

# Harvested Material – Breeder's perspective

UPOV Seminar on the breeders' rights in relation to harvested material  
27 May 2021

**Antonio Villarroel**

Representative of the International Seed Federation (ISF), CropLife International, the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), the Seed Association of the Americas (SAA), the African Seed Trade Association (AFSTA), Euroseeds and the Asia and Pacific Seed Association (APSA)



# Background

- **Art. 14.1:** the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder: (i) production or reproduction (multiplication), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing and (vii) stocking for any of the purposes mentioned in (i) to (vi), above.
- **Art. 14.2:** the acts as listed above shall apply also to harvested material, including entire plants and parts of plants, that has been obtained through the unauthorized use of propagating material of the protected variety, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.



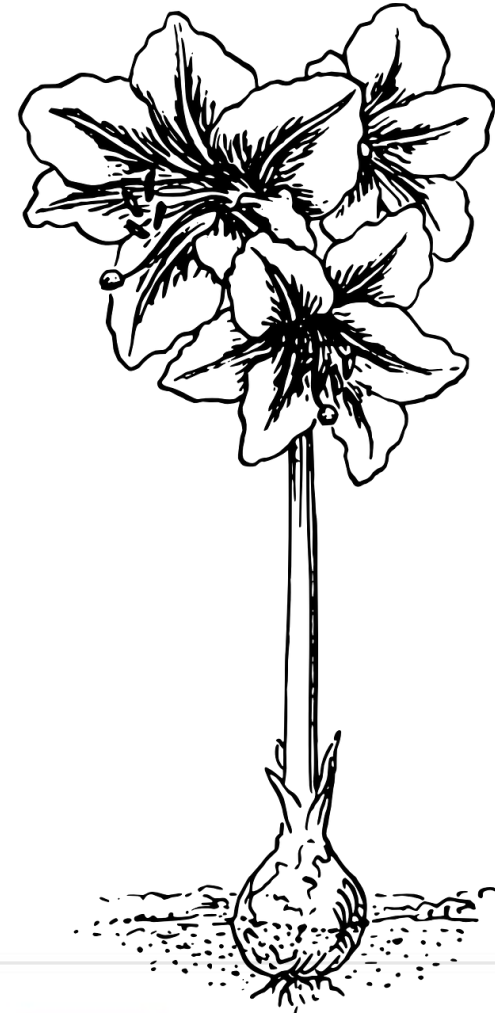
# Provisional protection

- **Art. 13:** Each Contracting Party **shall** provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures **shall** have the effect that the holder of a breeder's right **shall at least** be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application”.
- Nothing is said, however, with regard to the legal situation in which the plant material reproduced during that period would subsequently be found.
  - Crucial issue for specific species (woody plants such as fruit trees) where, once reproduced without authorization, the plants could remain under production for many years.



# Propagating vs Harvested Material

- Key terms in the UPOV system
- But UPOV Acts do not include a definition of “propagating material”, “harvested material” nor “unauthorized use”
- Divergence in national definitions => legal uncertainty
- Harmonization of definitions is needed, particularly in global market



# Blow to plant breeders

## CJEU decision on the Nadorcott case:



- After the grant of PBR, holder has only right to claim reasonable compensation for acts performed under “provisional protection”, but not further rights, such as, inter alia, the right to authorize or prohibit the use of variety constituents of that plant variety.
- CJEU: Performance of such acts does not constitute “unauthorized use”.
- The concept of “provisional protection” is undermined (or even deprived of sense).
- PVR’ holders are deprived, once the protection is granted, of any right to oppose the continuation of the exploitation (growing plants and producing and selling the fruit) of the plants propagated during the “provisional protection” period.
- This interpretation is too narrow & does not provide an effective protection of the breeder’s right on harvested material.





# Background about Nadorcott

- Long period under “provisional protection” (10 years from 1996 to 2006).
- Propagation and exploitation of the variety came out of any control by the breeder during that period (up to 1M plants; >30 nurseries and >700 growers).
- Breeder forced to deal with a vast number of amicable (several hundreds!) or contentious (over 100 cases at court) settlements to regularize the situation
- Huge amount of money invested (and lost) by the breeder in regularization (average compensation: 50% of royalties)



# Background about Nadorcott

- Nadorcott proved to be an extremely profitable variety for growers:

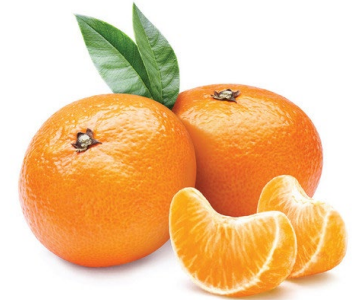
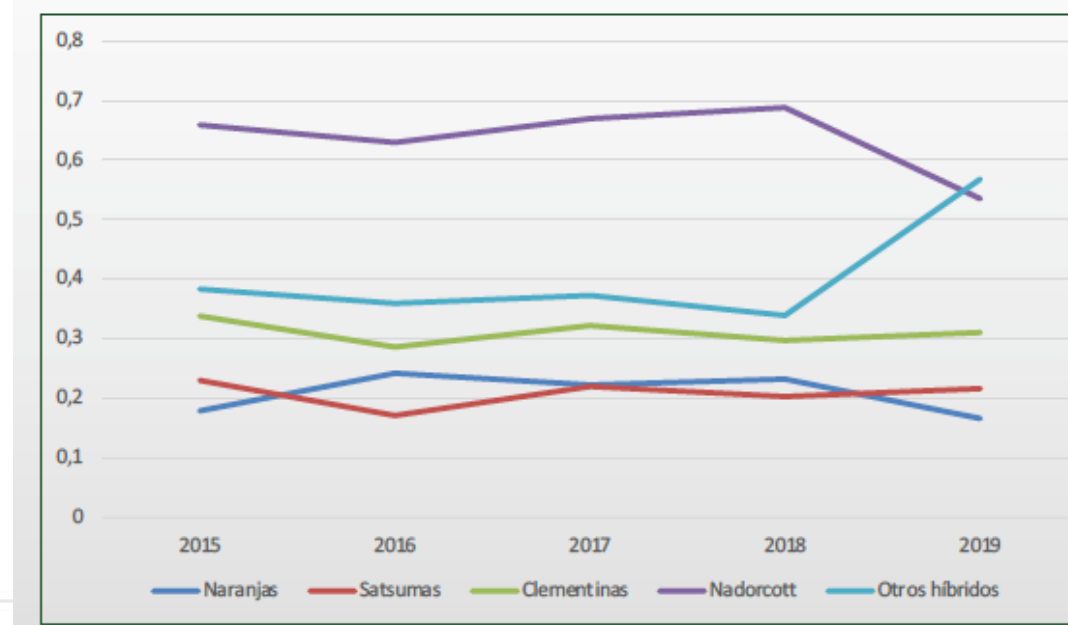


Table 4. Profitability of mandarin varieties (2018/19)

	Gross margin	Profit margin	Land income	Price	Profitability
Satsumas	0,21	0,27	0,28	0,216	NO
Clementinas	0,21	0,27	0,28	0,31	Ordinary
Nadorcott	0,21	0,27	0,28	0,535	YES
Hybrids	0,21	0,27	0,28	0,568	YES

(Datos en €/Kg.).

Source: Polytechnic University of Valencia



# Background about Nadorcott

- Nadorcott proved to be an extremely profitable variety for growers:

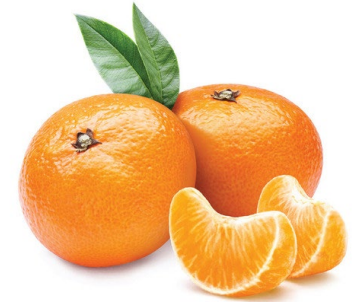


Table 5. Summary of bottom line for mandarin growers in Spain (years 2008 to 2020)

Variety Group	Negative	Balanced	Positive	Very positive
Clementines	8	1	3	0
Free Hybrids	3	3	5	1
Club Hybrids	0	0	1	11

Source: Polytechnic University of Valencia



# Concerns over CJEU interpretation

- ⇒ Provisional Protection is vital, especially for species with a longer DUS-period such as fruit trees
- ⇒ Segmentation is a clear trend, specially in fresh produce (fruits, vegs, potatoes, flowers), providing new opportunities to add value for breeders, growers and consumers
- ⇒ Business model put at risk



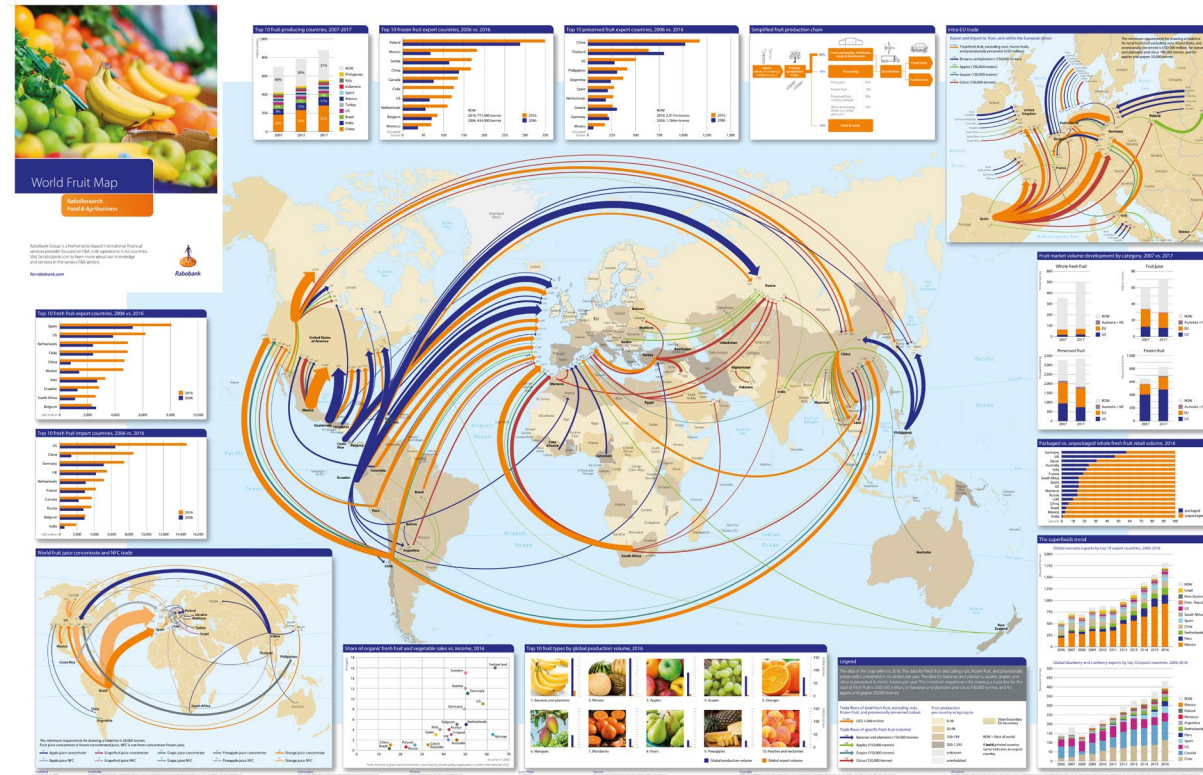
# Concerns over CJEU interpretation - 2

- Emerging plant diseases under a changing climate scenario threat our global food supply
- Tolerance to both abiotic and biotic stresses constitute priority breeding goals for all crops.
- After years of breeding new varieties, plant breeders seek to bring the benefits of innovations quickly to growers and consumers.
- Narrow interpretation of the scope of “provisional protection” and “unauthorized use” endangers our capacity to face those challenges as it can result in serious delays in making available newest varieties to the market (no incentive but risks for breeders to commercialize their varieties before PBR is granted).



## Implications with regard to the concept of “unauthorized use”

- UPOV EXN on HRV: Thus, *unauthorized acts can only occur in the territory of the member of the Union where a breeder's right has been granted and is in force.*
- Potential challenges for enforcement of PBR on (“unauthorised”) harvested material coming from third countries where the variety is not protected (where no authorization is required)?
- Relation with article 16, as the PBR in the territory of import is not exhausted? - A PBR can only be exercised in the country where it is in force
- Lack of clarity here could affect relocation of production and endanger the growing global trade for many crops (fruits, vegs, potatoes, ornamentals...)





# Questions that seminar should answer:

- How can the loophole in the protection of harvested material, as highlighted by the decision of the CJEU, be closed?
- How is the legal situation when a variety, without the consent of the breeder, is propagated (reproduced/multiplied) and grown in country A, where no PBR law exists, and harvested material is exported from this country to country B, where a breeders right for the variety is in force? Can the import of the harvested material be stopped by the title holder?
- Does it make a difference if a signed contract between the breeder and a grower is breached?



# Questions that seminar should answer (2):

- Does it make a difference if breeder has authorized the shipment of propagating material to country A, and the material is now multiplied further without his consent?
- Does it make a difference if a PBR system exists in country A, but the breeder has not sought protection for his variety in the country?
- How is the legal situation if a PBR law exists in country C, which contains an unlimited farmers' exemption for the species concerned, and a farmer makes use of it and exports his harvest to country B?





# Conclusion

- For breeders it is critical that the UPOV Plant Breeders Rights system provides effective protection for harvested material especially in cross-border situations.
- Current EXN on Acts in respect of Harvested Material under the 1991 Act (adopted on October 24, 2013), provides for a too narrow interpretation of the concept of “unauthorized use of propagating material”.
- This significantly weakens the PBR protection and undermines quick access to innovation.
- Consider a clarification and differentiation of the terms “propagating material” and “harvested material”.



***Thank you for your attention!***



# Back-up slides



# CPVR Regulation 2100/94

Art.5(3) : “A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to herein after as ‘variety constituents’”



# Variety Constituents vs. Harvested Material

Conclusion Kanzi case: Plant material, which can be directly used to produce entire plants with the same characteristics as those which are protected, is to be considered as 'variety constituents'!





# Road Ahead (according to Metzger, 2016)

Restrictive concepts of prop. material can be handled in the agricultural sector

But: Loopholes of protection for ornamental breeders

Loopholes concern use of consumption products => revision of 2nd level of 'cascade'

Intermediate solution under UPOV 1991

- \* Broad definition of propagating material

- \* Barriers for protection of harvested material should be lowered through careful interpretation

