

**Working group on harvested material and unauthorized use of propagating material**

**WG-HRV/1/2**

**First Meeting  
Geneva, March 15, 2022**

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**INTRODUCTION TO THE REVISION OF THE EXPLANATORY NOTES ON PROPAGATING MATERIAL, ACTS IN RESPECT OF HARVESTED MATERIAL AND PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION**

*Document prepared by the Office of the Union*

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

**EXECUTIVE SUMMARY**

1. The purpose of this document is to provide an introduction for the revision of the explanatory notes on propagating material, acts in respect of harvested material and provisional protection under the UPOV Convention for consideration by the Working Group on harvested material and unauthorized use of propagating material (WG-HRV).

2. The WG-HRV is invited to:

(a) note the information provided in this document;

(b) note that the comments and proposals received from the members of the WG-HRV in reply to Circular E-21/228 are available on the UPOV website: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=67773](https://www.upov.int/meetings/en/details.jsp?meeting_id=67773);

(c) consider the proposals received in reply to Circular E-21/228, on the basis of documents WG-HRV/1/3 (with proposals concerning document UPOV/EXN/PPM/1), WG-HRV/1/4 (with proposals concerning UPOV/EXN/HRV/1) and WG-HRV/1/5 (with proposals concerning UPOV/EXN/PRP/2); and

(d) request the Office of the Union to prepare preliminary draft texts for the revision of the following documents, for consideration by the WG-HRV at its second meeting: “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/2 Draft 1), “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/2 Draft 1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/3 Draft 1), on the basis of the discussions at the first meeting of the WG-HRV.

3. The structure of this document is as follows:

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## BACKGROUND

4. The CAJ agreed on September 21, 2021, by correspondence, to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV) and approved the terms of reference (ToRs) for the WG-HRV. At its seventy-eighth session, held via electronic means on October 27, 2021, the CAJ approved the composition of the WG-HRV. The terms of reference (ToRs) and composition for the WG-HRV are reproduced in the Annex of this document (see document CAJ/78/13 "Report", paragraph 24).

## INTRODUCTION TO THE REVISION OF THE EXPLANATORY NOTES ON PROPAGATING MATERIAL, ACTS IN RESPECT OF HARVESTED MATERIAL AND PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION

### Proposals for the revision of documents UPOV/EXN/HRV/1, UPOV/EXN/PPM/1 and UPOV/EXN/PRP/2

5. On November 18, 2021, the Office of the Union issued Circular E-21/228 to the members of the WG-HRV, inviting proposals for the revision of documents UPOV/EXN/HRV/1, UPOV/EXN/PPM/1 and UPOV/EXN/PRP/2 by December 19, 2021.

6. In reply to UPOV Circular E-21/228, comments and proposals were received from the following members of the WG-HRV: Australia, Japan, Netherlands, International Association of Horticultural Producers (AIPH) and a joint contribution from the African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), CropLife International, Euroseeds, International Seed Federation (ISF), and the Seed Association of the Americas (SAA).

7. The comments and proposals received from the members of the WG-HRV in reply to Circular E-21/228 are available on the UPOV website: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=67773](https://www.upov.int/meetings/en/details.jsp?meeting_id=67773).

8. The proposals received in reply to Circular E-21/228 have also been introduced in boxes in documents WG-HRV/1/3 (with proposals concerning UPOV/EXN/PPM/1), WG-HRV/1/4 (with proposals concerning UPOV/EXN/HRV/1) and WG-HRV/1/5 (with proposals concerning UPOV/EXN/PRP/2), available on the UPOV website: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=67773](https://www.upov.int/meetings/en/details.jsp?meeting_id=67773).

### Next steps

9. On the basis of the discussions at the first meeting of the WG-HRV, the WG-HRV may wish to request the Office of the Union to prepare preliminary draft texts for the revision of the following documents, for consideration by the WG-HRV at its second meeting: "Explanatory Notes on Propagating Material under the UPOV Convention" (document UPOV/EXN/PPM/2 Draft 1), "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" (document UPOV/EXN/HRV/2 Draft 1), and "Explanatory Notes on Provisional Protection under the UPOV Convention" (document UPOV/EXN/PRP/3 Draft 1).

10. *The WG-HRV is invited to:*

(a) *note the information provided in this document;*

(b) *note that the comments and proposals received from the members of the WG-HRV in reply to Circular E-21/228 are available on the UPOV website: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=67773](https://www.upov.int/meetings/en/details.jsp?meeting_id=67773);*

(c) *consider the proposals received in reply to Circular E-21/228, on the basis of documents WG-HRV/1/3 (with proposals concerning UPOV/EXN/PPM/1), WG-HRV/1/4 (with proposals concerning UPOV/EXN/HRV/1) and WG-HRV/1/5 (with proposals concerning UPOV/EXN/PRP/2); and*

(d) request the Office of the Union to prepare preliminary draft texts for the revision of the following documents, for consideration by the WG-HRV at its second meeting: “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/2 Draft 1), “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/2 Draft 1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/3 Draft 1), on the basis of the discussions at the first meeting of the WG-HRV.

[Annex follows]

ANNEX

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

The Administrative and Legal Committee (CAJ) agreed on September 21, 2021, by correspondence, to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV) and approved the terms of reference (ToRs) for the WG-HRV. The CAJ, at its seventy-eighth session, on October 27, 2021, approved the composition of the WG-HRV.

TERMS OF REFERENCE AND COMPOSITION OF THE 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) members of the Union and the observers agreed by the CAJ:

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 (CIOPORA), International Seed Federation (ISF) and the Seed Association of the Americas (SAA).

- (b) other members of the Union are free to participate at any meeting of the WG-HRV and make comments, where so desired;

- (c) the WG-HRV will revert back to the CAJ if the WG-HRV recommends 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 the Annex and of document]