

**Working Group on Harvested Material and Unauthorized Use of Propagating Material**

**WG-HRV/6/2**

**Sixth Meeting  
Geneva, October 22, 2024**

**Original: English  
Date: August 6, 2024**

**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 proposal of Terms of Reference for a study. The study will address aspects on the Scope of the Breeder’s Right and the Exhaustion of the Breeder’s Right.

2. The structure of this document is as follows:

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BACKGROUND ..... 1

MEETING WITH MEMBERS OF THE WG-HRV THAT MADE PROPOSALS AT THE FIFTH MEETING ON THE AUTHORS AND FUNDING FOR THE STUDY ..... 2

ANNEX     UPDATED DRAFT TERMS OF REFERENCE OF THE STUDY ON THE "SCOPE OF THE BREEDER'S RIGHT" AND THE RELATIONSHIP WITH THE "EXHAUSTION OF THE BREEDER'S RIGHT"

**BACKGROUND**

3. The WG-HRV, during its third meeting,<sup>1</sup> agreed to organize a study to assist 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 (see document WG-HRV/3/4 “Report”, paragraph 11).

4. The WG-HRV agreed to invite the members of the WG-HRV to propose issues and/or suggest authors for such a study (see document WG-HRV/3/4 “Report”, paragraph 17). Consequently, the Office of the Union sent UPOV Circular E-23/071.

5. The WG-HRV noted, during its fourth meeting,<sup>2</sup> 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.

6. The WG-HRV agreed that 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.

<sup>1</sup> Held in Geneva on March 21, 2023.

<sup>2</sup> Held in Geneva on October 25, 2023.

7. The WG-HRV agreed that 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.

8. The WG-HRV, during its fifth meeting<sup>3</sup>, discussed, in essence, support to the study and funding, the number and name of authors and a proposal from Japan to introduce two illustrative cases as part of the scope of the study. 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 the meeting on the number and names of authors and the matters relating to funding. Due to time constraints, the proposal from Japan on the scope of the study only commenced but could not be finalized.

#### MEETING WITH MEMBERS OF THE WG-HRV THAT MADE PROPOSALS AT THE FIFTH MEETING ON THE AUTHORS AND FUNDING FOR THE STUDY

9. As agreed at the fifth meeting, invitation to a virtual meeting was issued to the members of the WG-HRV that made comments and/or proposals on the authors or funding considerations. The meeting took place by virtual means on May 22, 2024, and the following members of the WG-HRV participated at the meeting: Argentina, Australia, Brazil, European Union, Japan, Association for Plant Breeding for the Benefit of Society (APBREBES), International Association of Horticultural Producers (AIPH), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) and International Seed Federation (ISF).

10. The participants at the meeting agreed to propose the below 5 authors for consideration by the WG-HRV at its sixth meeting in October 2024 (listed in alphabetical order):

- Mr. Huib Ghijsen (nominated by AIPH)
- Ms. Vivianne Kunisawa (nominated by Brazil)
- Mr. Charles Lawson (nominated by Australia)
- Mr. Axel Metzger (nominated by the European Union)
- Mr. Joseph Strauss (nominated by Japan)

11. The matter of funding was discussed and the following proposal for a budget was made:

- 55,000 Swiss Francs which would include:
  - Honorarium of 10,000 Swiss francs for each of the 5 authors.
  - Travel expenses up to 5,000 Swiss francs in total for the 5 authors. The purpose of the travel could be to convene a meeting amongst the authors or to support travel to come to Geneva to present the findings of the study or any other unforeseen travel expenses.
- The overall estimation of the cost to be shared as follows: UPOV regular budget would cover 30,000 Swiss francs and the Funds-in-Trust Agreement between the Government of Japan and UPOV (JP-FIT) would cover 25,000 Swiss francs.

12. The participants at the meeting agreed to propose the above funding proposal for endorsement by the WG-HRV at its sixth meeting in October 2024.

13. Based on the conclusions of the WG-HRV at its fourth and fifth meetings and the virtual meeting on May 22, 2024, the Office of the Union has updated the proposed terms of reference for a study, including a timeline, authors and budget (see Annex).

*14. The WG-HRV is invited to consider the matters presented in this document and the updated terms of reference for a study, as set out in the Annex.*

[Annex follows]

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<sup>3</sup> Held in Geneva on March 21, 2024.

ANNEX

UPDATED DRAFT TERMS OF REFERENCE OF THE STUDY ON THE "SCOPE OF THE BREEDER'S RIGHT" AND THE RELATIONSHIP WITH THE "EXHAUSTION OF THE BREEDER'S RIGHT"

SCOPE:

The study to 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 with summaries of relevant court cases from UPOV members bound by the 1991 Act.

COMPOSITION:

The study should be carried out by the five authors mentioned below. The authors should agree on one of them to be coordinating their work.

The working language of the authors should be English and the study should be drafted in English.

<b>Experts (alphabetic order)</b>
Mr. Huib Ghijsen
Ms. Vivianne Kunisawa
Mr. Charles Lawson
Mr. Axel Metzger
Mr. Joseph Strauss

MODUS OPERANDI:

Independence:

The authors are independent in drafting the study, in the sense that the authors should not receive individual instructions from anyone and that the authors should be impartial and objective.

The five authors should draft one study and should follow a collaborative working method following academic standards. Following such standards, the authors should manage potential different perspectives or analysis and, if applicable, how such matters should be reflected in the study.

Having received the study, it is up to the WG-HRV to consider a possible follow-up and to request further guidance from the CAJ, as appropriate.

UPOV members are not bound by the content and/or conclusions drawn in the study.

Timeline:

The authors will be asked to deliver the draft study by latest February 28, 2025 for consideration at the seventh meeting of the WG-HRV, expected to take place in Geneva in March 20, 2025, to be confirmed. The final version of the study to be delivered by latest September 1<sup>st</sup>, 2025.

The time could be prolonged upon request by the authors.

Financial support:

55,000 Swiss Francs which would include:

- Honorarium of 10,000 Swiss francs for each of the 5 authors.
- Travel expenses up to 5,000 Swiss francs in total for the 5 authors. The purpose of the travel could be to convene a meeting amongst the authors or to support travel to come to Geneva to present the findings of the study or any other unforeseen travel expenses.

The overall estimation of the cost to be shared as follows: UPOV regular budget would cover 30,000 Swiss francs and the Funds-in-Trust Agreement between the Government of Japan and UPOV (JP-FIT) would cover 25,000 Swiss francs.

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