

Working group on harvested material and unauthorized use of propagating material

WG-HRV/2/4 Corr..

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

Document prepared by the Office of the Union

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1. The Working group on harvested material and unauthorized use of propagating material (WG-HRV), at its first meeting held by electronic means on March 15, 2022, considered document WG-HRV/1/4 “Proposals concerning the Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” and agreed the following (see document WG-HRV/1/6 “Report”, paragraphs 11 to 13, reproduced below):

“11. The WG-HRV agreed that the following matters should be considered in relation to a revision of the Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention:

General	to replace “his right” by “their right” in relevant parts of the document, unless it is a quote from Article 14(2) of the 1991 Act of the UPOV Convention.
Paragraph 1	To add footnote 1 after “breeder”, based on the following text “ <u>For the purpose of this EXN the term ‘Breeder’ includes both the breeder according to Article 1 iv of the UPOV 1991 Act and the title holder, as the case may be.</u> ” and in accordance with the wording used in UPOV guidance documents.
Paragraph 3	to change as follows: “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. <u>When harvested material has the potential to be used as propagating material, it can be considered as propagating material.</u> ”

“12. The WG-HRV considered the proposals and comments in relation to document WG-HRV/1/4, Annex, section “(c) Unauthorized use of propagating material” and agreed to discuss the following matters at its next meeting:

(a) the cascade principle under the “Scope of the Breeder’s Right”, in Article 14 of the 1991 Act, and its relationship with the provisions on the “Exhaustion of the Breeder’s right”, under Article 16 of the 1991 Act;

(b) the history of those provisions, including the notion of “unauthorized use”, under Article 14(2) and the notion of “consent” under Article 16; and

(c) clarifications on where the use had taken place and where the right can be exercised.

“It was agreed that the Office of the Union would collate information that members of the WG-HRV wished to share on the above topics and would provide background information on the above provisions as the basis for the discussion at the second meeting of the WG-HRV.

“13. The WG-HRV considered the proposals and comments in relation to document WG-HRV/1/4, Annex, section “(d) Reasonable opportunity to exercise his right” and agreed to consider that matter further at the second meeting of the WG-HRV. It was agreed that illustrative examples of how the provision of information could work in practice would facilitate the discussions.”

2. The WG-HRV, at its first meeting, agreed to invite additional comments on documents WG-HRV/1/3, WG-HRV/1/4 and WG HRV/1/5 within six weeks after its first meeting (see document WG-HRV/1/6 "Report", paragraph 15 and UPOV Circular E-22/058 of April 12, 2022).
3. In reply to UPOV Circular E-22/058, proposals for a revision of document UPOV/EXN/HRV/1 were received from New Zealand and the International Association of Horticultural Producers (AIPH).
4. In the Annex to this document, the proposals agreed at the first meeting and the proposals received in reply to Circular E-22/058 have been introduced in boxes in the text of document UPOV/EXN/HRV/1 with endnotes to provide background information. When the new proposals relate to previous proposals made in reply to Circular E-21/228 of November 18, 2021, the previous proposals have been kept in italics for ease of reference.

[Annex follows]

ANNEX

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

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Note

Proposals agreed by the WG-HRV at its first meeting are presented in the text of document UPOV/EXN/HRV/1 in revision mode.

Proposals received in reply to UPOV Circular E-22/058 of April 12, 2022, on document UPOV/EXN/HRV/1, are presented in boxes. *When those new proposals relate to previous proposals made in reply to Circular E-21/228 of November 18, 2021, the previous proposals have been kept in italics for ease of reference.*

Endnotes provide background information.

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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^{1 a} must not have had **reasonable opportunity** to exercise ~~his~~ **their**^b right in relation to the said propagating material. The following paragraphs provide guidance in relation to "unauthorized use" and "reasonable opportunity".

(b) Harvested material

2. The UPOV Convention does not provide a definition of harvested material. However, Article 14(2) of the 1991 Act refers to "[...] harvested material, *including entire plants and parts of plants*, obtained through the unauthorized use of propagating material of the protected variety [...]", thereby indicating that harvested material includes entire plants and parts of plants obtained through the use of propagating material.

¹ The term "breeder", includes the notion of applicant and holder of the breeder's right, in accordance with the definition of "breeder" in Article 1(iv) of the 1991 Act of the UPOV Convention which is:

"– 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"

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. When harvested material has the potential to be used as propagating material, it can be considered as propagating material.^c

Proposals from New Zealand^d

In relation to the above change to paragraph 3 proposed in WG-HRV/1/6 "Report" paragraph 11, New Zealand made the following comment:

"The highlighted section is an addition however if the proposed basis begins with all plant material is propagating material, then such a sentence may become unnecessary.

To adopt the starting point that all plant material is propagating material, unless demonstrated otherwise, and reorientate the revision towards guidance regarding when material becomes harvested material is something of a change in approach but not entirely in substance. Such an approach is consistent with Article 14 (2) and 16 (2), which both refer to harvested material to include entire plants and parts of plants. To take the revision in this direction may pose difficulties for member states with definition of propagating and/or harvested material in individual national law that may not be able to accommodate such an approach in the Explanatory Note.

The Convention was drafted at a time when there was a much clearer distinction between harvested and propagating material. Thirty years on that is no longer the situation and explanatory notes must not only reflect the Convention but also current practice and commerce."

(c) Unauthorized use of propagating material

Acts in respect of propagating material

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

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^e

Paragraph 4 to be changed as follows: "Authorization is the clear manifestation of an act of will from the side of the breeder. Therefore, 'Unauthorized use' refers to the acts in respect of the propagating material that require the, where no such explicit authorization of the holder of the breeder's right in from the territory concerned (Article 14(1) of the 1991 Act), but where such authorization breeder 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.

"The 'Unauthorized use' condition should be construed to mean that the propagating material has been used without formal prior consent of the breeder.

"The breeder normally doesn't have any possibility to trace the origin of the harvested material to verify whether it has been produced from unauthorized propagating material at a given time and in a given territory.

"Therefore, those who are trading/exporting/importing the harvested material shall provide upon request from the breeder and/or other stakeholders (e.g., courts, enforcement authorities, PVP offices) the evidence they must have available, establishing that the harvested material has been obtained from an authorized use of the propagating material of the protected variety or of a variety that has been applied for protection.

"Accordingly, anyone dealing with the harvested material of a protected plant variety is obliged to check or to have checked in the supply chain and prove that it has been obtained from an authorized use of the propagating material of that variety. It is not up to the breeder to prove that s/he has not given the authorization (impossible to prove that an act has not taken place, whilst easy for someone to show that s/he has been authorized to do something)."

Proposals from AIPH^f

In relation to paragraph 4, AIPH made the following general comment:

“AIPH emphasizes the so called cascade-principle of art 14 sub 2 has to be clarified in the EXN. So, it is important to go back to the History of the protection of harvested material in UPOV Convention 1991. Huib Ghijsen (former representative of ISF in UPOV) has written a valuable paper about this History and the document is introduced by AIPH in the virtual meeting of the WG-HRV on 15 March 2022. This paper makes clear that the term “authorization” was not intended to be used solely as an exclusive permission based on a formal right like an PVR. It was only the intention to force the breeder to exercise his rights first on the propagating material and, only if he could not do so, then to exercise his rights on the harvested material. It needs no further arguments that this is a condition for a smooth working production and trade chain. In the diplomatic conferences of UPOV 1991, it was the German delegation who proposed an amendment (report CAJ/XXV/2, October 1989) containing this obligation to the breeder to exercise his right at first at the propagating material, before exercising it on harvested material. In the June 1990 meeting of the CAJ a key discussion took place concerning the position of the harvested material, on which basis the Office of the Union submitted a further proposal drafted as we know now in the current text of art 14, sub 2, (act in respect of harvested material) speaking about *authorization* whereas the original draft was based on the notion of *consent*.

The history and the development of the 1991 UPOV Convention, shows the strong wish to strengthen and improve the Breeder's Right by extending the protection to all commercial material of plant varieties and at the same time, to formulate the scope of protection such that the breeder is obliged to exercise his right first on the propagating material and in the case he is not able to do so, for example if he has no right in a given territory, he may exercise his right on the harvested material. As a result, paragraph 2 of article 14 must be interpreted such that the 'unauthorized' use of propagating material includes also this use 'without the consent' of the owner of the variety.

In other words: the cascade article 14, sub 2, is a kind of exhaustion rule as well: first, the breeder has to try exercising his right on the propagating material. Secondly, in the cases he was not able to do so reasonably, on the harvested material. Exercise his right on the harvested material will in practice mean enforcing his right.

With this interpretation the so-called U-turn constructions (reproducing the variety in a neighboring country, where the variety could not be or was not protected, harvest the fruits or the flowers from the reproduced material and import those products into the country where the variety was only protected by its reproductive material), are avoided as well. “

Following the above general comment. AIPH made these specific proposals on the last two paragraphs in the box above [see above proposals on paragraph 4 from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA]:

“Therefore, those who are trading/exporting/importing the harvested material shall provide upon request from the breeder and/or other stakeholders (e.g., courts, enforcement authorities, PVP offices) the evidence they must have available, establishing that the harvested material has been obtained from ~~an authorized~~ use of the propagating material of the protected variety which was based on a specific and explicit consent by the breeder. The same should apply to ~~or of~~ a variety that has been applied for protection.”

Accordingly, anyone dealing with the harvested material of a protected plant variety is obliged to check or to have checked in the supply chain and prove that it has been obtained from ~~an authorized~~ use of the propagating material of that variety which was based on a specific and explicit consent of that use by the breeder. It is not up to the breeder to prove that s/he has not given the ~~authorization consent~~ (impossible to prove that an act has not taken place, whilst easy for someone to show that s/he has been ~~authorized to permitted~~ to do something)”

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

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

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

Proposals from Japan^g

Paragraph 5 to be changed as follows: “(...)

“In relation to ‘unauthorized use’ of propagating material, the acts such as planting and growing (cultivation) the propagating material of the protected variety for the purpose of producing harvested material would also require the authorization of breeder.

“Thus, subject to Articles 15 and 16, ‘unauthorized use’ refers to the acts listed in (i) to (vii) above in respect of propagating material and the relevant acts such as planting and growing (cultivation) the propagating material for the purpose of producing harvested material in the territory concerned, where such authorization was not obtained.”

Proposals from AIPH^h

In relation to paragraph 5, AIPH made the following comment regarding the proposal of Japan in the box above:

“The proposal of Japan could be defined as a wish to extend the scope of plant breeders right, namely to add the acts *planting and growing (cultivation)* to the acts, who require authorization of the right holder, as formulated in Article 14(1)(a) (i) to (vii).

AIPH would give in consideration that a legal foundation for such an extent might fail, because: 1) it does not see a base for it in the records of the Diplomatic Conference for the Revision of the UPOV Convention in March, 1991 and 2) it considers the revision of the said explanatory notes not to be the legally correct moment and place to enlarge the scope of the plant breeders right.”

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAAⁱ

Paragraph 5 to be changed as follows: ~~“Thus, subject to Articles 15 and 16, “unauthorized use” refers to the acts listed in (i) to (vii) above in respect of propagating material in the territory concerned, where such authorization was not obtained.”~~

6. For example, in the territory of a member of the Union where a breeder’s right has been granted and is in force, unauthorized export of propagating material would be an unauthorized act.

Proposals from the Netherlands^j and AIPH^k

Paragraph 6 to be changed as follows: “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 or import of propagating material would be an unauthorized act.

“As soon as material of the protected variety has been sold or otherwise marketed by the right holder or with his consent, the right becomes exhausted in relation to the material concerned.

“If harvested material is imported in a territory, whereby the use of the propagating material and consequently the production of harvested material have both taken place outside the territory of import, and there has been no act of authorization by the right holder in the territory of import, the use of the propagation material can be considered to be unauthorized.”

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^l

Paragraph 6 to be changed as follows: “For example, in the territory of a member of the Union where a breeder’s right has been granted and is in force (Country A), unauthorized export of propagating material would be an unauthorized act. Likewise, if the propagating material of a variety has been imported in a given territory without the authorization of the breeder, and is multiplied and/or sold, in that territory (Country B) where the variety is not protected then, any activity performed that is listed in Article 14(1)(a) of the 1991 Act of the UPOV Convention shall be regarded as unauthorized. This does not mean that the breeder of the right in Country A can invoke the right granted in Country A in relation to the use of propagating or harvested material of the variety in Country B. However, for the purpose of assessing whether the condition in Article 14.2 of the Convention ‘obtained through the unauthorized use of the propagating material’ is met, in a case relating to import from Country B to Country A, the initial export from Country A mentioned above shall be considered as unauthorized.”

Proposal from AIPH^m

In relation to paragraph 6 and to the proposals in the previous boxes, AIPH made the following comment:

“to facilitate the discussions: both texts in the two previous boxes aim the same results.”

Conditions and limitations

7. Article 14(1)(b) of the 1991 Act of the UPOV Convention further states that “[t]he breeder may make his authorization subject to conditions and limitations”. Thus, subject to Articles 15 and 16, “unauthorized use” also refers to the acts listed in Article 14(1)(a) (i) to (vii) that are not undertaken in accordance with the conditions and limitations established by the breeder.

Proposals from Japanⁿ

Paragraph 7 to be changed as follows: “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) and the relevant acts that are not undertaken in accordance with the conditions and limitations established by the breeder.

“For example, if the breeder puts conditions and limitations to produce harvested material in authorizing his right in respect of propagating material, the production of harvested material would be an unauthorized use.”

Proposals from AIPH^o

In relation to paragraph 7, AIPH made the following general comment:

“to facilitate the discussions:

What exactly does Japan mean by “the relevant acts”? Does it refer to UPOV article 14, 1 sub b (breeder may make his authorization subject to conditions and limitations)? If so, this could be clarified by an explicit referral to article 14, 1 sub b.

Examples:

- breach of an (license-) agreement in a country without a PVR-system
 - breach of PVR-rights in the situation that an (license-) agreement does not exist at all.
- These cases are ‘unauthorized’ as well.”

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^p

Paragraph 7 to be changed as follows: “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) and the relevant acts that are not undertaken in accordance with the conditions and limitations established by the breeder.

“For example, if the breeder puts conditions and limitations to produce harvested material in authorizing the right in respect of propagating material, the production of harvested material in breach of those conditions and limitations should be considered as unauthorized use.”

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

Proposals from the Netherlands^q and AIPH^r

Paragraph 8 to be changed as follows: “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 conditions and limitations according to which a breeder may authorize the acts (UPOV article 14, par.1) in respect of the propagating material are a matter for the breeder to decide. Any act of the licensee which isn’t in accordance with the aforementioned conditions and limitations will be considered as unauthorized use.”

Compulsory exceptions to the breeder's right

9. Document UPOV/EXN/EXC "Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention", Section I "Compulsory Exceptions to the Breeder's Right", provides guidance on the provisions for the compulsory exceptions to the breeder's right provided in Article 15 (1) of the 1991 Act of the UPOV Convention. "Unauthorized use" would not refer to acts covered by Article 15 (1) of the 1991 Act of the UPOV Convention.

Optional exception to the breeder's right

10. Article 15(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. 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.

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^s

Paragraph 11 to be changed as follows: "Where a member of the Union ~~decides to incorporate this optional~~ allows de jure or de facto such an exception into its PVP legislation, 'unauthorized use' would not refer to acts that were covered by the optional exception provided that the conditions to define the reasonable limits and safeguard the legitimate interests of the breeder, are in place and have been complied with by the propagating material used to obtain the harvested material. However, subject to Articles 15(1) and 16, 'unauthorized use' would refer to acts that were included in the scope of the breeder's right and were not covered by the optional exception in the legislation of the member of the Union concerned. In particular, 'unauthorized use' would refer to acts that did not comply with the reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception."

(d) Reasonable opportunity to exercise ~~his~~ their^t right

12. The provisions under Article 14(2) of the 1991 Act mean that breeders can only exercise their rights in relation to the harvested material if they have not had a "reasonable opportunity" to exercise their rights in relation to the propagating material.

Proposals from ISF, CIOFORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^u

Subtitle (d) to be changed as follows: "Reasonable opportunity to exercise ~~his~~ the right"

Footnote 2 in paragraph 12: "Article 14(2) lies on the assumption that harvested material obtained through the unauthorized use of propagating material is unlawful, unless proven otherwise (i.e., reasonable opportunity did exist). For the breeder, establishing the absence of a 'reasonable opportunity', which is a negative proof (i.e., reasonable opportunity is not...), is impossible since only that which exists will have evidence of its existence. Making a negative claim requires to prove nonexistence which is logically impossible and legally unjustifiable.

"Based on the above, the breeder is only able to prove the absence of 'reasonable opportunity to exercise his right in relation to the said propagating material' in two manners: Either by a statutory declaration of the breeder affirmatively stating the absence of 'reasonable opportunity', or by showing the absence of legal grounds and/or measures for enforcing one's breeder's rights.

"Therefore, the absence of a reasonable opportunity may be assumed, and it will be up to the alleged infringer to prove to the contrary that the breeder did in fact have a reasonable opportunity to exercise the right."

13. The term "his right", in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned (see paragraph 4 above): a breeder can only exercise ~~his~~ their right in that territory. Thus, "exercise his right" in relation to the propagating material means to exercise ~~his~~ their right in relation to the propagating material *in the territory concerned*.

Proposals from Japan^x

"Regarding the proposal from ISF, CIOFORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA, "The term 'his right', in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned where the propagating material is used", Japan has concerns.

It is considered that, this proposal does not always apply to all member countries, just to the countries within Intergovernmental Organization, such as European Union. So, original text should retain. New text should be written separately, if necessary."

Proposals from the Netherlands^y and AIPH^z

Subsection (d) "Reasonable opportunity to exercise his right" to be changed as follows:

"His right

"~~13. 12.~~ 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.

"~~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.

"Reasonable opportunity

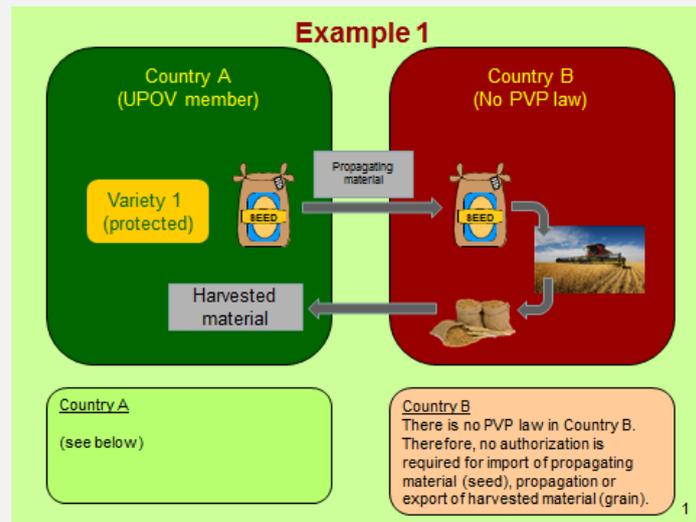
"14. A right holder cannot be considered to have had reasonable opportunity to exercise his (territorial) right against imported harvested material, when this harvested material is imported in the territory concerned and where the use of propagating material and consequently the production of harvested material were taking place outside this territory. On the grounds of article 16 sub (1) (i) of the 1991 Act the scope of the right – and the acts of article 14, par. 1 – can't cover other territories than the territory concerned.

"15. Article 14, par. 1 or 2 UPOV doesn't impose an obligation to the right holder to actively apply for plant breeders rights protection across the world. That would not be a reasonable requirement and hence could not mount to a reasonable opportunity.

"16. The requirement of reasonable opportunity implies that the right holder a) had knowledge of the alleged unauthorized use of the propagating material and b) that there are means to exercise his right.

"17. Exercise his right means a right has been granted. Only in that case one can enforce his right.

“18. As soon as the right is granted it can be exercised. Whether the right can be exercised in respect to harvested material will depend on whether the use of the propagating material - that led to the production of the harvested material - can be considered as unauthorized.”



Example 1

“Unauthorized import of harvested material from country B to country A

“The right holder of Variety 1 can exercise his right on the imported harvested material if the harvested material is put on the market in the territory concerned (Country A) for the first time. There is no exhaustion of the right on the grounds of article 16 UPOV if the rights holder didn't give his consent for the “act” of import of the harvested material.”

Example 2

“One of the acts of article 14, par. 1 UPOV concerns to harvested material (within the same territory/region)

“The same situation except for the fact that:

“a) Legal entity A and Legal entity B are established in the same region/ territory (article 16, 3 UPOV), for example the European Union. It can be compared with the situation that in one territory (one Country) one of the acts of article 14 UPOV, par. 1 takes place regarding propagation and harvested material.”

“b) Legal entity B uses propagating material to produce a harvest of Variety 1 of Legal entity A without the consent of A and sells or markets the harvested material to another Legal person in the same territory.”

“In that case there is an infringement of the right of Legal entity A by Legal entity B if

“a) the harvest is obtained by use of the propagating material of A without his authorization.”

“b) and A didn't have a reasonable opportunity to exercise his right in relation to the propagating material concerned.”

“Legal basis example 2:

“a) there is no exhaustion of the right because the harvested material is put on the market without consent (article 16, par. 1 en 2 UPOV)

“b) article 14, par. 2 UPOV applies regarding the selling or marketing of the harvested material.”

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^{aa}

Paragraph 13 to be changed as follows: “The term ‘his right’, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory ~~concerned~~ where the propagating material is used (see paragraph 4 above): a breeder can only exercise his the right in that territory. Thus, ‘exercise his right’ in relation to the propagating material means to exercise his the right in relation to the propagating material in the territory concerned.”

Proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA^{bb}

To add new paragraph after paragraph 13 as follows: “In order to decide whether the breeder has had a reasonable opportunity to exercise the rights in the territory where the unauthorized use of the propagating material of the protected variety took place the following should be considered:

- The chronology of the events is important. It has to be established if at the time the breeder enforced the rights in relation to the harvested material, the breeder had knowledge of the unauthorized use of the propagating material of the variety and if the breeder had had a reasonable opportunity to oppose the unauthorized use, based on the applicable law and jurisprudence in the territory.
- The place of events can be relevant. In case the use of the propagating material took place in a different territory than the territory in which the harvested material is being used without the breeders' authorization, the breeder may decide to enforce the right in the territory where the harvested material is being used. Since the action against the user of the harvested material will be decided under the laws of the country in which the harvested material was used, the lack of reasonable opportunity to exercise the right in that territory in relation to the propagating material should be considered as established.

The proposals made are without prejudice to the scope of the exemptions as laid down in the UPOV Convention, and to the principle of exhaustion.”

Proposals from AIPH^{cc}

In relation to paragraph 13, AIPH made the following comments:

“General comment by AIPH to facilitate the discussions:

One could conclude that the text in the joint breeders block and the text (including schematic examples) in the NL and AIPH block has the same meaning and intention. Nevertheless, AIPH does prefer the suggestion and examples of NL and AIPH, as in the latter's opinion they create more practical clarification.”

In relation to the previous comment from AIPH (see above paragraph 16 reproduced below):

“16. The requirement of reasonable opportunity implies that the right holder a) had knowledge of the alleged unauthorized use of the propagating material and b) that there are means to exercise his right.”

“AIPH suggests to replace the previous sentence by the following sentence: Reasonable opportunity means that the holder of the right did have or should have had the possibility to exercise this right on the propagating material. If the right was not (yet) granted or the propagating material was used without his consent, he did not have such opportunity.”

[Endnotes follow]

ENDNOTES

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- ^a see document WG-HRV/1/6 "Report", paragraph 11.
- ^b see document WG-HRV/1/6 "Report", paragraph 11.
- ^c see document WG-HRV/1/6 "Report", paragraph 11.
- ^d The proposal from New Zealand, in reply to Circular E-22/058, is available at https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ^e The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^f The proposals from AIPH, in reply to Circular E-22/058, are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ^g The proposals from Japan are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563724
- ^h The proposals from AIPH, in reply to Circular E-22/058, are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ⁱ The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726.
- ^j The proposals from the Netherlands are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563737
- ^k The proposals from AIPH are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563725
- ^l The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^m The proposals from AIPH, in reply to Circular E-22/058, are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ⁿ The proposals from Japan are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563724
- ^o The proposals from AIPH, in reply to Circular E-22/058, are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ^p The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^q The proposals from the Netherlands are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563737
- ^r The proposals from AIPH, in reply to Circular E-22/058, are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ^s The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^t see document WG-HRV/1/6 "Report", paragraph 11.
- ^u The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^v see document WG-HRV/1/6 "Report", paragraph 11.
- ^w see document WG-HRV/1/6 "Report", paragraph 11.
- ^x The proposal from Japan, in reply to Circular E-22/058, is available at https://www.upov.int/meetings/en/details.jsp?meeting_id=70188
- ^y The proposals from the Netherlands are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563737
- ^z The proposals from AIPH are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563725
- ^{aa} The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^{bb} The proposals from ISF, CIOPORA, CropLife International, Euroseeds, APSA, AFSTA, and SAA are available at: https://www.upov.int/meetings/en/doc_details.jsp?meeting_id=67773&doc_id=563726
- ^{cc} The proposals from AIPH, in reply to Circular E-22/058, are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70188

[End of Annex and of document]