



# AIPH

Mr Peter Button  
Vice-secretary general of UPOV  
34 Chemin des Colombettes  
CH-1211 Geneva 20

14<sup>th</sup> March 2023

**RE: AIPH contribution in response to UPOV Circular E-23/022 dated February 17, 2023**

Dear Mr Button,

AIPH would like to contribute to UPOV Circular E-23/022, aiming to be of support and of cooperation to the Working Group on Harvested material, the third meeting of which is scheduled on 21<sup>st</sup> March 2023.

Please may I refer you to the information below, containing information and proposals to provide UPOV with AIPH's contribution in response to UPOV Circular E-23/022?

May I please inform you that, based on this information, AIPH would like to offer further contribution in the discussions scheduled on 21<sup>st</sup> March, and AIPH would like to maintain the possibility to give further input beforehand.

Finally, I would like to inform you that AIPH will be represented in the meeting in the Working group by two delegates. Mr Huib Ghijsen will participate physically, and Ms Mia Buma will participate virtually.

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

Yours Sincerely,

M. Buma

Secretary of AIPH Committee for Novelty Protection



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As previously mentioned in the second working group (March 6, 2022) of the WG-HRV, AIPH's opinion is that unfortunately the parties involved in the conception of EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION adopted by the Council at its forty-seventh ordinary session on October 24, 2013, have given a too strong interpretation to the meaning of the wording "unauthorized use" in article 14 sub 2 of the UPOV Convention 1991.

So, it is important to go back to the history of the conception of the principle of protection of harvested material in UPOV Convention 1991.

AIPH would like to repeat its arguments as brought in the second meeting of the WG-HRV and would like to refer to the added documents, containing the relevant citations in CAJ/27/2 June 1990 and the relevant paragraphs in CAJ 20-5 Proposals / see below comments for revision (Page 9 FIS). See the sentences marked in yellow in the added documents.

AIPH raised the following arguments in the meeting of the WG-HRV on 15 March 2022: the term "authorization" was not intended to be used solely as an exclusive permission based on a formal right like an PVR. It was only the intention to force the breeder to exercise his rights first on the propagating material and, only if he could not do so, then to exercise his rights on the harvested material. It needs no further arguments that this is a condition for a smoothly working production and trade chain, an important condition to the farmers and growers. It was the German delegation who proposed an amendment (report CAJ/XXV/2, October 1989) containing this obligation to the breeder to exercise his right at first at the propagating material, before exercising it on harvested material. In the June 1990 meeting of the CAJ, a key discussion took place concerning the position of the harvested material, on which basis the Office of the Union submitted a further proposal drafted as we know now in the current text of art 14, sub 2, (act in respect of harvested material) speaking about *authorization* whereas the original draft was based on the notion of *consent*.

The history and the development of the 1991 UPOV Convention, shows the strong wish to strengthen and improve the Breeder's Right by extending the protection to all commercial material of plant varieties and at the same time, to formulate the scope of protection such that the breeder is obliged to exercise his right first on the propagating material and in the case he is not able to do so, for example if he has no right in a given territory, he may exercise his right on the harvested material.



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As a result, paragraph 2 of article 14 must be interpreted such that the 'unauthorized' use of propagating material also includes this use 'without the consent' of the owner of the variety.

In other words: the cascade article 14, sub 2, is a kind of exhaustion rule as well: first, the breeder has to try exercising his right on the propagating material. Secondly, in the cases he was not able to do so reasonably, on the harvested material. Exercise his right on the harvested material will in practice mean enforcing his right.

With this interpretation the so-called U-turn constructions (reproducing the variety in a neighboring country, where the variety could not be or was not protected, harvest the fruits or the flowers from the reproduced material and import those products into the country where the variety was only protected by its reproductive material), are avoided as well.

Finally, with this interpretation of 'unauthorized use' one may conclude that acting against contractual obligations in a PBR license-contract has to be qualified as unauthorized as well and therefore the breeder may enforce its right on the harvested material.

As said before, AIPH would like to refer to the added CAJ documents and paragraphs to substantiate its arguments above. AIPH is looking forward to giving input to the further discussions in the working group next week and is honored to be able to participate in the valuable and important work of the WG-HRV.