

**Working Group on harvested Material and Unauthorized use of Propagating Material****WG-HRV/5/3****Fifth Meeting  
Geneva, March 21, 2024****Original:** English  
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**PROPOSALS CONCERNING THE EXPLANATORY NOTES ON PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance***BACKGROUND**

1. The Working group on harvested material and unauthorized use of propagating material (WG-HRV), at its first meeting, held via electronic means on March 15, 2022, received a presentation on document WG-HRV/1/5 "Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention" but did not have time to discuss the document. It agreed to discuss the document at its second meeting and, in the meantime, to invite additional comments on document WG HRV/1/5 within six weeks after its first meeting (See document WG-HRV/1/6 "Report", paragraphs 14 and 15 and UPOV Circular E-22/058).
2. In reply to UPOV Circular E-22/058, proposals were received from Japan and the International Association of Horticultural Producers (AIPH).
3. The WG-HRV did not have time to discuss the proposals in its second and third meetings.
4. In the fourth meeting of the WG-HRV, held in Geneva on October 25, 2023, the proposals were discussed.
5. The proposed changes to paragraphs 2 and 5 of the Explanatory Notes on Provisional Protection were not retained.
6. 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.
7. 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.
8. 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.
9. 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.

10. The WG-HRV agreed to consider the following during its fifth meeting:
  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.

See paragraph 18, document WG-HRV/4/3 "Report".

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11. The Office of the Union proposes to introduce the sentence below in track changes in paragraph 6 of the Explanatory Notes on Provisional Protection;

"6. A member of the Union may provide in its legislation that the measures of provisional protection (see below notes on "Measures") shall only take effect in relation to persons whom the breeder has notified of the filing of the application. Such a notification may be considered to be fulfilled in relation to all persons when the law has retained the date of the publication as the initial date for provisional protection, because publication is generally recognized as a notification mechanism of third parties. [Information concerning applications for plant breeder's right can be published in a physical document or in an electronic format.](#)

12. The organizations representing breeders (ISF, CIOPORA, Croplife International, Euroseeds, APSA, AFSTA, and SAA) submitted to the UPOV Office, on 11 February 2024, a proposed text for paragraph 8 of the Explanatory Notes on Provisional Protection, **see Annex.**

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

*consider the proposals under paragraphs 11 and 12 above, concerning the explanatory notes on provisional protection under the UPOV Convention.*

[Annex follows]

## ANNEX

## PROPOSED TEXT FOR PARAGRAPH 8 OF THE EXPLANATORY NOTES ON PROVISIONAL PROTECTION FROM THE BREEDERS' ASSOCIATIONS: AFSTA, APSA, CIOPORA, CROPLIFE INTERNATIONAL, EUROSEEDS, ISF, AND SAA

“Paragraph 8 in the EXN on PRP to be changed as follows: “The use of the term ‘on provisional protection’ is intended to attribute to the breeder protection during the period between the filing or the publication of the application and the grant of the breeder’s right. The use of the text ‘at least’ clarifies that the members of the Union may already provide full protection in this period.

Early release of new varieties adapted to address a wide range of challenges, including sustainability, is to the benefit of farmers, growers, consumers, and society at large. To encourage breeders to release their varieties to the market as early as possible, the principle of “Provisional Protection” has been introduced. The intended effect of the provisional protection is to safeguard the interests of the breeder during the period between the filing or the publication of the application and the grant of the title. This is particularly relevant in species that have a long DUS testing period.

To safeguard the interests of the breeder, the provisional protection must be effective. Effective protection requires that the breeder, from the moment when he releases his variety, can prevent third parties from propagating the variety, and that he can exercise his right on harvested material in case unauthorized use of propagating material of his variety occurs.

In annual crops propagating material will be produced every year, and the breeder can prevent third parties from propagating the variety at every propagation cycle. In multi-annual plants, where the same plants are used to produce harvested material (for example in the case of fruit trees), the plants stay in the ground and produce harvested material (fruits) for many years. During all these years, the breeder has the opportunity only once to prevent the production of the propagating material (e.g. the fruit trees). If during the provisional protection the breeder cannot prevent third parties from producing propagating material, he would not have the opportunity anymore to exercise his right (once granted) over the propagating material nor the harvested material, if a third party has planted the trees during the period of provisional protection and continues to produce fruits for multiple years after the grant of the right. This lack of effective protection cannot be overcome by contract laws and contractual arrangements.

If during the provisional protection period breeders cannot prevent third parties from producing propagating material,

- the legal framework set by the UPOV Convention discriminates between the different crops because - as shown before - with multi-annual crops planted before the protection is granted, the production may continue long after the grant. Once the PBR title for an annual variety is granted, the variety has full protection, and the breeder can exercise the right with each growing season. With multi-annual plants this is not the case, as the plants that were produced and planted in the provisional protection period continue to produce harvested material,
- this situation could push farmers and growers to exploit the newest varieties without contributing to the innovation provided by the breeders, by conducting unlicensed activities during the period of provisional protection,
- it deprives the breeder of the possibility to work only with licensed growers, and thus secure a minimum quality standard for the variety.
- particularly small breeders, such as most breeders in the fruit sector, and farmer-breeders, suffer, because they have less resources to enforce their rights whereas for them it is particularly important to have clear and effective laws that protect them.

Although the UPOV 1991 Act allows a range of different options to provide protection between the application for protection and the grant of the title, granting breeders full rights and power to enforce these rights during the period of 'provisional protection' is the most effective mechanism and constitutes the best incentive for breeders for making quickly available their state-of-the-art varieties to the market."

[End of Annex and of document]