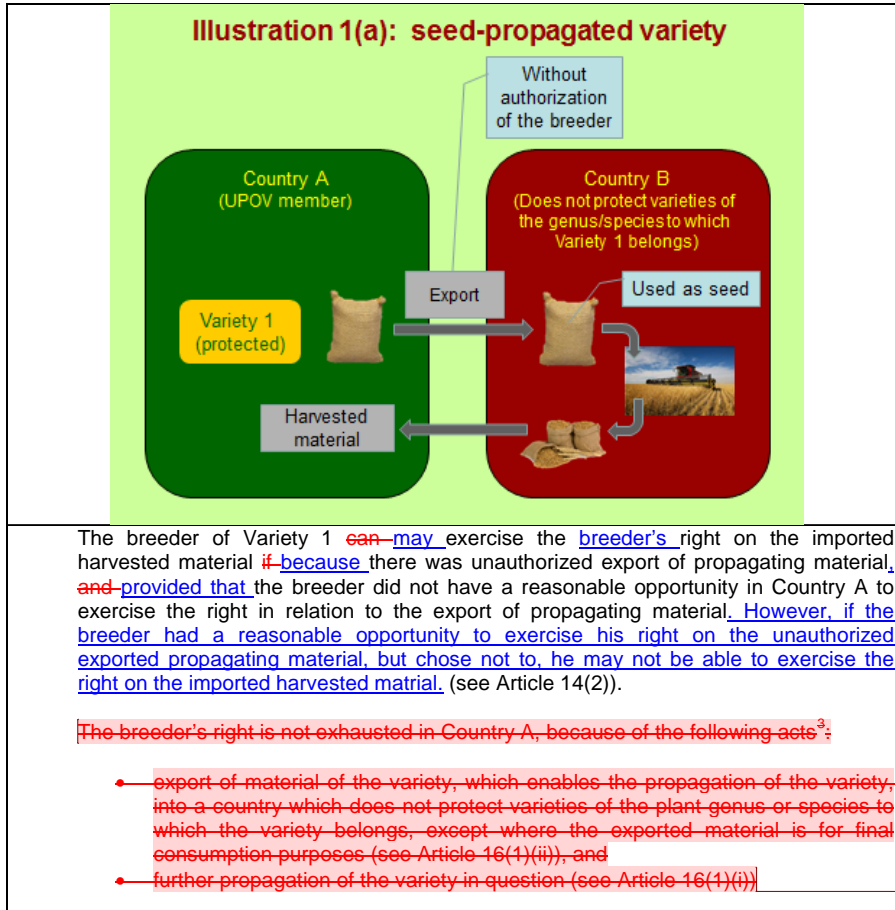
(e) Illustrative examples

15. The following examples have been provided to illustrate some situations where a breeder may be considered to be able to exercise their 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 the right in relation to the said propagating material.

[Note:

Document UPOV/EXN/HRV/1 does not contain any examples. The following examples are based on the examples presented in document CAJ-AG/13/8/3, amended in accordance with the changes agreed by the CAJ-AG at its eighth session, held in Geneva on October 25, 2013, and comments received, copies of which are posted on the CAJ-AG website. Changes to the examples in document CAJ-AG/13/8/3 could not be indicated in this document in an appropriate way, due to their extensive nature, e.g. merging of examples. However, the examples in this document make reference to the corresponding examples in document CAJ-AG/13/8/3 (see document CAJ-AG/13/8/10 "Report", paragraph 57)]

Example 1 [see Examples 1 to 4 in document CAJ-AG/13/8/3]



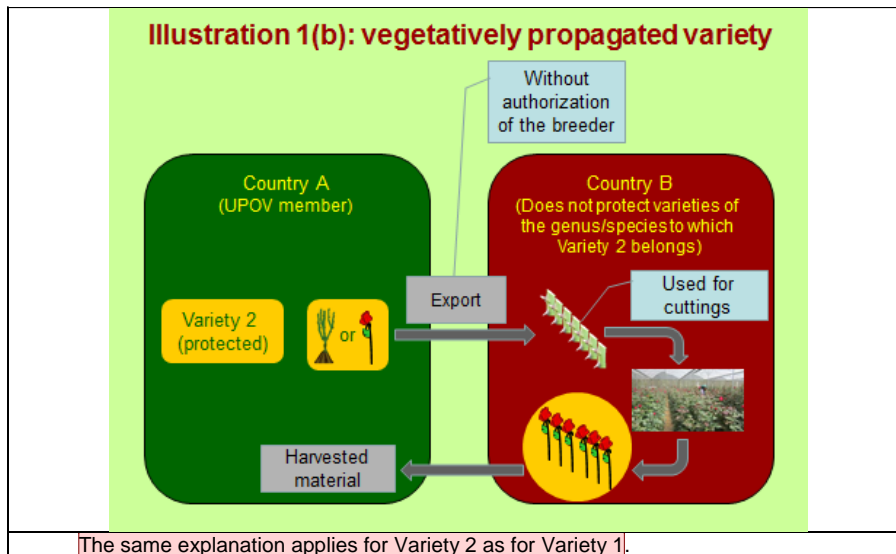
Comment [pt06]:

We have concerns about referring to exhaustion in this document. Article 16 (1) requires that the material of the protected variety has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned. This example and a few others below do not show or indicate whether the breeder sold or consented to selling of the material in Country A that was exported without his authorization. It is not proper to address the exhaustion issue here, without this key requirement.

We have concerns about discussing "exhaustion" in the context of harvested materials because they are two separate issues. As we recall, CC decided not to prepare an explanatory document on exhaustion. Article 14(2) (Acts in respect of the harvesting material) can be applied independent of Article 16(1) (exhaustion of rights).

In Example 1(a), the illustration indicates that the exported bag contains propagating material (seed), and the exported seed is "used as seed" to produce harvested material. It is not clear if this act constitutes "further propagation" to implicate non-exhaustion.

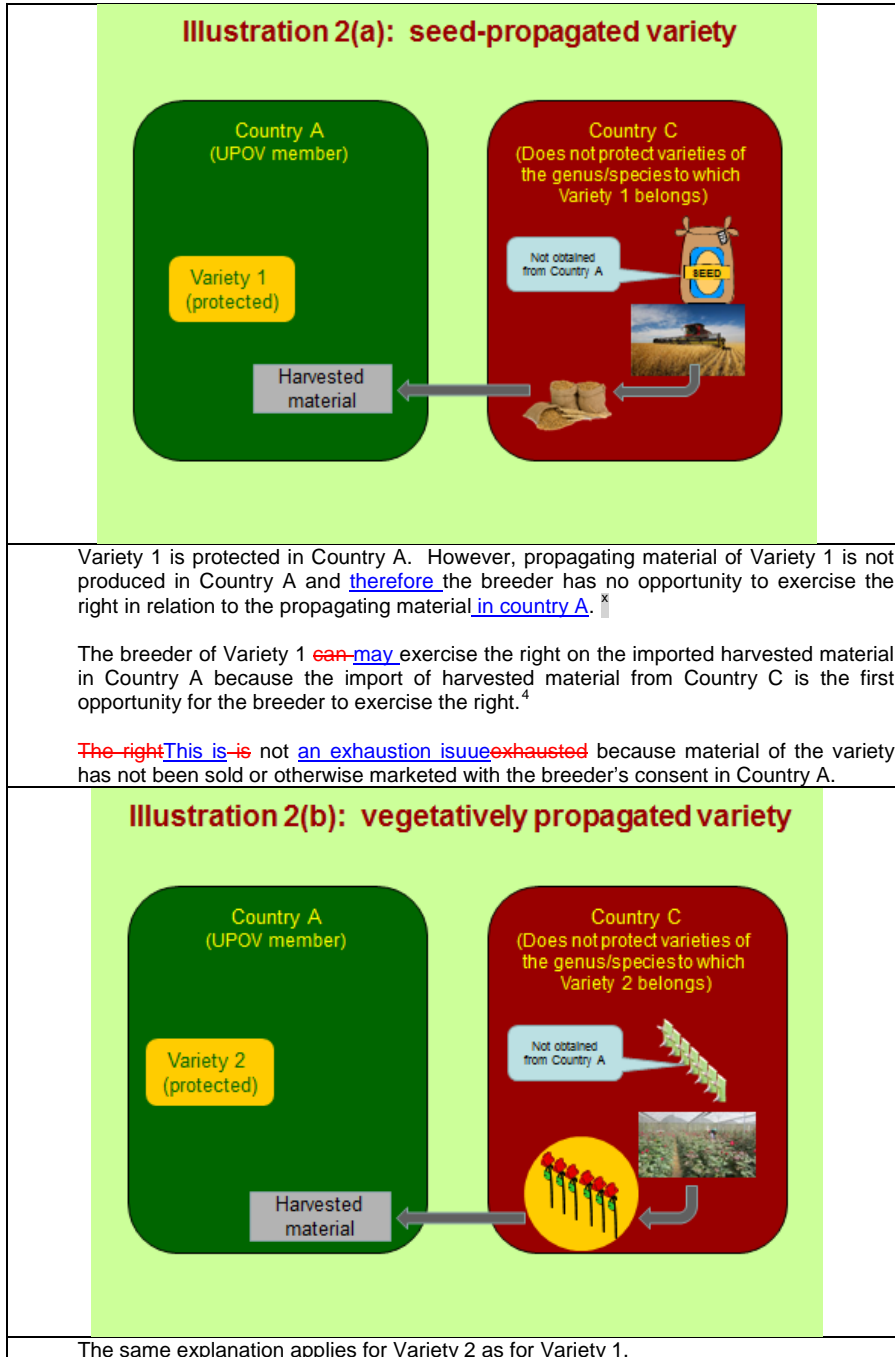
³ Provided that the breeder has not given consent for the acts concerned.



The same explanation applies for Variety 2 as for Variety 1.

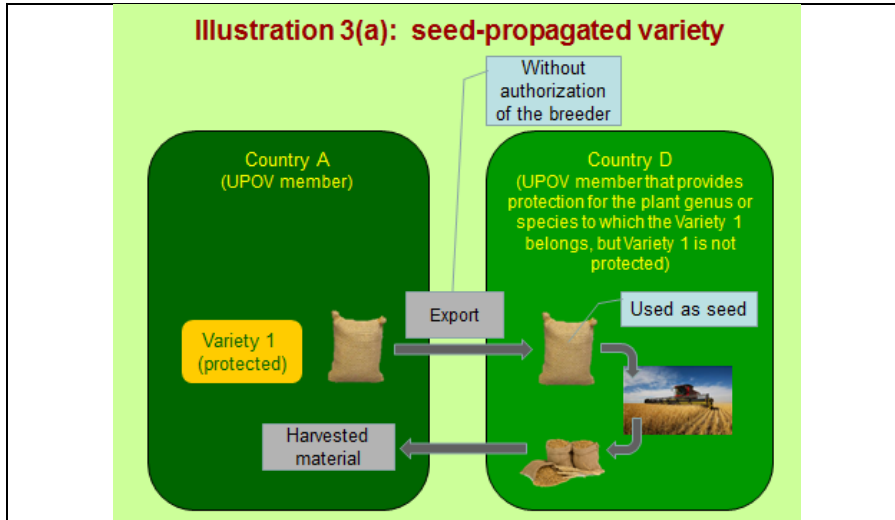
Comment [pto7]: Same comments as for Example 1(a).

Example 2 [see Example 9 in document CAJ-AG/13/8/3]



⁴ Provided that the breeder has not given consent for the acts concerned.

Example 3 [see Examples 5 and 6 in document CAJ-AG/13/8/3]



Alternative (a)

The breeder of Variety 1 could seek protection of the variety in Country D, but did not. Nevertheless, the breeder of Variety 1 ~~can~~ may exercise the right in Country A on the imported harvested material if because there was unauthorized export of propagating material, provided that ~~and~~ the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material. However, if the breeder had a reasonable opportunity to exercise his right on the unauthorized exported propagating material, but chose not to, he may not be able to exercise the right on the imported harvested material. (see Article 14(2)).

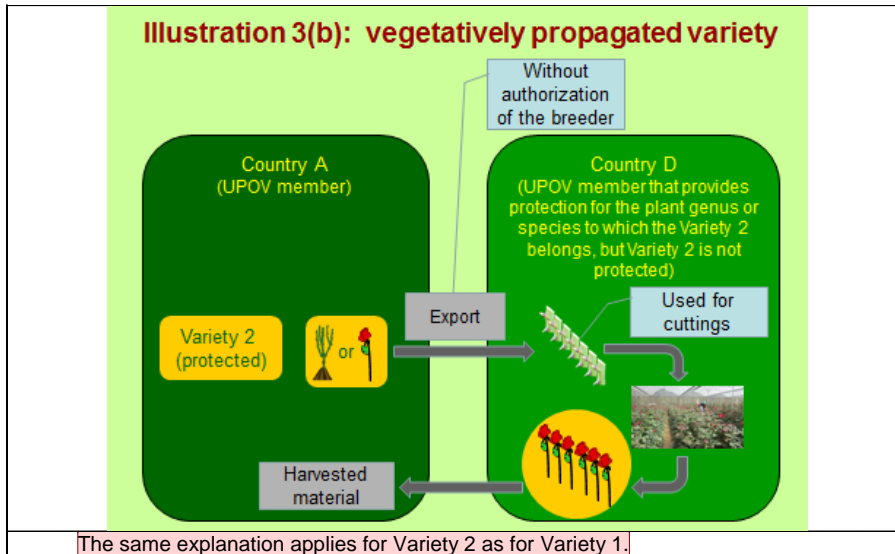
~~The breeder's right is not exhausted in Country A, because of further propagation of the variety in question (see Article 16(1)(i)).~~^{5 xi}

~~Alternative (b)~~

~~The breeder of Variety 1 cannot exercise the right on the imported harvested material because the right is exhausted (see Article 16(1)(ii)).~~^{xii and xiii}

Comment [pto8]: This may not be an exhaustion issue because there is no indication that the exported material has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned (Country A). There may not be "further propagation" because exported propagating material (seed) is used as seed to produce the harvested materials.

⁵ ~~Provided that the breeder has not given consent for the acts concerned.~~

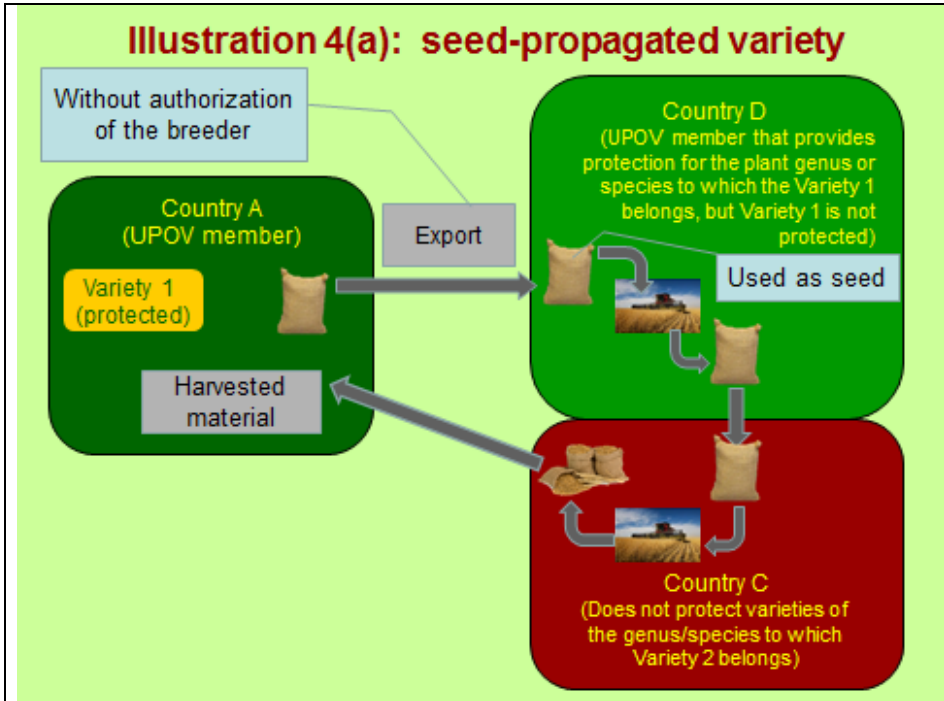


The same explanation applies for Variety 2 as for Variety 1.

Comment [pto9]: Same as the previous comments.

It is not proper to address exhaustion issue here. This illustration possibly indicates "further propagation," but in a country providing protection for the plant genus or species to which Variety 2 belongs. We still have concerns about applying Article 16(1)(i).

Example 4 [see Example 7 in document CAJ-AG/13/8/3]



Alternative (a)

The breeder of Variety 1 ~~can may~~ exercise the right in Country A on the imported harvested material ~~if because~~ there was unauthorized export of propagating material, ~~provided that and~~ the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material. However, if the breeder had a reasonable opportunity to exercise his right on the unauthorized exported propagating material, but chose not to, he may not be able to exercise the right on the imported harvested material. (see Article 14(2)).

~~The breeder's right is not exhausted in Country A, because of the following acts⁶:~~

- ~~• further propagation of the variety in question (see Article 16(1)(i)), and~~
- ~~• 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 (see Article 16(1)(ii)).^{xii}~~

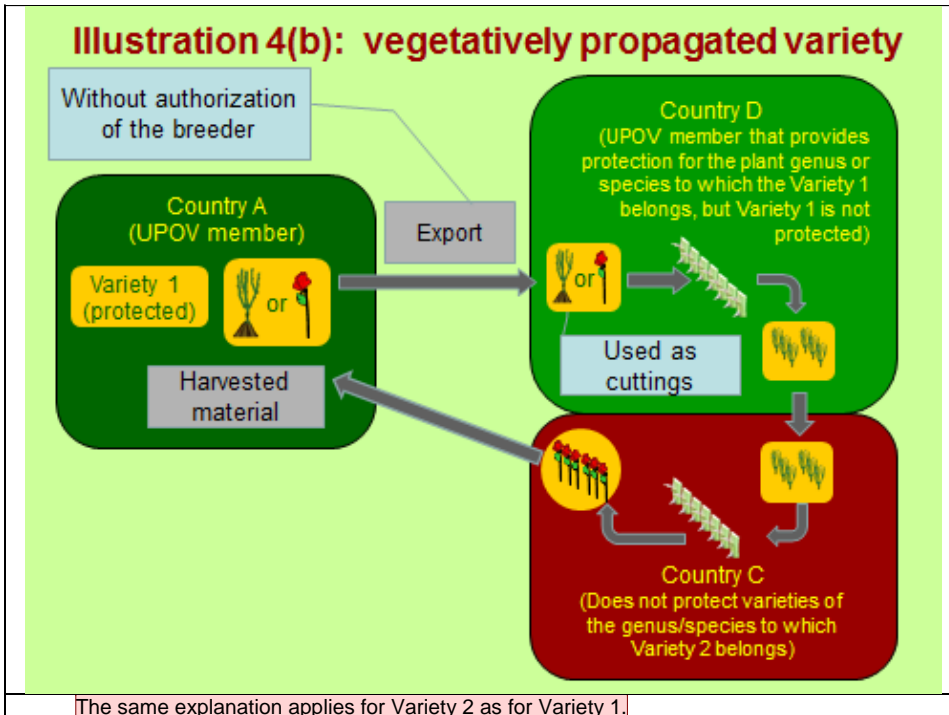
~~Alternative (b)~~

~~The breeder of Variety 1 cannot exercise the right on the imported harvested material because the right is exhausted (see Article 16(1)(i)).^{xiv}~~

Comment [pto10]: Same as above. In order for exhaustion to become an issue, the breeder has to sell or market the material that is exported without his authorization. The illustration does not indicate this. The exported material may have been stolen or produced without an authorization of the breeder and therefore there is no issue of exhaustion.

In this case there is an evidence of "further propagation", but in a country providing protection for the plant genus or species to which Variety 2 belongs. We still have concerns about applying Article 16(1)(i)..

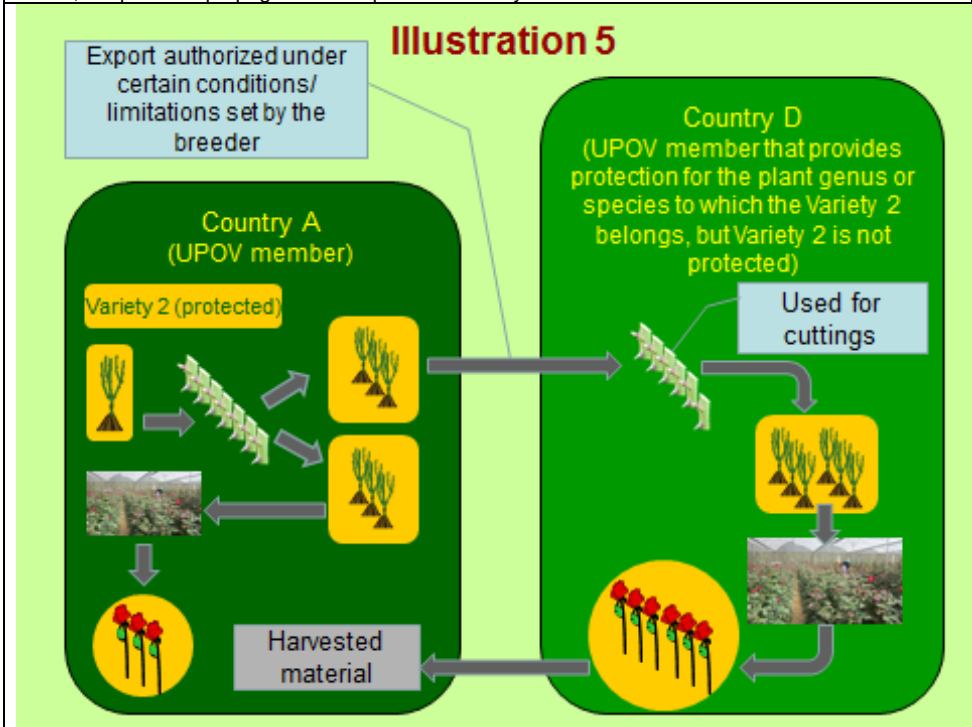
⁶ Provided that the breeder has not given consent for the acts concerned.



Comment [pto11]: Same as the earlier comments

Example 5 [see Example 8 in document CAJ-AG/13/8/3]

The breeder of Variety 2 authorizes a propagator in Country A to produce 50,000 plants for sale for cut-flower production. The propagator produces 50,000 plants, which are sold to a grower in Country A. The grower in Country A plants 25,000 plants, but sells 25,000 plants to a grower in Country D (for cut-flower production), where Variety 2 is not protected. The grower in Country D uses the 25,000 plants to propagate further plants of Variety 2.



The breeder of Variety 2 did not authorize export of plants for further propagation.

The breeder of Variety 2 ~~can~~ may exercise the right on the imported harvested material ~~if~~ because there was unauthorized export of propagating material, provided that ~~and~~ the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material. However, if the breeder had a reasonable opportunity to exercise his right on the unauthorized exported propagating material, but chose not to, he may not be able to exercise the right on the imported harvested material.

The breeder's right ~~is~~ may not ~~be~~ exhausted in Country A, because of further propagation of the variety in question (see Article 16(1)(i)).⁷ xv and xvi

Comment [pto12]: This fact pattern shows that the breeder sold the propagating materials under a contract. *The export to Country D is not authorized. Applying Article 14 (2) is appropriate.* We still have concerns about applying Article 16(1)(i).

⁷ Provided that the breeder has not given consent for the acts concerned.

Example 6 [see Example 11 in document CAJ-AG/13/8/3]

Variety 1 is protected in Country A. In Country A, an exception under Article 15(2) of the 1991 Act is applicable for variety A, 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 on his own holding without the authorization of the breeder.

Explanation

The breeder of Variety 1 ~~can~~ may be able to exercise the right on the harvested material if the breeder did not have a reasonable opportunity to exercise the right in relation to the propagating material (see Article 14(2)).

Depending on the national law of country A, the breeder may have the burden of proving that he did not have a reasonable opportunity to exercise his right over the propagating material, or the farmer may have the burden of proving that the breeder had a reasonable opportunity, but failed to exercise his right over the propagating material. ~~The breeder's right is not exhausted because there is "further propagation of the variety in question" (see Article 16(1)(i)).~~

Comment [pto13]: We prefer to use "may be able to" because the conditions described may allow the breeder to take an action in respect of the harvested material, but there may be other preventive factors such as there is no proof.

Comment [pto14]: This fact pattern may be appropriate to demonstrate non exhaustion of breeder's right under Article 16(1)(i). However, we want to propose deleting this second paragraph. The fact that the right is not exhausted does not mean that the breeder can exercise his right over the harvested material.

Example 7 [see Example 10 in document CAJ-AG/13/8/3]

Variety 3 is protected in Country A. In Country A, there is an exception under Article 15(2) of the 1991 Act, but that exception is not applicable for the species to which variety 3 belongs. A farmer uses some of the harvested material of variety 3 for propagating purposes on the farmer's own holding without the authorization of the breeder.

Explanation

The breeder of Variety 3 ~~can~~ may be able to exercise the right on the harvested material if the breeder did not have a reasonable opportunity to exercise the right in relation to the propagating material (see Article 14(2)).

Depending on national laws of country A, the breeder may have the burden of proving that he did not have a reasonable opportunity to exercise his right over the propagating material, or the farmer may have the burden of proving that the breeder had a reasonable opportunity, but failed to exercise his right over the propagating material. ~~The breeder's right is not exhausted because there is "further propagation of the variety in question" (see Article 16(1)(i)).~~

Comment [pto15]:

ⁱ Gender neutral term

ⁱⁱ Comment of the European Seed Association (ESA)
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253728.pdf).

"The draft explanatory note (document UPOV/EXN/HRV Draft 10) which was presented to the CAJ and which the CAJ decided to propose for adoption to the UPOV Council [adopted by the Council on October 24, 2013, as document UPOV/EXN/HRV/1] contains the following sentence in paragraph 4: "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." At the same time work in the CAJ-AG has started on the development of illustrative examples regarding the situations in which the breeder could exercise his right on the harvested material. The document CAJ-AG/13/8/3 presenting the illustrative examples recalls the discussions which took place prior to the Diplomatic Conference in 1991 on the extension of the scope to harvested material and proposes to seek explanations to the examples taking into account also the considerations raised in those discussions. Therefore, some of the examples (in particular example 9) presented in document CAJ-AG/13/8/3 concern situations where products are imported into the country where the protection is granted from countries without protection. Such examples would however not fit into the restrictive interpretation included in paragraph 4 (as cited above) of the explanatory note as proposed for adoption to the UPOV Council.

"As expressed during the Sixty-Eighth Session of the CAJ, ESA is concerned regarding the room which remains for discussion of illustrative examples after the adoption of the abovementioned interpretation of the notion of "unauthorized use". Nevertheless, we understand and can follow the explanations given at the Sixty-Eighth Session of the CAJ according to which a revision of the explanatory note on acts in respect of harvested material, and in particular of the interpretation addressed above,

remains possible should the discussion on the illustrative examples lead to the conclusion that such revision would be necessary. ESA is therefore confident that the range of examples that can still be discussed in relation to this subject is not going to be limited by the aforementioned paragraph 4."

- iii Comments of the European Union
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_268177.pdf)
- iv Proposal of the Russian Federation
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253207.pdf)
- "1. Paragraph 5 should be added by the following:
- 'Article 16(1)(ii) of the 1991 Act states: '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
- ...
- '(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."
- v Proposal of the Russian Federation
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253207.pdf)
- "2. It would be applicable paragraph 6 to write down in the following edition:
- "E.g., unauthorized export of propagating material from the territory of a UPOV member, where the breeder's right has been granted and it is in force, into a country which does not protect varieties of the plants genus or species to which the variety belongs, except where the exported material is for final consumption purposes, would be unauthorized act."
- vi Proposal of the Russian Federation to delete paragraphs 7 and 8
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253207.pdf)
- "3. Paragraphs 7 and 8 should be excluded because:
- "The person who has been authorized (under Article 14(1)(i-vii)) to acts in respect of propagating material, but not kept to the conditions and limitations made by the breeder (under Article 14(1)(b)), was the very infringer. The breeder has reasonable opportunity to exercise his right on the given batch of the propagating material, having sued to the licensee. The law-abiding farmer having purchased the propagating material from the licensee (violated conditions and limitations of the breeder), has the right to produce harvested material of the variety without any liabilities to the breeder (Article 16 (1))."
- (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_274004.pdf)
- "4) When preparing any Explanatory Notes it should be guided by the UPOV Convention provisions but not be tempted to extend breeder's right on a harvested material produced beyond the territory protected.
- "It should not be considered in the Explanatory Notes any private treaties including new forms of direct contracts with farmers pretending to profit earning over and above those provided by scope of the breeder's right in the UPOV Convention."
- vii Comment of the European Seed Association
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253728.pdf)
- At the Sixty-Eighth Session of the CAJ comments from the Russian Federation have been distributed and it was concluded that those comments would be addressed by the CAJ-AG. Given that the explanatory note as presented to the CAJ was proposed to the Council for adoption we understand that the comments of the Russian Federation might be considered by the CAJ-AG in the framework of a possible future revision. In this respect, with regard to comment number 3 of the Russian Federation ESA wishes to note that paragraphs 7 and 8 of the explanatory note should not be deleted since it is crucial to clarify in the explanatory note that acts carried out without respecting the conditions of an authorization also constitute "unauthorized use" for the purpose of Article 14(2) and (3) of the UPOV 1991 Convention. Furthermore, in respect of that comment number 3 of the Russian Federation we would like to draw the attention of the CAJ-AG to the decision of the Court of Justice of the European Union in case C-140/10 (*Greenstar-Kanzi Europe*) which may provide useful elements for the discussion of this matter.
- viii Comment of the Russian Federation
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_12_7/comments_russian_federation.pdf)
- "We consider it is inadmissible in any Explanatory notes to provide with every the Union member to determine 'reasonable opportunity' for breeder to exercise 'his right'. The UPOV Convention provision concerning enforcement of PBR only in the territory where it has been granted should not be revised in Explanatory notes. According to the UPOV Convention it is a norm - if the breeder did not apply and had not protection for his variety, he has no 'his right' on acts in respect of propagating material and consequently has no right on acts in respect of harvested material grown in the territory in question and on acts in respect of material exported from the territory to a protection country."
- ix Comment of the Russian Federation
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253826.pdf)
- "It is observed in the document [document CAJ-AG/13/8/10] 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 C[A]J/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 2. and to comments to it)."
- Note:* The Model Law on the Protection of New Varieties of Plants (1996) states as follows:
- "13.9 A variety can be exploited in the country in which it is protected by a breeder's right without this taking the form, in that country, of production of propagating material or of a trade act related to such material, in other words, without the owner of the breeder's right being able to exercise his right under paragraph (1) [Article 14(1) of the 1991 Act of the UPOV Convention]. This is the case, for example, when the harvested material is imported. The aim of paragraph (2)

[Article 14(2) of the 1991 Act of the UPOV Convention] is to give the holder the possibility of exercising his right in relation to the harvested material under the circumstances defined in this particular paragraph.

"13.10 Special attention should be paid to the wording of this provision if it is decided not to use the text of the Convention: the text proposed in the Model Law implies that, in any action for infringement, the defendant will have to prove that the plaintiff (the holder of the right) could reasonably have exercised his right at an earlier stage."

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_274004.pdf)

"2) The term 'reasonable opportunity' must not be considered in Explanatory Notes on Acts in Respect of Harvested Material.

"Act 14 (2) of the UPOV Convention provides the breeder wide opportunities (within provisions of 14(1)) to suppress illegal activities in respect of propagating material which sometime has the place in the territory protected. In case of production of harvested material from the illegal propagating material the breeder according to Act 14(2) has opportunity to claim in court his right on that harvested material. The court only establishes on the base of parties evidence if the breeder had a reasonable opportunity to exercise his right in respect of the propagating material used. The proof of absence of the reasonable opportunity is a matter of the very breeder."

^x Comment of the Russian Federation

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253826.pdf)

"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 material.'

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

^{xii} Comments of European Union

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_268177.pdf)

^{xiii} Extract from document CAJ-AG/13/8/3:

(Note: this alternative assumes that there is exhaustion of the right because there is no "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" and assumes that that "further propagation" means propagation that requires the authorization of the breeder, because authorization is not required in Country D.

In previous discussions in the CAJ-AG, it was noted that such an explanation implied that there would be less protection for breeders in Country A if harvested material originated from a non-UPOV member with no PVP law compared to a UPOV member, for the same situation, and concluded that such a situation would not have been the intention of the Convention.)

^{xiii} Comment of the Russian Federation

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253826.pdf)

"Examples 5 and 6 [Example 3].

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

^{xiv} Comment of the Russian Federation

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253826.pdf)

"Example 7 [Example 4].

"The situation in Country F [country D] is similar as ones in Examples 5 and 6 [Example 3]. There is PBR exhaustion on exported batch of seeds."

^{xv} Comments of the European Union

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_268177.pdf)

"Note: In the EU, to prevent exhaustion of a plant breeder's right, the breach of contract (no respect of the conditions and limitations set out in the licensing contract with the breeder) must relate to an essential aspect of the plant breeder's right (e.g. CJEU court case C-140/10). Further propagation is considered to be an essential element of the plant breeder's right. Therefore further propagation (to propagate more than the terms of the contract) will not result in the exhaustion of the plant breeder's right."

^{xvi} Comment of the Russian Federation

(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_253826.pdf)

"Example 8 [Example 5].

"There were no infringements when exporting of saplings from country H [country A]. Country I [country D] 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 [country A] are used as propagating material the breeder can exercise his right on the import of cutting into Country H [country A]."

[End of document]