

Administrative and Legal Committee

CAJ/81/5

**Eighty-First Session
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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

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EXECUTIVE SUMMARY

1. This report covers the fourth, fifth, and sixth meetings of the Working Group on Harvested Material and Unauthorized use of Propagating Material (WG-HRV).
2. During its fourth meeting, the WG-HRV agreed to propose to the CAJ the revision of the Explanatory Notes on Propagating Material under the UPOV Convention. The WG-HRV also discussed the prospects of commissioning a study on the “scope of the breeder’s right” and the relationship with the “exhaustion of the breeder’s right”.
3. During the fifth meeting of the WG-HRV, the members of the WG-HRV expressed support for commissioning a study, and the WG-HRV agreed that the Office of the Union would convene a virtual meeting with those members of the WG-HRV that had made proposals on the number and names of authors and the matters relating to funding, to discuss the organization of the study. It was agreed to put on hold discussions on the proposals to revise the Explanatory Notes on Provisional Protection under the UPOV Convention until progress was made on matters concerning the study.
4. The sixth meeting of the WG-HRV will take place on October 22, 2024, and the Office of the Union will publish an addendum version of this document after the WG-HRV/6 meeting to report to the CAJ/81 the latest developments concerning its work.
5. 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.
6. The structure of this document is as follows:

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BACKGROUND

7. The CAJ, at its eightieth session, held in Geneva on October 25, 2023, noted the report on the WG-HRV, as provided in document CAJ/80/3 “Report on the Working Group on Harvested Material and Unauthorized use of Propagating Material (WG HRV)”. The CAJ expressed support for the ongoing work of the WG-HRV, which included the need for clarification on the notions of propagating and harvested materials and exhaustion of the breeder’s right, the scope of provisional protection, the notion of “unauthorized use” and “reasonable opportunity” under Article 14(2) and the role of contracts and plant breeders’ rights, including that the authorization of the breeder might be subject to conditions and limitations.

FOURTH MEETING OF THE WG-HRV (OCTOBER 25, 2023)

8. The WG-HRV held its fourth meeting in Geneva, on October 25, 2023, by hybrid means. The WG-HRV/4 documents and report are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=77809.

Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention

9. The WG-HRV/4 considered document WG-HRV/4/2 “Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention”.

10. The WG-HRV noted that, at its third meeting, held in Geneva on March 21, 2023, it was agreed to modify the section “Factors that have been considered in relation to propagating material”, as presented below.

FACTORS THAT HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL

The UPOV Convention does not provide a definition of “propagating material”. Propagating material encompasses reproductive and vegetative propagating material. The following are non-exhaustive examples of factors, one or more of which could be used to decide whether material is propagating material. Those factors should be considered in the context of each member of the Union and the particular circumstances.

- (i) plant or part of plants used for the variety reproduction;
- (ii) whether the material has been used to propagate the variety;
- (iii) whether the material has an innate capability of producing entire plants of the variety (e.g. seed, tubers);
- (iv) whether the material could be used as propagating material, through the use of propagating techniques (e.g. cuttings, tissue culture);
- (v) whether there has been a custom/practice of using the material for propagating purposes or, as a result of new developments, there is a new custom/practice of using the material for that purpose;
- (vi) if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is “propagating material”;
- (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.

The above text is not intended as a definition of “propagating material”.

(see document WG-HRV/3/4 “Report”, paragraph 7).

11. The WG-HRV agreed to propose to the CAJ, at its eighty-first session in October 2024, to approve the revision of the “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/1) as set out in paragraph 5 of document WG-HRV/4/2 (see paragraph 10, above).

12. The CAJ is, under agenda item 5(a) of today’s meeting, invited to approve the revision of the “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/1) as set out in paragraph 5 of document WG-HRV/4/2 (see paragraph 10, above).

Prospects of commissioning a study on the “scope of the breeder’s right” and the relationship with the “exhaustion of the breeder’s right”

13. The WG-HRV noted the replies to UPOV Circular E-23/071, as set out in paragraphs 9 and 10 and the Annex to document WG-HRV/4/2.

14. The WG-HRV discussed whether it would be appropriate to select one author or a team of authors to carry out the study. It was agreed that it would be appropriate to select a team of authors in order to capture a diversity of views into the work. It was agreed that the number of authors should be limited to a maximum of four and that one of the authors should be designated to lead the team.

15. The WG-HRV agreed that the study should include an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to Article 14 and Article 16 of the 1991 Act. It was discussed whether jurisprudence from UPOV members should be part of the study. It was agreed that one part of the study would focus on the analysis of the intentions of the drafters of the 1991 Act and a second part would include summaries of court cases from UPOV members bound by the 1991 Act.

16. The WG-HRV agreed that, in accordance with the discussions during the fourth meeting of the WG-HRV, the Office of the Union would consult the members of the WG-HRV that provided replies to UPOV Circular E-23/071 and propose the basis of a study, including terms of reference, timeline and authors, for consideration by the WG-HRV at its fifth meeting.

Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention

17. The WG-HRV considered document WG-HRV/2/5 and discussed the proposals of members of the WG-HRV concerning the text in the explanatory notes on provisional protection.

18. The proposed changes to paragraphs 2 and 5 of the Explanatory Notes on Provisional Protection were not retained.

19. Members of the WG-HRV supported the idea to introduce a sentence in paragraph 6 of the Explanatory Notes on Provisional Protection indicating that publications of an application for a plant breeders' right refers to publications in an official journal or gazette either in a physical document or in an electronic format. The WG-HRV requested the Office of the Union to draft a text that would capture that element for consideration by the WG-HRV at its next meeting.

20. It was concluded that there was no agreement for a new text in paragraph 8 concerning the measures and that the present wording should be maintained.

21. The WG-HRV noted that the organizations representing breeders (ISF, CIOPORA, Croplife International, Euroseeds, APSA, AFSTA, and SAA) offered to provide a text with an explanation of the importance on providing effective protection during the period of provisional protection, to be considered by the WG-HRV, at its fifth meeting.

FIFTH MEETING OF THE WG-HRV (MARCH 21, 2024)

22. The WG-HRV held its fifth meeting in Geneva, on March 21, 2024, by hybrid means. The WG-HRV/5 documents and report are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=80843.

Prospects of commissioning a study on the "scope of the breeder's right" and the relationship with the "exhaustion of the breeder's right"

23. The WG-HRV considered document WG-HRV/5/2.

24. The members of the WG-HRV expressed support for commissioning a study.

25. Some initial initiatives and ideas on how to fund the study had been identified but that matter should be further explored.

26. The WG-HRV agreed that the Office of the Union would convene a virtual meeting with those members of the WG-HRV that had made proposals at its fifth meeting on the number and names of authors and the matters relating to funding.

27. The WG-HRV agreed that, for the next meeting, the section "modus operandi" of the Terms of Reference for the study be updated to include the elements of collaborative work following academic standards and the explanations on the notion of independence.

28. The WG-HRV agreed that discussions on the proposals to revise the Explanatory Notes on Provisional Protection under the UPOV Convention will be put on hold until progress was made on matters concerning the study.

SIXTH MEETING OF THE WG-HRV (OCTOBER 22, 2024)

29. The WG-HRV will hold its sixth meeting in Geneva, on October 22, 2024, by hybrid means. The WG-HRV/6 documents will be available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=83693.

30. The Office of the Union will publish an addendum version of this document after the WG-HRV/6 meeting, to report to the CAJ/81 the latest developments concerning its work.

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

[Annex follows]

ANNEX

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]