

Working group on harvested material and unauthorized use of propagating material

WG-HRV/3/4

**Third Meeting
Geneva, March 21, 2023****Original:** English
Date: August 11, 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 third meeting in Geneva, on March 21, 2023, in hybrid format, 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/3/1.

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

5. The WG-HRV considered document WG-HRV/3/2.
6. The WG-HRV noted that comments concerning document WG-HRV/3/2 had been received jointly from African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), CropLife International, Euroseeds, International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), International Seed Federation (ISF) and Seed Association of the Americas (SAA).
7. The WG-HRV agreed to modify the section “Factors that have been considered in relation to propagating material”, as presented below. The changes agreed at the meeting are presented in manual revision mode and highlighted in **yellow** and previously agreed changes are highlighted in **grey**, for ease of reference.

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 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 **or may be** used to propagate the variety;

- (iii) whether the material ~~is capable~~ has an innate capability of producing entire plants of the variety (e.g. seed, tubers);
- (iv) ~~(vii)~~ ~~when harvested whether the material has the potential~~ including harvested material, could be used as propagating material, it can be considered as through the use of propagating techniques material (e.g. cuttings, tissue culture);
- (v) ~~(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;
- ~~(vi)~~ ~~(v)~~ the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);
- ~~(vii)~~ ~~(iv)~~ 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
- ~~(viii)~~ (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”.

8. The representative of CropLife International, speaking on behalf of AFSTA, APSA, CropLife International, Euroseeds, CIOFORA, ISF and SAA, expressed concerns with regard to the text under the heading “Factors that have been considered in relation to propagating material”, and noted that it would have been preferable to provide guidance that would result in alignment between UPOV members, rather than leaving all options open.

PERSPECTIVES ON “UNAUTHORIZED USE” UNDER ARTICLE 14(2) OF THE 1991 ACT OF THE UPOV CONVENTION

9. The WG-HRV considered documents WG-HRV/3/3 and WG-HRV/3/3 Add..

10. The WG-HRV noted that contributions concerning document for WG-HRV/3 received from Australia, European Union, Japan, Republic of Korea, New Zealand, International Association of Horticultural Producers (AIPH) and joint comments from the African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), CropLife International, Euroseeds, International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOFORA), International Seed Federation (ISF), and Seed Association of the Americas (SAA) (joint contribution) had been posted on the WG-HRV/3 webpage https://www.upov.int/meetings/en/details.jsp?meeting_id=74773.

11. The WG-HRV agreed to organize a study to assist its deliberations on the “Scope of the Breeder’s Right” in Article 14(1) and (2) of the 1991 Act, including the notions of “unauthorized use” and “reasonable opportunity” and the relationship with the “Exhaustion of the Breeder’s Right” in Article 16 of the 1991 Act.

12. The Delegation of Japan recalled that the principle of cascade (Article 14(2)) is a principle to ensure that enforcement of rights against harvested material using unauthorized protected material, already in distribution downstream, are only exercised when it was not reasonably possible for the breeder to exercise his rights at the upper stream (propagating stage) so as not to disrupt the free distribution of goods. The Delegation emphasized that this last condition in Article 14(2) would inherently require Article 14(1) for the breeder to be able to exercise his rights on the acts leading to the production of harvested material at the propagating stage, or else, would make the condition otiose.

13. The Delegation of Japan referred to the records of the Diplomatic Conference (953, 1022, 1529.3), where it was clearly understood that the authorization of production or sales of propagating material, encompassed the authorization of production of harvested material and which can be conditioned and limited by the breeder under Article 14(1)(b). The Delegation further recalled that the Diplomatic Conference, concluded that the Article 14(2) applies where the breeder had not authorized the use of propagating material for the purpose of producing the harvested material, which in turn underlines the scope of Article 14(1) to include the breeder to authorize the production of harvested material at the propagating stage.

14. The Delegation of Japan pointed that the current explanatory note was not clear on the fact that the production of harvested material for products such as fruits trees, were part of the authorization at the propagating stage, and the ambiguity promoted the understanding for some, that the authorization on propagating material excluded the authorization for acts leading to the production of harvested material, or in

other words, take the interpretation that authorization for harvested material was only possible when something bad happened early on (infringement at propagating stage).

15. The Delegation of Japan, further noted that there were incongruities between Article 14 and Article 16, in which Article 16 allowed for the exception to exhaustion of materials that were exported to non-protecting countries, allowing for breeders rights to extend their rights, for example, at harvested material imported back from those countries, while the current Article 14(2) was limited in terms of the understanding of “unauthorized use” where the unauthorized use could only happen within the territory, thus limiting the application of Article 14(2).

16. For these reasons, the Delegation of Japan proposed a study on Article 14, the relationship between (1) and (2) and the relationship between Article 16 and Article 14.

17. The WG-HRV agreed to invite the members of the WG-HRV to propose issues and/or suggest authors for a study on the “Scope of the Breeder’s Right” which would consider Article 14(1) and (2) of the 1991 Act, including the notions of “unauthorized use” and “reasonable opportunity”, and the relationship with the “Exhaustion of the Breeder’s Right” in Article 16 of the 1991 Act, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work.

18. The WG-HRV agreed that, based on the replies received, the Office of the Union would propose the terms of reference for a study, timeline and author (s), if appropriate, for consideration by the WG-HRV at its fourth meeting.

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

19. The WG-HRV did not have time to discuss document WG-HRV/2/5.

DATE AND PROGRAM OF THE FOURTH MEETING

20. The WG-HRV agreed to hold its fourth meeting on the afternoon of October 25, 2023, following the seventy-ninth session of the Administrative and Legal Committee (CAJ).

21. *This report was adopted by correspondence.*

[Annex follows]

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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