

Working Group on harvested Material and Unauthorized use of Propagating Material

WG-HRV/4/2

**Fourth Meeting
Geneva, October 25, 2023**

**Original: English
Date: October 20, 2023**

PROPOSAL TO REVISE THE “EXPLANATORY NOTES ON PROPAGATING MATERIAL UNDER THE UPOV CONVENTION” AND PROSPECTS OF COMMISSIONING A STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”

Document prepared by the office of the Union

Disclaimer: this document does not represent UPOV policies or guidance

EXECUTIVE SUMMARY

1. The purpose of this document is to invite the Working Group on harvested material and unauthorized use of propagating material (WG-HRV) to consider:

(a) the next step concerning the proposals on the Explanatory Notes on Propagating Material under the UPOV Convention agreed by the WG-HRV at its third meeting on March 21, 2023; and

(b) the replies to UPOV Circular E 23/071 of April 5, 2023, on the proposed issues and suggested 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.

2. The WG-HRV is invited to:

(a) note the information provided in this document;

(b) propose to the CAJ at its eighty-first session to approve the revision of the “Explanatory Notes on Propagating Material under the UPOV Convention”, (UPOV/EXN/PPM/1) as set out in paragraph 5 of this document;

(c) note the replies to UPOV Circular E-23/071, as set out in paragraphs 9 and 10 and the Annex of this document; and

(d) consider that the Office of the Union would propose the basis of a study, including terms of reference, timeline and author (s), if appropriate, for consideration by the WG-HRV at its next meeting, as set out in paragraph 15 of this document.

3. The structure of this document is as follows:

EXECUTIVE SUMMARY1

BACKGROUND2

PROPOSAL TO AMEND THE EXPLANATORY NOTES ON PROPAGATING MATERIAL2

FACTORS THAT HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL2

PROPOSAL FOR A STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”3

 UPOV Circular E-23/071 of April 5, 20233

 Proposed Experts 3

 Scope of the study 4

ANNEX RESPONSES RECEIVED IN REPLY TO UPOV CIRCULAR E-23/071 OF APRIL 5, 2023

- Appendix I: Australia
- Appendix II: Brazil
- Appendix III: European Union
- Appendix IV: Japan
- Appendix V: Republic of Korea
- Appendix VI: Joint contribution 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 (CIOPORA), International Seed Federation (ISF) and Seed Association of the Americas (SAA)
- Appendix VII: International Association of Horticultural Producers (AIPH)

BACKGROUND

4. Background to this document is available in documents WG-HRV/3/2 “Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention” and WG-HRV/3/3 “Perspectives on “unauthorized use” under Article 14(2) of the 1991 Act of the UPOV Convention”.

PROPOSAL TO AMEND THE EXPLANATORY NOTES ON PROPAGATING MATERIAL

5. The WG-HRV, at its third meeting, held in Geneva on March 21, 2023, 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) ~~(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~~
- (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”.

(see document WG-HRV/3/4 “Report”, paragraph 7).

Following the agreement of the above text in the WG-HRV, it is proposed to present the text to the CAJ for adoption.

6. *The WG-HRV is invited to propose to the CAJ at its eighty-first session to approve the revision of the “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), as set out in paragraph 5 of this document.*

PROPOSAL FOR A STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”

7. The WG-HRV, at its third meeting, held in Geneva on March 21, 2023, agreed to organize a study to assist in 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.

8. 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” 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, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work. The WG-HRV agreed that, based on the replies received, the Office of the Union would propose the basis of a study, including terms of reference, timeline and author (s), if appropriate, for consideration by the WG-HRV at its next meeting (see document WG-HRV/3/4 “Report”, paragraphs 11, 17 and 18).

UPOV Circular E-23/071 of April 5, 2023

9. The Office of the Union issued UPOV Circular E-23/071 on April 5, 2023, inviting the members of the WG-HRV to propose issues and/or suggest authors for a study 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, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work.

10. In reply to UPOV Circular E-23/071 of April 5, 2023, the Office of the Union received contributions from Australia, Brazil, European Union, Japan, Republic of Korea, International Association of Horticultural Producers (AIPH) and joint contribution 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) which are reproduced in the Annex to this document.

11. The following paragraphs present a summary of the experts proposed and the comments received on the scope of the study.

Proposed Experts

12. The European Union and the International Association of Horticultural Producers have proposed that a group of experts should carry out the study. Brazil has proposed two experts and others have proposed individuals.

Member of the WG-HRV	Proposed Experts – see CV in Annex
Australia	Charles Lawson
Brazil	Rodrigo Dolabella Vivianne Kunisawa
European Union	Axel Metzger Sven Bostyn Pilar Montero A professor from the Max Planck Institute (no name proposed)
Japan	Joseph Strauss
AIPH	Huib Ghisen, as part of a team

Scope of the study

13. At its third meeting, the WG-HRV agreed on the following scope:

“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, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work.”

In reply to UPOV Circular E-23/071 of April 5, 2023, members of the WG-HRV have made comments and proposals in relation to the scope of the study, as follows:

European Union

“-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, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work and available case law (CJEU).

“-Interpretation of the sentence “the breeder may make his authorization subject to conditions and limitations” in Article 14(1)(b) of the UPOV Convention, as this sentence represents the point of interplay between the statutory plant variety protection law and the private contractual law.”

Japan

“First question

“Does the cascade principle (Article 14(2)) and exhaustion principle (Article 16) conform with the literal interpretation of 14 (1) offered by some, where, authorization for any acts relating to a harvested material is excluded?

“Second question

“What were the reasons behind the decision of the delegation of the 91 Convention to delete the use of propagating material for the purpose of producing harvested material from the acts listed for authorization under Article 14 (1).

“Third question

“The Diplomatic Delegation for 1991 Convention specifically decided to address the issue of the 1978 Convention, in which the protection for harvested material was extremely limited. How and where was the problem of extending breeders right to harvested material, addressed after the provision on the use of propagating material for the purpose of producing harvested material were deleted from Article 14(1)? How were the decision to include the provision for the breeder to put limitations and conditions on the authorizations of Article 14 (1), instead of the aforementioned deletion, a remedy to the problem of strengthening breeders’ rights for harvested material? Would the inclusion of the condition clause, allow for the breeders to condition or limit ways or areas of production of harvested material, which otherwise would be implicit in the authorization of sales or production of propagating material?

“Fourth question

“Finally, what are the relationships between Article 14(1) and article 14(2)?

“Fifth question

“What was “authorization” in Article 14 intended to cover as the delegations of the 91 Convention seem to place the words in a different and broader context, than what is suggested in the explanatory note. Does it include the notion of a formal consent? In relation to that, what does “unauthorized” use mean?”

Republic of Korea

Republic of Korea has emphasized that the scope of the study should not go beyond the UPOV Convention.

Joint contribution from Breeders' Associations

"1. Elements: Legal History and Background at UPOV – Legislation & Jurisprudence in the member states

"2. Data to be gathered: we propose UPOV generates a questionnaire on the basis of the proposal, to be sent out to all UPOV members asking them to provide feedback."

International Association of Horticultural Producers (AIPH)

"AIPH has emphasized that the study should set out the full rationale of the provisions in the UPOV Convention on harvested material and the importance to go back and study the history of the conception of the principle of harvested material."

14. Considering that the question on whether a team or an individual shall be asked to make a study has been raised, as well as the many comments and proposals on the scope of the study, the Office of the Union needs further input from the WG-HRV during the meeting on 25 October 2023 before pursuing with the next steps. The members of the WG-HRV are invited to provide comments on the mentioned matters during the meeting.

15. Based on the replies received, and the discussions during the fourth meeting of the WG-HRV, the Office of the Union would propose the basis of a study, including terms of reference, timeline and author (s), if appropriate, for consideration by the WG-HRV at its next meeting. It is proposed to organize the meeting virtually in March 2024, a date to be established.

16. *The WG-HRV is invited to:*

(a) note the information provided in this document;

(b) propose to the CAJ at its eighty-first session to approve the revision of the "Explanatory Notes on Propagating Material under the UPOV Convention", (UPOV/EXN/PPM/1) as set out in paragraph 5 of this document;

(c) note the replies to UPOV Circular E23/071, as set out in paragraphs 9 and 10 and the Annex of this document; and

(d) consider that the Office of the Union would propose the basis of a study, including terms of reference, timeline and author (s), if appropriate, for consideration by the WG-HRV at its next meeting, as set out in paragraph 15 of this document..

[Annex follows]

ANNEX

RESPONSES RECEIVED IN REPLY TO UPOV CIRCULAR E-23/071 OF APRIL 5, 2023

This Annex contains the following:

- Appendix I: Australia
- Appendix II: Brazil
- Appendix III: European Union
- Appendix IV: Japan
- Appendix V: Republic of Korea
- Appendix VI: Joint contribution 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 (CIOPORA), International Seed Federation (ISF) and Seed Association of the Americas (SAA)
- Appendix VII: International Association of Horticultural Producers (AIPH)

[Appendix I follows]

ANNEX, APPENDIX I

AUSTRALIA

“Dear UPOV Secretariat,

“We would like to suggest Prof Charles Lawson for the proposed study, his biography is copied below. Prof Lawson has recently completed research for us on Exhaustion of a PBR and Harvested Material in the context of the Australian Plant Breeder’s Rights Act which included studying issues similar in scope to those discussed at the recent working group meeting. While the focus was the Australian PVP system, his research involved considering the related Articles of the UPOV Convention, including analysis of records of the Diplomatic Conference. The completed reports are available online: [University of Queensland PBR policy research | IP Australia](#).

“Charles Lawson is a Professor in the Griffith Law School, Griffith University. He studied science and law at The Australian National University and holds a Bachelor of Science with Honours in biochemistry and genetics and a Bachelor of Laws. He also holds a Doctor of Philosophy from the ANU’s Research School of Biological Sciences in molecular biology and biochemistry and a Master of Laws from Queensland University of Technology for research into gene patenting and competition. Before joining the university sector, he worked as a lawyer in both the private and public sectors, including at the Australian Government Solicitor and the Commonwealth Department of Finance and Deregulation. His research focus is on patents, plant breeder’s rights, sharing biological materials and public administration law. He has published widely with over 150 refereed publications and a number of consultancies delivering reports to Australian and international governmental institutions including IP Australia, the United Nations Food and Agriculture Organisation and the International Union for the Protection of New Varieties of Plants.

“Kind regards
“Isabel”

[Appendix II follows]

BRAZIL

“Dear UPOV,

“In response to the request to indicate topics and people to prepare a study regarding the scope of the breeder’s right and notions of unauthorized use and reasonable opportunity, follow suggestions of names and contacts of people that were shared with SNPC by the private sector:

“(i) Rodrigo Dolabella: +55 61 99110 9783; rodrigo.dolabella@gmail.com
(https://br.linkedin.com/in/rodrigo-dolabella-2a368340?trk=people-guest_people_search-card);
and

„(ii) Viviane Kunisawa: +55 11 98080 7005; viviane.kunisawa@lickslegal.com
(<https://br.linkedin.com/in/viviane-yummy-kunisawa/pt>).

“Best regards,
“Stefânia.”

[Appendix III follows]

EUROPEAN UNION

“Dear Mr Button, dear Peter,

“We would like to present the following suggestions in relation to your request concerning the organisation of a study (UPOV Circular E-23/071):

“Scope of the study:

“-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, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work and available case law (CJEU).

“-Interpretation of the sentence “the breeder may make his authorization subject to conditions and limitations” in Article 14(1)(b) of the UPOV Convention, as this sentence represents the point of interplay between the statutory plant variety protection law and the private contractual law.

“Possible authors:

“- Axel Metzger: Professor of Civil law and Intellectual Property at Humboldt-University in Berlin and member of the Board of Appeal of the CPVO

“- Sven Bostyn: Professor at University of Copenhagen (Faculty of Law)

“- Pilar Montero: Professor of Commercial Law, University of Alicante

“-Professor from the Max Planck Institute, Department of Intellectual property and Competition law (<https://www.ip.mpg.de/en/>).

“We suggest to work with several experts coming from different universities/institutions and countries as to ensure the diversity of independent views and to form an independent expert group that would together submit a report to the UPOV/CAJ. The WG-HRV should be available to support the study and answer any possible questions. The expert group, once agreed in the CAJ, should organise its work and start before the end of 2023. The study could take about 6 months with a possibility for extension. So the study could be delivered by 30 June 2024. The way of working, independency and timelines should be included in the ToR.

“Kind regards,
“Päivi Mannerkorpi”

[Appendix IV follows]

ANNEXE, APPENDICE IV
[in English only/ en anglais seulement/en inglés solamente]

JAPAN



Proposals on the topics of research and the authors of the research

I Topics of Research :

The Diplomatic Conference of the 1991 UPOV Convention, concluded that, Article 14 (2) applies, where two conditions are 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.

However, the current explanatory note, notably paragraph 4 and 5, is not necessarily clear on where the authorization on propagating material for the purpose of producing the harvested material is provided.

This has led to a very literal interpretation of the UPOV Article 14 (1) for some, in that Article 14(1) in fact, excludes the breeder from authorizing the use of propagating material for the purpose of producing harvested material, and that the Breeder cannot exercise (authorize) his right on harvested material, unless there is an prior infringement of the use of propagating material listed in UPOV Article 14 (1) which are assumed to be unrelated to production of harvested material. This particular interpretation of the UPOV Convention, effectively renders it impossible to exercise breeders right on harvested material.

However, Article 14 of UPOV91 Convention was explicitly proposed to resolve the problem of UPOV78 Convention that did not provide for protection with acts relating to the production of harvested materials. It would thus be contrary to the purpose of the 91 Convention, if Article 14 only provided for a protection for harvested material that is effectively impossible to enforce.

Moreover, it is not clear whether the current explanatory note on Article 14(1) really excludes the breeder from authorizing the use of propagating material for the purpose of producing harvested material, as such an interpretation would be inconsistent with principles shown in other provisions in the 91 Convention, or with the intentions of the delegations shown in the records. For this reason, Japan propose to study the following questions:

First Question:.

- Does the cascade principle (Article 14(2)) and exhaustion principle (Article 16) conform with the literal interpretation of Article 14 (1) offered by some, where, authorization for any acts relating to a harvested material is excluded? An interpretation that the breeder is not allowed to exercise his right in relation to the propagating material for the purpose of



producing a harvested material, at the time of his transfer of the propagating material, would contradict the following two principles, where in both principles, the breeder is expected to be able to exercise his right at the propagating stage or where the breeder had the first chance to sale/transfer his material.

1. The principle of cascade(Article 14(2)) is a principle to ensure that rights against harvested material already in distribution downstream, are only exercised when it was not possible to exercise his rights at the upper stream(propagating stage). This principle stands to prevent unnecessary distortion in the distribution, and asks the breeder to exercise his right the earliest possible stage. (See also Delegation record 916 reproduced below)
2. The principle of Exhaustion(Article16), which Article 14 (2) is subject to, is the idea that the right holder should not be able to receive the benefit of the product twice, when the right holder had the chance at the point of sales to recuperate any future benefits (in this case the harvested product) that may arise from that product(the propagating material) after the sales.

"916. Mr. HAYAKAWA (Japan) observed that his Delegation was in favor of strengthening the breeder's right but felt that, if a mandatory provision were to be accepted to the effect that the breeder would be able to exercise his right in relation to harvested material and other products, it would not lead to the establishment of a smooth relationship between the breeders and the users of varieties. The breeder should exercise his right at the earliest possible stage. If the breeder could freely choose the stage at which he exercised his right, there would be a very uncertain situation for the trade. Therefore, the Delegation of Japan proposed to introduce a so-called 'cascade principle.' It was only on that condition that Japan would be able to accept a broadening of the scope of the breeder's right.

Second Question:

What were the reasons behind the decision of the delegations of the 91 Convention to delete the use of propagating material for the purpose of producing harvested material from the acts listed for authorization under Article 14(1)?

The Delegation records show that the provision of the use of propagating material for the purpose of producing harvested material was explicitly deleted from the acts requiring authorization in Article 14(1), which has been the reasons supporting the interpretation that Article 14(1) in fact, excludes the authorization of the production of harvested material.

However, in the records, several delegations have expressed their understanding (reproduced bellow) in that, the authorization of sales and production of the propagating material, implicitly covered the authorization for the use of a propagating material for the purpose of producing a harvested material, as there usually would be no other reason to produce



or sale the propagating material. Based on this understanding, some delegations were very cautious that an inclusion of a provision for producing a harvested material in addition to the sales of propagating material, can insinuate a double authorization for an overlapping purpose, and thus, requirement to pay a license fee twice for the same propagating material, denying the principle of exhaustion.

**953. Mr. BURR (Germany) wished once more to explain the purpose of the proposal made by his Delegation, that had the same content as that of the Delegation of the United States of America. In his view, there was agreement that authorization also implicitly covered the production of harvested material if the breeder had authorized the production and sale of propagating material. That was a case of harvested material that had been produced by authorized use of propagating material. However, where the breeder had not authorized sale and propagating material had nevertheless been sold and had been sown, for instance by the breaking of a licensing agreement, then that was a case of harvested material that had been produced by unauthorized use of propagating material. That was exactly the case that his Delegation wished to subject to intervention by the breeder.*

**958. Mr. BURR (Germany) wished to put a question to the Delegation of the United Kingdom. Was the agreement of the breeder to use for the purpose referred to to be required in addition to his agreement to the sale of the propagating material? In his preceding statement he had assumed it to be obvious that one could sow the propagating material where the breeder had given his agreement to its sale. Why should one otherwise have sold it? The question could be answered in both directions. Nevertheless, there had to be clarity."*

**961. Mr. FOGLIA (Italy) wondered whether the proposal of the Delegation of the United Kingdom was really necessary. The use of propagating material might be covered implicitly by Article 14(1)(a). Another question was the reason for using the expression 'commercial production' when Article 14(1)(a)(i) referred to 'production,' unspecified.*

**1010.1 Mr. KUNHARDT (Germany) stated that his Delegation had already taken a position on that proposal and had expressed its objections to the wording. The proposal would add a further act of utilization under subparagraph (a), that was to say in relation to propagating material of the protected variety, which would not however directly concern propagating material, meaning that one could gain the impression that a breeder's right could be asserted twice, in a cumulative manner, with respect to one and the same object. That would mean that the breeder's right with respect to ornamentals and fruit trees would never be exhausted.*

1013. Mr. KIEWIET (Netherlands) stated that his Delegation was in the same position as the Delegations of Germany and Japan. One of the questions raised by Mr. Harvey (United Kingdom) was about the sense of Article 14(1)(b) if Article 14(1)(a) would not cover the use for the purpose specified in the proposal. In the opinion of his Delegation, it made a sense because, if propagating material was put on the market, the putting on the market implied an authorization by the seller to the buyer to produce harvested material from that propagating material, otherwise the selling of the propagating material would make no sense.

**1022. Mr. KIEWIET (Netherlands) agreed with Mr. Öster (Sweden): the propagation of a fruit tree was indeed covered by Article 14(1)(a)(i). In addition, the selling of the fruit obtained from the propagated trees was covered by Article 14(1)(b). He added that his Delegation felt that the purchase of the fruit tree implied the authorization to produce and sell fruit from that tree, unless otherwise provided in a contract.*



Third Question:

The Diplomatic delegation for 1991 Convention specifically decided to address the issue of the 1978 Convention, in which the protection for harvested material was extremely limited. How and where was the problem of extending breeders right to harvested material, addressed, after the provision on the use of propagating material for the purpose of producing harvested material were deleted from Article 14(1)? How, were the decision to include the provision for the breeder to put limitations and conditions on the authorizations of Article 14(1), instead of the aforementioned deletion, a remedy to the problem of strengthening breeders' rights for harvested material? Would the inclusion of the condition clause, allow for the breeders to condition or limit ways or areas of production of harvested material, which otherwise would be implicit in the authorization of sales or production of propagating material?

**1529.2 Following the suggestion, made by the Delegation of the United Kingdom in Plenary, to insert in Article 14(1)(a) a provision on the use of propagating material for the purpose of producing harvested material, many Delegations had pointed out that such a provision would extend the scope of Article 14(1)(a) beyond that which was needed to address the problem, and would therefore require a subsequent limitation. To give a suitable wording to that limitation had been found to be very difficult and the Working Group therefore decided unanimously that it was better to tackle the problem in Article 14(1)(b).*

**1529.3 The discussion on this issue had raised the question of whether or not the provision of Article 5(2) of the 1978 Act of the Convention should be included in the revised Convention. That provision made it clear that the breeder, in giving his authorization, may put conditions and limitations on the licences granted. The Working Group thought that it was useful to include that provision in Article 14(1)(a), particularly as the Conference had decided to delete Article 14(1)(a)(viii) and had therefore restricted the list of acts subject to authorization under Article 14(1)(a).*

**1529.4 (Continued from 954) 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.*

Fourth Question:

Finally, what are the relationship between Article 14(1) and article 14(2)? If the scope of authorization stipulated in Article 14 (1), encompassed the authorization for the production of harvested material, would that make the conditions set in Article 14 (2) otiose? On the contrary, would it be logical to interpret, as the delegation of Germany has commented, that Article 14(1) provides the breeder with the right to authorize sales of propagating material



and condition or limit the production of harvested material at the point of authorization, but only if this was not reasonably possible, such as the case of stolen propagated material, or an imported harvested material based on illegal propagation of the propagating material overseas, article 14(2) would in effect, provide means to rescue such an infringement? With such an understanding,

"953.Mr. BURR (Germany) wished once more to explain the purpose of the proposal made by his Delegation, that had the same content as that of the Delegation of the United States of America. In his view, there was agreement that authorization also implicitly covered the production of harvested material if the breeder had authorized the production and sale of propagating material. That was a case of harvested material that had been produced by authorized use of propagating material. However, where the breeder had not authorized sale and propagating material had nevertheless been sold and had been sown, for instance by the breaking of a licensing agreement, then that was a case of harvested material that had been produced by unauthorized use of propagating material. That was exactly the case that his Delegation wished to subject to intervention by the breeder.

Fifth Question:

What was "authorization" in Article 14 intended to cover as the delegations of the 91 Convention seem to place the words in a different and broader context, than what is suggested in the explanatory note. Does it include the notion of a formal consent? In relation to that, what does "unauthorized" mean?

"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 [...]"

II Authors of Research

Japan proposes to outsource the research to Max Plank. Dr. Joseph Straus, who represented AIPPH at the time of the creation of the 91 Convention and is the Professor of IP law, Director of the Max Planck Institute and chairman of the Munich IP Law Centre. He not only knows the discussion of the time, does not represent a particular country, and is a recognized authority in the IP realm.

WG-HRV/4/2

ANNEX, APPENDIX V

REPUBLIC OF KOREA

“Dear sir,

“First of all, I am sorry for the late reply.

“Regarding study group, on behalf of Korea Seed & Variety Service, I just would like to express my opinion in stead of proposing specific issue.

“I hope that the subject of this study be within the scope of UPOV Convention and also be studied in the scope of Convention because if something goes beyond Convention, it could shake the foundation of Convention.

“Anyway, I support this study and am interested in future findings of it about the scope of breeder's right based on 1991 Act including the notion of 'unauthorized use'.

“Yours sincerely,

“PARK Chan Woong”

[Appendix VI follows]

ANNEX, APPENDIX VI

JOINT CONTRIBUTION 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 (CIOPORA), INTERNATIONAL SEED FEDERATION (ISF) AND SEED ASSOCIATION OF THE AMERICAS (SAA)

“Dear UPOV office,

“In response to Circular E-23/071, regarding the WG-HRV proposal for issues, we would like to make the following suggestions:

- “1. Elements: Legal History and Background at UPOV – Legislation & Jurisprudence in the member states
- “2. Data to be gathered: we propose UPOV generates a questionnaire on the basis of the proposal, to be sent out to all UPOV members asking them to provide feedback.

“Best regards,

“Marcel Bruins

“On behalf of the Task Force HRV, consisting of representatives of AFSTA, APSA, CIOPORA, Croplife International, Euroseeds, ISF and SAA”

[Appendix VII follows]

INTERNATIONAL ASSOCIATION OF HORTICULTURAL PRODUCERS (AIPH)



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

3rd May 2023

**RE: AIPH contribution in response to UPOV Circular Circular E-23/071,
dated April 5, 2023**

Dear Mr. Button,

AIPH would like to contribute to UPOV Circular E-23/071, aiming to be of support and of cooperation to the Working Group on Harvested material, the fourth meeting of which is scheduled on 25th October, 2023.

With reference to the WG-HRV agreement 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" 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, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work, AIPH would like to give the following response.

As said previously in the second working group and repeated in the third working group 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 too strong an interpretation to the meaning of the wording "unauthorized use" in article 14 sub 2 of the UPOV Convention 1991.



AIPH has given the arguments for its statement in written and oral contributions in the first three meetings of UPOV's WG-HRV.

Against this back-ground AIPH would like to put forward the following suggestions:

1. The setting out of the full rationale of art 14 (2) is a 'conditio sine qua non' for the conception of a next EXPLANATORY NOTES ON ACTS IN RESPECT OF HARVESTED MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION, which the UPOV members can agree on. Therefore, AIPH considers it as really important to go back to and to study the history of the conception of the principle of protection of harvested material (UPOV article 14 (2) in UPOV Convention 1991).

2. This study should be done by an independent and academic qualified team, selected from several independent institutes and universities, who are well-known because of their knowledge and high quality performance of research in the field of Plant Breeders Rights or at least have a reputation for quickly learning complex IP-systems.

3. To add Mr. Huib Ghijsen as one of the authors and as member of the mentioned team. Mr. Ghijsen has had a long-standing contribution to UPOV as a representative of the International Seed Federation (ISF), has both the relevant juridical and technical academic education and is not allied to any concerned organisation, authority or industry, which guarantees his impartiality.

He has an excellent knowledge of the conception of the UPOV Convention 1991 and how its principles are henceforth translated and applied in practice.



AIPH

4. Mr. Ghijsen has made a study of 'The history of the protection of harvested material in UPOV 1991'. This paper has already been introduced by AIPH to UPOV at the second meeting of the WG-HRV. Meanwhile, Mr Ghijsen will produce a 'Flowchart of the history of the scope of protection of UPOV 1991, in particular with regard to the harvested material'. AIPH would like to put forward this document -as soon as it is final- to the UPOV office in order to contribute to the work of the study of the above mentioned group.

May I please also inform you that based on this information, AIPH would like to give further contribution in the discussions on 25th October, 2023.

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

Yours sincerely

Tim Briercliffe
Secretary General

International Association of Horticultural Producers, Horticulture House, Chilton, Didcot, Oxfordshire OX11 0RN United Kingdom.
T: +44 (0) 1235 776230 | E: sg@aiph.org | www.aiph.org

The International Association of Horticultural Producers is an international non-profit association registered in Brussels, Belgium.
VAT number: GB 184353007. Registration number: 546 558 178.

[End of Annex and of document]