



CPVO

Community Plant Variety Office

Notions of “Novelty” and “Variety of Common Knowledge” Protection of Harvested and Propagating material under UPOV 1991 Act

根据1991年UPOV法案对收获及繁殖材料“新颖性”和“已知品种”的保护

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新植物品种保护国际研讨会

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Introduction to UPOV and the CPVO

UPOV和CPVO简介



UPOV Convention (UPOV公约)



- The International Union for the Protection of New Varieties of Plants (UPOV) was set up in 1961 / 国际植物新品种保护联盟成立于1961年
- Intergovernmental organization regulating and harmonising the International legal framework for the protection of PVRs – *Sui generis* system of IP protection over plant varieties / 是规范和协调PVRs保护国际法律框架的政府间组织——植物品种知识产权保护的特殊制度
- UPOV has its Headquarters in Geneva (Switzerland) – It has legal personality / UPOV总部位于日内瓦（瑞士）- 具有法人资格
- UPOV currently has 77 Contracting Parties (Feb 2021) / UPOV目前有77个缔约方（2021年2月）
- UPOV Convention adopted in Paris in 1961 – revised in 1972, 1978 & 1991
> latest Act: 1991 Act / 1961年在巴黎通过的UPOV公约-1972年、1978年和1991年修订
>最新法案：1991年法案



Legal Framework of the EU PVR system

欧盟PVR制度的法律框架

The EU put in place the Community Plant Variety Rights (CPVR) system / 欧盟实施了“欧盟植物品种权”（CPVR）系统

- *A sui generis (regional) system for the protection of plant varieties in the EU territory*/保护欧盟地区植物品种的属（区）制；
- *In line with the TRIPS Agreement requirements [Article 27(3)(b)]*/ 符合三方协议要求 [第27（3）（b）条] ；
- *Legal basis is Council Regulation No 2100/94 on Community Plant Variety Rights (BR)*/ 关于植物多样性权利（BR）的第2100/94条法律法规 ；
- *Modelling on the UPOV Convention (the EU is member of UPOV since 2005)*/ 仿效UPOV公约（欧盟自2005年起成为UPOV公约成员） ；
- *Managed by the Community Plant Variety Office (CPVO), in Angers, France*/ 由法国Angers的欧盟植物品种保护办公室（CPVO）管理.

Agency of the EU operational since 1995 and currently based in Angers, France.

欧盟机构自1995年开始运作，
目前总部设在法国昂热。

Mission Statement:

'To deliver and promote an efficient Intellectual Property Rights system that supports the creation of new plant varieties for the benefit of Society'

使命宣言：

“制定和促进有效的知识产权制度，支持植物新品种创造，造福社会”



CPVO

Community Plant Variety Office



The Application procedure (申请程序)



Uniform EU protection (欧盟统一保护)



The protection under the EU system has a uniform effect throughout the EU territory = 27 EU Member States (Article 2 BR)/ 欧盟体系下的保护在整个欧盟领土上具有统一的效力=27个欧盟成员国 (BR第2条) .

- Grant, Transfer, Termination on a Uniform Basis/ 统一



IP

priority/ 知识产权属地原





OUTLINE (大纲)

- **Part I:** Definition and Interpretation of the notion of “Novelty”/ “新颖性” 概念的界定和解释
- **Part II:** Definition and Interpretation of the notion of “Variety of Common Knowledge”/ “已知品种” 概念的界定和解释
- **Part III:** Protection of Propagating and Harvested material/ 收获与繁殖材料的保护



Part I

Definition and Interpretation of the notion of “Novelty”

“新颖性”概念的界定和解释



Conditions for PVR protection (PVR保护条件)



DISTINCTNESS

差异性

UNIFORMITY

一致性

STABILITY

稳定性

NOVELTY

新颖性

DENOMINATION

名称

DECISION

判定

Conditions for the protection of a variety

品种保护的条件

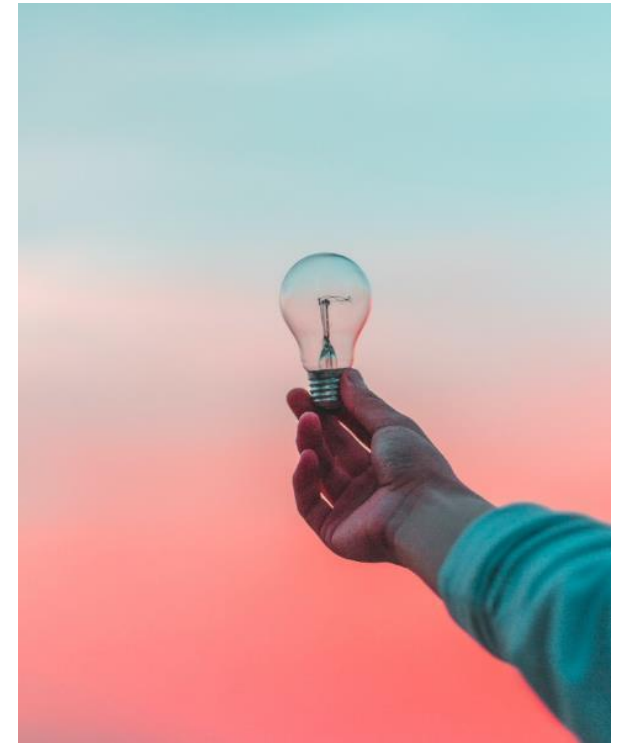


- Article 5 UPOV 1991 Act / UPOV 公约1991年文本第5条
- The variety must be/ 品种必须满足:
 - **NEW** 新颖
 - **Distinct** 差异
 - **Uniform** 一致
 - **Stable** 稳定



Notion of Novelty (新颖性概念)

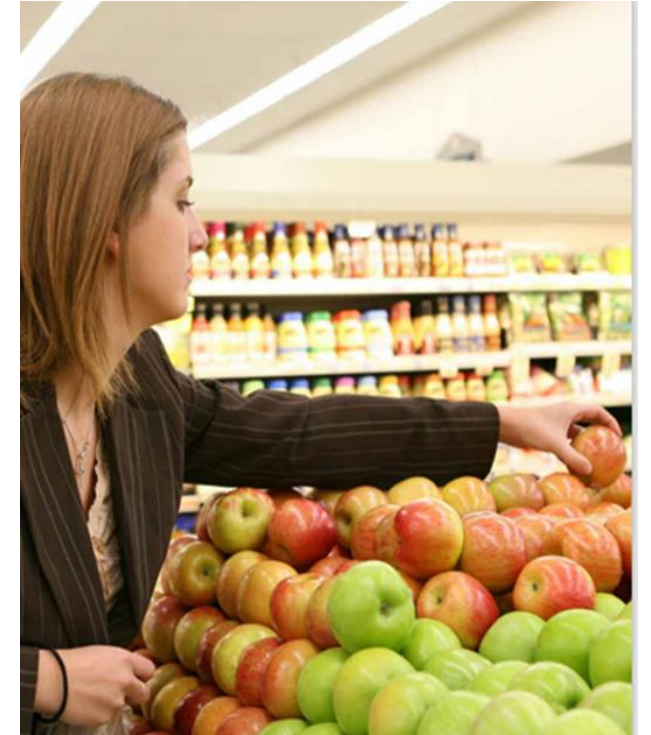
- Article 6 UPOV Act 1991/UPOV 公约1991年文本第6条
- Introducing concepts/概念介绍:
 - Disposal of propagating or harvested material/繁殖或收获材料的处置
 - Selling of propagating or harvested material/繁殖或收获材料的出售
 - The consent of the breeder/育种者准许
 - The purposes of exploitation of the variety/品种培育目的





Commercial novelty (商业新颖性)

- Selling
- Marketing 销售营销
- Accessibility of the variety 品种的可及性
- ≠ Notion of novelty under patent law!
≠ 专利法下的新颖性概念!





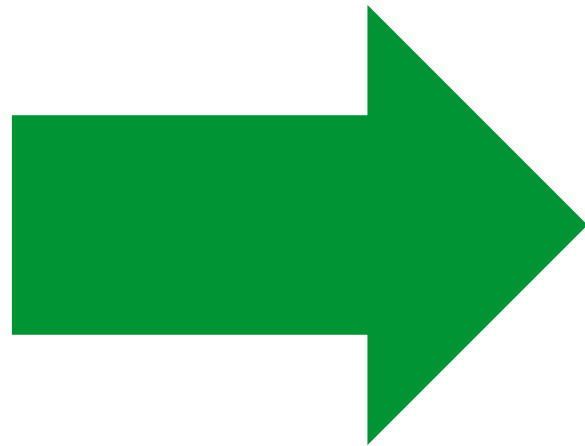
Acts not affecting novelty (不影响新颖性的行为)

- Trials of the variety/ 品种试验
 - Sale or disposal of to others without the consent of the breeder/ 未经育种者同意，向他人出售或处置
 - Sale or disposal as part of statutory requirements/ 作为法定要求的一部分出售或处置
 - Displaying at an official exhibition/ 在官方展览上展出
 - Sale [for consumption] of harvested material which is a surplus product from the creation/testing of the variety, provided that the variety is not identified/ 销售[用于消费]收获的材料，该材料是从该品种的创作/测试中获得的剩余产品，前提是该品种未被识别
- See EXP Notes on Novelty under the UPOV Convention / 见UPOV公约关于新颖性的经验说明



Examples (示例)

- Agreement with a farmer to test the variety/ 与农民签订的试验品种的协议
- Harvested material apt for consumption/ 易消耗的收获物
- Selling without identification/ 无认证销售



- Avoid food waste/ 避免食物浪费
- Return for the farmer/ 回馈农民
- No remuneration for the breeder/ 育种者无报酬
- Does not result into commercial exploitation/ 不会导致商业开发

European Fruit Research Institutes Network (欧洲水果研究网络)



Variety testing agreement – Conditions/ 品种测试协议-条件

- *no financial compensation for the recipients/ 对接受者没有经济补偿*
- *no expenses for the recipients/ 接受者无需支付任何费用*
- *evaluation of the horticultural merits of the variety/ 该品种的园艺价值评价*
- *no transfer of rights from the breeder to the recipient/ 育种者不得将权利转让给接受者*
- *absolute prohibition on disposal of plant material/ 绝对禁止处理植物材料*
- *private trials (no third parties allowed)/ 私人审判（不允许第三方参与）*
- *no release of fruits, pips or pollen of the variety **before the variety is protected by a PVR**/ 在品种受到PVR保护之前，不会发放果实、果核或花粉*

Time and territorial limits

(时间和地域限制)



- *One year within the territory of the Contracting party in which the application has been filed/ 在提出申请的缔约国领土内一年*
- *Four years in a territory other than that of the Contracting party in which the application has been filed or Six years in the case of trees or vines/ 在提出申请的缔约方以外的领土内四年，或在树木或藤蔓植物的情况下六年*



UPOV Model Form for Applications for PVRs

(UPOV申请PVRs 的标准格式)



8. The variety has been [sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety]⁵ / [offered for sale or marketed, with the agreement of the breeder]⁶ (Authority to delete as appropriate)

in [territory of application]: _____

☐ not yet ☐ for the first time (date) _____

under the denomination _____

and in other territories: _____

☐ not yet ☐ for the first time (territory and date) _____

under the denomination _____

8. 品种已经育种者准许，由于一定的育种目的被销售或处置于他人（有权适当删减）

在申请领地：

☐尚未 ☐首次
名称

以及 在其他领地：

☐尚未 ☐首次
名称



The EU Framework (欧盟框架)

Regulation 2100/94 (BR) / 条例2100/94 (BR)

- Article 6 BR → Article 5 UPOV / BR第6条 → UPOV第5条
- Article 10 BR → Article 6 UPOV / BR第10条 → UPOV第6条
- Same concepts and notions / 相同的概念与定义
- Territorial scope: sale or disposal within the EU territory (27 Member States) / 领土范围：在欧盟领土内销售或处置 (27个成员国)

Part II

Definition and interpretation of the notion of “Variety of Common Knowledge”

“已知品种”概念的界定与解释



Common knowledge (已知)

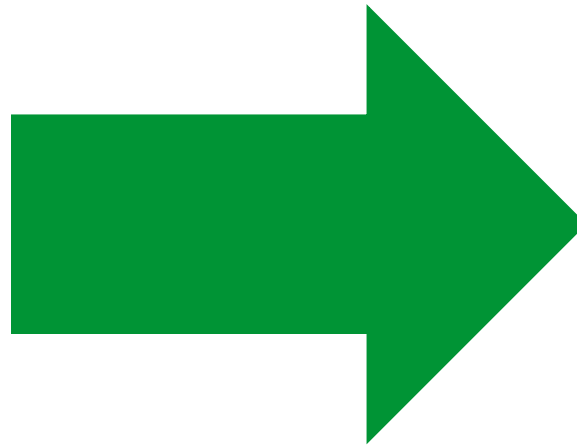
- Not linked to novelty/ 与新颖性无关
- Linked to the assessment of *distinctness*/ 与差异性评估有关
- Not defined in UPOV 1991 Act/ UPOV公约1991年文本中未定义
- Non-exhaustive list of examples/ 非详尽的示例列表





Definition of Variety (品种的定义)

- To be considered of common knowledge a variety needs to meet the definition set out in the UPOV Convention / 符合常识定义的品种需要满足UPOV公约的各项规定
- Not necessarily satisfy DUS for the grant of a PVR / 不一定满足DUS授予PVR的要求



- A single plant is not considered a variety / 一株植物不被认为是一个品种
- A species is not a variety / 一个物种不是品种
- PVR refused → can enter in the common knowledge if sold/marketed / PVR 拒绝 → 如果销售/营销, 可以认为是已知种



Characteristics (特征)



Territoriality – World test 领土权—全球性测试



Detailed description 细节描述



Application for a PVR PVR申请



Living plant material accessible to the public
公众可及的活体植物材料



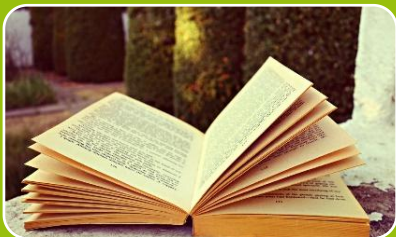
Characteristics (特征)



Commercialisation 商品化



Entry in an official register 官方注册



Other type of information 其他信息形式
• Books, publications, internet etc. 书籍, 出版, 网络



Varieties no longer in existence (品种已不存在)

- Variety description available in documented form/ 品种说明以文件形式提供
- No living plant material can be found after/在下列情况下无法找到活体植物材料:
 - a request to the breeder/ 对育种者的请求
 - a request to the authority responsible for protection or listing/ 向负责保护或列入名单的当局提出的请求
- procurement of commercial plant material from the market/ 从市场上采购商用植物材料
- a request to institutions which have published a variety description/ 对出版了各种描述的机构的请求
 - a request to plant collections (e.g. botanical gardens, gene banks)/ 植物收集请求 (如植物园、基因库)

→ The variety **cannot be** considered common knowledge

→ 这种多样性不能视为已知种



The EU Framework (欧盟框架)

- *Art. 7(2) BR → Art. 7 UPOV 91 Act*
- *Same examples listed in UPOV / 与 UPOV中列出的示例相同*
- *No further specification as to what can be considered a variety of common knowledge / 无关于何种可被认为是已知种的进一步说明*



Part III

Protection of Propagating and Harvested Material

繁殖和收获材料的保护



The scope of the PVR

[Article 14(1) to (3) UPOV Convention]

PVR的范围[UPOV公约第14 (1) 至 (3) 条]



Propagating material 繁殖材料



Harvested material 收获材料



Products made directly from the harvest

直接收获的产品



Definition of propagating material

繁殖材料的定义

- *Propagating material covers reproductive and vegetative propagating material*
- 繁殖材料包括生殖繁殖材料和营养繁殖材料
- *UPOV Examples of factors for ascertaining whether a material is propagating material:*
- UPOV确定材料是否为传播材料的因素示例：
 - (i) *plant or part of plants used for the variety reproduction* 用于品种繁殖的植物或部分植物；
 - (ii) *whether the material has been or may be used to propagate the variety* 该材料是否已被或可能被用来繁殖该品种；
 - (iii) *whether the material is capable of producing entire plants of the variety* 该物料是否能够生产该品种的整株植物；
 - (iv) *whether there has been a custom/practice of using the material for propagating purposes* 是否有使用该等资料作繁殖用途的习惯/做法；
 - (v) *the intention of the actors concerned (producer, seller, supplier, buyer, user)* 有关行为者（生产者、销售者、供应商、买方、用户）的意图；
 - (vi) *if, based on the nature of the material and/or the form of its use, it can be determined that the material is “propagating material”*; or 如果根据材料的性质和/或其使用形式，可以确定材料是“繁殖材料”；或
 - (vii) *the variety material where conditions and mode of its production meet the purpose of reproduction of new plants of the variety but not of final consumption.* 生产条件和生产方式符合该品种新植物繁殖目的，但不满足最终消费目的的品种材料。



Propagating vs Harvested Material

繁殖与收获材料

- The UPOV Convention does not provide a definition of “propagating material” nor of “harvested material” UPOV公约没有规定“传播材料”和“收获材料”的定义
- Dividing line between propagating material and harvested material? Challenging exercise, insofar the latter can serve as propagating material 繁殖材料和收获材料之间的分界线？具有挑战性，后者可以作为繁殖材料
- Breeders are calling for the notion of propagating material to explicitly include harvested material liable to being used as propagating material 育种者呼吁繁殖材料的概念明确包括可被用作繁殖材料的收获材料

Scope of PVR

PVR范围



Authorization of the holder required for the following acts [Art. 14(1) UPOV Convention]:

下列行为需要所有者授权 [UPOV公约第14 (1) 条]



Production or reproduction

生产或再生产



Conditioning for the purpose of propagation

基于繁殖目的



Offering for sale, selling or other marketing

供销售或者其他营销



Exporting /Importing

出口或进口



Stocking for any of the above mentioned purposes

为以上目的而储存



Article 14 UPOV [Scope of the breeder's right]

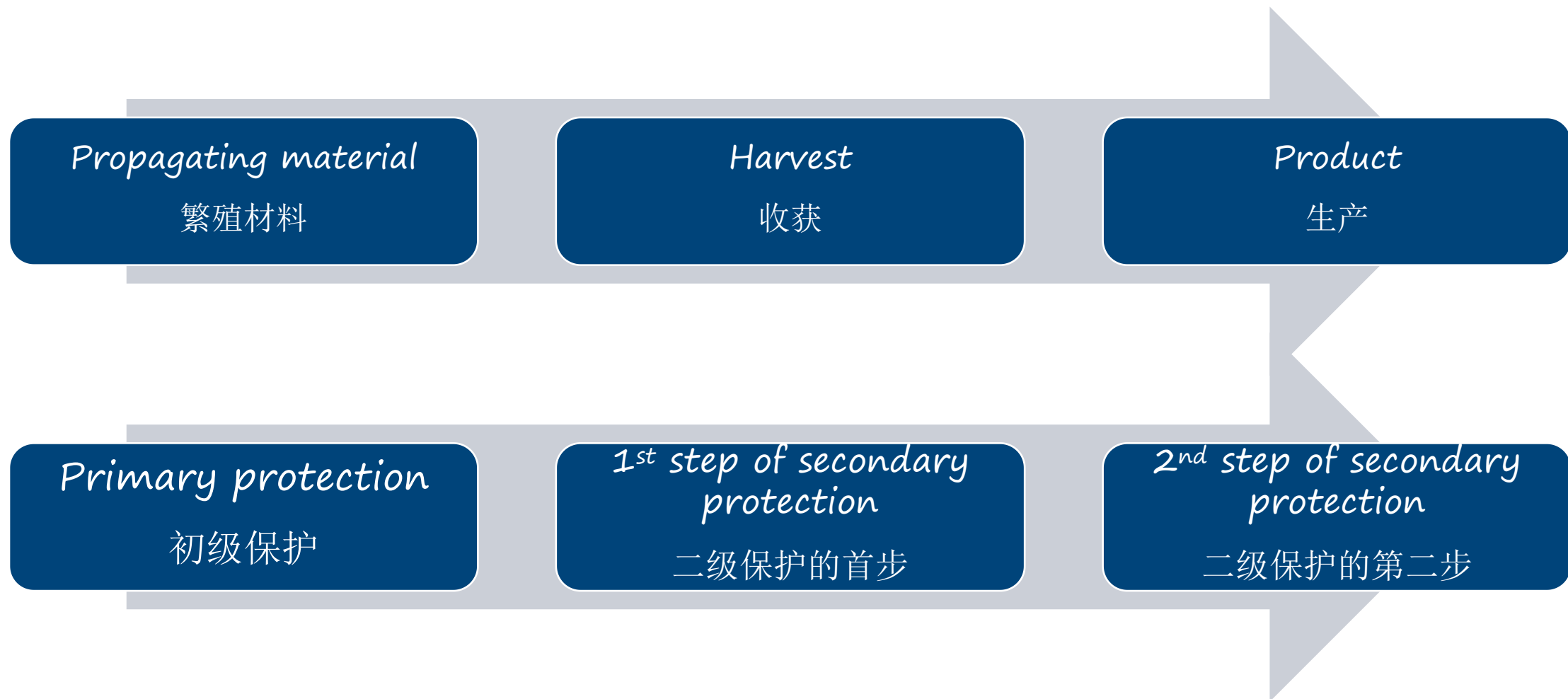


UPOV第14条[繁殖者的权利范围]

- (1) [*Acts in respect of the propagating material*] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:
- (i) production or reproduction (multiplication),
 - (ii) conditioning for the purpose of propagation,
 - (iii) offering for sale,
 - (iv) selling or other marketing,
 - (v) exporting,
 - (vi) importing,
 - (vii) stocking for any of the purposes mentioned in (i) to (vi), above.
- (b) The breeder may make his authorization subject to conditions and limitations.
- (2) [*Acts in respect of the harvested material*] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.
- (1) 繁殖材料相关条例
- (a) 根据第15条与第16条，以下条例说明了繁殖材料品种保护中需要获得育种者授权的内容：
- (i) 生产或再生产（增殖）
 - (ii) 基于繁殖目的
 - (iii) 提供于销售
 - (iv) 销售或者其他营销
 - (v) 出口
 - (vi) 进口
 - (vii) 为以上各项目的而储存
- (b) 育种者可对条件和限制作出授权
- (2) 收获材料相关授权
- 根据第15条与第16条，（1）（a）中各项适用于收获材料，包括植物整体和部分植物，对保护品种繁殖材料未授权的使用需要育种者的授权，除非育种者已经有合理的机会对繁殖材料行使了权利。



The “cascade” principle



The conditions of the secondary protection (二次保护的条件)



Unauthorised use 未授权的使用

- The right must be in force/权利必须生效
- Acts falling under the scope of the PVR / 属于PVR范围的行为

Reasonable opportunity to exercise the right 合理的行使权利的机会

- Awareness of the infringement/ 侵权意识
- Effectiveness of the enforcement tools/ 执法工具的成效

Cascade regime in the EU BR (欧盟BR的级联机制)



Article 13 BR:

1. A CPVR shall have the effect that the holder shall be entitled to effect the acts in paragraph 2. / CPVR应具有持有人有权实施第2条所述行为的效力
2. [PRIMARY PROTECTION REGIME] The following acts in respect of **variety constituents**, or harvested material of the protected variety shall require the authorization of the holder: Production or reproduction (multiplication); [...] Selling or other marketing; [...] / [初级保护制度] 下列涉及受保护品种的品种成分或收获材料的行为，须经持有人授权：生产或再生产（繁殖）；[……]销售或其他营销；[……]
3. [SECONDARY PROTECTION REGIME] The provisions of paragraph 2 shall apply in respect of **harvested material** only if this was obtained through the unauthorised use of variety constituents of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said variety constituents. / [二级保护制度] 第2条的规定仅适用于未经授权使用的受保护品种收获材料，除非持有人有合理机会行使其对所述品种成分的权利

Nadorcott (C-176/18) CJEU Preliminary Ruling

欧盟法院初裁



Preliminary Questions referred to EU Court of Justice by Spanish Supreme Court

/ 西班牙最高法院提交欧盟法院的初步问题

Landmark ruling: the scope of Community Plant Variety Rights has been clarified

/ 标志性裁决：明确了植物品种权的范围

→ *Practical Impact in the field of Enforcement* / 执法领域的实际影响

The cascade-protection system: hierarchic articulation between a “primary protection” regime, concerning **variety constituents**, and a “secondary protection” regime, concerning **material** / 等级保护制度：一级保护制度和二级保护制度之间的等级关系，前者涉及品种成分



Nadorcott (C-176/18) CJEU Preliminary Ruling

欧盟法院初裁



- *Distinction between Enforcement of* 强制执行之间的区别
- *Rights relating to variety constituents* / 与品种成分有关的权利
- *Rights relating to harvested material* / 与收获材料有关的权利
- *In the case of harvested material, title holders only have the right to authorise/prohibit acts relating to such, where the 2 conditions of Article 13(3) BR are met* 对于收获材料，所有权人只有在满足第13（3）条的2个条件的情况下才有权授权/禁止与此类材料相关的行为

Recommended Readings 推荐读物

International and EU Plant Variety Rights system / 国际和欧盟植物品种权制度:

- Würtenberger, G., Ekvad, M., van der Kooij, P., and Kiewiet, B., *European Union Plant Variety Protection. Oxford University Press (2015, 2d Ed.)*.
- Sanderson, J., *Plants, People and Practices: The Nature and History of the UPOV Convention (2018). Cambridge Intellectual Property and Information Law, Cambridge University Press.*

Notion of Novelty / 新颖性概念:

- UPOV Explanatory Notes on Novelty

Notion of Variety of Common Knowledge / 已知品种概念:

- UPOV Document Section TGP/9.3.1: *Consideration of All Varieties of Common Knowledge in the Examination of Distinctness*

Protection of Propagating and Harvested Material / 繁殖与收获材料的保护:

- UPOV Explanatory Notes on Harvested Material
- UPOV Explanatory Notes on Propagating Material





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