

**Working group on harvested material and unauthorized use of propagating material****WG-HRV/2/6****Second Meeting  
Geneva, September 6, 2022****Original:** English  
**Date:** February 26, 2023**REPORT**

*adopted by the Working group on harvested material and unauthorized use of propagating material*

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**OPENING OF THE MEETING**

1. The Working Group on Harvested material and unauthorized use of propagating material (WG-HRV) held its second meeting via electronic means on September 6, 2022, chaired by Mr. Peter Button, Vice Secretary-General of UPOV.
2. The meeting was opened by the Chair, who welcomed the participants.
3. The list of participants is reproduced in the Annex to this report.

**ADOPTION OF THE AGENDA**

4. The WG-HRV adopted the draft agenda as proposed in document WG-HRV/2/1.

**INFORMATION CONCERNING PROPAGATING MATERIAL, ACTS IN RESPECT OF HARVESTED MATERIAL AND PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION**

5. The WG-HRV considered document WG-HRV/2/2 and noted that sections of the document would be presented under the relevant agenda items.
6. The WG-HRV noted that the proposals and comments received in reply to Circular E-21/228 and Circular E-22/058 had been introduced in boxes 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).

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

7. The WG-HRV considered documents WG-HRV/2/2 and WG-HRV/2/3.

8. The WG-HRV noted that there were some similarities between factors (iii) and (vii) in document WG-HRV/2/3, Annex:

“(iii) whether the material is capable of producing entire plants of the variety;

[...]

“(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 the differences between factors (iii) and (vii) should be clarified and that the following be considered in the formulation in the next draft:

(a) in relation to factor (iii) “whether the material is capable of producing entire plants of the variety”, to consider if it includes situations whether the material itself, without human intervention, is capable of producing the plants of the variety (e.g. tuber);

(b) in relation to factor (vii) “when harvested material has the potential to be used as propagating material, it can be considered as propagating material”, to consider if it includes situations that requires human intervention for propagating the plants of the variety (e.g. tissue culture);

(c) in relation to factor (vii) to consider alignment with the drafting style of the other factors as follows: “when harvested whether the material, including harvested material, has the potential...”

10. In relation to the comments on the use of the registered denomination for harvested material, the WG-HRV noted that such a use was not specified in the UPOV Convention. Under the UPOV Convention, the obligation to use the registered denomination applied to propagating material.

11. The representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) noted, on behalf of the African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), CIOPORA, CropLife International, Euroseeds, International Seed Federation (ISF) and Seed Association of the Americas (SAA), that they were in favor of developing a single definition of propagating material rather than the list of factors to be considered in relation to propagating material.

12. The Chair recalled the previous discussions on this approach and concluded that it would be very difficult for members of the Union to reach agreement on a single definition of propagating material.

13. The WG-HRV concluded that there were some concerns with linking matters on propagating material and harvested material in the explanatory notes on propagating material.

14. The WG-HRV requested the Office of the Union to prepare a new draft of the document providing clarification in relation to factors (iii) and (vii) to assist in the revision of document UPOV/EXN/PPM/1, for consideration by the WG-HRV, at its third meeting.

## PROPOSALS CONCERNING THE EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION

15. The WG-HRV considered documents WG-HRV/2/2 and WG-HRV/2/4.

16. The WG-HRV considered the new text in document WG-HRV/2/4, Annex, paragraph 3:

“3. The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material. When harvested material has the potential to be used as propagating material, it can be considered as propagating material.”

17. The WG-HRV agreed that the new text in document WG-HRV/2/4, Annex, paragraph 3, be redrafted to explain that material should not be excluded from consideration as propagating material because it was harvested material.

18. The WG-HRV noted that document WG-HRV/2/2, Annex, contained the history of the cascade principle under the “Scope of the Breeder’s Right”, in Article 14 of the 1991 Act, and its relationship with the provisions on the “Exhaustion of the Breeder’s right”, under Article 16 of the 1991 Act. It also contained the history of the notion of “unauthorized use” under Article 14(2) and the notion of “consent” under Article 16, including the moment where the term “consent” was changed by “authorization” in the scope of the right:

“74. Several delegations observed that the wording proposed by the Office of the Union now spoke of ‘authorization’ whereas the draft was based on the notion of ‘consent’. It was noted that the intention was not to modify the text in substance [...]”

(see document WG-HRV/2/2, Annex, page 26)

19. The Chair noted that the concept of consent and the authorization was different in the current explanatory notes.

20. The Delegations of the European Union and Australia expressed support to the explanation of “unauthorized use” in the current explanatory notes. The Delegations of Spain, Japan and Netherlands preferred a broader understanding of “unauthorized use”.

21. The Delegation of Argentina explained that, for the domestic market, when a bag of seeds was legally purchased the breeder’s right was exhausted.

22. The Delegation of Japan referred to situations of unauthorized exports of material of perennial fruit tree plants that, if propagated abroad, could be harvested for a long time without the breeders having an opportunity to obtain remuneration.

23. The Chair noted the different perspectives and interpretations of the notion “unauthorized use” and observed that the current explanatory notes did not reflect those different perspectives and interpretations. He suggested to consider the inclusion of the different understandings in a similar way to the list of factors in the explanatory notes on propagating material.

24. The Delegation of the United States of America suggested that it would be useful to have examples on how members of the Working Group understand and implement those provisions.

25. The Delegations of Australia, Netherlands and the European Union expressed support to the proposal.

26. The Delegation of Japan highlighted that, during the 1991 Diplomatic Conference for the Revision of the Convention, a proposal was made to consider unauthorized use of propagating material when the use was for the purpose of producing harvested material. It further noted that that proposal was accepted without real opposition, as it was reflected in paragraph 1543 of the Records of the Diplomatic Conference:

“1529.4 (...) Concerning Article 14(1)(b), the Working Group had been conscious of the fact that the decision had been taken to remove the square brackets from the last clause appearing in the Basic Proposal. It therefore proposed a system in which the harvested material of the protected variety could be the basis of a royalty collection where two conditions were met: (i) that the breeder had not authorized the use of propagating material for the purpose of producing that harvested material; and (ii) that the breeder had had no reasonable opportunities to exercise his right in relation to the propagating material.”

“[...]”

“1543. The PRESIDENT noted that there was no real opposition to the proposal. He concluded that it was therefore accepted. He thanked the Working Group and its Chairman, Mr. Harvey (United Kingdom).

(document WG-HRV/2/2, Annex, pages 59 and 60)

27. On the above basis, the Delegation of Japan suggested that planting and ongoing cultivation be included in the understanding of “unauthorized use” in the explanatory notes.

28. The representative of CropLife International expressed support for the intervention by the Delegation of Japan and considered that unauthorized “cultivation” should be understood as unauthorized use in Article 14(2) and part of the notion of “production” under Article 14(1) of the 1991 Act.

29. The Chair noted that that reference to the Diplomatic Conference could be useful to explain the rationale for the introduction of the new perspectives presented by certain members of the Union that were not reflected in the current explanatory notes.

30. The Delegation of the Netherlands was in favor that further work included relevant matters concerning the notion of “consent” under exhaustion of the breeder’s right in Article 16 of the 1991 Act.

31. The Delegation of the Republic of Korea expressed its concern about enlarging the term authorization outside of the territory.

32. The Delegation of Japan confirmed the understanding that the right was to be exercised within the territory where the right existed.

33. The WG-HRV requested the Office of the Union to prepare a document that would explain the different perspectives of unauthorized use. The WG-HRV agreed that the members of the WG-HRV would provide examples of their understanding on those provisions and how their understanding would impact the ability of breeders to exercise their rights in the territory.

34. The WG-HRV agreed to postpone discussions of document WG-HRV/1/4, Annex, section “(d) Reasonable opportunity to exercise his right”, until the work on section (c) “Unauthorized use of propagating material”, as set out above, had been completed.

#### PROPOSALS CONCERNING THE EXPLANATORY NOTES ON PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION

35. The WG-HRV noted the proposals from the International Seed Federation (ISF), CIOPORA, CropLife International, Euroseeds, Asia and Pacific Seed Association (APSA), African Seed Trade Association (AFSTA), and Seed Association of the Americas (SAA) presented in document WG-HRV/2/5 but did not have time to consider the document.

36. The WG-HRV agreed to consider document WG-HRV/2/5 at its third meeting.

#### DATE AND PROGRAM OF THE THIRD MEETING

37. The WG-HRV agreed the following tentative date for its third meeting: March 15, 2023. It was noted that the date would be confirmed in accordance with the work programs to be approved by the Council on October 28, 2022.<sup>1</sup>

38. The WG-HRV agreed that the Office of the Union should produce the documents for its third meeting by the end of January. The WG-HRV would be invited to send comments and examples by the end of February to be distributed to the WG-HRV prior to the third meeting.

39. The following program was agreed for the third meeting of the WG-HRV:

1. Opening of the meeting
2. Adoption of the agenda
3. Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention
4. Perspectives on “unauthorized use” under Article 14(2) of the 1991 Act of the UPOV Convention
5. Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention
6. Date and program of the fourth meeting

40. *This report was adopted by correspondence.*

[Annex follows]

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<sup>1</sup> The Council approved the following for the third meeting of the WG-HRV (WG-HRV/3): March 21, 2023 (13.00-16.00) (hybrid meeting) (see document C/56/8 Rev. at [https://www.upov.int/edocs/mdocs/upov/en/c\\_56/c\\_56\\_8\\_rev.pdf](https://www.upov.int/edocs/mdocs/upov/en/c_56/c_56_8_rev.pdf)).

ANNEXE / ANNEX / ANEXO

(dans l'ordre alphabétique des noms français des membres /  
in the alphabetical order of the French names of the members /  
por orden alfabético de los nombres en francés de los miembros)

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