

Working Group on harvested Material and Unauthorized use of Propagating Material

WG-HRV/5/4 Corr.

**Fifth Meeting
Geneva, March 21, 2024****Original:** English
Date: May 8, 2024

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 fifth meeting in Geneva, on March 21, 2024, 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/5/1.

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

5. The WG-HRV considered document WG-HRV/5/2.
6. The representative of CropLife International, on behalf of the African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), CropLife International, Euroseeds, International Seed Federation (ISF) and Seed Association of the Americas (SAA), hereinafter the “Breeders’ Organizations”, recalled that the Breeders Organizations, had submitted a proposal for a text to be discussed under agenda point 4, “Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention (document WG-HRV/5/3)”. The representative requested that the matter be postponed until the study had been finalized.
7. The Chair recalled that, in addition to the proposal from the Breeders’ Organizations, there was another proposal to amend the Explanatory Notes on Provisional Protection under the UPOV Convention.
8. The WG-HRV agreed to the request made by the Breeders’ Organizations, and that other matters in relation to the Explanatory Notes on Provisional Protection under the UPOV Convention would be addressed if time so allowed.

Support to the study and funding

9. The Chair invited the WG-HRV to provide its views on the relevance of the study for making progress on the mandate given to the Group and on matters concerning funding for the study.

10. The Delegation of Japan stressed the importance of commissioning a study. It noted that important concepts, “unauthorized use” and “reasonable opportunity” needed to be clarified. It expressed a specific concern regarding the exercise of the right and enforcement of fruit varieties. For instance, it noted the importance of clarifying what a holder can do when protected propagating material in a country was used in another country without protection to produce harvested material, and was imported in the country where the propagating material was protected. It believed that it was not the intention of the UPOV Convention to specifically limit the enforcement of a particular plant species, namely fruits over other plant varieties. It was important that the best researchers were commissioned to do the study to shed light on this issue and that funding be made available to pay the researchers for their efforts.

11. The Delegation of Japan expressed its willingness to use funds of the JP-FIT to provide partial funding for the study if there arise any costs that the UPOV funding cannot cover. However, the Delegation of Japan believed that it would be better if the funding was a collective contribution and not only from Japan. The Delegation of Japan encouraged other UPOV members to contribute to finance the study. Funding should not become a problem of independence if managed by the UPOV Office. The Delegation of Japan proposed to limit the numbers of authors to five. It would be reasonable for each of the proposing members of the WG-HRV to limit its number of nominees to one.

12. The Delegation of Canada supported a study and the proposed collaborative approach. It was of the view that a study could help in the policy debate. Canada supported the idea of paying the authors for their work. However, it noted that the UPOV budget was tight and there was the risk that if funds were taken from the UPOV budget, there might not be sufficient funds to finance other planned activities. If budgetary priorities needed to be made, not only the members of the WG-HRV should consider priorities, but all UPOV members. Undue bias could be avoided if the funds were administered by the UPOV Office. Securing funding was important, however, for this particular project, Canada was not in a position to contribute.

13. The Delegation of Canada recalled that in the past, members of UPOV had stepped up and provided funds or in-kind contributions to advance projects such as training, capacity building and technical work. To allocate the UPOV budget to matters of policy would be new, but members might consider the topic important enough to contribute. The Delegation of Canada posed the two folded question, first to the members, “are there members willing and able to provide funds?” and secondly, to the UPOV Office, “is there an administrative vehicle to receive funds?” It might be useful to give members and the UPOV Office some more time to investigate ways and sources to fund the study.

14. The Delegation of the European Union supported a study and the scope agreed on in the previous meeting. It supported a collaborative approach and that the authors would adhere to methods according to academic standards. The proposed list of authors contained high level experts. The authors should deliver a report and give a presentation on the findings. The European Union understood that there were budgetary constraints, but proposed that UPOV could pay the missions for the authors to meet if necessary, and to present the study to the WG-HRV. The European Union supported that authors be treated equally and proposed that it might be appropriate to send a communication and allow WG-HRV members some time to consider ways to source the project. All funding for the project should be administered by the UPOV Office and it was welcomed that the mission budget might be used as well as savings made. It noted that the European Union was not in position to allocate funding.

15. The representative of AIPH supported the study and the request from the Breeders’ Organizations to postpone the discussions on provisional protection. The representative of AIPH asked the WG-HRV to reconsider the limitation of authors and accept the seven authors on the list. AIPH further asked if the court cases referred to in the draft Terms of Reference related to cases on harvested material and unauthorized use. The representative of AIPH asked if the proposed authors were willing to do the work for free.

16. The Delegation of Brazil supported a study and maintained its support for Ms. Viviane Kunisawa to be part of the team of authors. The Delegation of Brazil further agreed with the Delegation of Japan that it would be appropriate to enlarge the scope of the study with the questions proposed by Japan in the document. The Delegation of Brazil agreed that it would be desirable that members fund the study although Brazil is not in a position to contribute at that stage.

17. The Delegation of Argentina explained that Argentina was not against the study but it was important that the potential authors were specialists with relevant experience and that the number of authors were not too high. Argentina was considering amending its law and move towards the 1991-Act and there were certain matters that were controversial. The outcome of a study was important since its conclusions might be used in Argentina, either in favor or against Argentina’s accession to the 1991 Act.

18. The representative of CIOFORA emphasized the importance of the proposed study for UPOV and breeders and that the best experts should be commissioned and that the experts should be paid. He supported the idea that the study should be funded by the UPOV budget and also welcomed the views expressed by Canada and Japan that optional resources from members willing to fund the study be explored.

19. The Chair concluded that there was general support for commissioning the study. The Chair explained that there was a mechanism to pay the authors and to receive funds from members and observers. She recalled that for the project to develop the electronic application form (EAF), now UPOV PRISMA, a multi-donor fund was created in accordance with the applicable financial regulations. She explained that, via a memorandum of understanding, donors provided different amounts to the fund set up for the specific purpose. The Chair further confirmed that there was a mechanism to pay travel expenses to speakers invited to UPOV seminars, if budget was available for the activity.

20. The Office of the Union explained that, during the consultation with the proposed authors, the authors agreed to participate to the study even if no budget was available, except for one of the authors.

21. The Chair explained that UPOV followed the principle of equal treatment for the same type of work, meaning that all authors should be equally treated unless there would be objectively justified reasons to pay different amounts to different authors, taking into account, for instance, different roles.

22. The Chair thanked the WG-HRV for the constructive exchange of views and stated that the number of authors for the study was relevant since it would also influence the matters of funding.

23. The Delegation of Japan explained that Mr. Strauss, proposed by Japan, requested to be remunerated. He initially required approximately 20,000 CHF but following developments, he would accept 10,000 CHF, excluding possible travel expenses.

Authors

24. The Chair invited the WG-HRV to provide its views on the number and the name of the authors.

25. The Delegation of Japan mentioned that too many authors could complicate the work but at the same time, it might be advisable to reflect the regional balance with each region represented by one nominee, and one from the breeding community, which would mean that the number should be five instead of four as previously agreed in the WG. It asked the EU delegation if it could limit the number of nominees to one

26. The Delegation of the European Union preferred to limit the number of authors to four or five and was concerned if the number of authors would be too high. It agreed that the study be collaborative and proposed to add to the Terms of Reference, that the study should be conducted according to academic standards. The following authors were proposed: Mr. Sven Bostyn, Mr. Axel Metzger, Ms. Pilar Montero and Mr. Joseph Strauss. In terms of regional balance, it suggested that it might be good to add Ms. Viviane Kunisawa.

27. The representative of AIPH emphasized that the experts should not be linked to regions but be chosen based on their level of expertise. AIPH was in favor of seven authors and maintained that Mr. Huib Ghijsen should be one of them.

28. The Delegation of South Africa agreed that expertise was more important than the geographical origin of the experts. It asked for more information on the background of the proposed authors and if the reference to independence in the draft Terms of Reference would mean that each author would draft its own report. The Delegation suggested that the Terms of Reference be clarified in that respect.

29. The Office of the Union explained that the proposed authors mentioned in the draft Terms of Reference were working at universities, or as an independent consultant or as a lawyer. The reference to independence was to clarify that the authors should not receive any individual instruction from anyone and that the authors should be impartial and objective. The idea was that the authors would draft one report and that the team would work in a collaborative manner. It would be up to the authors to manage different opinions and how such opinions would be reflected in the report.

30. The Chair proposed, and it was agreed by the WG-HRV, to update the draft Terms of Reference to clarify the above mentioned matters.

31. The representative of CropLife International, on behalf of the Breeders' Organizations, explained that the criteria to be applied when choosing authors should be number of years of specialized experience, and

relevant publications. On the above basis, the following authors were proposed: Mr. Sven Bostyn, Mr. Huib Ghijsen, Ms. Viviane Kunisawa, Mr. Charles Lawson and Mr. Joseph Strauss.

32. The Delegation of Japan agreed that the authors should work collaboratively on one report. Japan also agreed that expertise was a prerequisite.

33. The representative of APBREBES agreed that the authors should be independent, but the definition provided in the slides presented by the UPOV Office could be complemented by “no close links to any particular stakeholders involved in the discussions”. In his view, the academics on the list were more likely to meet that requirement, therefore APBREBES supported the proposed academics. He noted that a big group would make the coordination more complex, so a team of three authors was preferred.

34. The Delegation of the Republic of Korea requested information on the background of the proposed authors and which member of the WG-HRV proposed which expert(s).

35. The Chair recalled that members of the WG-HRV were invited to propose authors in reply to a Circular (Circular E 23/071) and that the proposed names were listed in the meeting document for the fourth meeting of the WG-HRV (WG-HRV/4/2). The Chair invited the members of the WG-HRV that proposed authors to present a short background of the proposed authors.

36. The Delegation of Australia explained that Mr. Charles Lawson, was a professor at the Griffith University. He studied science and law and had published articles on plant breeders' rights, for instance in the Journal of IP and Law in 2023, on exhaustion and harvested material. He has delivered research reports to Australian institutions in that field of law.

37. The Delegation of the European Union explained that the authors they support were all from academia: Mr. Axel Metzger was Professor at the Humboldt University in Berlin, Germany; Mr. Sven Bostyn was Associate Professor at the University of Copenhagen, Denmark; Ms. Pilar Montero was Professor at the University of Alicante, Spain; and Mr. Joseph Strauss was Professor Emeritus at the Max Planck institute. They all have specific expertise in intellectual property and plant breeders' rights.

38. The Delegation of Brazil proposed Ms. Viviane Kunisawa. Ms Kunisawa was a lawyer and had a Master of Law and a PHD. She had been studying in Germany as a pupil of Mr. Joseph Strauss. Ms Kunisawa drafted articles on plant varieties and related subject matters and worked on a project to revise the Brazilian plant variety law in 2009. She was presently working on a similar project looking into revising the present plant variety rights law. She had a keen interest in that area of law and would follow the work at UPOV level even if she was not retained as an author for the study.

39. The Delegation of Japan proposed Mr. Joseph Strauss, who participated in the preparatory work for the revision of the UPOV Convention in 1991. He had been an advisor on intellectual property to the WTO, World Bank, WIPO and the European Patent Office. Mr. Strauss had published papers on plant variety rights and presented papers at seminars organized by UPOV. He had experience in coordinating international research projects.

40. The representative of AIPH proposed Mr. Huib Ghijsen. Mr Ghijsen had a Law Degree from the Nijmegen University focusing on intellectual property rights. He had studied plant science at Wageningen University and probably the only proposed author that had experience in plant testing and plant breeding. He had served as member of the Dutch Board for Plant Variety Protection.

41. The Delegation of Argentina asked if there was still time to propose authors.

42. The Delegation of Japan welcomed the fact that there seemed to be a growing interest and involvement in this project. However, the Delegation of Japan requested that if there are new proposals for authors, the proposing countries should also consider the need for additional funding. Japan cannot fund too many authors. Since the Delegation of EU now have added the same author as Japan, Mr. Joseph Strauss, to their list of nominees, the Delegation of Japan wondered whether it was reasonable for the EU delegation to limit their nomination to Mr. Joseph Strauss instead of nominating four nominees in total from the EU.

43. The Chair recalled that a main objective of today's meeting was to reduce the number of authors proposed in reply to Circular E 23/071. She recalled that an increase of the number of authors at that point of the process might also impact on the funding considerations.

44. The representative of ISF, on behalf of the Breeders' Organizations, reiterated that it was important to keep a regional balance of authors to reflect differences in the implementation of the UPOV Convention in different parts of the world. It was also important to have a balance between academic and practical expertise as well as representation from members implementing the 1978 Act and the 1991 Act. On the above basis, she confirmed that the following authors were proposed by the Breeders' Organizations: Mr. Sven Bostyn, Mr. Huib Ghijsen, Ms. Viviane Kunisawa, Mr. Charles Lawson and Mr. Joseph Strauss.

45. The Chair proposed, and the WG-HRV agreed, that progress be made between today's meeting and the next meeting of the WG-HRV on the outstanding matters relating to funding and the authors. It was agreed that the Office of the Union would convene a virtual meeting with those members of the WG-HRV that had made proposals at today's meeting on the number and names of authors and the matters relating to funding.

46. The WG-HRV agreed that, for the next meeting, the section "modus operandi" of the Terms of Reference for the study be updated to include the elements of collaborative work following academic standards and the explanations on the notion of independence.

The scope of the study

47. The Chair mentioned that, in addition to what was agreed upon during the fourth meeting on the scope of the study, there was a proposal from Japan to include two illustrative cases, which were found in paragraph 12 of document WG-HRV/5/2.

48. The Chair asked if any member of the WG-HRV would not be in favor of extending the scope of the study as proposed by Japan in paragraph 12 of document WG-HRV/5/2.

49. The representative of APBREBES noted that the extended scope of the study proposed by Japan entailed two parts, one part on the clarification of unauthorized used and the reasonable opportunity and the other part, on whether two specific cases could be enforced by a court. In relation to the second part, he was of the view that it was up to courts to decide in which cases a plant breeder's right could be enforced. He noted that the study of court cases was already part of the scope of the study. On the above basis, APBREBES did not support to extend the scope of the study with the questions proposed by Japan.

50. The Delegation of Japan was of the view that academic advice was needed since the questions raised by Japan illustrated that the topic was ambiguous and contradictory with no jurisprudence from courts.

51. The Delegation of the European Union was hesitant to include specific questions in the Terms of Reference of the study. It was of the view that the questions by Japan were already covered by the proposed scope of the study, relating to Articles 14 and 16 of the 1991 Act of the UPOV Convention.

52. The Chair noted that the proposal by Japan was received in the framework of the consultations that the Office of the Union had carried out with members of the WG-HRV that had proposed authors the study. She thanked the WG-HRV for the initial reactions to the proposal by Japan concerning a request for the extension of the scope beyond what was agreed upon during the fourth meeting of the WG-HRV. She noted that, due to time constraints, it was not possible to continue deliberations on that proposal at the fifth meeting of the WG-HRV.

Conclusions

53. The Chair drew the following conclusions:

- The members of the WG-HRV expressed support for commissioning a study.
- Some initial initiatives and ideas on how to fund the study had been identified but that matter should be further explored.
- The WG-HRV agreed that the Office of the Union would convene a virtual meeting with those members of the WG-HRV that had made proposals at today's meeting on the number and names of authors and the matters relating to funding.
- The WG-HRV agreed that, for the next meeting, the section "modus operandi" of the Terms of Reference for the study be updated to include the elements of collaborative work following academic standards and the explanations on the notion of independence.
- Discussions on the proposals to revise the Explanatory Notes on Provisional Protection under the UPOV Convention will be put on hold until progress was made on matters concerning the study.

DATE OF THE SIXTH MEETING

54. The sixth meeting of the WG-HRV will take place on Tuesday, October 22, 2024 (hybrid means), at a time to be announced.

55. *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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II. ORGANISATIONS / ORGANIZATIONS / ORGANIZACIONES

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