

Working Group on Harvested Material and Unauthorized Use of Propagating Material

WG-HRV/7/2

**Seventh Meeting
Geneva, March 20, 2025****Original:** English
Date: February 25, 2025

REPORT ON THE PROGRESS MADE BY THE AUTHORS OF THE STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”*prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. The purpose of this document is to invite the Working Group on harvested material and unauthorized use of propagating material (WG-HRV) to take note of the report on the progress made by the authors of the study on the “Scope of the Breeder’s Right” and the relationship with the “Exhaustion of the Breeder’s Right”.
2. The progress report provided by the authors is reproduced in Annex I of this document. The Terms of Reference of the study approved by the WG-HRV, at its sixth meeting, are reproduced in Annex II of this document.

BACKGROUND

3. The WG-HRV, during its sixth meeting¹, further agreed that the drafting of the study should follow an independent approach in line with academic standards, that authors would disclose potential conflicts of interest in line with academic standards and that findings would not be binding on UPOV members. The WG-HRV agreed to include in the report of the study that the study’s purpose was to assist the WG-HRV in its deliberations in accordance with its ToRs without creating any obligation on the WG-HRV or UPOV members. The WG-HRV also agreed that the status of the report of the study would be a document of the WG-HRV to be made available on the UPOV website dedicated for the WG-HRV. The WG-HRV noted that a separate publication of the report of the study was not anticipated.
4. In relation to the proposed timeline, the WG-HRV agreed that the progress on the work of the authors should be reported by end of February for consideration during the seventh meeting of the WG-HRV, in March 2025, and that a final report would be expected by September 1, 2025.
5. The WG-HRV agreed that potential questions asked by the authors on practical matters of low complexity would be addressed by the Office of the Union. The WG-HRV also agreed that complex questions or request by the authors for substantive guidance would be referred to the WG-HRV, at its meeting(s), or through a written procedure, as appropriate (see document WG-HRV/6/3 “Report”, paragraph 13 to 15).

¹ Held in Geneva on October 22, 2024.

MEETING WITH THE AUTHORS OF THE STUDY ON JANUARY 31, 2025

6. The Office of the Union met online with the authors of the study to address any questions on the process, explain what was expected at the WG-HRV/7 meeting that will be held on March 20, 2025 and to provide practical information for their participation at the meeting. It was explained that the objective of the WG-HRV/7 meeting, that will be held on March 20, 2025, was to provide a progress report, not to discuss the substance of the study.

PRESENTATION BY THE AUTTHORS DURING THE MEETING ON MARCH 20, 2025

7. The authors will make a presentation during WG-HRV/7 meeting based on the progress report reproduced in the Annex I to this document.

[Annex I follows]

**PROGRESS REPORT ON THE STUDY ON THE "SCOPE OF THE BREEDER'S
RIGHT" AND THE RELATIONSHIP WITH THE "EXHAUSTION OF THE
BREEDER'S RIGHT"**

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FIRST REPORT FEB. 19, 2025

Terms of Reference, Annex to the document CAJ/81/5 Add

- 1) *Analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to 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; and*
- 2) *Summaries of relevant court cases from UPOV members bound by the 1991 Act.*

Preface

We understand that our Study group was tasked to develop a work independent from the positions taken by the Member States that had, respectively, nominated us for the task, as well as UPOV's Working Group on Harvested Material and Unauthorized Use of Propagating Material.

We will endeavor to adopt our position(s) by consensus, but do not exclude dissenting position(s).

The basis of our interpretation of Art. 14 (1) (2) and Art. 16 UPOV 1991, a Convention of international public law, follows which has been established by the Vienna Convention on the Law of Treaties.

We, finally, declare that we do not have any conflicts to work on the Study.

International Convention for the Protection of New Varieties of Plants

of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and
on
March 19, 1991

CHAPTER V
THE RIGHTS OF THE BREEDER
Article 14 Scope of the Breeder's Right

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),*
- (ii) conditioning for the purpose of propagation,*
- (iii) offering for sale,*
- (iv) selling or other marketing,*
- (v) exporting,*
- (vi) importing,*
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.*

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[...]

Article 16 Exhaustion of the Breeder's Right

(1) [Exhaustion of right] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts (i) involve further propagation of the variety in question or (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [Meaning of "material"] For the purposes of paragraph (1), "material" means, in relation to a variety, (i) propagating material of any kind, (ii) harvested material, including entire plants and parts of plants, and (iii) any product made directly from the harvested material.

(3) ["Territory" in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly

The Vienna Convention on the Law of Treaties

SECTION 3. INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

The coming months the Expert Group will analyze the following concepts of article 14(2):

- ‘propagating material’ vs. ‘harvested material’
- ‘acts of harvesting’
- ‘authorisation’ and ‘unauthorised use’
- ‘exercise his right’ vs ‘infringement’
- ‘reasonable opportunity’

Provisional list of documents in the travaux préparatoires

Article 5 UPOV 1978

CAJ VIII/5, October 1981

CAJ/VIII/6, November 1986

CAJ/XIX/11, 1 April 1987 Report – start of the revision

CAJ/XXII/2, of April 18-21 1988 Revision of the Convention

IOM IV/2, October 9-10 1989 fourth meeting with the International Organizations

CAJ/XXV/2, ANNEX II October 11-13 1989 Proposal of the “cascade”

CAJ XXV/2, 11-13 October 1989 Report of the meetings

CAJ 27/8, June 25-29 1990 Report of the meetings

IOM/V/2, October 10-11 1990 fifth meeting with the International Organizations

CAJ 28/6, October 12-16 1990 Report of the meetings

Records of the Diplomatic Conference 1991

Provisional list of Relevant Court Cases (updated Feb. 10, 2025)

1. CJEU “Greenstar Kanzi” (2011)
2. CJEU “Nadorcott” on Mandarins (2019)
3. German Federal Supreme Court “Melanie” (2006)
4. German Federal Supreme “Erntegut” (2023)
5. Australian Federal Court “Cultivaust Pty Ltd v Grain Pool Pty Ltd” (2005)
6. German Federal Supreme Court “Achat” (1987)
7. Court of Appeal of Düsseldorf “Cilena” (1996)
8. Regional Court of Düsseldorf “Goldfinger” (1998)
9. Rechtbank Den Haag “Amaryllis” (2016)
10. Supreme People’s Court China/Peking “Pomelo” (2019)
11. Japanese Intellectual Property High Court N° 10053 of 2018 “JMS5K – 16 shiitake mushrooms”

[Annex II follows]

ANNEX II

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 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; 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.

Experts (alphabetic order)
Mr. Huib Ghijsen
Ms. Vivianne Kunisawa
Mr. Charles Lawson
Mr. Axel Metzger
Mr. Joseph Straus

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 on March 20, 2025. The final version of the study to be delivered by latest September 1st, 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.

[End of annexes and of document]