

Working Group on Harvested Material and Unauthorized Use of Propagating Material
WG-HRV/10/2
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PROPOSALS CONCERNING THE REVISION OF THE EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION
prepared by the Office of the Union
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EXECUTIVE SUMMARY

1. At its ninth meeting, held on March 19, 2026, the Working Group on Harvested Material and Unauthorized Use of Propagating Material (WG-HRV) considered the final study on the “Scope of the Breeder’s Right” and the relationship with the “Exhaustion of the Breeder’s Right” (document WG-HRV/9/2) and agreed that the discussions at the meeting and the information contained in the study provided a good basis for the preparation of proposals for the revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1).

2. The WG-HRV considered matters that would benefit from clarification and agreed to focus on the following topics for its future work:

- (a) the notion of the inseparable whole of the two cumulative preconditions for the extension of the breeder’s right to harvested material conditions in Article 14(2) of the 1991 Act of the UPOV Convention:
 - (i) the unauthorized use of the propagating material of the protected variety requires the authorization of the breeder; and
 - (ii) that the breeder has had “no” reasonable opportunity to exercise the right in relation to the said propagating material;
- (b) the notion of unauthorized use:
 - (i) to explain a situation(s) when harvested material comes back into a territory in which the variety is covered by protection;
 - (ii) to explain a situation(s) when unauthorized use takes place entirely within the territory of protection;
- (c) the notion of reasonable opportunity:
 - (i) if the breeder had a reasonable opportunity to exercise his right commercially; and/or
 - (ii) if the breeder had a reasonable opportunity to enforce his rights by way of legal remedies;
- (d) the notion of the “cascade principle”;
- (e) the notion of exercising the breeder’s right at the earliest possible stage;
- (f) the relationship between Article 14(2) and Article 16 of the 1991 Act of the UPOV Convention on the exhaustion of the breeder’s right.

3. The WG-HRV noted that the list of topics identified above was not exhaustive and agreed that the work should begin with topics for which there was greater opportunity to achieve a common understanding and progressively address more complex or less clear concepts.

4. On that basis, the WG-HRV agreed that the Office of the Union would prepare draft proposals for the revision of document UPOV/EXN/HRV/1 for consideration by the WG-HRV at its tenth meeting.

5. The Annex to this document presents draft proposals prepared by the Office of the Union concerning the revision of document UPOV/EXN/HRV/1, for consideration by the WG-HRV.

6. The WG-HRV is invited to consider the proposals for revision of document UPOV/EXN/HRV/1, presented in the Annex to this document.

[Annex follows]

ANNEX

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

Note for Draft version

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

Highlighted text in grey indicates proposed insertion to the text of document UPOV/EXN/HRV/1.

Highlighted text in yellow indicates references to paragraphs and/or pages of the Study on the “Scope of the Breeder’s Right and the Relationship with the Exhaustion of the Breeder’s Rights” (the “Study”), presented in the Annex of document [WG-HRV/9/2](#), or to the [Records of the Diplomatic Conference of 1991](#).

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

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on the scope of the breeder's right concerning acts in respect of harvested material (Article 14(2) of the 1991 Act) under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

ACTS IN RESPECT OF HARVESTED MATERIAL

(a) Relevant article

Article 14 of the 1991 Act of the UPOV Convention

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[...]

1. Article 14(2) of the 1991 Act requires that, in order for the breeder's right to extend to acts in respect of harvested material, the harvested material must have been obtained through the **unauthorized use** of propagating material **and** that the breeder must not have had **reasonable opportunity** to exercise his right in relation to the said propagating material. ~~The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity".~~

(b) The "cascade principle": exercising the breeder's right at the earliest possible stage

2. The "cascade principle" establishes a structured and stepped approach to the exercise of the breeder's right, whereby the acts that require the authorization of the breeder extend progressively from propagating material (Article 14(1) of the 1991 Act) to harvested material (Article 14(2) of the 1991 Act) and, subsequently, if the optional provision under Article 14(3) of the 1991 Act applies, to products made directly from harvested material of the protected variety. The "cascade principle" conditions each step of exercising the right on the lack of reasonable opportunity to exercise the right at the previous step thereby creating a hierarchy.

3. This principle serves two primary objectives: firstly, it ensures that exercising the right remains proportionate and secondly, it contributes to legal certainty by preventing arbitrary or retroactive strategies. The principle contributes to avoiding uncertainties in production and in the market. It builds trust amongst the stakeholders in the value chain, as the breeder may not choose arbitrarily the stage at which the breeder's right is exercised. The breeder's right over harvested material or products made from harvested material is conditional on the lack of a reasonable opportunity to act earlier.

4. Under the cascade principle set forth in Article 14 (2) and (3) of the 1991 Act, the breeder can exercise the right and receive the corresponding remuneration or royalty once only, subject to possible conditions and limitations established by the breeder under Article 14(1)(b) of the 1991 Act.

Conclusions 5, 6 and 12 of the Study, pages 40 and 41.

Study: paragraph 7.2 page 12; footnote 32 page 16; paragraph 9.5.2 page 21; paragraph 10.4 page 24; paragraph 13 page 28; paragraphs 20 to 23 pages 30 and 31; paragraph 18 page 30.

~~(b)~~(c) Harvested material

2.5. 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.

3.6. 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.

~~(c)~~(d) Unauthorized use of propagating material

Principle of territoriality

7. The scope of the breeder’s right of Article 14 (1) and (2) of the 1991 Act and, if applicable the optional provision under Article 14(3) of the 1991 Act, relate to the “protected variety” and the varieties covered by the scope (Article 14(5) of the 1991 Act). That variety or varieties covered by the scope are protected in the territory of the Contracting Party in which the breeder’s right has been granted. The assessment as to whether there was unauthorized use of the propagating material of the protected variety or varieties covered by the scope, as well as whether the breeder had a reasonable opportunity to exercise the right in relation to the said propagating material, is made under the law of the Contracting Party where the protection is valid.

Study: paragraph 2.2 page. 6; paragraph 4 page 7.

Acts in respect of propagating material

4.8. “Unauthorized use” refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder’s right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. ~~Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force.~~

Conclusion 2 of the Study, page 39.

5.9. With regard to “unauthorized use”, Article 14(1)(a) of the 1991 Act of the UPOV Convention states that “Subject to Articles 15 [Exceptions to the Breeder’s Right] and 16 [Exhaustion of the Breeder’s Right], the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating material in the territory concerned, where such authorization was not obtained.

6.10. 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

7.11. 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.

12. Such “unauthorized use” would include, for instance, import of harvested material, if such import is not allowed subject to conditions and limitations established by the breeder under Article 14(1)(b) of the 1991 Act.

Conclusion 7 of the Study, page 40.

8-13. Document UPOV/EXN/CAL “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”, provides guidance concerning the conditions and limitations to which the breeder’s authorization may be subject, for acts in respect of propagating material under the UPOV Convention.

Compulsory exceptions to the breeder’s right

9-14. 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

10-15. 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.

11-16. 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)(e) Reasonable opportunity to exercise his right

12-17. 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.

13-18. The term “his right”, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 4-8 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*.

19. The term “reasonable opportunity” was adopted as a compromise at the 1991 Diplomatic Conference, during which stricter proposals, such as “no legal possibility” or “in spite of all due care” were also discussed. The term aimed to ensure a flexible, context-sensitive application while preserving the “cascade principle” structure. The primary function to introduce the term “reasonable opportunity” was to ensure proportionality and to prevent retroactive claims (see paragraph 3). The reference to “exercise his right” may include both commercial acts upstream (e.g. licensing or royalty collection) and enforcement (e.g. legal remedies) depending on the case at hand.

Conclusions 4, 8, 9 and 10 of the Study, pages 39 to 41.

(f) The notion of the inseparable whole of the two cumulative preconditions for the extension of the breeder's right to harvested material in Article 14(2) of the 1991 Act

20. The two preconditions for the extension of the breeder's right to harvested material, i.e. "unauthorized use" of the propagating material of the protected variety, and that the "breeder has had [no] reasonable opportunity to exercise the right in relation to the said propagating material", in Article 14(2) of the 1991 Act constitute an inseparable whole. This means that the two preconditions are cumulative and that both would need to be demonstrated to exercise the right in relation to the harvested material.

Conclusion 3 of the Study, page 39.

Study: paragraph 7 page 9; paragraph 9.4 page 20; paragraph 10.3 pages 23 and 24.

Records of the Diplomatic Conference of 1991: paragraph 1529.5 page 403.

(g) The relationship between Article 14 and Article 16 of the 1991 Act

21. The general principle of exhaustion of the breeder's right is that once material of the variety has been sold or otherwise marketed by the breeder or with their consent in the territory concerned, the breeder's right is exhausted, except in cases when further propagation of the material takes place.

Study: paragraph 2 page 33.

22. The two exceptions to the principle of exhaustion, under Article 16(1)(i) and (ii) of the 1991 Act, relate to the use for further propagation of the variety and the export of material that can be used as propagating material, to 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".

Conclusion 13 of the Study, page 41.

23. The following might be considered regarding the relationship between Article 14 and Article 16 of the 1991 Act:

- (a) Where in accordance with Article 16 of the 1991 Act, the breeder's right to material of a protected variety is exhausted, Article 14 of the 1991 Act cannot be invoked by the breeder in relation to said material or any material derived from the said material.
- (b) In case of material that is further propagated from the above-mentioned material, and in case such material has been sold or otherwise marketed, the breeder's right is not exhausted in relation to the further propagated material (the right "revives").
- (c) If propagating material, or material that can be used as propagating material, of a protected variety in country A, is sold to a party X in country A, that exports this material to country B, which does not protect varieties of the plant genus or species to which the variety belongs, the breeder's right in relation to the specific propagating material, or material that can be used as propagating material, sold to party X, is exhausted in country A. The right to harvested material from the mentioned material in country B, is not exhausted in country A. Article 14(2) can be used to prevent import to country A of the mentioned harvested material produced in country B, as the production of the harvested material has not been authorized and the breeder had no reasonable opportunity to exercise the right in country B.
- (d) The breeder may make the authorization in relation to the use of the protected propagating material subject to conditions and limitations pursuant to Article 14(1)(b) of the 1991 Act. Such limitations may relate to any act mentioned in Article 14(1) of the 1991 Act, including import and export restrictions in relation to the propagating material and/or the harvested material produced by using the propagating material.

Conclusion 15 of the Study, pages 41 and 42.

The situations below are presented for discussion purposes by the WG-HRV and not as proposals to be added to the revision of document UPOV/EXN/HRV/1, unless otherwise agreed by the WG-HRV (Q1-Q5 are built on each other).

Use takes place entirely within the territory of protection – is it unauthorized?

A nursery in country X purchases 10 rose rootstocks (propagating material) of variety A from the breeder of variety A, in country X where variety A is protected.

Q1: Can the nursery sell cut flowers of variety A to a supermarket?

A1: Yes, the breeder sold the propagating material to the nursery (i.e. authorization) and the breeder had a reasonable opportunity to exercise their right (to sell or not to sell) in relation to the propagating material.

Q2: Can the nursery multiply and create 10 new rose rootstocks, and then sell cut flowers from the new rootstocks to the supermarket?

A2: No, there was unauthorized multiplication of the new 10 rootstocks, and the breeder did not have a reasonable opportunity to exercise their right in relation to the multiplication of the new 10 rootstocks, as the breeder was not aware of this act.

Q3: Can the nursery, instead of planting the 10 first rootstocks, sell these first root stocks to nursery number 2 in country X.

A3: Yes, the breeder's right to the 10 first rootstocks is exhausted, unless the breeder had made their authorization subject to export restrictions pursuant to Article 14(1)(b) of the 1991 Act.

Use when a variety is imported into a country which does not protect varieties of the plant genus or species to which the variety belongs – is it unauthorized?

Q4: Can nursery number 2 in country X, sell the 10 first rootstocks to nursery number 3, in country Y, which does not protect varieties of the plant genus or species to which the variety belongs?

A4: Yes, the breeder's right to the 10 first root stocks is exhausted, unless the breeder had made their authorization subject to export restrictions pursuant to Article 14(1)(b) of the 1991 Act.

Use when a variety is imported into a territory in which the variety is covered by protection – is it unauthorized?

Q5: Can nursery number 3 in country Y, grow cut flowers from the 10 first root stocks, and sell the cut flowers to a supermarket in country X, where the variety is protected.

A5:

- The right to the cut flowers is not exhausted within the meaning of Article 16 of the 1991 Act, as only the right to the first root stocks is exhausted.
- The breeder can exercise the right in country X to prevent imports of the cut flowers to country X from country Y, as the breeder did not authorize the multiplication and/or the import and the breeder did not have the reasonable opportunity to exercise the right in country X, for acts carried out in country Y.

[End of Annex and of document]