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STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”
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BACKGROUND

1. The purpose of this document is to invite the Working Group on harvested material and unauthorized use of propagating material (WG-HRV) to consider the authors’ final version of the study on the “Scope of the Breeder’s Right” and the relationship with the “Exhaustion of the Breeder’s Right”.
2. The presentation of the draft study made by Mr. Huib Ghijsen at the eighth meeting¹ of the WG-HRV, focused on the preliminary analysis of the intentions of the drafters of the 1991 Convention on the notions of “unauthorized use” and “reasonable opportunity”. He mentioned that the relationship with the “Exhaustion of the Breeder’s Right” in Article 16 of the 1991 Act as well as summaries of relevant court cases from UPOV members bound by the 1991 Act would be part of the final version of the study.
3. The WG-HRV, during its eighth meeting, agreed that the final version of the study be delivered on December 15, 2025, to the Office of the Union. It was agreed that the study will be made available to the WG-HRV in January 2026, giving the WG-HRV time to consider the final version of the study before the ninth meeting of the WG-HRV.
4. The final version of the study provided by the authors is reproduced in the Annex to this document.
5. *The WG-HRV is invited to consider the final version of the study provided in the Annex to this document.*

[Annex follows]

¹ Held in Geneva on October 22, 2025.

**WORKING GROUP ON HARVESTED MATERIAL AND UNAUTHORIZED USE OF
PROPAGATING MATERIAL**

FINAL REPORT

15 December 2025

UPOV EXPERT GROUP

Huib Ghijsen, Viviane Kunisawa, Charles Lawson, Axel Metzger and
Joseph Straus

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Preface

We understand that our Study group was tasked to work independently from the positions taken by the Member States that had, respectively, nominated us for the task, as well as UPOV's Working Group on Harvested Material and Unauthorized Use of Propagating Material.

We have endeavoured to adopt our position(s) by consensus, but had not excluded the possibility that dissenting position(s) along the study could occur.

The basis of our analysis of Article 14 (1), (2) and Article 16 UPOV 1991, a Convention of international public law, follows an extensive review of the Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, held in Geneva in March 1991, as well as the documents preceding these records.¹

We, finally, declare that we do not have any conflicts of interest that would compromise our work on the Study.

¹ UPOV, Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, UPOV Publication 346 (E), Geneva, 1992. The analysis is also based on the formal preparatory documents of UPOV preceding the 1991 Diplomatic Conference, including, inter alia, the records and reports of the Administrative and Legal Committee (CAJ), notably CAJ/VIII/5 (June 1981); CAJ/XVI/3 (14–15 November 1985); CAJ/18/6 (November 1986, including the Annexed Draft Recommendation on the extension and harmonization of breeders' rights); CAJ/XXII/2 (April 1988); CAJ/XXIII/2 (October 1988); CAJ/XXIV/6 (April 1989); CAJ/XXV/ANNEX II (October 1989); CAJ/XXVI (11–13 October 1989); CAJ/27/2 and CAJ/27/8 (June 1990); and CAJ/28/6 (12–16 October 1990). Reference is also made to documents from the Meetings with International Organizations (IOM), including IOM IV/2 (Fourth Meeting, 9–10 October 1989) and IOM/5/2 Rev. (Fifth Meeting, 10–11 October 1990); to the Preparatory Meeting documents, in particular PM 1/2 (April 1990); as well as to documents of the Council of UPOV, including Council C/XXI/13 (15–16 October 1987).

Scope of the Report

According to the Terms of Reference the Study should include:

- i) a **first part** with an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to the “Scope of the Breeder’s Right” in Article 14 (1) and (2) of the 1991 Act, including the notions of unauthorized use and “reasonable opportunity” and, the relationship with the “Exhaustion of the Breeder’s Right” in Article 16 of the 1991 Act; and
- ii) a **second part** with summaries of relevant court cases from UPOV members bound by the 1991 Act.

PART ONE

First Chapter: Harvested Material: Authorization/Unauthorized Use, Exercise of the Right and Infringement

I. The notions of "unauthorized use of propagating material" and "reasonable opportunity" and their practical application

1. For our analysis, it seems appropriate first to recall that the limitation of the scope of protection to the acts related to the propagating material of the protected variety as conceived under the UPOV 1961 and 1978 Acts had, long before the preparatory work on the 1991 Act had started, been viewed as inadequate particularly by the breeders of vegetatively propagated fruit and ornamental plants.² It also seemed inadequate for breeders of new cultivars developed by means of traditional breeding methods over, in certain instances, periods of thirty years of work, and intended to supply not only food and fiber, but also a large number of industrially useful commodities, which for instance were intended to serve as source of diesel, or ethanol, or eruct acids used in the manufacture of lubricants and plasticizers, or liquid wax ester for cosmetics, and of high quality lubricants.³ Although controversially discussed, the extension of the scope of the breeder's right to the harvested material was one of the key reasons for the UPOV 1991 revision, not least aimed to raise plant breeder's protection approaching a level of patent protection, however, specifically adapted to the peculiarities of plant breeding and the specific needs of plant breeders. Eventually the Diplomatic Conference adopted the compromise set forth in Article 14(2) UPOV 1991. It makes the **authorization** of the breeder for acts enumerated in Article 14(1) in respect of harvested material, i.e. the extension of the scope of protection to the harvested material, subject to two conditions. On the one hand, that the harvested material has been obtained through an ***unauthorized use of propagating material of the protected variety***, and on the other hand, that *the*

² Cf. i.e., comments which René Royon, the long serving Secretary General of CIOPORA, made on the occasion of the Second session of the Committee of Experts on Biotechnological Inventions and Industrial Property in February 1986 (WIPO Doc. BIOT/CE(II)/3 of February 2, 1986), and same, Die Schutzbedürfnisse der Züchter von Obst- und Zierpflanzen. GRUR Int. (1987), 329 ss.

³ Cf. J. Straus, The Relationship Between Plant Variety Protection and Patent Protection for Biotechnological Inventions from an International Viewpoint, IIC 1987, 723 ss.(at 726, with further references).

breeder has had no reasonable opportunity to exercise his right in relation to the said propagating material. In other words, to *the propagating material of that protected variety.*

2. Before *analyzing* the negotiations, which in the Diplomatic Conference led from the wording of Article 14 (1) (b) of the Basic Proposal adopted by the Council of UPOV on 19 October 1990,⁴ which reads as follows:

“In respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material].”

To the text eventually adopted as Article 14 (2) UPOV 1991:

“[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.”

The following clarification as regards some basic law principles also seems appropriate:

2.1 The effects of a breeder’s right granted by a UPOV Contracting Party are limited to that Contracting Party’s territory.

2.2 As regards the scope of the breeder’s right determined in Article 14 UPOV 1991, its paragraphs (1) and (2) in a respective case relate to the “protected variety”,

⁴ DC/91/3.

which means the variety for which the Contracting Party where the protection in respect of the harvested material sought, granted the breeder's right related to the protected variety, whose propagating material had been used without the authorization of the breeder's right owner.

2.3 The acts enumerated in paragraph (1) under (i) to (vii) in respects of the propagating material of the protected variety require **the authorization of the breeder's right owner**, otherwise they unconditionally (except when covered by Article 15 and/or Article 16) constitute an act of infringement in the country where protection was sought and the respective right is valid.

2.4 Those same acts, however, in respect of the harvested material of the protected variety, require authorization of the right holder only if the harvested material had been obtained through an unauthorized use of the propagating material of the protected variety and the right holder has had no reasonable opportunity to exercise his right in relation to the said propagating material in the country where protection sought and the respective right is valid.

3. The decisive point of attachment in Article 14 (1) and Article 14 (2) UPOV is the same, i.e., the *protected variety*. That is, the variety for which the Contracting Party, where protection had been sought, had granted the respective breeder's right, and where the acts, e.g., of offering for sale, selling or other marketing, importing in respect of the harvested material produced through the use of propagating material of the protected variety was not authorized by the owner of the breeder's right at issue. Thus, both preconditions for the *authorization* at stake, i.e., the *unauthorized use of the propagating material of the protected variety, as well as the reasonable opportunity to exercise that right in relation to the said propagating material, are assessed under the law of the Contracting Party where protection was sought and the allegedly infringed right is valid*.

4. This basic understanding of the effects of a breeder's right granted by a UPOV Contracting Party, is illustrated by the German Federal Supreme Court of Justice. In a case in which the distribution of harvested material (in Germany) obtained through [unauthorized] use of propagating material of the [in Germany] protected variety in France, the Court held an infringement of the breeder's right granted in Germany. The claimant

could not assert his right against the production of harvested material of his protected variety “Melanie” in France, because the effects of the respective breeder’s right were limited to the territory of Germany. By the distribution of harvested material (plants) in Germany, obtained through the [unauthorized] use of propagating material of the [in Germany] protected variety in France the Court found the breeder’s right infringed under § 10 (2) No.2 German Plant Variety Protection Act.⁵ The Claimant had no opportunity to assert their breeder’s right in respect of the use of the propagating material of the variety “Melanie” for the production of the harvested material distributed by the Defendant.⁶

Thus, the use of the propagating material of the variety “Melanie” in France the Court considered unauthorized, and the distribution of the attacked plants, understood as harvested material, in Germany constituted an infringement of the breeder’s right on the protected variety "Melanie".⁷

5. The above follows also from the principle of “*independence of the breeder’s right*”, set forth in Article 10 (3) UPOV 1991. Thereunder “No Contracting Party shall refuse to grant a breeder’s right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other State or Intergovernmental organization.”

6. Article 16 UPOV 1991 sets forth:

*(1) [Exhaustion of right] 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

⁵ Corresponding Article 14 (2) UPOV 1991 [J.S.].

⁶ Judgment of February 14, 2006, Case X ZR 93/04, No.12 of the Reasons, at pp.6-7 of the original .

⁷ This basic understanding is also shared by the Tokyo District Court in its Judgment of June 8, 2018 and the Intellectual Property High Court of Japan in its Judgment of March 6, 2019, in the “Shitaki” Case.

- (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.*

(2) [Meaning of “material”] *For the purposes of 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.*⁸

Thus, the exhaustion under Article 16 UPOV 1991 also becomes effective only if 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**”.

7. An **analysis** of the UPOV 1991 drafters’ understanding and intentions in respect of the use of the notion “**unauthorized use**” in Article 14 (2), as it has developed through the negotiations of the contracting parties and interested 'stakeholders', and as recorded in the Preparatory Documents and the Records of the Diplomatic Conference, cannot address this notion in isolation. i.e., isolation understood, as a predominantly semantic understanding of the term "authorization". The point of attachment rather constitutes the inseparable nexus between “**unauthorized use**” and “**reasonable opportunity to exercise the right**”, as the latter notion has developed in the course of its drafting.

7.1 The intended extension of the scope of protection, i.e., of the effects of the breeder’s right in the UPOV 1991 Act, had been intensively discussed even before the Basic Proposal was presented. The latter, because of the extent of the proposed changes and the complexity of its legal methodology, triggered 22 delegations to propose changes/amendments of Article 14 of the Basic Proposal.

⁸ Our emphasis.

7.2 From the developments, which preceded the 1991 Diplomatic conference, and had addressed expressly or implicitly the *authorization or consent of the breeder's right owner*, the following documents are relevant:

- (a) At the 16th session of the Administrative and Legal Committee (CAJ) on 14 and 15 November 1985, in which the extension of the scope of protection was discussed, the session minutes, *inter alia* read as follows:

“18. Cases covered by the extension to the end product - The arguments in favor of the protection of the end product in the cases of ornamental plants, mainly put forward by CIOPORA, are well known. It will be remembered that the purpose is not to allow breeders to charge royalties at every imaginable opportunity, at various stages in the exploitation of the variety, *but to charge them also in connection with certain types of exploitation that escape protection. The main case aimed at is the import of cut flowers from countries that do not have a plant variety protection system.* It also has to be observed that the majority of those countries, owing to their agro-economic circumstance, allow cut flowers to be produced at prices that defy all competition, even if the cost of transport (by special aircraft) is taken into account.”⁹

- (b) At the 4th meeting between the Administrative and Legal Committee (CAJ) and the International Organizations of breeders and patent specialists (IOM) on 9 and 10 October 1989, the following new text for Article 5 [Effects of the Right Granted to the breeder] was proposed:

“(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all persons *not having his consent*:

- (i) from reproducing or propagating the variety,
- (ii) from offering for sale, putting on the market, exporting or using material of the variety,
- (iii) from importing or stocking material of the variety for any of the aforementioned purposes.

⁹ CAJ/XVI/3, paragraph 18 (our emphasis).

(2) The right shall not extend to (i) acts described in paragraph (1)(ii) and (iii) above concerning any material which has been put on the market in the Member State of the Union concerned by the breeder or with *his express consent*, or material derived from the said material in accordance with the purpose intended when it was put on the market.”¹⁰

(c) In the IOM October 1989 meeting, the *German delegation* submitted a proposal for paragraph 2 of the then discussed Article 5, which contained for the first time the cascade approach and reads as follows:

“(2) Where the owner of the breeder's right **is unable to exercise his rights** in accordance with paragraph (1) (i) (ii), *his right shall extend to the harvested material of the variety.*

Where the owner of the breeder's right is unable to exercise his right in accordance with paragraph (1) (ii) or in respect of harvested material, his right shall extend to the products directly obtained from harvested material of the variety.”¹¹

(d) Of interest is the Report on this IOM meeting prepared by the UPOV office.¹² Many delegations expressed satisfaction with the German proposal. Spain expressed a reservation, the Netherlands and Sweden had doubts as to the second sentence, particularly in the light of earlier discussions on the scope of the word “material”. In the context of the aim of this Study, the passage of the Report are reproduces *verbatim*:

“75. The Vice Secretary General considered that if the Committee departed from the structure set out in document IOM/IV/2, it might fail to achieve its objective, which was to strengthen the right of the breeder, notably by adapting it to recent foreseeable developments in the technical and economic field under consideration.

76. The Delegations of Denmark and the Federal Republic of Germany emphasized that the proposal was intended merely to set forth the same

¹⁰ IOM/IV/2, p.10 (our emphasis).

¹¹ CAJ/XXV/2, ANNEX II (our emphasis).

¹² CAJ/XXV/2, pp.11-12.

rights in a different form. *The Delegation of the Federal Republic of Germany pointed out that the aim was to spell out clearly that the owner of the right could exercise it once only and receive a royalty once only, and that he should do so at the earliest possible stage.* In its opinion, there had never been any question of leaving the choice of the stage to the owner – if the text proposed in document IOM/IV/2 conveyed that impression it was in imperative need of amendment.¹³

77. Delegation of France feared that the owner of a right might be unable to exercise it in respect of imported harvested material, such as cut flowers, as the right to prohibit such imports was not provided for. The Delegation of Federal Republic of Germany replied that that right should be provided for and that the wording of the proposed text should be reconsidered and improved, for example, by specifying the grounds on which the exercise of the right has been prevented.”¹⁴

(e) The 27th session of the CAJ on 25 to 29 June 1990, discussed the Draft of the 1991 UPOV Revision Act. Article 14: “Effects of the Breeder’s Right” which had the following wording:

“(1) The breeder’s right shall confer on its owner the right to prevent all persons not having his **consent** [from exploiting the variety and in particular,]

(i) from reproducing or propagating the variety, or from conditioning reproductive or propagating material of the variety,

(ii) from offering for sale, putting on the market or using material of the variety,

(iii) from exporting material of the variety,

(iv) from importing or stocking material of the variety for any of the afore mentioned purposes.”¹⁵

As regards the proposed definitions for the UPOV 1991 Act, the Draft in Article 1 (x) defined “material of a variety” as meaning: reproductive or vegetative

¹³ Ibid., p.12 (our emphasis).

¹⁴ Ibid., p.12.

¹⁵ CAJ/27/2, p.51.

propagating material of any kind; harvested material; [the product directly obtained from harvested material].¹⁶

(f) From the UPOV's Office Report on the 27th CAJ session¹⁷ the following passages are of interest and reproduced below:

“69. During the first exchange of views, several delegations pointed to the difficulties that would be occasioned for the countries by extension of the rights afforded to the breeder.

70. The main difficulties referred to concerned:

(i) The fact, according to certain delegations, that the text did not clearly show *that the breeder had to “exercise his rights” and royalty at the first stage of exploitation* **that was feasible**: those delegations would like a “hierarchy” of rights.

71. To remove the first difficulty, the Delegations of the Federal Republic of Germany and Switzerland each submitted a written proposal for a new text. On the basis of the discussions on those two proposals, the Office of the Union then submitted a further proposal drafted as follows:

“(1) Subject to paragraphs (3) and (4), the following acts shall require the **authorization** of the breeder:

(a) in respect of the **propagating** material of the protected variety

(i) ...

...

(b) in respect of harvested material of the protected variety, any of the acts referred to in (a) above, provided that the harvested material was obtained through the use of a propagating material whose use, for the purposes of obtaining harvested material, was **not authorized** by the breeder ...

...

¹⁶ CAJ/27/2, p.11. Thus, the protection of harvested material was not subject to any condition different from those related to propagating material.

¹⁷ CAJ 27/8, 1990.

74. Several delegations observed that the wording proposed by the Office of the Union now spoke of **“authorization”** whereas the draft was based on the notion of **“consent.”** Certain members of the Committee considered that the word “authorization” – given in the present text of the Convention – could have a more formal connotation and, for example, exclude implicit consent, others felt that the two notions could be used indifferently.”¹⁸

(g) In the last CAJ meeting before the Diplomatic Conference, several delegations were in favor of the introduction of a notion of “cascading application” of breeder’s right, which, the Secretary General viewed as a technically difficult formulation. The UPOV Office meeting Report reads in this regard:

“The Committee finally agreed to the inclusion of the notion of cascading as an option in the Final Draft by adding in square brackets at the end of subparagraph (b) the words **“and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material”** and at the end of subparagraph (c) the words “and if, but only if the breeder has had no legal possibility of exercising his right in relation to the harvested material”.”¹⁹

8. As observed above,²⁰ in the Diplomatic Conference of 1991 22 delegations submitted proposals for changes, amendments or deletions of provisions set forth in the Basic Proposal of the Council. In the following, reference is made only to those proposals, discussions related to them, and their outcome, relevant for the analysis of the notion “obtained through the unauthorized use of propagating material of the protected variety.”

8.1 The Delegation of *Spain* submitted a two parts Proposal.²¹ Firstly, it proposed to make the extension of the breeder’s right protection to the harvested material of the protected variety optional. Secondly, to in any case, “add the phrase now appearing in square brackets in the Basic Proposal both in subparagraph (b) ... It had to be clear also

¹⁸ Ibid, pages 11/12 (our emphasis).

¹⁹ CAJ 28/6, Report 12-16 October 1990, p.7, no.41, second paragraph (our emphasis).

²⁰ 8.

²¹ Doc DC/91/82.

in what cases these two options could be used,” in the revised text.²² In other words, Spain proposed to make the protection of harvested material dependent on the condition that the breeder “has had **no legal possibility** of exercising his right in relation to the harvested material.”

The proposal of Spain to make protection of harvested material of a protected variety optional was rejected by 13 votes against, four in favor, one abstention.²³

The second part received active support from the Delegation of *Japan*,²⁴ which in its own Proposal for the Amendment of Article 14 (1)(b),²⁵ had first proposed that the text in square brackets, i.e., “and if, but only if, the breeder **has had no legal possibility of exercising his right** in relation to the propagating material”, becomes Convention text. Moreover, Japan proposed to specify the acts requiring the authorization of the breeder’s right owner in respect of harvested material,²⁶ and make the authorization dependent also on “*provided that, in spite of all due care required by the circumstances, the breeder could not exercise his right in relation to any of the acts concerning the propagating material of the protected variety referred to in (a) above.*”²⁷

The discussion triggered by the two proposals earned some positive and some critical reactions with suggestions for further amendments. In general, delegates expressed their support for strengthening the breeder’s right. The President proposed to close the debate and leave it to the Drafting Committee to finalize the wording if the proposals were accepted. The Records show the following outcome:

“The principle of the proposals of the Delegations of Japan and Spain, reproduced in documents DC/91/61 and DC/01/82, to make the exercise of the breeder’s right in respect of the harvested material dependent upon the fact that

²² Records (in the following „R“), no.894.2, p.311.

²³ R no.914, p.314.

²⁴ R no.916, p.314.

²⁵ Doc DC/91/61, R, pp. 119-120

²⁶ This proposal of Japan was rejected by five votes for, eight votes against and four abstentions (R no. 942, p.318.

²⁷ Id. p. 120 (our emphasis).

it had been impossible to exercise it in respect of the propagating material was accepted by 10 votes for and eight votes against.”²⁸

8.2.1 The Delegation of the *United States of America* in its Proposal for the Amendment of Article 14 (1) (b)²⁹ proposed the following wording:

“(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the **unauthorized** use of propagating material [whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no **legal** possibility of exercising his right in relation to the propagating material]].”³⁰

8.2.2 The Delegation of the *Federal Republic of Germany* in its Proposal for the Amendment of Article 14 (1) proposed the following wording for the subparagraph (b):³¹

“In respect of the harvested material, including whole plants, of the protected variety, through any of the acts referred to in (a), above, provided that the harvested material was obtained through [the] **unauthorized** use of propagating material [whose use, for the purpose of obtaining harvested material, was **not authorized** by the breeder [and if, but only if, the breeder has had **no legal possibility** of exercising his right in relation to the propagating material];].”³²

8.2.3 The Delegation of *Denmark* proposed the following wording for Article 14 (1) (b):

“(b) in respect of other parts of plants or the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested

²⁸ R no. 934, p.317 (our emphasis).

²⁹ Doc DC/91/12, R p.101.

³⁰ Id, second emphasis.

³¹ Doc DC/91/91, R p.131.

³² Id. Our emphasis. [The notions “unauthorized” and “not authorized” reflect the wording in the square brackets of paragraph (1), i.e.: “Acts requiring the breeder’s authorization”, corresponding to the wording of the Basic Proposal, but not to the finally adopted text of the Convention. They also make clear that the cascade rule is limited to protected varieties, aimed at insuring the exercising the respective right at the earliest stage of commercial exploitation.].

material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material was not authorized by the breeder, and if, but only if, the breeder has had no **legal possibility** of exercising his right in relation to the propagating material.”³³

8.2.4 A Proposal of the Delegation of the *United Kingdom* to add to Article 14 (1) (a) a subparagraph (viii) with the following wording: “use for the commercial production of cut flowers and fruits”³⁴ led to an extensive, partially controversial debates in the Plenary.³⁵ At the end of the debate, the President noted that, “at this point of the debate several interlinking questions were being considered at the same time and that several courses of action could be envisaged: make a proposal for a new Article 14 (1) (a) (viii) and then come back to Article 14 (1) (b); decide on the latter and then reconsider the former; set up a working group.”³⁶ Which was then set up by consensus by the Conference on 11 March 1991.³⁷

8.2.5.1 The Report of the *Working Group* on Article 14 (1) (a) and (b) submitted the Group’s Chairman, Mr. J. Harvey from the United Kingdom.³⁸ Mr. Harvey noted that the Conference meeting in Plenary gave the Working Group the mandate to amend Article 14 (1) (b) in order to take into account the technical and juridical aspects involved and its relation to Article 14 (1) (a) of the Basic Proposal as amended by the Conference meeting in Plenary according to documents DC/91/10 and DC/91/11³⁹ and keeping in mind the principle of “cascading” adopted by the Conference meeting in Plenary.⁴⁰

8.2.5.2 As regards the proposed amendment of Article 14 (1) (a) the Working Group recalled that Article 14 (1) (a) was now silent on whether the authorization of the breeder was necessary for the production of harvested material from propagating material. And also, did not mention whether the breeder could make their authorization with respect to the acts mentioned in paragraphs (1) (a) (i) to (vii) subject to conditions. Although the

³³ Doc DC/91/97, R p.134 (our emphasis).

³⁴ Doc DC/91/110, R p.141.

³⁵ R nos. 955-968, at pp. 321-324, nos. 1005-1048, at pp. 331-338.

³⁶ R no. 1027, p. 336.

³⁷ R no. 1030, p.336.

³⁸ Doc DC/91/118, R pp.144-146.

³⁹ Proposals of the Delegation of the USA Article 14(1) (a) (iv) to read: “selling or other marketing [sale or other putting on the market.” And, to delete the proposed Article 14 (1) (a) (viii). (R p.100 and p.101).

⁴⁰ No. 5, R p. 144.

Working Group understood that the freedom of contract for the breeder was implicit, they eventually agreed to insert at the end of paragraph (1) (a) an additional sentence with the following wording:

“The breeder may make his authorization of acts under subparagraphs (1) (a) (i) to (vii) subject to conditions and limitations.”⁴¹

8.2.5.3 For the discussion of the amendment of Article 14 (1) (b), the Working Group used the Proposal of the Delegation of the United States of America as starting point.⁴² It further considered the Proposal submitted by the Delegation of Japan⁴³ to introduce the concept of “due care” into Article 14 (1) (b), accepted the principle, but agreed that it was already included in the text by the use of the word “reasonable.”⁴⁴ The Working Group then summed up:

“18. The Working Group considered carefully the final clause of paragraph (1) (b) agreed by the Conference meeting in Plenary. It noted the Conference decision to delete the square brackets from the text⁴⁵ and its instruction to the Drafting Committee to propose a final text expressing the principles contained in the clause. The Working Group noted that the text was originally intended to cover a specific situation but that the discussion had indicated **a need to widen the text beyond the original intention whilst preserving that intention**. The Working Group agreed that this was within its terms of reference, and the Working Group proposal contains an appropriate amendment.”⁴⁶

8.2.5.4 The Group proposed the following wording of Article 14 (1) (b):

“(b) In respect of harvested material of the protected variety, including entire plants and parts of plants, any of the acts referred to in paragraph (a) above provided that such harvested material was obtained through the unauthorized use

⁴¹ No. 10, R p.145.

⁴² See *supra* no. 10.2.1.

⁴³ See *supra* no. 10.1, 3d paragraph.

⁴⁴ No.15, R p.146.

⁴⁵ See *supra* no. 10.1, quotation in last paragraph, referring to R no.934, p.317.

⁴⁶ No, 16, R p. 146 (our emphasis).

of propagating material, unless the breeder has had reasonable opportunities to exercise his right in relation to the propagating material.”⁴⁷

8.2.6.1 This proposal of the Working Group was discussed in the fifteenth meeting of the Plenary on 13 March 1991, Mr. Harvey, Chairman of the Group, explained, *inter alia*, that the Group had proposed some very slight changes in the text “which did not alter its meaning”. Further, he stated:

“The changes concerned the end of Article 14 (1) (b), which should read as follows: ‘provided that such harvested material was obtained through the unauthorized use of propagating material, and that [unless the breeder has not had reasonable opportunity [opportunities] to exercise his right in relation to the propagating material.’ Those changes would make clearer that the second provision (‘and that ...’) **referred to the whole provision rather than to the clause immediately preceding it and beginning with: ‘provided that’.**”⁴⁸

8.2.6.2 After the Plenary discussed the Working Group’s report, the President noted, that “there was no real opposition to the proposal. **He concluded that it was therefore** accepted.”⁴⁹

9. The **analysis** of the Preparatory Documents and the Records of the Diplomatic Conference as regards the notion of “**unauthorized use of propagating material**” of the protected variety in Article 14 (1) (b), now Article 14 (2) UPOV 1991, leads to the following conclusions:

9.1 Any use specified in Article 14 (1) (a) UPOV 1991, including any conditioned under Article 14 (1) (b), **of propagating material of a protected variety** requires **authorization of the owner of the breeder’s right related to that variety.** It is otherwise an **unauthorized use.**

⁴⁷ No. 18, R p.146.

⁴⁸ R No.1529.5, at p. 403. (our emphasis).

⁴⁹ R No. 1543, at p.405. Thus, it submitted to the Drafting Committee (R No. 1537, at p. 404).

9.2 As it transpires from the Records of the Diplomatic Conference, the notion **unauthorized** in Article 14 (2) UPOV 1991 relates to the **authorization of the holder of the breeder's right at issue and not to the legal status of the propagating material used for obtaining the harvested material**. The finally adopted wording had its origin in the decision of the Plenary to “make the exercise **of the breeder's right** in respect of the harvested material dependent upon the fact that **it had been impossible to exercise it** in respect of **propagating material**.”⁵⁰

9.3 The Working Group responsible for the adopted wording of Article 14 (2) UPOV 1991 used for the discussion of the amendment of the then Article 14 (1) (b) the proposal of the Delegation of the United States.⁵¹ In the respective context, it is recalled, that the Proposal had the following wording: “... provided that the harvested material was obtained through the unauthorized use of propagating material [whose use, for the purpose of obtaining harvested material, **was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right ...]**.”⁵² The Proposal submitted by the German Delegation had a corresponding wording “... was not authorized by the breeder ...”.⁵³ The same applied to the proposal of Denmark.⁵⁴ In other words, in the context of Article 14 (2) UPOV 1991, it is **irrelevant whether the use of the propagating material outside the territory where the respective breeder's right is granted, valid and enforced is covered by any proprietary right or not, i.e., legally or illegally used**.

9.4 The notion “**unauthorized use**” in Article 14 (2) UPOV as one of the conditions for the extension of the breeder's right to harvested material is inseparably connected with the second one, i.e., that the “**breeder has had [no] reasonable opportunity to exercise his right in relation to the said propagating material**.” The two conditions constitute **an inseparable whole**, as clarified by Mr. Harvey, the chair of the Working Group in the Plenary.⁵⁵

⁵⁰ R No. 934, p.317 (our emphasis). Cf. *supra* 10.1 *in fine*.

⁵¹ Cf, *infra*...

⁵² Doc DC/91/12, R p.101.

⁵³ Doc DC/91/91, R p.131.

⁵⁴ Doc DC/91/97, R p.134.

⁵⁵ R No. 1529, at p. 403; also *supra* no.10.2.6.1.

9.5 It transpires from the Preparatory Documents and the Records of the Diplomatic Conference, in particular from the statement of Mr. Harvey, the reason for introducing the notion “**reasonable opportunity**”⁵⁶ into the wording of (now) Article 14 (2) was because “the discussion had indicated a need to *widen the text beyond the original intention whilst preserving that intention.*”⁵⁷ That a “reasonable opportunity” in particular does not exist, if “the breeder **has had no legal possibility to exercising his right in relation to the propagating material,**” beyond doubt.⁵⁸

9.5.1 As regards the practical application of the combination of "unauthorized use" and "reasonable opportunity to exercise the right" as preconditions for the extension of the effects of the breeder's right to harvested material, the following is recalled.

9.5.2 When in October 1989 the German delegation submitted its proposal, which eventually led to Article 14 (2) UPOV 1991, its “aim was to spell out clearly that **the owner of the right could exercise it once only and receive a royalty once only, and that he should do so at the earliest possible stage.**”⁵⁹ Many delegations shared that approach. Although there was no discussion as to the territory where those stages of commercial exploitation take place, no doubt could and can exist, that the requirement that “**the owner of the right**”, **exercises his breeder’s right at the earliest possible stage in relation to the propagating material of the protected variety, and receive royalty once only, by definition can only mean, *in the country where the right is granted and valid.***

9.5.3 In its last meeting before the Diplomatic Conference, several delegations were in favor of the “cascading application” approach. However, some delegations, as the meeting’s report shows, criticized “*that the text did not clearly show that the breeder had to “exercise his rights” and royalty at the first stage of exploitation **that was feasible.***”⁶⁰ That for the owner of a breeder’s right it is **not feasible** to exercise his right

⁵⁶ I.e., for replacing “and if, but only if, the breeder had no legal possibility to exercise his right.”

⁵⁷ R No. 15, R p.146 (*supra* no. 10.2.5.3).

⁵⁸ The German Federal Court of Justice in a Judgment of November 2023 .X ZR 70/22 – “Harvested crop”, carefully analyzed the drafting history of Article 14 (2) UPOV, Nos. 51-54, and found that “... it follows from the legislative history that not only legal but also factual possibilities are relevant that existed up to the point in time at which consent is required in relation to the propagating material at latest” (id. No. 55).

⁵⁹ Cf. *supra* no.9.2 (d), 3rd indent. Denmark shared that position.

⁶⁰ CAJ 27/8 June 25-29, 1990, No. 70 (i) (emphasis HG & JS), also *supra* no. 9.2 (f).

in respect of the propagating material of the protected variety, in cases the respective act occurred outside the territory of its validity, goes without saying.

9.5.4 The subsequent CAJ's decision understood in the context of that discussion finally agreed to the inclusion of the notion of cascading as an option by adding in square brackets at the end of subparagraph (b) the words **"and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material."**⁶¹ This wording in the Diplomatic Conference was expressly supported many delegations.⁶²

9.5.5 The explicit, even enhanced requirement, **"and if, but only if the breeder has had no legal possibility"**, in the light of the drafting developments, leaves no doubt, that **"no legal possibility", means that the effects of the respective breeder's right had no effects in the territory where the acts in respect of propagating material of the protected variety occurred, thus, the breeder had the first opportunity to exercise the breeder's right.** The Drafting Committee subsequently adopted the wording that **"it had been impossible to exercise the right."**⁶³ As noted above, the finally adopted wording **"no reasonable opportunity"** was adopted in **order to widen the possibility to claim protection of harvested material** under some, not specified other circumstances, but has preserved the intention expressed and imposed by **"has had no legal possibility"** of the Basic Proposal and **"had been impossible"**, used by the Drafting Committee.⁶⁴

9.5.6 Only for the sake of completeness, the wording **"has had no legal possibility"** implicitly indicates, that as a rule, such a legal situation cannot occur **in the territory where the right is granted and valid, and protection sought!**⁶⁵ The owner of a valid breeder's right could only under exceptional circumstances, such as war, legally

⁶¹ Cf. *supra* no 9.2 (g).

⁶² E.g., Spain (Doc DC/91/82), Japan (Doc /91/61), United States of America (DC/91/12), Federal Republic of Germany (Doc DC/91/91) and Denmark (Doc DC/91/97). Delegations of France (R No. 918, p.315) and the Netherlands (R No. 920, p. 315), however, opposed, arguing that being an not acceptable limitation of the respective breeder's right causing unnecessary complications,

⁶³ Cf. *supra* no 11.2, referring to R no.934, p.317.

⁶⁴ Cf. *supra* no 10.2.5.3

⁶⁵ For the specific situation of a third party use of the propagating material of a variety in the country where the breeder's right for that variety had been applied for, but not yet granted, i.e., applicant enjoying only provisional protection under Article 13 UPOV 1991, cf. our separate analysis (cf. *infra* no...).

imposed sanctions, etc., be denied by law the exercising of their valid right in respect of propagating material of the protected variety.

9.5.7 In other words, at issue and targeted are cases in which acts specified in Article 14 (1) UPOV 1991 in respect of harvested material require authorization of the breeder's right holder under conditions set forth in Article 14(2) UPOV 1991. The idea, the notion "obtained through **unauthorized use** of propagating material of the protected variety" in Article 14 (2), would mean, that the variety **has to be protected by a breeder's right in the territory where the acts in respect of propagating material occurred**, does not stand scrutiny.⁶⁶ The analyzed Preparatory documents and the Records of the Diplomatic conference reveal the opposite! It clearly runs against the evidenced intentions of the UPOV 1991 drafters and, if accepted, it would devoid the extended scope of the breeder's right to the harvested material in the country where the right is granted and valid, and protection sought of any effects.

II. Main Findings:

10.1 The notion of "**unauthorized use**" in Article 14 (2) UPOV 1991 relates to the **authorization of the holder of the breeder's right on the protected variety, not to the legal status of the propagating material used.**

10.2 The effects of a breeder's right are limited to the territory of the Contracting State where granted. **They have no legal effects outside that territory.**

10.3 The inseparable **nexus between "*unauthorized use*" and "*reasonable opportunity to exercise the right*"** [of the respective breeder related to the protected variety he owns], implies by definition the situation where the **breeder had no legal possibility to exercise his right** in relation to the use of propagating material of his protected variety for obtaining the **harvested material**. Which is the case, whenever the

⁶⁶ The statement in the "Explanatory Notes on Acts in Respect of Harvested Material under the UPOV Convention," of September 28, 2007, prepared by the Office of the Union (UPOV/EXN/HRV Draft 1), stating, "unauthorized acts can only occur in the territory of the Union where the breeder's right has been granted and is in force," does not reflect the meaning and the scope of "unauthorized use" in Article 14 (2) UPOV 1991 (cf. *supra* nos. 11.2-11.4).

act of the use of propagating material of the protected variety **occurs in a territory outside the validity of the respective breeder's right.**

10.4 As a consequence, the **authorization of the breeder's right holder is required**, for all acts specified in Article 14 (1) (i)-(vii) UPOV 1991 related to the harvested material so obtained outside the validity of the respective breeder's right, when that harvested material enters into, and is distributed in the territory where the respective breeder's right is valid. As the harvested material then fulfills the cumulative requirements "unauthorized and no reasonable opportunity to exercise his right". Enforcing or any other exercising of that right, e.g., by claiming royalties, at the same time constitutes "exercising of the breeder's right at the earliest possible stage" within the cascade.

Second Chapter: Reasonable Opportunity

I. The notion of “Reasonable Opportunity”: Introduction

1. This section analyzes the drafting history and interpretative trajectory of these provisions, drawing on UPOV negotiation records. The objective is to situate the reasonable opportunity requirement within the broader sequence of Articles 14 and 16, as developed across the report.

II. Development of the “Reasonable Opportunity” Clause in Article 14(2)

2. The 1991 UPOV Convention introduced several substantive revisions to the scope and structure of plant breeders’ rights. Among these, the insertion of the expression “reasonable opportunity” in Article 14(2) and (3)⁶⁷ stands out as a significant development⁶⁸. This clause plays a crucial role in delineating the limits of the breeder’s right over harvested material and products derived from such material. Closely tied to this is the so-called “cascade principle”, a concept that was expressly recognized by several delegations as a safeguard ensuring that enforcement descends only where prior exercise was not feasible.

3. Paragraphs (2) and (3) extend that right beyond propagating material to include harvested material and, optionally, products made directly from harvested material. However, these extensions are subject to a limitation: the breeder must not have had a reasonable opportunity to exercise their right at an earlier stage. This clause serves as a safeguard against disproportionate enforcement and retroactive claims when the breeder had the chance to act earlier but failed to do so.

4. As reflected in the Records, these conditions are cumulative and were intended to prevent retroactive or disproportionate enforcement. This cumulative

⁶⁷ For the sake of clarity, it is important to note that the notion of “reasonable opportunity” did not form part of the original discussions during the drafting of the 1978 Act of the UPOV Convention. There is no reference to the expression in the 1978 Records of the Geneva Diplomatic conference on the Revision of the International Convention for the Protection of New Varieties of Plants.

⁶⁸ UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E) (UPOV, 1992), p. 314-320; p. 403-414.

structure, confirmed during the Diplomatic Conference, aligns this chapter with both the Unauthorized Use analysis and the downstream implications addressed in the chapter on Exhaustion.

5. The inclusion of the “reasonable opportunity” clause was a product of complex negotiations. Early drafts, such as the proposals by Spain and Japan (documents DC/91/82 and DC/91/61), used more rigid language: “no legal possibility” or “in spite of all due care ... the breeder could not exercise his right.” These formulations were considered overly strict and raised concerns regarding judicial interpretation and feasibility⁶⁹.

6. While the exact authorship of the “reasonable opportunity” expression cannot be definitively attributed, it appears from the records that the phrase was introduced into the discussion and formally incorporated into the final working drafts during negotiations involving the United States delegation⁷⁰. The United States delegation proposed replacing these restrictive terms with the more flexible “reasonable opportunity”.

7. Mr. Hoinkes (USA) actively participated in clarifying the scope of Article 14(1)(b), and his responses to inquiries from other delegations reinforced the understanding that the provision should include the “reasonable opportunity” condition, as proposed by the Working Group: “Mr. Hoinkes (USA) replied ... a cross-reference to the provisions of paragraph (1)(b) did not permit a selective approach limited to the words ‘harvested material.’ ... Those provisions were to be considered altogether”⁷¹. This proposal was understood by the negotiators as preserving the sequential structure of enforcement while allowing national authorities to assess practical constraints on a case-by-case basis.

⁶⁹ “The proposal of the Delegation of Japan, reproduced in document DC/91/61, to list in Article 14(1) (b) the acts in respect of the harvested material covered by the breeder's right was rejected by five votes for, eight votes against and four abstentions”. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 318.

⁷⁰ UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 403- 414.

⁷¹ UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 415.

8. The proposal gained wide support⁷². Sweden expressly confirmed that the USA proposal incorporated the cascade logic originally articulated by Japan, and the President of the Conference publicly affirmed this interpretation. The UK delegation endorsed the clause⁷³, clarifying that harvested material obtained from unauthorized use should trigger breeder intervention only where no prior opportunity existed. It was argued that paragraph 14(1)(b) did not automatically exclude authorized material and thus the clause was essential to ensure appropriate boundaries.

9. The Working Group accepted the expression “reasonable opportunity”⁷⁴ as incorporating the idea of “due care,” which had been suggested by Japan⁷⁵. The final drafting reflects the consensus that the clause subsumed evidentiary expectations regarding diligence, without imposing rigid standards that might hinder interpretation or enforcement.

10. Accordingly, Article 14(2) and (3) were adopted with two cumulative requirements: (i) unauthorized use of propagating material; and (ii) no reasonable opportunity to act at that earlier stage, a structure that integrates with the overall enforcement sequence and with the analysis presented in the chapters on Unauthorized Use and Exhaustion.

⁷² Several delegations supported the preservation of a right over harvested material, even while expressing concerns about its practical enforceability. France, for example, opposed proposals to delete or weaken this component of Article 14, emphasizing that the Convention should accommodate future technological developments and that certain breeders, such as those working with aromatic or perfume plants, could only rely on protection at the harvested-material stage. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 407-408.

Other delegations, such as Canada and the Netherlands, debated the nature of the provision, if mandatory or optional. The Netherlands favoured a binding provision, whereas Canada preferred no provision at all. Both ultimately recognized the U.S. proposal as a workable compromise. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 413- 415.

⁷³ UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 414- 415.

⁷⁴ Delegations including Germany, Denmark, and Spain, which had initially submitted alternative proposals, withdrew them in support of the U.S. draft. The resulting provision was understood to preserve the cascade principle while introducing a legally operable standard. As Mr. Burr (Germany) noted, the provision addressed cases in which a license had been broken, or unauthorized propagation occurred despite the breeder's lack of control. It allowed for enforcement only when earlier intervention was truly not feasible. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 413.

⁷⁵ UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E)

(UPOV, 1992), p. 314-320; p. 146. “15. The Working Group considered a proposal from the Delegation of Japan to introduce the concept of “due care” into the text of paragraph (1) (b). The Working Group accepted the principle of the proposal but agreed that the concept was already included in the text by the use of the word “reasonable”.

11. The reasonable opportunity clause imposes a proportionality check on enforcement. Rather than adding a new interpretative layer, it operationalizes the intention expressed during negotiation that enforcement should occur as early as possible and only descend the cascade when earlier intervention was not legally or practically feasible.

12. The distinction between exercising and enforcing rights was clarified during the Conference. “Exercise” was understood primarily as royalty collection or licensing, while “enforcement” referred to legal remedies. The “reasonable opportunity” clause pertains to the former – whether the breeder had a chance to act commercially at the earlier stage.⁷⁶ For purposes of Article 14(2), the inquiry focuses on whether the breeder had a realistic commercial opportunity to act upstream, not on whether litigation was available.

III. Deliberations on Royalty Collection and the Limits of Enforcement

13. An important debate emerged regarding the stage at which breeders should be entitled to collect royalties⁷⁷, whether it should be limited to the stage of propagating material or extended to harvested material under certain conditions. The consensus among many delegations was that royalties should, as a rule, be collected at the earliest possible stage in the production chain, typically at the point of propagating material. This position was justified by concerns about legal certainty, the need for stable trade practices, and the desire to avoid complicating enforcement procedures.

14. Delegations from Japan, Sweden, Canada, Australia and Denmark emphasized that harvested material protection should be exceptional.⁷⁸ In their view, the

⁷⁶ Conclusion derived from the discussions between paragraphs 1527-1615. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), (UPOV, 1992), p. 403 – 416.

⁷⁷ UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E) (UPOV, 1992), p. 304; p. 315-317.

⁷⁸ Mr. Espenhain (Denmark) recalled that his Delegation had always supported strengthening the breeder’s right, *but the royalties should be collected at the first possible stage* (par. 926). That also corresponded to a recommendation adopted at the 1978 Diplomatic Conference. Mr. Oster (Sweden) said that *the breeder should not have the possibility to choose the stage at which he would collect his royalties*. The right should focus on propagating material (para 922). Mr. Bradnock (Canada) supported the Swedish and Spanish proposals, emphasizing that royalties should normally be collected at the propagating material stage, and

breeder should not be allowed to choose at will the point of enforcement. They feared that this flexibility could lead to commercial unpredictability and complicate relations between breeders and users. Instead, they advocated a model in which breeders exercise their rights as early as legally and practically possible and only rely on harvested material rights when enforcement upstream is not feasible. At the same time, concerns were raised by other delegations, including France⁷⁹, Germany⁸⁰, and the Netherlands, about the legal and evidentiary burden that could arise under a strict cascade model.

15. In contrast to most state delegations, CIOPORA and the International Chamber of Commerce (ICC) supported giving breeders greater flexibility to decide at which stage they would collect royalties⁸¹. They argued that the issue should not be whether enforcement occurred at the propagation or harvesting stage, but whether the breeder could effectively control the use of the variety. From their perspective, where enforcement was most effective, royalties should be collected, whether upstream or downstream. They cited the example of France: depending on the crop, royalties could be collected at different stages without difficulty.

16. The divergence between these positions revealed a deeper disagreement between those prioritizing legal certainty and procedural clarity and those favouring a more pragmatic approach focused on enforceability and breeder autonomy. Ultimately, while the Conference agreed to strengthen the breeder's rights, it also aimed to prevent arbitrary or strategic shifting of royalty collection points by breeders. The proposal to make Article 14(1)(b) optional, which would have provided greater flexibility to breeders,

only exceptionally on harvested material (para 924). UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E) (UPOV, 1992), p. 315-316.

⁷⁹ France noted that requiring breeders to prove that they could not have acted earlier could create confusion with the concept of exhaustion of rights. Such a requirement, it was argued, would force breeders to provide "negative proof," i.e., to demonstrate that they had no opportunity to act at the propagating stage. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E) (UPOV, 1992), p. 315.

⁸⁰ Germany expressed support for clarifying the principle of exhaustion but favoured a more straightforward approach, such as the formulation proposed by the United States. Similarly, AIPPI warned that the difficulty of identifying the origin of harvested material and tracing infringement could render enforcement virtually impossible if the burden of proof fell entirely on the breeder. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E) (UPOV, 1992), p. 315.

⁸¹ "931. Mr. ROYON (CIOPORA) stated that CIOPORA was in favor of the strengthening of the breeder's right because of the many loopholes that existed in many UPOV member States at the present time." [...] "932. Mr. SMOLDERS (ICC) stated that his Delegation supported the statements made by the Delegation of France and the representative of CIOPORA.", in UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E) (UPOV, 1992), p. 317.

was rejected by a majority vote. This result indicated a preference for a uniform application of the cascade principle, but one that included clear and limited conditions under which downstream enforcement over harvested material could be permitted.

17. In conclusion, although there was shared recognition of the need to protect breeder's rights robustly, the prevailing view was that royalties should ordinarily be collected at the stage of propagating material. Only in situations where upstream application was legally or practically impossible would it be appropriate to invoke rights over harvested material under the cascade principle. The debate thus reflected a balance between ensuring legal clarity and enabling an effective right, with different delegations drawing that line in slightly different places.

18. Royalties should, as a general rule, be collected at the earliest possible stage of the production chain, namely, at the level of propagating material. The collection of royalties over harvested material is permitted only in exceptional circumstances, when the breeder has no reasonable opportunity to exercise rights at the earlier stage. This reflects the logic of the cascade principle, which allows enforcement to “descend” to downstream material only when upstream control is legally or practically impossible.

19. The Conference rejected the idea of giving breeders full discretion to choose the collection point, to avoid legal uncertainty and burdening users. However, there was recognition that in practice, the breeder might need flexibility to exercise rights at the stage where control is more effective, provided that such flexibility remains consistent with the cumulative conditions of Article 14(2) and the exhaustion framework of Article 16.

IV. Structure and Function of the “Cascade Principle”

20. The “Cascade Principle” establishes a structured and sequential approach to the exercise of plant variety rights, whereby protection extends progressively from propagating material to harvested material and, subsequently, to products made directly from that harvested material. Crucially, this model conditions each successive layer of protection on the inability to exercise rights at the previous stage, thereby creating a hierarchy.

21. This design serves two primary objectives: it ensures that legal interventions remain proportionate to the circumstances and avoids arbitrary or retroactive strategies that could undermine legal certainty or impose undue burdens on downstream actors.

22. The term was explicitly introduced during the Diplomatic Conference by the Japanese delegation⁸². Mr. Hayakawa (Japan) emphasized that, to avoid market uncertainty, the breeder should not be allowed to choose arbitrarily the stage at which rights are exercised. Japan thus proposed that the breeder's right over harvested or processed material should be conditional on the lack of opportunity to act earlier. This became known as the "cascade principle," and Japan conditioned its support for an expanded breeder's right on the inclusion of such a structure⁸³.

23. This negotiated understanding is reflected not only in Article 14(2)-(3) but also in the logic of Article 16, where the scope of exhaustion depends on the point at which the breeder exercised the right.

V. Main findings

24. The analysis demonstrates that the "reasonable opportunity" clause functions as both a gateway and a safeguard in the architecture of plant variety protection. Emerging from the diplomatic compromise of the 1991 UPOV revision, it was intended to restrain excessive or retroactive enforcement while ensuring that breeders are not deprived of remedies when upstream control is impossible.

25. As reflected in the cumulative structure of Article 14(2), its operation depends on both the existence of unauthorized use and the absence of a realistic opportunity for upstream exercise of rights, thereby aligning this chapter with the analysis developed in the preceding section on Unauthorized Use.

⁸² "Therefore, the Delegation of Japan proposed to introduce a so-called "cascade SUMMARY MINUTES 315 principle." It was only on that condition that Japan would be able to accept a broadening of the scope of the breeder's right.", UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 314-315.

⁸³ This position resonated with other delegations supported a two-pronged condition: the use of propagating material must be unauthorized, and the breeder must not have had a reasonable opportunity to exercise their right at that level. This was seen as essential to ensure fairness and legal consistency. UPOV, Records of the Geneva Diplomatic Conference of 1991, UPOV Publication No. 346(E), p. 315.

26. Ultimately, the cascade principle and the notion of reasonable opportunity together define the temporal and spatial limits of breeders' rights. They embody a normative equilibrium: protecting innovation and investment in plant breeding without compromising the predictability and stability of agricultural trade.

27. Their interaction also provides the conceptual bridge to Article 16, as discussed in the chapter on Exhaustion, where the point at which the breeder exercised the right determines whether exhaustion applies.

Third Chapter: The development of the Exhaustion provision in the UPOV 1991 Convention and its interaction with the Scope of Protection

1. The development reflecting the intentions of the authors of the final wording of article 16 has been presented, specifically, on the basis of the preparatory papers by the Council, the CAJ, the IOM, the PM⁸⁴ and the records of the Diplomatic Conference.

I. Evolution of the Exhaustion Clause in the UPOV Revision Process (1986–1991)

2. In November 1986, at its 25th anniversary, the UPOV Office published a recommendation to extend the breeder's right to all material of the variety, with the additional requirement that once material had been placed on the market in the territory concerned, the breeder's right was exhausted, except in case the material was used for (re)production⁸⁵.

3. The background of this recommendation was that the limitation of the scope of protection to reproductive material in article 5, UPOV 1978 offered a loophole: growers produced fruits and flowers in a country where the variety could not be protected and imported those harvested products in the country where only the reproductive material of the variety could be protected⁸⁶.

4. Paragraph 5 (4), providing also for the protection of the marketed product, was only recommended.

5. In 1987 the UPOV Council took the decision to revise the UPOV Convention dating from 1978. One of the main reasons was to strengthen the breeder's right by extending its scope of protection⁸⁷.

⁸⁴ CAJ: Legal and Administrative Committee. IOM: Meeting with International Organizations. PM: Preparatory Meeting for the Revision of the UPOV Convention

⁸⁵ CAJ / 18 / 6, November 1986, ANNEX: Draft recommendation on the extension and harmonization of the rights afforded the breeders proposed by the Office of the Union on the basis of the foregoing discussion.

⁸⁶ CAJ/VIII/5 June 1981, page 2 paragraphs 6, 7.

⁸⁷ COUNCIL C/XXI/13, October 15 and 16, 1987, page 14.

6. In the early stage of the revision of the Convention, the protection as laid down in article 5 of UPOV 1978, was extended to all material of the variety and the products derived therefrom.⁸⁸

7. The exhaustion paragraph, article 5 (2)(b), prevented the holder from exercising his rights both on propagating material and the products harvested therefrom, but the exclusive right on reproduction was not exhausted.⁸⁹

8. In this stage it was provided for that the sale of cut flowers produced from rose bushes or tulip bulbs sold to the public for planting in private gardens, would not exhaust the right as to adhere to fair practices and the intended purpose of the material used for derivation.⁹⁰

9. It was the intention that exhaustion applies only to the material being put on the market in the territory of protection and not for the material exported to another territory where the variety is also protected.⁹¹

10. In the first preparatory meeting for the revision of the UPOV Convention in April 1990, the existing text was extended⁹², now providing for the exhaustion of the material once it has been released within the territory of protection, with three exceptions: (a) that the material (i) is used for further reproduction or (ii) outside the field of use for which the breeder put material on the market or gave his consent, or (iii) is exported into a country which does not protect the plant genus or species to which the variety belongs.

11. Exception (ii) was based on the wish of the breeders to apply fair practices on the material derived from the harvested material. Exception (iii) is based on the consideration that:

⁸⁸ CAJ/ XXII/2, April 1988, page 9 article 5 paragraphs (1) and (2)(a): proposal to extend the right to all material of the variety.

⁸⁹ CAJ/ XXII/2, April 1988, page 9 article 5 (paragraph (2)(b)): Exhaustion of rights principle Such right shall not extend, however, to the offering for sale or selling of material put on the market by the breeder or with his express consent or of material derived from that material in accordance with its intended destination.

It follows that the right of reproduction is not subject to exhaustion.

⁹⁰ CAJ/ XXII /2, April 1988, page 10, paragraph 6; CAJ XXIII/2, October 1988, page 15, paragraphs 14 and 15:

The exhaustion principle would apply with respect to the material initially sold and to derived material, but on the condition that the derivation follows fair practices within the intended use of the material as sold.

⁹¹ CAJ XXIII/2, October 1988, page 15, paragraph 13; CAJ /XXIV/6, April 1989, page 15, paragraph 76.

⁹² PM 1/ 2, April 1990, page 33, paragraph 17.1

Proposed New Text Article 17 Effects of the Breeder's Right, Explanatory Notes.

At the twenty-fifth session of the Administrative and Legal Committee, a new structure and a draft were proposed for the Article which deals with the effects of the breeder's right, principally as a result of criticism of the difficulty of comprehending the provision dealing with the principle of exhaustion.

“in order to make the right effective in relation to exports, these are excluded from exhaustion; this exclusion, however, is only valid for exports to countries without protection as provided by Article 10(4) of the relevant law in the Federal Republic of Germany”.⁹³

12. Furthermore, this exception would also apply where exports took place towards a country that protected plant varieties, but not the taxon involved to which the variety belonged⁹⁴.

13. In the meeting with the International Organizations, the following paragraph was added without further explanation or discussion⁹⁵:

“(b) For the purposes of sub-paragraph (a), “material” means, in relation to a variety,
(i) reproductive or vegetative propagating material of any kind,
(ii) harvested material and
(iii) any product directly obtained from the harvested material.”

14. In the CAJ/28 meeting in October 1990, just after the meeting with the International Organizations, the delegations of Germany and the Netherlands considered paragraph (a)(ii) too vague, while providing the breeder too much power over materials of the variety put on the market. It was also difficult for the user of the propagating material how to prove the consent of the breeder. The committee eventually agreed to put this subparagraph between square brackets⁹⁶.

15. On the proposal of Sweden and Germany the sentence “except where the export is for consumption purposes” was added without any discussion at the end of subparagraph (a)(iii).⁹⁷

⁹³ PM 1 / 2, April 1990, page 38, paragraph 17.13, last sentence

⁹⁴ CAJ/27/8 June 1990, page 13, paragraph 90: to supplement sub-paragraph (iii) by a reference to the taxon to which the variety belonged; in other words, the principle of exhaustion would also not apply where export took place towards a country that protected plant varieties, but not the taxon involved.

⁹⁵ IOM/5/2 Rev. Fifth meeting with International Organizations, 10 and 11 October 1990, page 47.

⁹⁶ CAJ/28/6, 12-16 October 1990, page 8, paragraph 48

⁹⁷ CAJ/28/6, 12-16 October 1990, page 8, paragraph 49

II. Final Deliberations at the Diplomatic Conference and Adoption of Article 16

16. During the discussion of the Basic Proposal of Article 16 at the Diplomatic Conference⁹⁸, it was eventually decided that paragraph (a)(iii), as put between square brackets, would not be included in the final text. This is the former paragraph (a)(ii) concerning the issue of using the material outside the field of use for which the breeder put material on the market or gave his consent. In spite of the pleading by the Vice Secretary-General of UPOV⁹⁹, the Japanese amendment to add an adapted paragraph (iii)¹⁰⁰ was eventually rejected¹⁰¹

In the final text, it was concluded that this matter should be solved between the breeder and the parties concerned on the basis of private law. Otherwise, it could happen that third parties who acted in good faith in obtaining material of a protected variety from others than the breeder without knowing under what conditions this material was originally put on the market should not be the victim of abuses in relation to that material committed by others¹⁰².

17. In the Diplomatic Conference the deliberations on the term “consumption” resulted in the conclusion that there had to be “consumption” in a broad sense when somebody put seeds on the market which were used for production of animal feed, for example, and the breeder’s right should be exhausted in that case because the seeds had been put on the market for that purpose.¹⁰³ The Drafting Committee believed that this term would include feed for animal production purposes.¹⁰⁴

18. Final text of Article 16:

Exhaustion of the Breeder’s Right

“(1) [Exhaustion of right] 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

⁹⁸ DC 1991, paragraph 1675.1 Basic proposal: Paragraph ii) and iii) have been changed order!

⁹⁹ DC 1991, paragraph 1672.1

¹⁰⁰ DC/91/69: (iii) involves the use as propagating material of material which has not been sold or otherwise put on the market as propagating material.

¹⁰¹ DC 1991 paragraph 1683.

¹⁰² DC 1991, paragraph 1673

¹⁰³ DC 1991, paragraphs 1681.2 and 1681.4

¹⁰⁴ DC 1991, paragraph 1852.5

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.*

(2) [Meaning of “material”] For the purposes of 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.*

(3) [“Territory” in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.”

III. Main Findings

19. The intention of the drafters of the UPOV 1991 Convention concerning exhaustion, is clearly to restrict the breeder’s right to the first, usually propagating material released on the market, with the consequence that the material harvested or derived therefrom does not fall under the protection of Article 14, unless the breeder had no reasonable opportunity to exercise his right.

20. The use of harvested material like plants or bulbs for the production of derived material like flowers, does not fall under the exhausted breeder’s right, where paragraph 14(1)(b) can be used to exercise the right on that material.

The two exceptions i) and ii) in Article 16 regard the use for further propagation of that material and the export of material that can be used as propagation material, to a country where the variety cannot be protected, “except where the exported material is for final consumption purposes”.

21. This last sentence was added without further discussion. But a logical conclusion is that, although such material, like grass seeds for pastures or lawns may also be capable for propagation, no derived propagating or harvested material should be expected from such material.

22. Regarding the relationship between Article 14 and Article 16 UPOV 1991:

A. It is clear that where, according to Article 16, the breeder’s right is exhausted, Article 14 can no longer be invoked by the breeder with regard to the respective material.

B. In case of further propagation of the material of the variety that has been put on the market, the breeder’s right “revives.”

C. The use of harvested material, wherefore the breeder’s right has been exhausted – like rose bushes or tulip bulbs – for the production of flowers, can be controlled by the provision under article 14(1)(b):
“The breeder may make his authorization subject to conditions and limitations”.

D1. If propagating material, or material that can be used as propagating material, of a protected variety is sold to a party that exports this material to a territory where there is no breeder’s right available for the species to which this variety belongs, the breeder’s right is not exhausted.

D2. That means that the holder can exercise his right on the imported harvested material produced from this propagating material, as the harvested material has been produced unauthorized in relation to the non-exhausted breeder’s right and the holder had no reasonable opportunity to exercise his right in that other territory.

Conclusions

The Group analyzed the history of the 1978 and 1991 UPOV Conventions and the intentions of the drafters, for the concepts of article 14 (1) and (2) of UPOV 1991, viz. “unauthorized use”, “reasonable opportunity”, as well as their relationship with the “Exhaustion of the Breeder’s Right” by studying the preparatory papers and the records of the diplomatic conferences, together with the relevant jurisprudence.

On the basis of these extensive studies, the Group arrived at the following summarized conclusions:

1. Any use specified in Article 14 (1)(a) UPOV 1991, subject to conditions and limitations under Article 14 (1)(b), of propagating material of a protected variety, requires authorization of the owner of the breeder’s right related to that variety. It is otherwise an unauthorized use.
2. The notion “unauthorized” in Article 14 (2) UPOV 1991 relates to the authorization of the holder of the breeder’s right at issue and not to the legal status of the propagating material used for obtaining the harvested material. Whether the use of the propagating material outside the territory where the respective breeder’s right is granted, valid and enforced, is covered by any proprietary right or not, i.e., legally or illegally used, is irrelevant.
3. 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) UPOV constitute an inseparable whole.
4. The introduction of the notion “reasonable opportunity” into the wording of Article 14 (2) has widened the possibility to claim protection of the breeder’s right to harvested material beyond the previous notion of “has had no legal possibility to exercising the right in relation to the propagating material”.

5. Under the cascading principle set forth in Article 14 (2) UPOV 1991 the owner of the right can exercise the right and receive the corresponding royalty once only, subject to possible contractual conditions and limitations imposed by the owner of the breeder's right.

6. The authorization of the breeder's right holder is required for all acts specified in Article 14 (1) (i)-(vii) UPOV 1991, also related to the harvested material so obtained outside the validity of the respective breeder's right, when that harvested material enters into and is distributed in the territory where the respective breeder's right is valid as the harvested material then fulfills the cumulative requirements "unauthorized use" and "no reasonable opportunity to exercise his right". Any other exercise of that right, e.g., by claiming royalties, at the same time constitutes "exercising of the breeder's right at the earliest possible stage" within the cascade.

7. "*Unauthorized use*": the use of propagating material of a protected variety, without the authorization of the holder, for the production of the resulting harvested material within or outside the territory where the variety is protected is unauthorized use. This will also include where the possibly imported harvested material falls under the protection of article 14(2) UPOV 1991.

8. The *reasonable opportunity* clause was adopted as a compromise during the 1991 Diplomatic Conference, replacing stricter proposals such as "no legal possibility" or "in spite of all due care." This drafting choice ensured a flexible, context-sensitive interpretation while preserving the cascade structure. It reflects a negotiated compromise intended to preserve the cascade structure while allowing contextual judicial interpretation and marked a new safeguard in extending rights to harvested material.

9. Its primary function is to ensure proportionality: downstream enforcement over harvested material is permitted only when breeders lacked a realistic chance to exercise rights earlier at the propagation stage. The distinction drawn at the Conference between "exercise" of rights (e.g., licensing or royalty collection) and "enforcement" (legal remedies) confirmed that *reasonable opportunity* pertains primarily to the former: whether the breeder had a commercially meaningful chance to intervene upstream.

10. *Reasonable opportunity* has emerged as the decisive threshold for applying the cascade principle: it prevents retroactive or opportunistic claims while ensuring breeders are not deprived of protection when upstream enforcement is legally or practically impossible.

11. The intention of the drafters of the UPOV 1991 Convention concerning exhaustion, is clearly to restrict the breeder's right to the first, usually propagating, material released on the market, with the consequence that the material harvested or derived therefrom does not fall under the protection of article 14, unless the breeder had no reasonable opportunity to exercise his right.

12. The use of harvested material like plants or bulbs for the production of derived material like flowers, does not fall under the exhausted breeder's right, where paragraph 14(1)(b) can be used to exercise the right at the earliest possible stage on the propagating material or possibly the harvested material.

13. The two exceptions i) and ii) in Article 16 regard the use for further propagation of that material and the export of material that can be used as propagation material, to a country where the variety cannot be protected, "except where that material is for final consumption".

14. The last sentence has been added without further discussion. But a logical conclusion is that, although such material, like grass seeds for pastures or lawns may also be capable for propagation, no derived propagating or harvested material should be expected from such material.

15. Regarding the relationship between Article 14 and Article 16 UPOV 1991:

- a. It is clear that where, according to Article 16, the breeder's right is exhausted, article 14 can no longer be invoked by the breeder with regard to the respective material.
- b. In case of further propagation of the material that has been put on the market, the breeder's right "revives."
- c. The use of harvested material, wherefore the breeder's right has been exhausted - like rose bushes or tulip bulbs - for the production of flowers, can be controlled by the provision under Article 14(1)(b): "The breeder may make his authorization subject to conditions and limitations".
- d. If propagating material, or material that can be used as propagating material, of a protected variety is sold to a party that exports this material to a territory where there is no breeder's right available for the species to which this variety belongs, the breeder's right is not exhausted.
- e. That means that the holder can exercise his right on the imported harvested material produced from this propagating material, as the harvested material has been produced unauthorized in relation to the non-exhausted breeder's right and the holder had no reasonable opportunity to exercise his right in that other territory.

PART TWO – CASE LAW

I. “Melanie” and “Amethyst”

German Federal Supreme Court, 14. 2. 2006, X ZR 93/04, GRUR 2006, 575 – Melanie and Amethyst¹⁰⁵.

Facts: The plaintiff is the proprietor of the German Plant Variety Rights in the variety “Melanie” and the Community Plant Variety Right “Amethyst”, both belonging to the botanical species *Calluna vulgaris*. He is claiming an infringement of his plant variety rights by the defendant. The defendant is the company responsible for the purchases of the garden centres of the B-group of companies. The defendant bought plants of *Calluna vulgaris* from intervener N° 2, a company situated in the Netherlands, who had bought plants from intervener N° 1, a company situated in France. The plaintiff considers *Calluna vulgaris* plants sold by the defendant to infringe his plant variety rights.

Findings: The Federal Court of Justice held that the sale of whole plants does not fall within the scope of section 10 para. 1 N° 1 German PVR Act as the provision only covers propagation material. Pursuant to section 2 N° 2 German PVR Act “propagation material” includes only plants and parts of plants, which are intended for the production of plants or for cultivation. However, the court held that the plants were “other plants” within the meaning of section 10 para. 1 N° 2 German PVR Act in relation to which the plaintiff had not been able to exercise his plant variety rights. Regarding the production of plants in France, the plaintiff was unable to exercise his right which, as a national right, was limited to the territory of Germany. The Court also held that, regarding plants of the variety “Amethyst” whole (pot) plants could not be seen to be “harvested material” within the meaning of Article 13 paragraph 3 Regulation 2100/94, as “no act of a harvest” occurred in their production. The Court considered those plants as “variety constituents” within the meaning of Article 13 paragraph 2.

II. “Erntegut”

German Federal Supreme Court, 28.11.2023, X ZR 70/22, GRUR 2024, 127 – Erntegut

¹⁰⁵ English summary/German full text available at <https://cpvoextranet.cpvo.europa.eu/PVRCASELAW>

Facts: The plaintiff the holders of several cereal varieties protected by Community PVRs. The legal predecessor of the defendant (hereinafter referred to simply as the defendant) sold harvested crops that it had purchased from three different farmers as consumer goods. The farmers had produced the harvested crops from material that they had purchased from three other farmers. The plaintiff is seeking an injunction prohibiting the defendant from offering, selling, otherwise placing on the market or storing for one of these purposes harvested material of the varieties in suit without the consent of the rightsholder. According to the plaintiff, the rightsholder had no opportunity to assert their plant variety rights with regard to the use of these variety constituents since he had no knowledge of the earlier sale of variety constituents to the farmers who later sold the harvested crops to the defendant.

Findings: Rights in relation to harvested material are not excluded under Article 13 (3) Regulation 2100/94 if the entitled person had the legal possibility to assert his right in connection with the variety protection elements. Rather, it is necessary that the entitled person actually had sufficient possibilities to his right in relation to the variety constituents used to obtain the harvested material.

b) A sufficient opportunity to assert the right in connection with the variety constituents used for the production of harvested material presupposes that the entitled person can ensure in advance that acts of use in relation to these variety constituents will only take place with his consent.

III. “Cilena”

Court of Appeal of Düsseldorf, 21.03.1996, 2 U 20/95, Mitt. 1998, 153 = BeckRS 2011, 00338
– Cilena

Facts: The plaintiff is the holder of the German plant variety right of the potato variety “Cilena”. He instructed a test buyer to ask the defendant, a merchant dealing with potatoes, to deliver 1.000 kg of potatoes of the variety “Cilena”. The potatoes should be usable to use as propagating material. The defendant delivered the potatoes suitable for planting for a total price of DM 299,60 labelled as “table potatoes”. The plaintiff claimed for injunctive relief and damages of DM 155,00 for lost licence fees besides damages of DM 299,60 for the potatoes which the test buyer bought.

Findings: The Court of Appeal held that the defendant infringed the plaintiff's plant variety right by selling "propagating material" pursuant to sections 2 Nr. 2, 10 N° 1 German PVR Act 1985. In addition to an injunctive relief, it ordered the defendant to pay damages in the amount DM 155,00 (plus interest) for lost licence fees. The court held that the plaintiff did not have further damages as the potatoes which the test buyer bought were worth the DM 299,60 it paid for them. In its reasoning, the court referred to the "Achat"-Decision by the Federal Supreme Court. The distributor is liable if a possible later propagation is foreseeable for him at the time of sale and if he accepts this possibility by not taking adequate measures to prevent an infringement of the variety right. In case of a foreseeable later propagation, one adequate measure would be to notify the variety right holder. It is not sufficient to only use the label "table potatoes".

IV. "Goldfinger"

Regional Court of Düsseldorf, 24.11.1998, 4 O 404/97¹⁰⁶

Facts: The plaintiff is the holder of several German plant variety rights including the variety "Goldfinger" and of exclusive licenses of poinsettia plant species. The defendant was a propagator having concluded a licence agreement with the plaintiff, in which he was obliged to only obtain propagating material from the breeder or accordingly licensed third parties. However, the defendant received 134.000 plants covered by rights of the plaintiff from a third party who did not have such a licence anymore. The defendant later sold millions of cuttings.

Findings: The Regional Court held that the defendant infringed the plaintiff's plant variety rights by selling "propagating material" pursuant to sections 2 Nr. 2, 10 para. 1 N° 1 German PVR Act. It elaborated that the defendant's license was validly restricted by the aforementioned clause although the plaintiff had a monopole on poinsettia plants. The court ordered injunctive relief and granted damages to the defendant. Although the plaintiff received license fees from the defendant, damages still were justified because the right holder had a reasonable interest in securing the quality and reputation of its plant varieties. However, the suit was partially dismissed because the plaintiff failed to prove having the exclusive licenses of some of the plant variety rights.

¹⁰⁶ German full text available at <https://cpvoextranet.cpvo.europa.eu/PVRCASELaw>.

V. “Amaryllis”

Hoge Raad, 9.4.2021, Court of Appeal, 29.10.2019, Court of The Hague 6.7.2016¹⁰⁷

Facts: The plaintiff is engaged in the cultivation, breeding and packaging of flower bulbs as well as trading in flower bulbs, seeds and related articles. He holds the Dutch and European plant variety rights for varieties of Amaryllis L. The defendant is a grower of flowers. He took over a flower bulb nursery which operated under the control of a third party until the spring of 2010. When the defendant took over the nursery, planting material, including amaryllis bulbs of the protected varieties were still present on the premise. These bulbs were (partly) sold by the defendant to consumers.

Findings: The sale of flower bulbs constitutes an infringement of plaintiff’s plant breeders’ rights. Flower bulbs fall under the definition of propagating material, since they are intended to serve for the cultivation of plants. It is not relevant in this context whether the bulbs are sold on the consumer market. After all, consumers will also use the bulbs to grow flowers from them. Flower bulbs are “plants and parts of plants intended for plant cultivation or propagation or for that purpose” in the sense of Article 1 lit f) Dutch PVR Act and fall under Article 57(1) of the Act. They are also covered as “plant parts insofar as those parts can produce complete plants” by Articles 5(3) and 13(2) CPVR.

VI. “Franklin”

Cultivaust Pty Ltd v Grain Pool Pty Ltd: Federal Court 21.5.2004 (Mansfield J), Full Federal Court 28.10.2005 (Finn, Emmett & Bennett JJ)¹⁰⁸

Facts: The plaintiff (Cultivaust Pty Ltd) was the license holder of a Plant Breeder’s Right (PBR) in Australia for the barley variety “Franklin” under the *Plant Breeder’s Rights Act 1994* and first granted under the *Plant Variety Rights Act 1987*. At the time a compulsory barley marketing pool for the variety was conducted by a government corporation (Grain Pool Pty Ltd)

¹⁰⁷ Dutch full text available at <https://cpvoextranet.cpvo.europa.eu/PVRCaseLaw>.

¹⁰⁸ Federal Court full text available at

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2004/2004fca0638>. Full

Federal Court full text available at

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2005/2005fcafc022>.

where farmers in Western Australia were required to deliver their harvested barley grain to Grain Pool and this grain was then marketed and sold by Grain Pool.

The farmers were then paid for the grain they had delivered to Grain Pool. As such, Grain Pool controlled the sale and distribution of barley produced in Western Australia. Cultivaust claimed Grain Pool had infringed their PBR by storing the “Franklin” grain for the purpose of offering it for sale, selling it or exporting it. Cultivaust variously allocated and distributed the protected barley to farmers for growing without imposing a royalty expecting to collect their royalty when the harvested grain was delivered to Grain Pool (an End Point Royalty). Farmers also saved seeds across seasons supplying the harvest of those saved seeds in the following years. The grains delivered to Grain Pool were sold to maltsters and animal feeders (expressly not reproduction).

Findings: In deciding there was no infringement the court held that “propagating material” was a plant material capable of reproduction to generate multiple individual plants also capable of reproduction, and that “harvested material” was the second and subsequent generations of the crop (G2 and G2+).

In Australia at the time, there was an implied licence to store and sell the first generation of seeds (G1). As such the G2 and G2+ grain delivered to Grain Pool was “harvested material”. For the “harvested material” to infringe required both: (1) production or reproduction without authorisation; and (2) no reasonable opportunity to exercise the PBR over the “propagating material” (at G0 or G1). As a matter of fact the court found Cultivaust could have imposed a royalty on the farmers at the point of first allocation and distribution. As they had not because they wanted to impose an end point royalty but could have – this was a reasonable opportunity – there was no infringement by Grain Pool by storing the “harvested material” grain.

VII. “Shitake”

Shiitake Case – IP High Court of Japan, Judgment of March 6, 2019; Tokyo District Court, Judgment of June 8, 2018

Facts: The plaintiff, Mori Sangyo Co., Ltd., held the breeder’s right for the shiitake variety JMS5K-16, a strain originally developed by Meiji Seika and registered in Japan in 1999.

The defendant, Kawazuru Co., Ltd., along with its affiliated companies, was engaged in the import and sale of shiitake mushrooms allegedly derived from unauthorized propagation of that variety. The cultivation process at issue involved fungus beds imported from China, supplied via a Japanese intermediary, Suzutomi Co., Ltd. The beds were labelled as varieties “L-808” and “Xiao Ji SD-1.” However, the plaintiff presented evidence—including DNA analysis and expert reports, suggesting that these beds in fact contained the JMS5K-16 variety, and that the mushrooms harvested in Japan and sold by the defendant were materially identical to the protected variety.

The plaintiff did not have protection for JMS5K-16 in China and could not pursue enforcement at the stage of propagating material. On this basis, it claimed infringement over the harvested material sold in Japan, invoking the cascade clause under Article 2(5)(ii) of the Seeds and Seedlings Act.

Findings: The District Court partially upheld the plaintiff’s claim. It recognized infringement based on morphological and genetic similarity between the infringing mushrooms and the registered variety. The court awarded damages, ordered the cessation of sales, and required disposal of infringing stock. It dismissed claims against one of the affiliated companies, finding insufficient evidence of involvement. The defendants argued that the characteristics of JMS5K-16 under fungus bed cultivation were not publicly available and thus not legally protected. The court rejected this view, stating that the registration documents made it sufficiently clear that JMS5K-16 was adapted for both raw wood and fungus bed cultivation. The appeal was filed by the defendants, and a partial cross-appeal by the plaintiff. The IP High Court confirmed the core findings of the lower court, increased the damages award, and provided a more in-depth analysis of the cascade clause and “reasonable opportunity.” It rejected the plaintiff’s request for a public apology and dismissed the defendant’s challenge regarding characterization of the variety.

VIII. “Nardocott”

CJEU, 19.12.2019, C-176/18 - Club de Variedades Vegetales Protegidas v. Adolfo Juan Martínez Sanchís

Facts: The case involves the mandarin tree variety “Nadorcott” for which an application for a PVR was filed in 1995 and, after an appeal, was finally granted and published by the CPVO in 2006. Mr. Martínez Sanchís, a Spanish farmer, had purchased Nadorcott plants from a nursery between 1995 and 2005, thus before the grant of the PVR, but after the application for those rights had been published. The claimant, CVVP (a plant variety protection association), sought damages for acts done both during the provisional protection period and after full protection had been granted. Specifically, CVVP wanted to prevent the use and marketing of the harvested fruit from these trees.

Findings: The Court distinguished primary protection (over propagating material or “variety constituents”) and secondary protection (over harvested material). It affirmed that: (i) protection over harvested material is conditional; (ii) it is available only if the two cumulative conditions in Article 13(3) are met; (iii) this cascade logic preserves a balance between breeder protection and agricultural production.

The Court ruled that purchasing plants during the provisional protection period (i.e., after the application was published but before formal grant) does not qualify as unauthorized use under Article 13(3). During that period, breeders only have a right to reasonable compensation, not exclusive rights to prohibit use. So, if propagation happened during provisional protection, it is not considered non-unauthorized, and Article 13(3) protection over harvested fruit cannot apply. The Court did not define “reasonable opportunity” in detail, but it confirmed it as a factual criterion, i.e., a condition that must be verified by national courts in each case. However, it reaffirmed that this clause is critical in preventing breeders from asserting rights retroactively in situations where they could have enforced their rights earlier but failed to do so.

IX. “Greenstar Kanzi”

CJEU, 20.10.2011, C-140/10 – Greenstar Kanzi v. Jean Hustin and Jo Goossens

Facts: A Belgian breeder of apple trees (Better3Fruit) granted an exclusive licence to its licensee (Nicolai) to commercialise trees of the particular variety Nicoter. In the licence agreement it was stipulated that the licenced product (i.e., the protected apple trees) could only be sold if the buyer first signed an agreement allowing him to grow or market the protected trees. Nicolai disregarded this clause and sold the apple trees to a grower, Hustin, without the

latter having signed the growing/marketing agreement. Hustin subsequently sold apples from these trees to Goossens.

In the meantime, the licence agreement between Better3Fruit and Nicolaï had been terminated and Better3Fruit concluded a new exclusive licence agreement with Greenstar Kanzi Europe. Greenstar sued Hustin and Goossens for infringement of the Community Plant Variety rights for Nicoter and for unfair trade practices. According to Greenstar, Hustin could not have legitimately purchased the apple trees from Nicolaï since the latter had violated the terms of its licence agreement and, as a consequence, he could also not have legitimately sold the harvest of the trees to Goossens. According to Hustin and Goossens, Greenstar's rights were exhausted because Nicolaï had disposed of material of Nicoter in the Community. According to them, this was all the more so since they were not aware of Nicolaï's contractual obligations when he bought the trees from him.

Findings: In its decision of 20 October 2011, the CJEU decided that, whereas a licensee who puts goods protected by a PVR on the market is normally considered to be doing so with the consent of the holder of the PVR, a licence agreement does not constitute an absolute and unconditional consent of the holder to the licensee putting the goods on the market. In that respect, Article 27(2) of Regulation 2100/94 expressly provides for the possibility, for the holder, to invoke the rights conferred on him by the PVR against a person enjoying the right of exploitation where that person contravenes any of the clauses of the licensing contract.

According to the court, this also implies that any person acquiring the plant material further downstream cannot rely on the doctrine of exhaustion. Nevertheless, the CJEU clarified that, an infringement of any clause of the licensing contract does not always result in vitiation of the holder's consent. That can only be the case if it is established that the licensee breached a condition or limitation in the licensing contract relating directly to the essential features of the PVR. According to the CJEU, a condition or limitation which does not affect the consent to the placing of the goods on the market and which therefore has no effect on the exhaustion of the holder's right, does not meet that requirement. The Court further decided that subjective elements, such as awareness of the conditions or limitations imposed in the licensing contract, do not in principle play any role in the assessment of an infringement or of the right to bring an action against the person who committed that infringement.

X. “IFG Vine”

Tribunale di Bari, 20.7.2020, case 2356/2020, International Fruit Genetics LL.C. v. Top Fruit Di Angela Cokucci and C.¹⁰⁹

Facts: The plaintiff is the holder of several Community PVRs granted for varieties with denominations ‘IFG TWO’, ‘IFG SEVEN’, ‘IFG NINE’ and ‘IFG ELEVEN’. The cultivation and growing of the trees of the protected varieties by the defendant took place in the period between the publication of the application and the granting of the Community PVRs. The plaintiff asks the court for a saisie-description and injunction against the defendant for the alleged infringement of the PVRs by the use and marketing of the harvested fruit from the grapevines.

Findings: Following the interpretation provided by the Court of Justice of the European Union in case C-176/18 (‘Nadorcott’), the title holder is only entitled to a reasonable compensation under Article 95 of the Basic Regulation for the cultivation of variety constituents carried out in the period between the publication of the application and the date of granting of the Community plant variety right. Consequently, the fruits obtained from trees planted during the provisional protection period, cannot be considered as obtained through unauthorized use pursuant to Article 13(3) of the Basic Regulation, and this even if they were harvested after the grant of the Community plant variety right.

XI. “Sun World”

Corte Suprema di Cassazione, 9.4.2024, case 9429/2024, GRUR Int. 2025, 262 (English translation)

Facts: Sun World, holding a Community plant variety known as ‘Sugranineteen’, which produces seedless red table grapes marketed under the registered trademark ‘Scarlotta seedless’, entered into a contract titled ‘Lease Contract with the Grapes Producer’ (hereinafter, the ‘Main Contract’) with the one-man enterprise ‘Mi.An.’, owner of a plot of land of 1.8 hectares located in the countryside of Acquaviva delle Fonti (Bari, Italy). This contract granted to the latter,

¹⁰⁹ English summary/German full text available at <https://cpvoextranet.cpvo.europa.eu/PVRCASELaw>.

upon a payment in the amount of EUR 855.60, the licence to lease and grow 3,100 buds of Sugranineteen on its land. Article 4 of the Main Contract also provided that the fruit produced from the rented plants was to be marketed by an authorised Sun World distributor.

Findings: Protection of harvested material, consisting of fruits that are not liable to be used as propagating material, can only be invoked under two conditions: (a) such material was obtained through the unauthorised use of variety constituents; (b) the holder did not have the opportunity to exercise his right in relation to those variety constituents. A contractual clause conferring on the holder of intellectual property rights in respect of patented cultivars also the power to determine the persons who alone will be entitled to distribute the fruits obtained by the producer, previously authorised to use the variety constituents of the protected variety from which such fruits were produced, where such fruits are not likely to be used as propagating material, is null and void as contrary to public order, on the ground of infringement of Article 13(2) and (3) of Council Regulation (EC) No. 2100/94, as interpreted by the CJEU.

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[End of Annex and of document]