

**Administrative and Legal Committee**

**CAJ/79/8**

**Seventy-Ninth Session  
Geneva, October 26, 2022**

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**REPORT ON THE WORKING GROUP ON HARVESTED MATERIAL AND UNAUTHORIZED USE OF PROPAGATING MATERIAL (WG-HRV)**

*Document prepared by the Office of the Union*

*Disclaimer: this document does not represent UPOV policies or guidance*

**EXECUTIVE SUMMARY**

1. The Administrative and Legal Committee (CAJ) is invited to note the developments concerning the work of the Working Group on Harvested Material and Unauthorized use of Propagating Material (WG-HRV), as reported in this document.

2. The structure of this document is as follows:

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**BACKGROUND**

3. The CAJ, at its seventy-eighth session, held via electronic means on October 27, 2021, noted that the decisions in document CAJ/78/5 had been taken by the CAJ by correspondence on September 21, 2021, as provided in document CAJ/78/12, paragraph 31, as follows. The CAJ:

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

(iii) approved the terms of reference (ToRs) for the WG-HRV, as presented in the Annex to document CAJ/78/12;

(iv) requested 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) noted that, at its seventy-eighth session, the CAJ would 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.

4. The CAJ considered document CAJ/78/5 Add. and approved the following composition of the WG-HRV:

“3. In reply to Circular E-21/157 of September 23, 2021, the following members of the Union and observers in the CAJ expressed an interest to be members of the WG-HRV: Argentina, Australia, Brazil, Chile, China, Czech Republic, European Union, France, Japan, Netherlands, New Zealand, Norway, Republic of Korea, Spain, United Kingdom, United Republic of Tanzania, United States of America, Association for Plant Breeding for the Benefit of Society (APBREBES), CropLife International, Euroseeds, International Association of Horticultural Producers (AIPH), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOFORA), International Seed Federation (ISF) and the Seed Association of the Americas (SAA).”

5. The CAJ approved the date of March 15, 2022, for the first meeting of the WG-HRV, to be held by electronic means (see document CAJ/78/13 “Report”, paragraphs 23 to 28).

6. In addition to the members of the WG-HRV, the following members of the Union have expressed an interest to participate in the meetings of the WG-HRV: Canada, Kenya, Romania, South Africa. In accordance with the terms of reference for the WG-HRV (ToR), those members of the Union were also invited to join the meetings of the WG-HRV.

#### FIRST MEETING OF THE WG-HRV (MARCH 15, 2022)

7. The WG-HRV, at its first meeting, held via electronic means on March 15, 2022, considered the comments and proposals received in reply to Circular E-21/228 of November 18, 2021, which were presented in documents WG-HRV/1/2, WG-HRV/1/3 (proposals concerning UPOV/EXN/PPM/1), WG-HRV/1/4 (proposals concerning UPOV/EXN/HRV/1) and WG-HRV/1/5 (proposals concerning UPOV/EXN/PRP/2).

8. The documents and report of the first meeting of the WG-HRV are available at: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=67773](https://www.upov.int/meetings/en/details.jsp?meeting_id=67773).

#### SECOND MEETING OF THE WG-HRV (SEPTEMBER 6, 2022)

9. The WG-HRV, at its second meeting, held via electronic means on September 6, 2022, considered document WG-HRV/2/2 “Information concerning propagating material, acts in respect of harvested material and provisional protection under the UPOV Convention”. The Annex to document WG-HRV/2/2 contained the results of a research with the historical documents in chronological order of the cascade principle concerning provisions on propagating material, harvested material and exhaustion.

6. The WG-HRV considered the conclusions at its first meeting and the proposals and comments received in reply to Circular E-22/058 of April 12, 2022, presented in documents WG-HRV/2/3 (proposals concerning UPOV/EXN/PPM/1), WG-HRV/2/4 (proposals concerning UPOV/EXN/HRV/1) and WG-HRV/2/5 (proposals concerning UPOV/EXN/PRP/2).

10. The documents of the second meeting of the WG-HRV are available at: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=70188](https://www.upov.int/meetings/en/details.jsp?meeting_id=70188)

11. The report of the second meeting of the WG-HRV will be made available at [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=70188](https://www.upov.int/meetings/en/details.jsp?meeting_id=70188).

#### THIRD MEETING OF THE WG-HRV (MARCH 14, 2023)

12. The third meeting of the WG-HRV will be held via electronic means on March 14, 2023.

13. *The CAJ is invited to note the developments concerning the work of the WG-HRV, as reported in this document.*

[Annex follows]

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

*approved by the Administrative and Legal Committee on September 21, 2021*

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]