



Implementation of Article 14(2) and 14(3) of UPOV 1991 in Relation to the Phrase “Reasonable Opportunity”

(Christchurch, May 2007)

ISF is of the opinion that the history of article 14 of the UPOV Convention and the below-mentioned case clearly indicates that the phrase “unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating (harvesting) material”, relates only to an existing right as granted and does not extend to the obligation to protect the variety in other countries where the variety can be protected and might be produced.

Paragraphs (2) and (3) of article 14 UPOV 1991 extend the protection of the protected variety, as formulated in paragraph (1), to the harvested material and, optionally, to the end product. This important extension of the breeder’s right however is only applicable if the propagating material was used unauthorized *and* if the holder of the Plant Breeder’s Right (PBR) had no *reasonable opportunity* to exercise his right on the preceding propagating or harvested material.

The question here is whether the requirement that the breeder should first have tried to exercise his breeder’s right on the propagating material, before he can obtain his rights on harvested material, imposes the obligation on the breeder to protect his varieties in all countries where there is a PBR system and where there is the risk that the variety in question may possibly be propagated and exported to the country where it is protected.

From the history of this provision as reflected in the minutes of the Diplomatic Conference of 1991, it can be concluded that it has clearly not been the intention to require breeders to protect their varieties in other UPOV countries, but that the aim of this phrase is to oblige the breeder to exercise his existing right at the earliest possible opportunity in the trade chain.

Recent jurisprudence, the decision of the German Supreme Court of 14 February 2006, No. X ZR 93/04, confirms this interpretation. In this case harvested material of a variety of *Calluna vulgaris*, only protected by German PBR, was after reproduction in France traded in Germany. The Court reasoned that as the breeder had no opportunity to act on the propagation material, because he had no PBR in France, he was entitled to exercise his rights on the harvested material. This decision supports the view that the provision as discussed is only related to the exercise of an acquired PBR.