

Working group on harvested material and unauthorized use of propagating material

WG-HRV/4/3

Fourth Meeting Geneva, October 25, 2023 Original: English

Date: January 4, 2024

REPORT

prepared by the Office of the Union

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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 fourth meeting in Geneva, on October 25, 2023, in hybrid format, chaired by Ms. Yolanda Huerta, 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/4/1.

PROPOSAL TO REVISE THE "EXPLANATORY NOTES ON PROPAGATING MATERIAL" UNDER THE UPOV CONVENTION

- 5. The WG-HRV considered document WG-HRV/4/2.
- 6. The WG-HRV noted that, 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.

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, 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 used to propagate the variety;
- (iii) whether the material has an innate capability of producing entire plants of the variety (e.g. seed, tubers);
- (iv) whether the material, could be used as propagating material, through the use of propagating techniques (e.g. cuttings, tissue culture);
- (v) 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) 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";

(vii) 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).

7. The WG-HRV agreed to propose to the CAJ, at its eighty-first session in October 2024, 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 document WG-HRV/4/2 (see paragraph 6, above).

PROSPECTS OF COMMISSIONING A STUDY ON THE "SCOPE OF THE BREEDER'S RIGHT" AND THE RELATIONSHIP WITH THE "EXHAUSTION OF THE BREEDER'S RIGHT"

- 8. The WG-HRV noted the replies to UPOV Circular E-23/071, as set out in paragraphs 9 and 10 and the Annex of document WG-HRV/4/2.
- 9. The WG-HRV discussed whether it would be appropriate to select one author or a team of authors to carry out the study. It was agreed that it would be appropriate to select a team of authors in order to capture a diversity of views into the work. It was agreed that the number of authors should be limited to a maximum of four and that one of the authors should be designated to lead the team.
- 10. The WG-HRV agreed that the study should include an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to Article 14 and Article 16 of the 1991 Act. It was discussed whether jurisprudence from UPOV members should be part of the study. It was agreed that one part of the study would focus on the analysis of the intentions of the drafters of the 1991 Act and a second part would include summaries of court cases from UPOV members bound by the 1991 Act.
- 11. The WG-HRV agreed that, in accordance with the discussions during the fourth meeting of the WG-HRV, the Office of the Union would consult the members of the WG-HRV that provided replies to UPOV Circular E-23/071 and propose the basis of a study, including terms of reference, timeline and authors, for consideration by the WG-HRV at its fifth meeting.

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

- 12. The WG-HRV considered document WG-HRV/2/5 and discussed the proposals of members of the WG-HRV concerning the text in the explanatory notes on provisional protection.
- 13. The proposed changes to paragraphs 2 and 5 of the Explanatory Notes on Provisional Protection were not retained.
- 14. Members of the WG-HRV supported the idea to introduce a sentence in paragraph 6 of the Explanatory Notes on Provisional Protection indicating that publications of an application for a plant breeders' right refers to publications in an official journal or gazette either in a physical document or in an electronic format. The WG-HRV requested the Office of the Union to draft a text that would capture that element for consideration by the WG-HRV at its next meeting.
- 15. Some members of the WG-HRV expressed support for the underlying reasons of the proposals made by the breeders' organizations to change paragraph 8 concerning the measures of the explanatory notes, but not to the proposed text. Some members of the WG-HRV stated that since the provision on provisional protection in the 1991 Act of the UPOV Convention provides for a choice on the measures that should be available during the period of the provisional protection, preferences on the implementation should not be introduced in the explanatory notes. The WG-HRV noted that it might be useful to provide in the explanatory notes for the background of, and justification for, the inclusion of the provisions on provisional protection in the UPOV Convention It was noted that UPOV members and future UPOV members may take such information into consideration when developing and implementing the provisions on provisional protection.

WG-HRV/4/3 page 3

- 16. It was concluded that there was no agreement for a new text in paragraph 8 concerning the measures and that the present wording should be maintained.
- 17. The WG-HRV noted that the organizations representing breeders (ISF, CIOPORA, Croplife International, Euroseeds, APSA, AFSTA, and SAA) offered to provide a text with an explanation of the importance on providing effective protection during the period of provisional protection, to be considered by the WG-HRV, at its fifth meeting.

DATE AND PROGRAM OF THE FIFTH MEETING

- 18. The WG-HRV agreed to hold its fifth meeting on March 21, 2024, via electronic means to consider the following:
 - 1. The commissioning of a study, including terms of reference, timeline and authors. The study would include a first part with an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to Article 14 and Article 16 of the 1991 Act, and a second part, that would include summaries of court cases from UPOV members bound by the 1991 Act.
 - 2. The UPOV Office would propose a text for paragraph 6 of the Explanatory Notes on Provisional Protection concerning the publication of applications for plant breeders' rights.
 - 3. The organizations representing breeders (ISF, CIOPORA, Croplife International, Euroseeds, APSA, AFSTA, and SAA) would provide a text with an explanation of the importance on providing effective protection during the period of provisional protection.

[Annex follows]

WG-HRV/4/3

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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WG-HRV/4/3 Annexe / Annex / Anexo page 2 / page 2 / página 2

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WG-HRV/4/3 Annexe / Annex / Anexo page 3 / page 3 / página 3

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WG-HRV/4/3 Annexe / Annex / Anexo page 4 / page 4 / página 4

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WG-HRV/4/3 Annexe / Annex / Anexo page 5 / page 5 / página 5

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WG-HRV/4/3 Annexe / Annex / Anexo page 6 / page 6 / página 6

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[Fin de l'annexe et du document/ End of Annex and of document/ Fin del Anexo y del documento]