



AIPH

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AIPH contribution in response to UPOV Circular E-21/228, Proposals for the revision of relevant Explanatory Notes

Dear Mr. Button,

AIPH would like to contribute to UPOV Circular E-21/228, aiming to be of support and of cooperation to the Working Group on Harvested material, which first meeting is scheduled on March 15, 2022.

Please, may I refer you to the added documents, containing information and proposals, to provide UPOV with AIPH's contribution in response to UPOV Circular E-21/228.

Thanking you in advance and AIPH is very willing to provide further response if needed,

Yours sincerely,

Secretary-General

Information and proposals from the Association of Horticultural Producers (AIPH) in response to UPOV Circular E-21/228, dated November 19, 2021

Introduction

By circular E-21/228, dated November 19, 2021, the UPOV office invited the members of the Working group on harvested material and unauthorized use of propagating material (WG-HRV) to send **proposals for the revision of the next relevant Explanatory Notes** for consideration by the Working group on harvested material and unauthorized use of propagating material (WG-HRV):

1. "Explanatory Notes on Acts in Respect of **Harvested Material** under the 1991 Act of the UPOV Convention" ([document UPOV/EXN/HRV/1](#));
 2. "Explanatory Notes on **Propagating Material** under the UPOV Convention" ([document UPOV/EXN/PPM/1](#)); and
 3. "Explanatory Notes on **Provisional Protection** under the UPOV Convention" ([document UPOV/EXN/PRP/2](#)),
- and
4. to consider the matters identified in the replies (as written down in CAJ/77/5) to UPOV Circular E-19/232;

Ad 1

AIPH would like to propose the suggestions, as marked in the attachment (see annex 1), **for the revision of the Explanatory Notes of Harvested Material** as further mentioned above under number one.

As one of its key arguments in proposing these suggestions in annex 1, Explanatory Notes on Acts in Respect of **Harvested Material**, AIPH would like to mention the following:

Because of a good and efficient working PBR and not to undermine the ornamental growers, who do respect the PBR rules and do pay royalties, situations should be avoided where it would be possible for PBR-offenders to reproduce the variety in other (neighboring) countries where it is not possible for the PBR-holder to protect his variety, to -subsequently- harvest the flowers or plants or ornamental trees from the reproduced material and -finally- to import those products into the country where the variety is protected. In these cases the owner of the protected variety could not prevent the commercial sales of the products of his protected variety. These situations are mentioned as U-turn constructions. UPOV Article 14 sub 2 foresees in these situations and the concerned EXN should focus on the goal, Article 14 sub 2 has been created for, namely: clearness of the so called cascade-rule as laid down in this article. Unfortunately, the current UPOV-EXN is not clear on the interpretation of the cascade-rule, especially if it concerns a product of a protected variety, imported from another country in which no PBR has been obtained.

In AIPH's opinion, the proposed suggestions in the annex do contribute to the desired clearness and do stay within the framework of the UPOV Convention 1991.

However, where AIPH suggests under ACTS IN RESPECT OF HARVESTED MATERIAL, sub (b) Harvested Material, sub 3, the sentence : When harvested material has the potential to be used as propagating material, it has to be considered as propagating material, AIPH strongly recommends to add the following second part of the sentence as well: *unless the person using the material can prove that he did not use it or could not use it as propagation material.*

AIPH would like to recommend this addition, realising the first part of the sentence increases the understanding of the principle of harvested material, but needs this specification containing a reversal of the burden of proof on the grower. AIPH would like to discuss this suggestion in the WG-HRV, because the first part of the sentence clarifies -as said- the principle of harvested material, but could at the same time create situations in which persons (in most cases growers) who act in compliance with the right of the Plant Breeders Right, could be unjustly punished. With AIPH's suggestion to add the concerned sentence, such situations are avoided and the position of the person (grower), who is able to prove he is not acting against the rights of the plant breeder holder because he did not or could not use the harvested material as propagation material, is safeguarded.

Ad 2

AIPH would like to propose the suggestions, as marked in the attachment (see annex 2), **for the revision of the Explanatory Notes of Propagating Material** as further mentioned above under number two. AIPH strongly recommends the added second part of the sentence (in the list of non-exhaustive examples of factors that have been considered by members of the Union in relation to whether material is propagating material): *unless the person using the material can prove that he did not use it or could not use it as propagation material*. AIPH would like to strongly recommend this addition, realising the first part of the sentence increases the understanding of the principle of propagating material, but needs this specification containing a reversal of the burden of proof on the grower. AIPH would like to discuss this suggestion in the WG-HRV, because the first part of the sentence does -as said- clarify the principle of propagation material, but could at the same time create situations in which growers who act in compliance with the right of the Plant breeders right, could be unjustly punished. With AIPH's suggestion to add the concerned sentence, such situations are avoided and the position of the grower, who is able to prove he is not acting against the rights of the plant breeder holder because he did not or could not use the material as propagation material, is safeguarded.

Ad 3

Concerning the Explanatory Notes on **Provisional Protection** as further mentioned above under number three, AIPH would like to state that it does not see which changes and/or additions can be made to clarify the EXN better or stronger.

Ad 4

(to consider the matters identified in the replies (as written down in CAJ/77/5) to UPOV Circular E-19/232)

Reply of the European Union

AIPH fully supports the clear and legally correct reply from the European Union, with regard to unauthorized use of propagating material.

Reply of Japan

AIPH is not in favour of the information and proposals of Japan in relation to unauthorized use of propagating material (in particularly in relation to fruit trees), for the following reasons. Japan provides the case of perennial plants (such as fruit trees), in which the breeder would not have any opportunity to exercise his right over propagating material, namely if the grower planted and grew the propagating material which was obtained before the protection was provided (before the authorization is required). Japan raises that under such circumstances, it is important for the breeder to exercise his right over harvested material that would be obtained over the years through the use (planting and growing, i.e., cultivation) of the propagating material after the protection is provided. In this case, Japan states that "use of propagating material" should cover the meaning 'planting and growing (cultivation)' which is not included in the acts listed in Article 14(1)(a) (i) to (vii).

Japan proposes to insert the following text in UPOV/EXN/HRV/1, under Unauthorized use of propagating material, Act in respect of propagating material: *In relation to “unauthorized use’ of propagating material, the acts such as planting and growing (cultivation) the propagating material of the protected variety for the purpose of producing harvested material would also require the authorization of breeder.*

AIPH does understand to desire of clearness of Japan in this circumstances, but AIPH would like to mention that the proposal of Japan could be defined as a wish to extend the scope of plant breeders right, namely to add the acts planting and growing (cultivation) to the acts, who require authorization of the right holder, as formulated in Article 14(1)(a) (i) to (vii).

AIPH would give in consideration that a legal foundation for such an extent might fail, because: 1) it does not see a base for it in the records of the Diplomatic Conference for the Revision of the UPOV Convention in March, 1991 and 2) it considers the revision of the said explanatory notes not to be the legally correct moment and place to enlarge the scope of the plant breeders right.

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