

Administrative and Legal Committee

CAJ/78/5

**Seventy-Eighth Session
Geneva, October 27, 2021**

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to be considered by correspondence

HARVESTED MATERIAL

Document prepared by the Office of the Union

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EXECUTIVE SUMMARY

1. The purpose of this document is to report on developments concerning matters on harvested material and unauthorized use of propagating material, including the “Seminar on the breeder’s right in relation to harvested material”, held on May 27, 2021, and to present a proposal for a review of the relevant guidance material.

2. The CAJ is invited to:

(a) note the developments concerning harvested material and unauthorized use of propagating material, including relevant matters on the “Seminar on the breeder’s right in relation to harvested material”, as set out in paragraphs 4 to 16 of this document; and

(b) approve the proposals for a procedure for the revision of relevant guidance, as follows:

(i) agree to initiate a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2);

(ii) agree to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV);

(iii) approve the draft terms of reference (ToRs) for the WG-HRV, as presented in the Annex to this document;

(iv) subject to approval of the establishment of, and ToRs for, the WG-HRV, to request the Office of the Union to issue a Circular to invite members of the Union and observers to the CAJ to express their interest to be a member of the WG-HRV; and

(v) note that, if applicable, at its seventy-eighth session, the CAJ will receive a report of the replies to the Circular with the expressions of interest to be part of the WG-HRV, with a request for the CAJ to agree its composition and the date for its first meeting.

3. The structure of this document is as follows:

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BACKGROUND

4. The Administrative and Legal Committee (CAJ), at its seventy-sixth session¹, agreed the matters in the following paragraphs (see below extracts from document CAJ/76/9 "Report", paragraphs 18 to 20):

"18. The CAJ noted the suggestion by Japan to develop guidance on the term 'unauthorized use of propagating material', in Article 14(2) of the 1991 Act of the UPOV Convention.

"19. The CAJ agreed to include an item in the agenda for the seventy-seventh session of the CAJ to be held on October 28, 2020, to consider a document with information and proposals from CAJ members and observers concerning the term 'unauthorized use of propagating material', in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention.

"20. The CAJ agreed that the Office of the Union should invite members and observers to provide information and make proposals by correspondence on the term 'unauthorized use of propagating material', in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention. Based on the proposals received by correspondence, the Office of the Union would prepare a document identifying substantive matters with proposals for consideration at the seventy-seventh session of the CAJ, to be held on October 28, 2020."

5. On December 23, 2019, the Office of the Union issued UPOV Circular E-19/232 to the designated persons of members in the CAJ, with an invitation to provide information and make proposals on the term "unauthorized use of propagating material", in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as follows:

"To assist in the analysis of the information and proposals, it would be helpful if the contributions could be structured according to the following:

- information on issues arising with regard to "unauthorized use of propagating material", in relation to trees;
- information on any explanation of the term "unauthorized use of propagating material" used in the territory (e.g. breeders' practices, guidance, contract clauses);
- case law;
- proposals on how to elaborate the term "unauthorized use of propagating material".

6. In reply to UPOV Circular E-19/232, the Office of the Union received information and proposals from the European Union, Japan and the Russian Federation, which are reproduced in Annexes I to III to document CAJ/77/5 "Harvested Material" (see document CAJ/77/5 "Harvested Material", paragraphs 5 and 6).

7. The CAJ, at its seventy-seventh session held via electronic means on October 28, 2020, noted the matters in document CAJ/77/9 "Outcome of the consideration of documents by correspondence" (see paragraphs 42 to 47), as reproduced below (see document CAJ/77/10 "Report", paragraphs 26 to 30):

"42. The CAJ noted the information and proposals received in reply to UPOV Circular E-19/232, as reproduced in Annexes I to III to document CAJ/77/5 ["Harvested Material"].

"43. The CAJ agreed to invite the Office of the Union to consult the members of the Union that provided information and proposals in reply to Circular E-19/232, in order to explore how to provide guidance on the term "unauthorized use of propagating material", including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as a basis to present a proposal for consideration by the CAJ at its seventy-eighth session.

"Proposals for next steps

"Japan

"44. In reply to Circular E-20/120 of August 21, 2020, the Delegation of Japan expressed its support for the decisions in document CAJ/77/5 and stated that it 'would be in favor of the organization of a seminar on harvested material by UPOV in 2021 in order to exchange information on this topic'.

¹ Held in Geneva on October 30, 2019.

Euroseeds

“45. In reply to Circular E-20/120 of August 21, 2020, the following comments were received from Euroseeds, on document CAJ/77/5:

‘We have noted that on this matter it is proposed to have a proposal for consideration by the CAJ at its next session, with the intention of investigating in the meantime how best guidance could be given on the notion of ‘unauthorized use of propagating material’. Euroseeds is in agreement with the proposed procedure. However, we wish to take this opportunity to express some key elements in relation to the notion of ‘unauthorized use’. Euroseeds believes that ‘unauthorized use’ does not only refer to use without the consent of the plant breeders’ right holder (i.e. consent for the acts listed in Article 14(1)(a) of the UPOV 1991 Convention) but also to any other unauthorized use, such as breach of contract. In that sense, Euroseeds advocates for a broad interpretation of the notion of ‘unauthorized use’ and would also like to emphasize that the decision rendered by the Court of Justice of the European Union in case C-176/18, which suggests a limited interpretation, has important negative consequences for breeders.

‘Based on the above, Euroseeds would like to see a good and strong explanatory note on harvested material recognizing the needs of breeders for a strong protection and workable enforcement possibilities also on harvested material. In this respect, for further information, we refer to the Euroseeds position on harvested material.’

“The International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) and the International Seed Federation (ISF)

“46. In reply to Circular E-20/120 of August 21, 2020, the following joint comments were received from the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) and ISF, on document CAJ/77/5:

‘In response to UPOV Circular E-20/120 of August 21, 2020, we very much appreciate the suggestion of Japan to develop guidance on the term ‘unauthorized use of propagating material’. The discussion about the topic comes at the exactly right time, since the matter has gained particular importance in the recent past, as the European Court of Justice (CJEU) in the case C-176/18 (Nadorcott) issued a far-reaching decision with the main focus on the question under which circumstances the requirement of ‘unauthorized use of propagating material (variety constituents)’ is given for the exercise of the plant breeders right on harvested material.

‘CIOPORA and ISF, therefore, are supportive of the proposal of Japan to add in the EXN, in relation to ‘unauthorized use’ of propagating material, the acts of planting and growing (cultivation). This would solve the situation where trees (propagating material) have been produced prior to the granting of the Plant Breeders Right and then are planted on the premises of a grower, who continuously produces fruits over several years.

‘The effective protection of harvested material is very important for breeders. Therefore, it might be advisable to have a seminar about the matter in the first half of 2021.’

“47. The joint comments from ISF, African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA) and Seed Association of the Americas (SAA), received in reply to Circular E-20/120, of August 21, 2020, expressed support to the above proposal from CIOPORA and ISF to organize a seminar on this topic, as reproduced below:

‘We welcome the contributions from European Union and Japan. We agree that this is a matter of great importance.

‘ISF has sent a letter co-signed with CIOPORA on the matter and we thank members for their consideration of our request on organizing a seminar/webinar, to further address the definition of ‘unauthorized use’ and clarification of the Explanatory Note.’”

8. Based on the recommendation by the CAJ, the Council, at its fifty-fourth ordinary session², decided to organize a seminar in the first half of 2021, to exchange information on matters concerning harvested material and unauthorized use of propagating material (see document C/54/21 “Report”, paragraph 54).

² Held via electronic means on October 30, 2020.

Matters proposed to be addressed at the Seminar on the breeder's right in relation to harvested material

9. In accordance with the agreed procedure to explore how to provide guidance on the term “unauthorized use of propagating material”, including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, as a basis to present a proposal for consideration by the CAJ at its seventy-eighth session, a seminar was organized in the first half of 2021, to exchange information on matters concerning harvested material and unauthorized use of propagating material (see “Background”, above).

10. On December 22, 2020, the Office of the Union issued UPOV Circular E-20/245 to the designated persons of members and observers in the CAJ, with an invitation to provide proposals of information on matters concerning harvested material and unauthorized use of propagating material that could be presented at the Seminar.

11. In reply to UPOV Circular E-20/245, the following members and observers submitted information and/or issues which they suggested to be addressed in the “Seminar on the Breeder's Right in relation to Harvested Material” and proposed speakers to address those issues: China, the European Union, the Netherlands, the International Association of Horticultural Producers (AIPH) and a joint submission from the International Seed Federation (ISF), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), Crop Life International, Euroseeds, Asia and Pacific Seed Association (APSA), African Seed Trade Association (AFSTA) and Seed Association of the Americas (SAA).

12. The information received from members and observers, including proposed speakers, in reply to UPOV Circular E-20/245 provided the basis for the development of the program of the Seminar, in consultation with Mr. Patrick Ngwediagi, Chair of the CAJ.

SEMINAR ON THE BREEDER'S RIGHT IN RELATION TO HARVESTED MATERIAL

13. The “Seminar on the breeder's right in relation to harvested material” was held on May 27, 2021.

14. The Program (document UPOV/SEM/GE/21/1), list of participants (document UPOV/SEM/GE/21/INF/1), biographies of the speakers, presentations and concluding remarks and a video of the Seminar are available at https://www.upov.int/meetings/en/details.jsp?meeting_id=63048.

15. The Seminar was attended by 214 participants, from 61 countries.

Concluding remarks

16. The following concluding remarks were presented at the closing of the Seminar by Mr. Manuel Antonio Toro Ugalde, Vice Chair of the CAJ, on behalf of Mr. Patrick Ngwediagi, Chair of the CAJ:

- *“How does the lack of effective protection on harvested material impact on growers and consumers?”*

“Evidence was presented at the Seminar that the lack of effective protection for new varieties of fruit trees, prior to the grant of breeders' rights, could inhibit the early introduction of new and improved varieties, thus reducing the benefits of those varieties for growers and consumers and, therefore, society as a whole. Furthermore, if breeders do not have effective protection to recover the investment in breeding, improved varieties might not be developed at all.
- *“What are the main challenges in the exercise of the breeder's right in relation to the harvested material?”*

“A common area of concern is lack of predictability concerning the breeder's right in relation to the harvested material.

“For certain species, trees, once planted, can produce fruits for many years. Therefore, a minimum scope of provisional protection and/or a narrow interpretation of “unauthorized use of propagating material” may not provide the means for the breeder to exercise and enforce their right in relation to the growing of the plants and producing and selling of the fruit.

- *“At the level of UPOV: what solutions do you see for those challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“Clear indication from presentations and discussions that guidance in the explanatory notes on harvested material would benefit from further clarification.

“To help to encourage the development of new varieties of plants, further guidance would be helpful on:

- “propagating material
- “harvested material
- “effective provisional protection
- “notion of ‘unauthorized use of propagating material’
- “the doctrine of exhaustion of rights in relation to the reversal of the burden of proof.”

PROPOSALS FOR A PROCEDURE FOR THE REVISION OF RELEVANT GUIDANCE

17. The CAJ, at its seventy-seventh session³, agreed that a proposal on guidance on the term “unauthorized use of propagating material”, including in relation to trees, in Article 14(2) of the 1991 Act of the UPOV Convention, should be presented for consideration by the CAJ at its seventy-eighth session and proposed to the Council the organization of a Seminar on these matters (see documents CAJ/77/9 “Outcome of the consideration of documents by correspondence”, paragraph 43, and CAJ/77/10 “Report”, paragraphs 26 to 30).

18. The purpose of “Seminar on the breeder’s right in relation to harvested material” was to exchange information on matters concerning harvested material and unauthorized use of propagating material as part of the CAJ considerations to develop guidance on these matters (see document C/54/21 “Report”, paragraph 54 and “Background” and paragraph 17, above) .

19. The concluding remarks, presented at the closing of the Seminar, by Mr. Manuel Antonio Toro Ugalde, Vice Chair of the CAJ, on behalf of Mr. Patrick Ngwediagi, Chair of the CAJ, included the conclusion that guidance in the explanatory notes on harvested material would benefit from further clarification and that, in order to encourage the development of new varieties of plants, the development of further guidance would be helpful (see “Concluding remarks” of the Seminar, paragraph 16 above).

20. On the above basis, the CAJ is invited to initiate a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2).

21. It is proposed that the revision should take into consideration the matters identified in the replies to UPOV Circular E-19/232 and in the “Seminar on the breeder’s right in relation to harvested material”. It is further proposed to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV) to draft relevant guidance.

22. The CAJ is invited to:

- (a) agree to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV);
- (b) approve the draft terms of reference (ToRs) for the WG-HRV, as presented in the Annex to this document; and
- (c) subject to approval of the establishment of, and ToRs for, the WG-HRV, to request the Office of the Union to issue a Circular to invite members of the Union and observers to the CAJ to express their interest to be a member of the WG-HRV.

³ Held via electronic means on October 28, 2020.

23. The CAJ, at its seventy-eighth session, will receive a report of the replies to the Circular with the expressions of interest to be part of the WG-HRV, with a request for the CAJ to agree its composition and the date for its first meeting.

24. *The CAJ is invited to:*

(a) *note the developments concerning harvested material and unauthorized use of propagating material, including relevant matters on the “Seminar on the breeder’s right in relation to harvested material”, as set out in paragraphs 4 to 16 of this document; and*

(b) *approve the proposals for a procedure for the revision of relevant guidance, as follows:*

(i) *agree to initiate a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2);*

(ii) *agree to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV);*

(iii) *approve the draft terms of reference (ToRs) for the WG-HRV, as presented in the Annex to this document;*

(iv) *subject to approval of the establishment of, and ToRs for, the WG-HRV, to request the Office of the Union to issue a Circular to invite members of the Union and observers to the CAJ to express their interest to be a member of the WG-HRV; and*

(v) *note that, if applicable, at its seventy-eighth session, the CAJ will receive a report of the replies to the Circular with the expressions of interest to be part of the WG-HRV, with a request for the CAJ to agree its composition and the date for its first meeting.*

[Annex follows]

ANNEX

DRAFT TERMS OF REFERENCE OF THE WORKING GROUP ON
HARVESTED MATERIAL AND UNAUTHORIZED USE OF PROPAGATING MATERIAL
(WG-HRV)

PURPOSE:

The purpose of the WG-HRV is to draft a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2), for consideration by the Administrative and Legal Committee (CAJ).

COMPOSITION:

- (a) to be composed of the members of the Union and the observers agreed by the CAJ;
- (b) other members of the Union would be free to participate at any meeting of the WG-HRV and make comments, where so desired;
- (c) the WG-HRV would revert back to the CAJ if the WG-HRV recommended to invite other observers or experts to any of its meetings; and
- (d) meetings to be chaired by the Vice Secretary-General.

MODUS OPERANDI:

(a) in drafting the revision of documents UPOV/EXN/HRV/1, UPOV/EXN/PPM/1, and UPOV/EXN/PRP/2, the WG-HRV to consider the matters identified in the replies to UPOV Circular E-19/232 and, in particular, the concluding remarks at the 2021 Seminar on the breeder’s right in relation to harvested material:

- *“How does the lack of effective protection on harvested material impact on growers and consumers?”*

“Evidence was presented at the Seminar that the lack of effective protection for new varieties of fruit trees, prior to the grant of breeders’ rights, could inhibit the early introduction of new and improved varieties, thus reducing the benefits of those varieties for growers and consumers and, therefore, society as a whole. Furthermore, if breeders do not have effective protection to recover the investment in breeding, improved varieties might not be developed at all.

- *“What are the main challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“A common area of concern is lack of predictability concerning the breeder’s right in relation to the harvested material.

“For certain species, trees, once planted, can produce fruits for many years. Therefore, a minimum scope of provisional protection and/or a narrow interpretation of “unauthorized use of propagating material” may not provide the means for the breeder to exercise and enforce their right in relation to the growing of the plants and producing and selling of the fruit.

- *“At the level of UPOV: what solutions do you see for those challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“Clear indication from presentations and discussions that guidance in the explanatory notes on harvested material would benefit from further clarification.

“To help to encourage the development of new varieties of plants, further guidance would be helpful on:

- “propagating material
- “harvested material
- “effective provisional protection
- “notion of ‘unauthorized use of propagating material’
- “the doctrine of exhaustion of rights in relation to the reversal of the burden of proof”.

(b) the WG-HRV to meet at a time and frequency to address its mandate, by physical and/or virtual means, as agreed by the WG-HRV;

(c) the WG-HRV to report to the CAJ on progress of its work and to seek further guidance from the CAJ, as appropriate;

(d) WG-HRV documents to be made available to the CAJ.

[End of Annex and of document]