

Working group on harvested material and unauthorized use of propagating material

WG-HRV/2/3

**Second Meeting
Geneva, September 6, 2022****Original:** English
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PROPOSALS CONCERNING THE EXPLANATORY NOTES ON PROPAGATING MATERIAL UNDER THE UPOV CONVENTION*Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. The Working group on harvested material and unauthorized use of propagating material (WG-HRV), at its first meeting, held via electronic means on March 15, 2022, considered document WG-HRV/1/3 "Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention", and agreed the following (see document WG-HRV/1/6 "Report", paragraphs 8 and 9, reproduced below):

"8. The WG-HRV agreed the following possible new factor should be considered further:

[...]
(vii) when harvested material has the potential to be used as propagating material, it can be considered as propagating material; or
[...]

"9. The WG-HRV agreed that further elaboration on the relationship of propagating material and harvested material, including the role of exhaustion, be prepared for consideration by WG-HRV at its next meeting to assist in its consideration of the above factor. It was agreed that illustrative examples could be included to facilitate the discussions and that the Office of the Union would consult those members of the WG-HRV that made interventions at the meeting on that topic."

2. The WG-HRV, at its first meeting, agreed to invite additional comments on documents WG-HRV/1/3, WG-HRV/1/4 and WG-HRV/1/5 within six weeks after its first meeting (see document WG-HRV/1/6 "Report", paragraph 15 and UPOV Circular E-22/058 of April 12, 2022).

3. In reply to UPOV Circular E-22/058, proposals for a revision of document UPOV/EXN/PPM/1 were received from New Zealand and the International Association of Horticultural Producers (AIPH).

4. In the Annex to this document, the proposals agreed by the WG-HRV at its first meeting and the proposals received in reply to Circular E-22/058 have been introduced in boxes in the text of document UPOV/EXN/PPM/1, with endnotes providing background information.

[Annex follows]

PROPOSALS CONCERNING THE EXPLANATORY NOTES ON
PROPAGATING MATERIAL UNDER THE UPOV CONVENTION

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Note

Proposals agreed by the WG-HRV at its first meeting are presented in the text of on document UPOV/EXN/PPM/1 in revision mode.

Proposals received in reply to UPOV Circular E-22/058 of April 12, 2022, on document UPOV/EXN/PPM/1, are presented in boxes.

Endnotes provide background information.

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PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on propagating material under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

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 that have been considered by members of the Union in relation to 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 or may be used to propagate the variety;
- (iii) whether the material is capable of producing entire plants of the variety;
- (iv) 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;
- (v) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);
- (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”; ~~or~~
- (vii) when harvested material has the potential to be used as propagating material, it can be considered as propagating material; or ^a
- (viii) 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”.

Proposals by New Zealand ^b

“Any explanatory note comes from the Convention itself and for this reason any subsequent revision of the note should have consideration as to the time the Convention was agreed and the time of the revision. Over the last five to ten years advances in biotechnology has enabled new processes and new opportunities. Not so very long ago, tissue culture propagation was a relatively unusual for most species, but now it is standard propagation practice for many species. In the past New Zealand had special provisions for plant material from *in vitro* propagation used for DUS testing purposes, but now use is frequent, the technology is reliable and consistent and particular provision is no longer necessary.

The availability and use of propagation technology have changed the understanding of what is propagating material. The technology allows the potential for any plant material to be considered propagating material. The conclusion that in general all plant material is propagating material does alter the underlying basis of the current Explanatory Note.

‘8. The WG-HRV agreed the following possible new factor should be considered further:

- (vii) when harvested material has the potential to be used as propagating material, it can be considered as propagating material; or [document WG-HRV/1/6 “Report”, paragraph 8]

“The above draft text does not have the basis that all plant material is propagating material. The text begins with harvested material which may also be propagation material. The proposed basis that all plant material is capable of propagation leads to the question of when the material can be considered harvested material and in effect this turns the Explanatory Note into guidance regarding the circumstances when propagating material can be considered harvested material.”

Proposals by AIPH^c

“In [this] process it could be fair to ask what the UPOV members do prefer?: 1) the original approach of the EXN, containing to provide a list of factors to be considered by members of the Union in relation to whether material is propagating material or 2) an approach containing the formulation of a definition of the principle of PPM? If one chooses the second approach, it would be preferable to formulate a clear and usable explanation of the concept of propagating material which does not go beyond the limits of the UPOV Convention.

An example for such explanation could be the formulation in which the notion of variety constituents has been introduced: ‘A plant grouping consistent of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as ‘variety constituents’. This formulation leads to the conclusion that the notion of variety constituents is in fact a synonym for the term propagating material as mentioned in art 6 (Novelty) and 14 (Scope of the right) of the UPOV Convention, containing provisions with regard to the novelty requirement and the scope of the right respectively. This approach and method also foresees in the challenges, the PVP law systems will face because of the upcoming new genetic breeding technics.”

UPOV organized a “Seminar on Propagating and Harvested Material in the context of the UPOV Convention” in Geneva on October 24, 2016. The proceedings of the Seminar can be found at http://www.upov.int/meetings/en/topic.jsp?group_id=73.

[Appendix follows]

RELEVANT ARTICLES OF THE UPOV CONVENTION

This Appendix contains the provisions of the UPOV Convention where reference is made to the notion of propagating material.

1991 Act of the UPOV Convention

Article 6

Novelty

(1) [*Criteria*] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, **propagating** or harvested **material** of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

Article 14

Scope of the Breeder's Right

(1) [Acts in respect of the **propagating material**] (a) Subject to Articles 15 and 16, the following acts in respect of the **propagating material** of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of **propagating material** of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said **propagating material**.

[...]

Article 15

Exceptions to the Breeder's Right

[...]

(2) [*Optional exception*] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for **propagating** purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

Article 16

Exhaustion of the Breeder's Right

(1) [*Exhaustion of right*] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question or
(ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of "material"*] For the purposes of paragraph (1), "material" means, in relation to a variety,

- (i) propagating material of any kind,
- (ii) harvested material, including entire plants and parts of plants, and
- (iii) any product made directly from the harvested material.

[...]

Article 20

Variety Denomination

[...]

(7) [*Obligation to use the denomination*] Any person who, within the territory of one of the Contracting Parties, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

[...]

1978 Act of the UPOV Convention

Article 5

Rights Protected; Scope of Protection

- (1) The effect of the right granted to the breeder is that his prior authorisation shall be required for
- the production for purposes of commercial marketing
 - the offering for sale
 - the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

[...]

Article 7

Official Examination of Varieties; Provisional Protection

[...]

(2) For the purposes of such examination, the competent authorities of each member State of the Union may require the breeder to furnish all the necessary information, documents, **propagating material** or seeds.

[...]

Article 10

Nullity and Forfeiture of the Rights Protected

[...]

(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or **propagating material** capable of producing the variety with its characteristics as defined when the protection was granted.

(3) The right of the breeder may become forfeit if:

(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or **propagating material**, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or

[...]

Article 13

Variety Denomination

[...]

(7) Any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative **propagating material** of a variety protected in that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

[...]

Article 14

**Protection Independent of Measures Regulating Production,
Certification and Marketing**

(1) The right accorded to the breeder in pursuance of the provisions of this Convention shall be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and **propagating material**.

[...]

^a see document WG-HRV/1/6 "Report", paragraph 8.

^b The proposal from New Zealand, in reply to Circular E-22/058, is available at https://www.upov.int/meetings/en/details.jsp?meeting_id=70188

^c The proposal from AIPH, in reply to Circular E-22/058, is available at https://www.upov.int/meetings/en/details.jsp?meeting_id=70188