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DRAFT

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

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*to be considered by the Administrative and Legal Committee Advisory Group  
at its ninth session, to be held in Geneva on October 14 and 17, 2014*

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Note for Draft version

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**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.

*Comment: Argentina<sup>a</sup>*

**GENERAL COMMENTS**

*"1.1 Article 14 (2) of the UPOV Convention to enable breeders to exercise their right in relation to the product of the harvest requires compliance with the following requirements:*

*"(a) that the situation should not fall within the compulsory and optional exceptions to Article 15, including the exception allowing the breeder and farmer to sow their own seeds;*

*"(b) that the right should not be exhausted under the terms of Article 16;*

*"(c) that a third party should have made "unauthorized use" of the propagating material of the protected variety;*

*"(d) that there should have been a reasonable opportunity for the breeder to exercise his right in relation to the propagating material of the protected variety, meaning that his authorization should have been sought for any of the acts contemplated in Article 14(1) in respect of the said material; and*

*"(e) that the extension of the breeder's right is over "the product of the harvest", including entire plants and parts of plants.*

**"1.2. DEFINITIONS**

*"Apart from the term "unauthorized use" mentioned in paragraph 6, there is no definition of key terms for consistent interpretation of Article 14(2), such as "product of the harvest", "reasonable opportunity to exercise the right" and "propagation material of the protected variety".*

*"For the interpretation of this article, the scope of the above concepts must be clearly established, as they are vital for the national authorities responsible for implementing national legislation and the UPOV Convention in relation to this article.*

*"Interpretation should not be predicated upon vague concepts or references to other explanatory notes. Nor should it be stated that the Convention does not define the product of the harvest but that it includes entire plants or parts of plants obtained through the use of propagating material, as this neither explain anything nor provides details on the object of the right which is being legislated, generating legal uncertainty that is detrimental to the harmonization which is the purpose of the explanatory notes.*

*"Nor is paragraph 3 acceptable as it creates a "praesumptio iuris tantum", assuming without factual basis that the product of the harvest which includes entire plants or parts of plants may potentially be used as propagating material. Any plant or part of a plant is propagating material if it is planted, regardless of how it was obtained.*

*"Therefore sections 2 and 3 and the last part of Alternative 2, paragraph 7 should be removed and a precise definition of "product of the harvest" should be provided, together with clear, illustrative examples.*

Comment: Russian Federation<sup>o</sup>

*"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."*

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<sup>1</sup> must not have had **reasonable opportunity** to exercise the right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity".

*Proposal 1.1: ESA<sup>c</sup>*

*"In point 1 the text in the penultimate sentence has been changed into 'exercise the right' instead of 'exercise his right'. The justification of this change - as explained in the endnotes - is that the word 'the' is a gender neutral term. We are of the view that in this context it is not precise to use the words 'the right' and in the explanatory notes it is more important to be precise than gender neutral. Further on, the text of Article 14(2) reads 'unless the breeder has had reasonable opportunity to exercise his right'. Therefore, we think it would be advisable to stick to the wording of the Convention itself also in the explanatory notes. If it is really an issue to use gender neutral terms we propose to clarify in an endnote that for the purpose of the explanatory notes the term 'his' means 'his or hers'.*

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<sup>1</sup> "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)

(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.

*Proposal 3.1: Argentina<sup>a</sup>*

*“Interpretation should not be predicated upon vague concepts or references to other explanatory notes. Nor should it be stated that the Convention does not define the product of the harvest but that it includes entire plants or parts of plants obtained through the use of propagating material, as this neither explain anything nor provides details on the object of the right which is being legislated, generating legal uncertainty that is detrimental to the harmonization which is the purpose of the explanatory notes.*

*“Nor is paragraph 3 acceptable as it creates a “praesumptio iuris tantum”, assuming without factual basis that the product of the harvest which includes entire plants or parts of plants may potentially be used as propagating material. Any plant or part of a plant is propagating material if it is planted, regardless of how it was obtained.*

*“Therefore sections 2 and 3 and the last part of Alternative 2, paragraph 7 should be removed and a precise definition of “product of the harvest” should be provided, together with clear, illustrative examples.”*

*Proposal 3.2: United States of America<sup>d</sup>*

*“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.”*

*Proposal 3.3: CIOPORA<sup>e</sup>*

*“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 can have the potential to be used as propagating material, if such material is not defined as propagating material in the law of the member of the Union.”*

*(Comment:*

*“CIOPORA maintains that if material is defined as propagating material in the PBR law of a UPOV member, it cannot be considered anymore in the legal sense to be harvested material.”)*

(c) Unauthorized use of propagating material

*Acts in respect of propagating material*

Proposal 4.1: text presented in document UPOV/EXN/HRV/2 Draft 1

*“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 breeder<sup>1</sup> 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 and in other territories if, without the breeder’s consent, 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 accordance with Article 16 of the 1991 Act.”*

Proposal 4.2: Argentina<sup>a</sup>

*“With respect to paragraph 4, the required authorization is from the ‘holder of the breeder’s right’ who is the person who holds the right and who has been granted a title and not the breeder mentioned in the definition of the Convention, who may be, without distinction, any of the three persons mentioned in the definition of the Convention.*

*[...]*

*“In both the first part of the explanatory note and in the examples, the concept of ‘unauthorized use’ of Article 14(2) is incorrectly conflated and equated with the exhaustion of the breeder’s right under Article 16.*

*“On this issue, we must consider the following points.*

- “Intellectual property rights are ‘territorial’ and their granting and enforcement apply only in the country in which the breeder obtained a title to a new plant variety. Therefore, a right granted in one territory, as mentioned in paragraph 4, cannot be extended to other territories, except where a property right, be it a breeder’s right or any other kind of property right for that plant variety, is in force in the other territories.*

*“They have no extraterritorial effect unless supranational legislation so provides and regulates regional plant breeder’s rights.*

*“Therefore, in paragraph 4 the text as from ‘..... and in other territories’ until the end should be deleted.*

- “For exhaustion of a breeder’s right, the territory must have previously enacted legislation which grants such rights and protects the genus and species as well as varieties owned by a breeder. If the right has not been granted, it cannot be exhausted, as in the examples cited in paragraphs 4(i) and (ii) deriving from Article 16 of the UPOV Convention of 1991. These examples should therefore be removed.*
- “A country may not consider it necessary for its domestic policy to protect plant varieties or to consider the escalation of protection, as did many countries that have acceded to the UPOV 1978 Act or to protect the breeder’s right by a different system. Therefore, not all propagating material that is marketed or used illegally act constitutes a violation of plant breeder’s right or ‘unauthorized use’.”*

*“If plant breeders’ rights do not exist because the country does not protect plant varieties, or species or genus, there is no ‘unauthorized use’.”*

*Proposal 4.3: Russian Federation<sup>b</sup>*

*"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.'"*

*Proposal 4.4: United States of America<sup>d</sup>*

*"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~~ breeder<sup>1</sup> in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. ~~Thus For example<sup>f</sup>, 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 if, without the breeder's 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 in that territory<sup>g</sup>, in accordance with Article 16 of the 1991 Act."*

*Proposal 4.5: United States of America<sup>d</sup>*

*"Para 7 and the alternatives seem redundant with para 4. Para 4 should be moved [to paragraph 7][...]."*

*Proposal 4.6: APBREBES<sup>n</sup>*

*"The wording adopted in the original Explanatory Notes UPOV/EXN/HRV/1 'Unauthorized acts can only occur in the territory of the member of the Union where a breeder's rights has been granted and is in force.' is of utmost importance and must be retained."*

*Proposal 4.7: CIOPORA<sup>e</sup>*

*CIOPORA proposes to consider the following:*

*"If a breeder himself directly exports propagating material of his variety, protected in his country, into a country, where no protection exists, there is no unauthorized use in the protected territory, but also no exhaustion, because the propagating has not been sold or otherwise marketed in the territory.*

*"If the recipient of the propagating material uses the material for further propagation, without the authorization of the breeder, unauthorized use of the propagating material is given."*



*Proposal 4.8: ESA<sup>c</sup>*

*“In point 4, in the first sentence the words ‘holder of the breeder’s right’ has been changed to ‘breeder’. This change is acceptable only if it is clarified earlier in the sentence, and in line with the text of Article 14(2), that the acts have to take place ‘in respect of the propagating material of the protected variety’. Further on, the words ‘in the territory concerned’ should be deleted from this sentence since unauthorized use can also refer to breach of contract which breach may occur on another territory.*

*“In the same point 4, the last paragraph reads as follows: ‘The breeder can enforce their right in the territory...’ This text, again to be in line with the text of Article 14(2), should be changed into ‘The breeder can enforce his right in the territory...’.*

*“We propose to include an additional paragraph or point after the current point 4 to clarify in general that the holder of the breeder’s right should have at least one opportunity to exercise his right. This should be a guiding principle.”*

5. 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.”

*Proposal 5.1: Russian Federation<sup>b</sup>*

*“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.”*

*Proposal 5.2: APBREBES<sup>n</sup>*

*“Terms of the UPOV Conventions should be used consistently; no new terms should be introduced. For example, instead of ‘propagating material’, terms such as ‘material that enables propagation’ are used, e.g. in para 5 (ii), or para 7 (alternative text 2). They should be replaced by ‘propagating material’, as in the UPOV Conventions.”*

~~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) 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.

*Proposal 6.1: Russian Federation<sup>b</sup>*

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

*Russian Federation proposes to replace “territory concerned” with “in the protection territory” or “in the territory where breeder’s right has been granted and is in force” throughout document (see comment on page 4)*

~~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.]<sup>1</sup>

[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 material<sup>2</sup>) that enables the propagation of the variety would be an unauthorized act.]<sup>1</sup>

*Proposal 7.1: Argentina<sup>a</sup>*

*"Interpretation should not be predicated upon vague concepts or references to other explanatory notes. Nor should it be stated that the Convention does not define the product of the harvest but that it includes entire plants or parts of plants obtained through the use of propagating material, as this neither explain anything nor provides details on the object of the right which is being legislated, generating legal uncertainty that is detrimental to the harmonization which is the purpose of the explanatory notes.*

*"Nor is paragraph 3 acceptable as it creates a "praesumptio iuris tantum", assuming without factual basis that the product of the harvest which includes entire plants or parts of plants may potentially be used as propagating material. Any plant or part of a plant is propagating material if it is planted, regardless of how it was obtained.*

*"Therefore sections 2 and 3 and the last part of Alternative 2, paragraph 7 should be removed and a precise definition of "product of the harvest" should be provided, together with clear, illustrative examples."*

[...]

*"If plant breeders' rights do not exist because the country does not protect plant varieties, or species or genus, there is no "unauthorized use".*

*"Alternative 1 of paragraph 7 does not follow.*

- *"For all the more reason, there is no 'unauthorized use' if the variety has not been protected because the breeder's right is a private right and it falls solely to him to protect his variety in countries that he considers relevant, and if he fails to do so, he has no rights over the variety. Therefore, the examples and the text cannot state that if the variety has not been protected, there is 'unauthorized use' of the material or its propagation."*

*Proposal 7.2: Russian Federation<sup>b</sup>*

*"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."*

<sup>2</sup> 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."

*Proposal 7.3: United States of America<sup>d</sup>*

*“Paragraph 7 and the alternatives seem redundant with paragraph 4. Paragraph 4 should be moved here.*

*Proposal 7.4: CropLife International<sup>k</sup>*

*“CropLife International notes with interest the proposed changes in the document. With regards to the alternatives in §7 (page 5), CropLife International wishes to express its preference for alternative text 2.”*

*Proposal 7.5: ESA<sup>c</sup>*

*“As regards the alternative texts proposed in paragraph 7 we are of the view that the first version is the most appropriate. (‘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.’)”*

*Conditions and limitations*

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.

*Proposal 8.1: Russian Federation<sup>b</sup>*

*“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.”*

~~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 of a breeder’s right shall also be linked to non-contractual responsibility. The act of an individual who purchases and produces propagating material from the licensee, in breach of the conditions and limitations made by the breeder, is considered as an offence to the plant breeder’s right.

Proposal 9.1: Argentina<sup>a</sup>

“The last part of paragraph 9, referring to non-contractual responsibility, is not understood. It should be specified exactly which situations are referred to because it is a very vague explanation.”

Proposal 9.2: Russian Federation<sup>b</sup>

“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.”

Proposal 9.3: United States of America<sup>d</sup>

“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 unauthorized act may be linked to non-contractual 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, may be considered an unauthorized act.”

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

Proposal 9.4: APBRESBES<sup>e</sup>

“Non-contractual responsibility: According to the text proposal of the new para 9, even acts of buyers of harvested material which is sold in breach of PBR, including breeders’ conditions and limitations, are considered as a PBR offence. Buyers of harvested material, in order to be on the safe side, would have to ask vendors of harvested material for their license, and read and understand it. This is totally out of proportion.

“There is moreover no reason why EU directive 864/2007 that is cited in the EU comment of 27 February 2014 on HRV as basis for this proposal, should be applied to all UPOV members.”

Proposal 9.5: ESA<sup>c</sup>

“In point 9 there have been two sentences added to the end. We agree to the essence of the addition but we propose to reformulate the text in order to use a terminology which is consistent with the content and purpose of the explanatory note. In other words, we propose not to refer to infringements and offence of PBR but rather to put the mentioned acts in the context of unauthorized use. Such text could read as follows: ‘The act of an individual who purchases and produces propagating material from a licensee, which act is not in accordance with the conditions and limitations set by the breeder, should be considered as unauthorized use.’”

*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.

*Proposal 10.1: Russian Federation<sup>b</sup>*

*"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."*

*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.

*Proposal 11.1: Russian Federation<sup>b</sup>*

*"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."*



~~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.

*Proposal 12.1: Argentina<sup>a</sup>*

*“For the following reasons, it is therefore inaccurate to state in the last part of paragraph 12 that acts that do not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception can be construed as “unauthorized use”.*

*“It is for national law to determine optional exceptions and only it can determine the limits, scope and interpretation of the optional exceptions and legislate and determine if reasonable limits and the legitimate interests of the breeder are respected.*

*“If breeders disagree with regulations governing such action, they must submit the comments and objections they consider relevant in the relevant country, but an explanatory note of an international convention that specifically vests the legislative power in this area with each Contracting Party cannot interpret concepts that are alien to it. The last part of paragraph 12 should be deleted.*

*“Without prejudice to the foregoing no explanation or practical examples concerning situations could be interpreted are included in the last part of paragraph 12, which is accordingly incomprehensible.*

*On the other hand, as the delegation of our country stated, the optional exception to the farmer’s right to reserve and use his seeds should not be conflated with situations of “unauthorized use” by the breeder because the optional exception depends not on what the breeder decides to authorize or the conditions or limitations the breeder set, but emerges from a legal stipulation by the country in accordance with its intellectual property law concerning plant varieties, which, on this point, is independent of the decisions of breeders.*

*Proposal 12.2: Russian Federation<sup>b</sup>*

*“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.”*

*Proposal 12.3: APBREBES<sup>c</sup>*

*“APBREBES had reminded that contract farming is fast increasing and that private contracts should not prevent the enjoyment of the farmers’ privilege in cases where the optional exception applies. The UPOV Seminar on contracts of 2008 does not refer to the more recent proliferation and diversity of contractual arrangements and has not sufficiently addressed the circumventing of the optional exception. In particular as international value chains are being further developed in quantity and quality, new legal questions have arisen. This issue is very important; UPOV should address it in more detail.”*

*“The EXN is focusing on international trade issues between countries of differing PBR status. It does nothing to further clarify PBR in relation to harvested material from farm-saved seeds (examples 6 and 7). These examples should be deleted and the EXN focused on international trade issues between countries of differing PBR status.”*

(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*.

[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.]

Proposal 14.1: Argentina<sup>a</sup>

“(a) There is no definition and clear examples are not given concerning this very important concept, because together with unauthorized use, it is the key to the breeder’s exercise of his right in relation to the harvested product.

“(b) Propagating material is not defined within the meaning of this article.

“This means that it is not known with legal certainty what underpins the extension of the right for those to whom this rule applies. The result is considerable legal uncertainty internationally, as it leaves it to each country freely to interpret these concepts, which are not only fundamental to the harmonization of UPOV principles but whose vagueness can also be detrimental to the interests of the country and its free trade.

“(c) For the Republic of Argentina, “have reasonably exercised their right” means that the breeder has taken “some effective action to prosecute and try to secure the conviction of a third party who has illegally used his propagating material”, i.e. he has initiated legal action which has culminated in a final judgment and that the court has found against him.

“Moreover, in Argentina, the National Seed Institute requests the breeder’s authorization for protected varieties in both the seed certification process and any trade act, including import and export; it does not authorize any act in which the breeder does not participate. Also, officials of the Institute vested with police power require proof of authorization from the breeders of protected varieties and failure to produce an authorization constitutes a crime.

“Therefore, the alternative mentioned in paragraph 14 does not apply to all countries. Moreover, it is not clear why it has been included and thus should be removed.

“(d) The indication in paragraph 14 that a breeder can only reasonably exercise his right ‘in the territory concerned’ is not accurate, as the breeder can own licensees in other countries or hold a property right in one or more countries and therefore can reasonably exercise his right over the propagating material, preventing its import or export, as the case may be.”

[...]

“The last part of paragraph 14 is unacceptable, given the reversal of the burden of proof: it is the holder of the breeder’s right who must prove the unauthorized use of their propagating material, prove that they have reasonably exercised their right in relation thereto, and that the propagating material corresponds to their protected variety. The third party should not be expected to provide evidence of facts that it is not privy to.”

*Proposal 14.2: Russian Federation<sup>b</sup>*

*"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'."*

*Proposal 14.3: APBREBES<sup>h</sup>*

*"Para 14 has very unclear text with regard to 'the territory concerned' It should clearly refer to the 'territory where the right title was granted.'*

*"Para 14 (Alternative text) proposes to put the burden of proof on the defendant who will have to prove that the rights holder (the plaintiff) could reasonably have exercised his right at an earlier stage. It should be up to the rights holder to prove that he could not exercise his right. The text should be deleted. The proposed text is moreover wrongly interpreted from the Russian comment of 17 December 2013."*

*"If a country has chosen not to provide PVP for good reasons, i.e. the country is not a WTO member, or the country is a Least Developed Country and therefore for good reasons exempted from TRIPS Agreement (currently until 2021), this country should not be burdened with license fees if it exports harvested material. The whole idea of trade globalisation would be turned against countries that can cheaply produce and have an undeveloped sector of independent national breeders if industrialised countries impose license fees."*

*"If a country where material is exported to, offers PVP rights for the species in question, but the variety in question is not protected, there may be good reasons for not protecting that variety in that country. The good reasons would be disregarded if the PBR applies when harvested material is exported back from that country to the first country."*

*Proposal 14.4: ESA<sup>c</sup>*

*"As regards the alternatives offered under point 14, we are of the opinion that the first text option is the most appropriate (starting with 'The term 'his right'...')."*

(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 his<sup>c</sup> 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.

*Proposal 15.1: Argentina<sup>a</sup>*

*“As said, the plant breeder’s right is ‘TERRITORIAL’, which means its granting and enforcement are limited to the territory of the country in which it was granted.*

*“Moreover, the plant breeder’s right is a ‘private right’ and it is only for plant breeders to take the action provided for in national legislation for the violation of their rights.*

*“From this it follows that it is worth conducting an analysis to determine whether the grounds for unauthorized use and reasonable exercise of the right and the possible extension of the right in relation to the harvested product in the country where the propagating material of was produced and in which the breeder holds a title, as well as the country’s existing legislation in regard to plant breeders’ rights and its procedures and enforcement systems in that regard.*

*“Therefore, it is ineffective and sometimes even contradictory to generalize, providing examples from possible situations in other countries, as is done in the illustrations provided in the explanatory note.*

*“If the breeder expressly or implicitly authorized any of the acts referred to in Article 14(1) with respect to the propagating material in a country with plant breeder’s rights, including imports and exports, then he has exhausted their right and cannot complain.*

*“Therefore the accompanying illustrations are not effective and should be incorporated once detailed clarification is provided in regard to the above-mentioned points, because the explanations are often unclear.”*

*Proposal 15.2: Russian Federation<sup>b</sup>*

*“Our observations concerning unreasonableness of examples of document CAJ-AG/13/8/3 distributed among the participants of the 8<sup>th</sup> session of CAJ-AG (see file [CAJ-AG\\_13\\_8\\_3\\_comment\\_RF\\_25.10.13\\_UPOV.docx](#)<sup>m</sup>) 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.”*

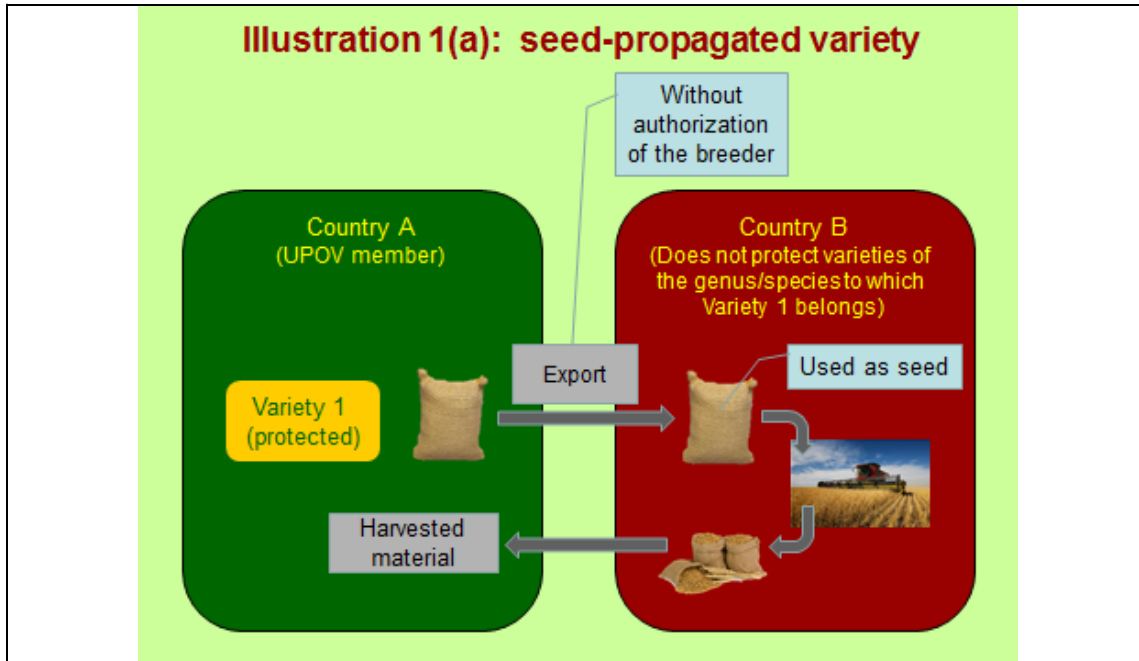
*Proposal 15.3: ESA<sup>c</sup>*

*“In point 15, for the same reasons as explained above, we propose to change the wording ‘a breeder may be considered to be able to exercise their right’ into ‘his right’.”*

*“As a general comment on the examples, we would welcome a little bit more explanation on the actual circumstances which are presented in the individual examples. This would benefit all readers to better understand the scenarios presented in the examples.”*

[Note: Document UPOV/EXN/HRV/1 does not contain any examples.]

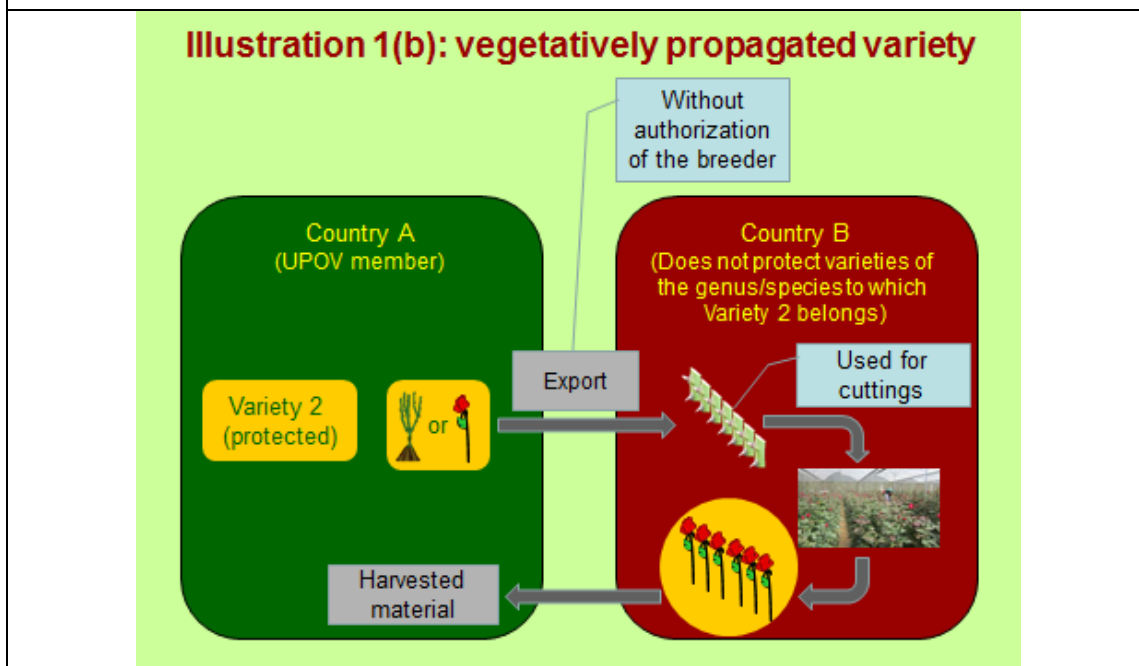
Example 1



The breeder of Variety 1 can exercise the right on the imported harvested material if there was unauthorized export of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material (see Article 14(2)).

The breeder's right is not exhausted in Country A, because of the following acts<sup>3</sup>:

- 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)), and
- further propagation of the variety in question (see Article 16(1)(i))



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

<sup>3</sup> Provided that the breeder has not given consent for the acts concerned.

*Proposal Example 1.1: Russian Federation<sup>b</sup>*

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

*Proposal Example 1.2: United States of America<sup>d</sup>*

*"The breeder of Variety 1 may exercise the breeder's right on the imported harvested material because there was unauthorized export of propagating material, provided that 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))."*

*Comment on Example 1(a):*

*"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).*

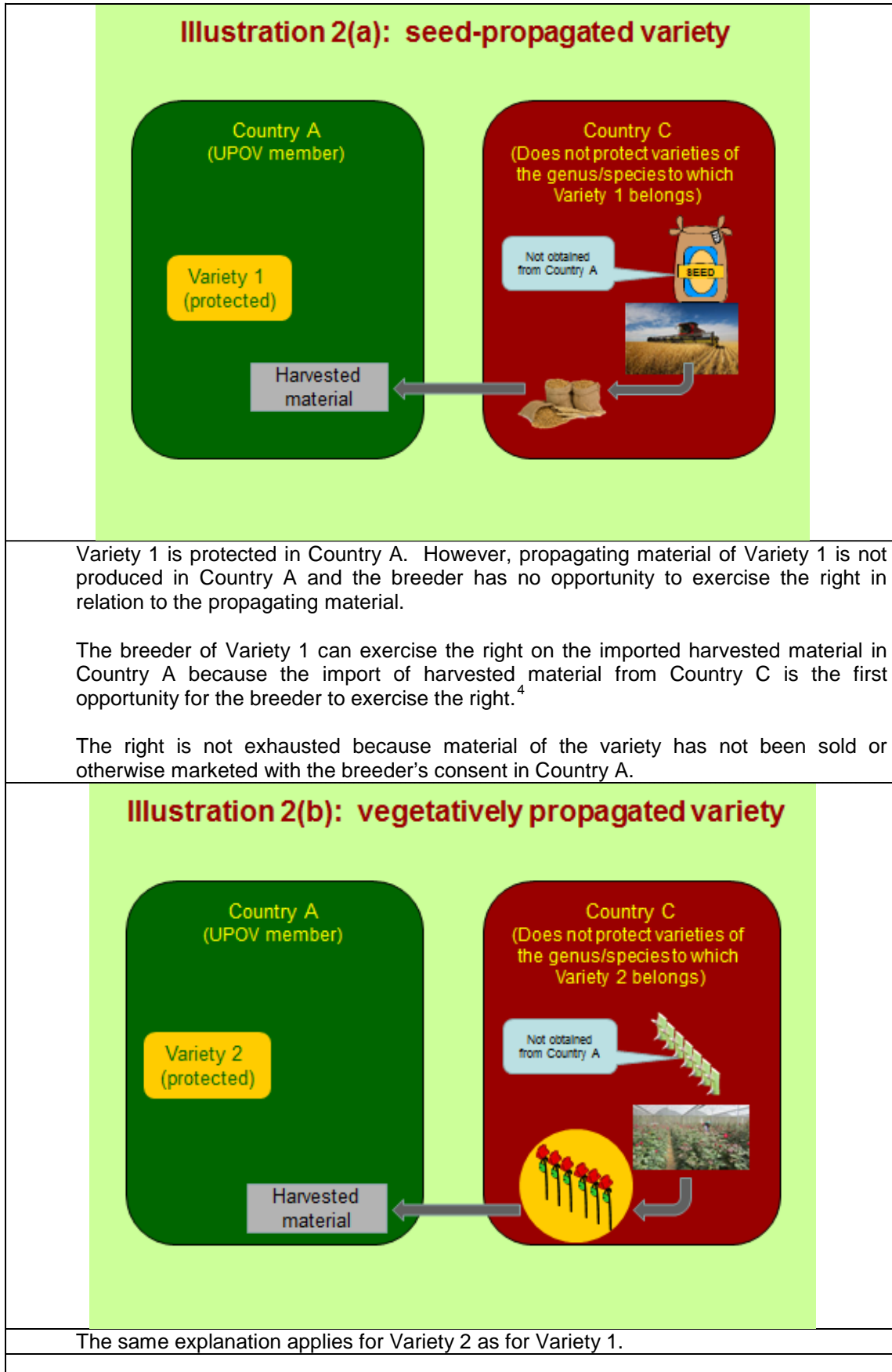
*"In Example 1(a), the illustration indicates that the exported bag contains propagating material (seed), and the exported seed is "used as seed" to produce harvested material. It is not clear if this act constitutes "further propagation" to implicate non-exhaustion."*

*Comment on Example 1(b): same comments as for Example 1(a)*

*Proposal Example 1.3: CIOPORA<sup>e</sup>*

*"UPOV is invited to consider using as examples for harvested material such material, which in all of its member states most likely is considered to be harvested material, e.g. fruits. In the EU and several other countries a cut-flower, which is capable of producing entire plants, is considered a variety constituent or propagating material. For the audience in these countries it may be misleading to define a cut-flower as harvested material."*

Example 2



<sup>4</sup> Provided that the breeder has not given consent for the acts concerned.



*Proposal Example 2.1: Russian Federation<sup>b</sup>*

*“(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.*

*“(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.*

*Proposal Example 2.2: United States of America<sup>d</sup>*

*“Variety 1 is protected in Country A. However, propagating material of Variety 1 is not produced in Country A and therefore the breeder has no opportunity to exercise the right in relation to the propagating material in country A.*

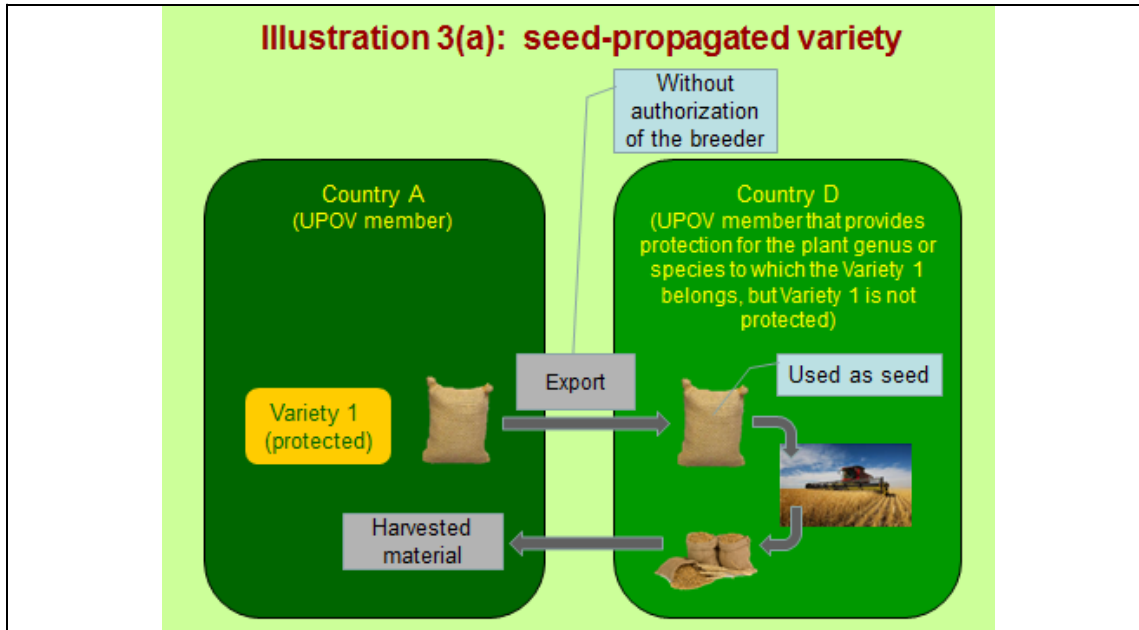
*“The breeder of Variety 1 may exercise the right on the imported harvested material in Country A because the import of harvested material from Country C is the first opportunity for the breeder to exercise the right.<sup>5</sup>*

*“This is not an exhaustion issue because material of the variety has not been sold or otherwise marketed with the breeder’s consent in Country A.”*

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<sup>5</sup> Provided that the breeder has not given consent for the acts concerned.

Example 3



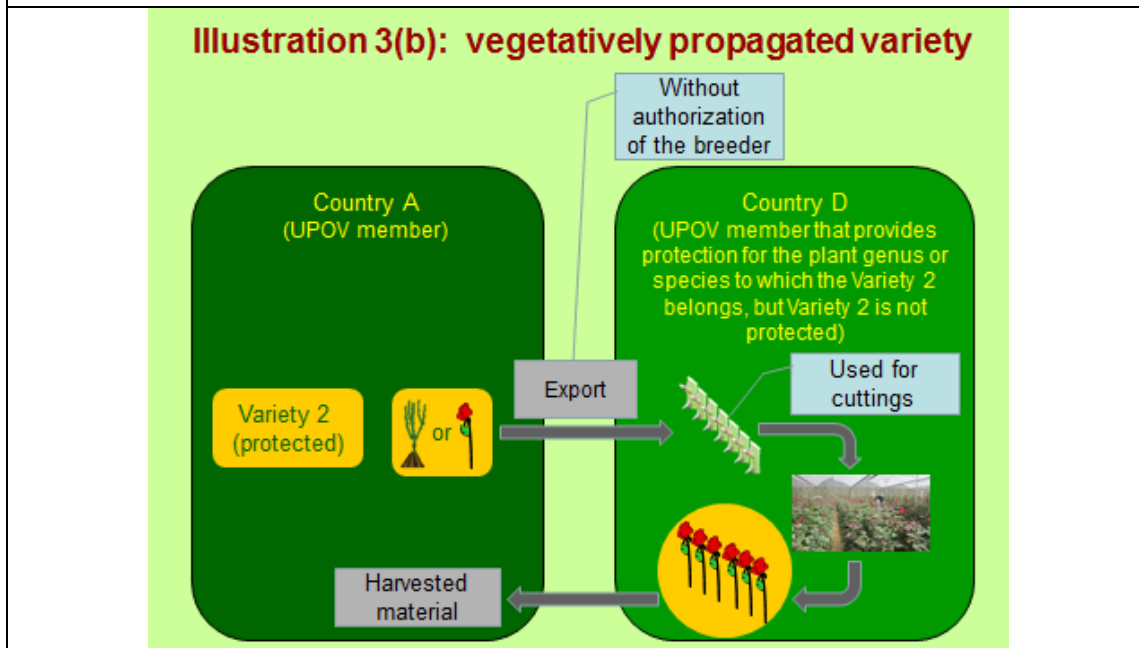
Alternative (a)

The breeder of Variety 1 could seek protection of the variety in Country D. Nevertheless, the breeder of Variety 1 can exercise the right in Country A on the imported harvested material if there was unauthorized export of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating 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)).<sup>6</sup>

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)).



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

<sup>6</sup> Provided that the breeder has not given consent for the acts concerned.

*Proposal Example 3.1: Russian Federation<sup>b</sup>*

*“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.”*

*Proposal Example 3.2: United States of America<sup>d</sup>*

*“The breeder of Variety 1 could seek protection of the variety in Country D, but did not. Nevertheless, the breeder of Variety 1 may exercise the right in Country A on the imported harvested material because there was unauthorized export of propagating material, provided that 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)).”*

*(Comment on 3(a):*

*“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.)*

*(Comment on 3(b):*

*“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)”*

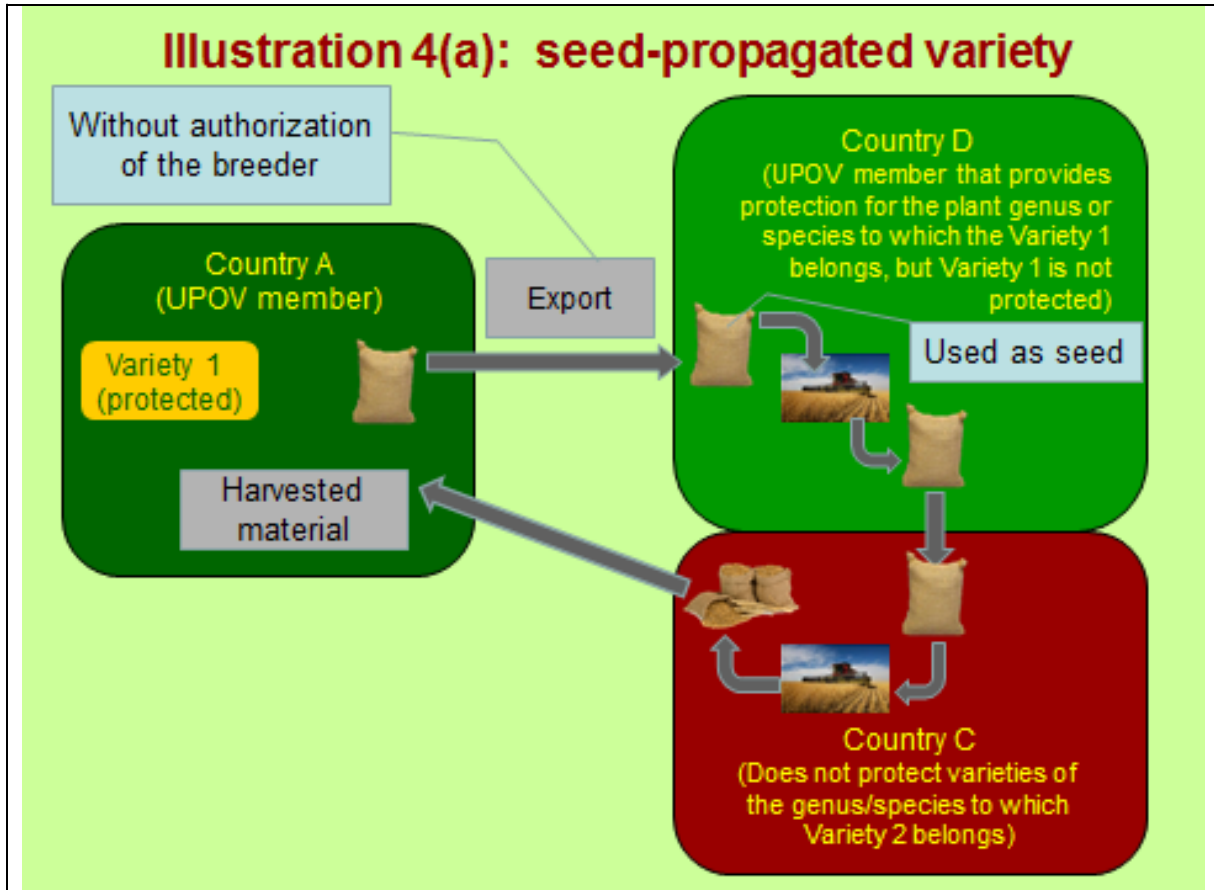
*Proposal Example 3.3: CropLife International<sup>f</sup>*

*“Croplife International has a strong preference for alternative (a), however this should not mean that a breeder has to protect his variety in each and every country where variety protection is possible in order to be able to exercise his rights.”*

*Proposal Example 3.4: ESA<sup>c</sup>*

*“In example 3 there is a text alternative (b) which is not correct since the text in Article 16(1) of UPOV has an ‘OR’ between (i) and (ii) and not an ‘AND’. This implies that if one of those conditions (either (i) or (ii)) is fulfilled there is no exhaustion and in example 3 there is further propagation involved. The same comment applies to text alternative (b) in example 4.”*

Example 4



Alternative (a)

The breeder of Variety 1 can exercise the right in Country A on the imported harvested material if there was unauthorized export of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material (see Article 14(2)).

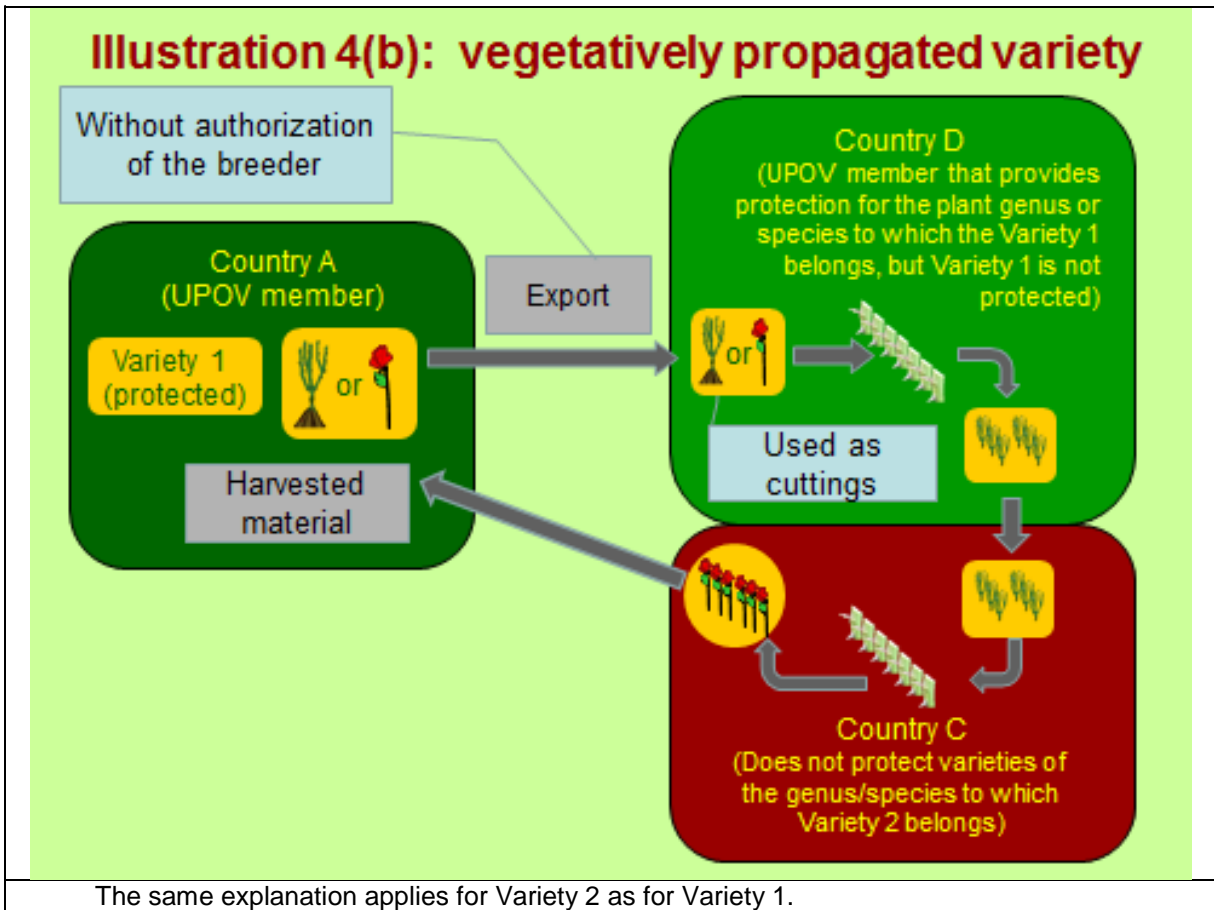
The breeder's right is not exhausted in Country A, because of the following acts<sup>7</sup>:

- 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))

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)).

<sup>7</sup> Provided that the breeder has not given consent for the acts concerned.



*Proposal Example 4.1: Russian Federation<sup>b</sup>*

*“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.”*

*Proposal Example 4.2: United States of America<sup>d</sup>*

*“The breeder of Variety 1 may exercise the right in Country A on the imported harvested material because there was unauthorized export of propagating material, provided that 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)).”*

*(Comment on 4(a):*

*“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).”*

*(Comment on 4(b):*

*“Same as the earlier comments”*

*Proposal Example 4.3: CropLife International<sup>k</sup>*

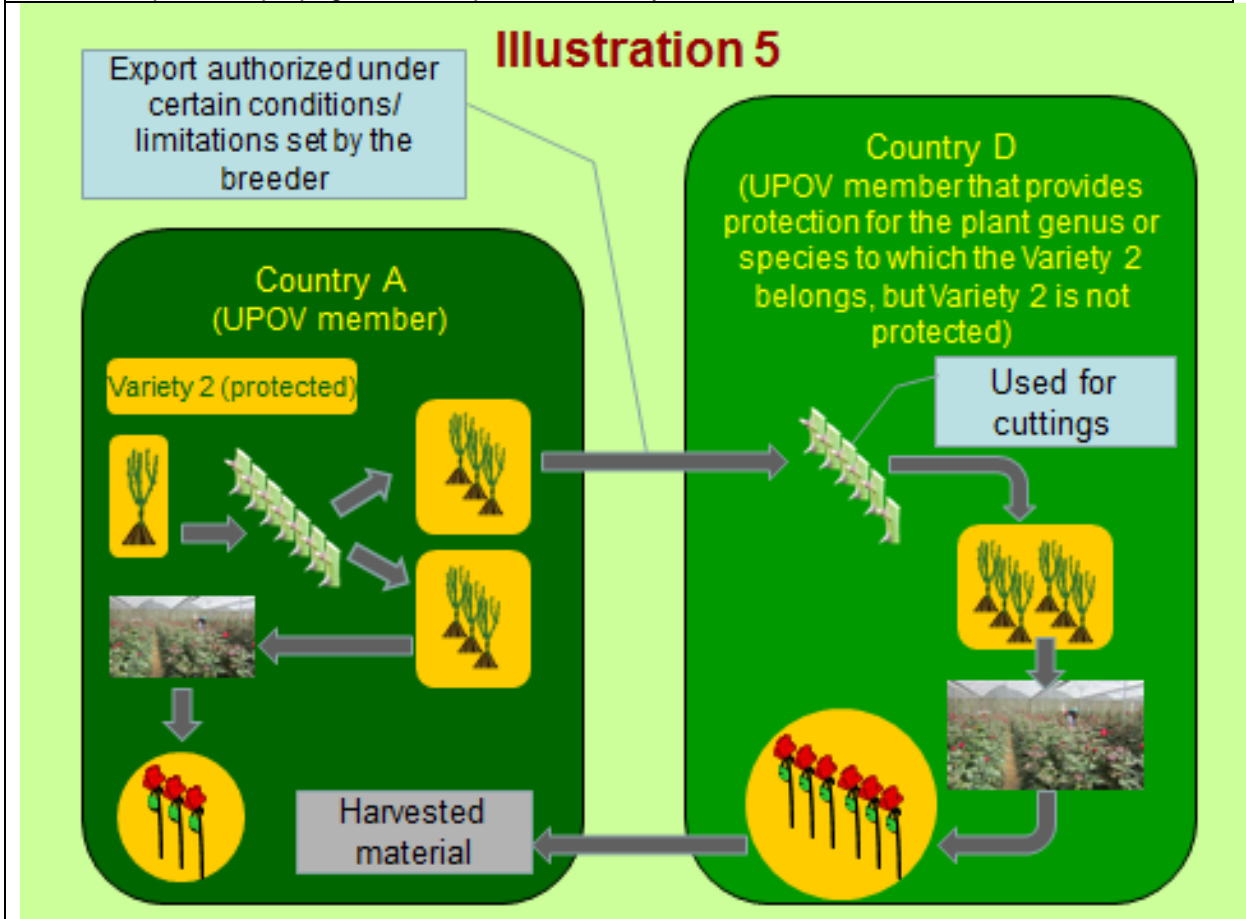
*“Croplife International has a strong preference for alternative (a).”*

*Proposal Example 4.4: ESA<sup>c</sup>*

*“In example 3 there is a text alternative (b) which is not correct since the text in Article 16(1) of UPOV has an ‘OR’ between (i) and (ii) and not an ‘AND’. This implies that if one of those conditions (either (i) or (ii)) is fulfilled there is no exhaustion and in example 3 there is further propagation involved. The same comment applies to text alternative (b) in example 4.”*

Example 5

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 exercise the right on the imported harvested material if there was unauthorized export of propagating material and the breeder did not have a reasonable opportunity in Country A to exercise the right in relation to the export of propagating material.

The breeder's right is not exhausted in Country A, because of further propagation of the variety in question (see Article 16(1)(i)).<sup>8</sup>

<sup>8</sup> Provided that the breeder has not given consent for the acts concerned.

*Proposal Example 5.1: Russian Federation<sup>b</sup>*

*“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.”*

*Proposal Example 5.2: United States of America<sup>d</sup>*

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

*“The breeder of Variety 2 may exercise the right on the imported harvested material because there was unauthorized export of propagating material, provided that 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 may not be exhausted in Country A, because of further propagation of the variety in question (see Article 16(1)(i)).”*

*(Comment:*

*“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).”*

*Proposal Example 5.3: ESA<sup>c</sup>*

*“Example 5 is confusing. The illustration states in a text box in the left upper corner ‘Export authorized under certain conditions/limitations set by the breeder’ but the text below starts the statement that ‘The breeder of variety 2 did not authorize export of plants for further propagation.’ We propose to clarify the apparent contradiction in this example.”*



Example 6

<p>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.</p>
<p>Explanation</p> <p>The breeder of Variety 1 can 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)).</p> <p>The breeder's right is not exhausted because there is "further propagation of the variety in question" (see Article 16(1)(i)).</p>
<p><i>Proposal Example 6.1: Russian Federation<sup>o</sup></i></p> <p><i>"Text 'The breeder's right is not ... in question' (see Article 16(1)(i))' in Example 6 should be deleted.</i></p> <p><i>"Explanation</i></p> <p><i>"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)).</i></p> <p><i>"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."</i></p>
<p><i>Proposal Example 6.2: United States of America<sup>d</sup></i></p> <p><i>"The breeder of Variety 1 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)).</i></p> <p><i>"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."</i></p> <p><i>(Comment on explanation, first paragraph:</i></p> <p><i>"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.")</i></p> <p><i>(Comment on explanation, second paragraph:</i></p> <p><i>"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 breeder's right is not exhausted because there is "further propagation of the variety in question" (see Article 16(1)(i)).']. The fact that the right is not exhausted does not mean that the breeder can exercise his right over the harvested material.")</i></p>
<p><i>Proposal 6.3: APBREBES<sup>n</sup></i></p> <p><i>"The EXN is focusing on international trade issues between countries of differing PBR status. It does nothing to further clarify PBR in relation to harvested material from farm-saved seeds (examples 6 and 7). These examples should be deleted and the EXN focused on international trade issues between countries of differing PBR status."</i></p>

Example 7

<p>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.</p>
<p>Explanation</p> <p>The breeder of Variety 3 can 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)).</p> <p>The breeder's right is not exhausted because there is "further propagation of the variety in question" (see Article 16(1)(i)).</p>
<p><i>Proposal Example 7.1: Russian Federation<sup>b</sup></i></p> <p><i>"It would be more applicable Example 7 to state in the following edition:</i></p> <p><i>"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."</i></p>
<p><i>Proposal Example 7.2: United States of America<sup>d</sup></i></p> <p><i>"The breeder of Variety 3 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)).</i></p> <p><i>"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."</i></p>
<p><i>Proposal 7.3: APBREBES<sup>h</sup></i></p> <p><i>"The EXN is focusing on international trade issues between countries of differing PBR status. It does nothing to further clarify PBR in relation to harvested material from farm-saved seeds (examples 6 and 7). These examples should be deleted and the EXN focused on international trade issues between countries of differing PBR status."</i></p>

- a See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285383.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285383.pdf).
- b See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285393.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285393.pdf).
- c See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285391.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285391.pdf).
- d See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285394.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285394.pdf).
- e See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285389.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285389.pdf).
- f Comment of the United States of America: "Other acts, such as conditioning and stocking are not mentioned here." (see [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285394.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285394.pdf))
- g Comment of the United States of America: "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." (see [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285394.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285394.pdf)).
- h See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285387.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285387.pdf).
- i 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](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."
- j 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](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_268177.pdf))
- k See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285382.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285382.pdf).
- l 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](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[AJ]/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](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."
- m See [http://www.upov.int/edocs/mdocs/upov/en/caj\\_ag\\_13\\_8/caj\\_ag\\_13\\_8\\_www\\_285393.pdf](http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285393.pdf).

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