



## APBREBES Report on the 2023 UPOV Session

Change marked the 2023 regular UPOV session as newly elected Vice-Secretary General Yolanda Huerta opened the session in the steps of her predecessor Peter Button. Negotiations on important issues, such as the interpretation of the private and non-commercial use exception for smallholders, continue to be very difficult. At least, after years of heated discussions, a new Explanatory Note on Essentially Derived Varieties was adopted. However, it seems that this explanatory comes short of answering several open questions.

### Administrative and Legal Committee (CAJ), October 25, 2023

The [Documents for the meeting](#) and the [Report](#) of the Administrative and Legal Committee (CAJ) with all the decisions taken can be found on the UPOV Website. We are describing a small selection of the topics discussed and the decisions taken.

At the beginning of the CAJ meeting Yolanda Huerta gave a [presentation](#), particularly introducing the new organizational chart of the UPOV Secretariat with the two newly appointed management positions: Mr. Martin Ekvad, appointed Director of Legal Affairs, which, inter alia, also examines the laws of candidates for UPOV membership, and Mr. Leontino Taveira, appointed Director of Global Development and Technical Affairs who, among other things, has the task of increasing UPOV's membership.

### **Novelty of parent lines with regard to the exploitation of the hybrid variety**

Our [report of the CAJ meeting in 2022](#), includes a brief history of the issue in UPOV (page 4). The question is whether or not the novelty of the parent lines is lost by the exploitation of the hybrid variety. The seed industry presented the results of their survey on commercial practices relating to the impact of commercial exploitation of the hybrid on the novelty of parent lines and promoted its position (the novelty of the parent lines should not be lost). Based on [their presentation](#), the question arises whether any amendment is necessary when only 5 out of 73 breeders state that there is a novelty problem with the parental lines. One of the arguments put forward in favour of maintaining the novelty of parental lines is that some breeders file for Plant Breeders' Rights on parent lines more than 1 year after the first commercialization of the F1 hybrid when they can better estimate the commercial success of the hybrid and/or the parent line. This seems to us a very strange argument, because whether in the case of plant variety rights or the case of patents, it is not possible to apply for protection only after the certainty of market success. The survey also revealed that there

are some breeders (although less than 10%) who apply for protection on the parent line toward the end of the protection period of the hybrid with the aim of extending its protection period. But it is precisely those who want to prevent this “evergreening” who argue that the novelty of the parent lines also expires with the commercialisation of the hybrids.

In the discussion that followed, Canada announced that based on the arguments presented, they would change their interpretation so that the novelty of the parent lines is maintained. Others, such as the United States, stated that this is not possible for them, as their interpretation is enshrined in law. South Africa asked if this discussion intended to adapt the Explanatory Notes, after which the Chair assured that it was only to raise awareness and that there should be no dogmatic outcome.

The CAJ finally decided to keep this item on the agenda for the next session to share additional information and experiences from members of the Union and create wider awareness on this topic. Consequently, the Office of the Union will invite the members of the Union who replied that the novelty of the parent lines was lost by the exploitation of the hybrid variety to make a brief presentation to explain their national circumstances. An opposite view will be presented by the European Union. One gets the impression that this call for presentation is an attempt to put pressure on countries that take the position that the novelty of the parent lines is lost when the hybrids are commercialised.

For APBEBES, it seems as if we were in the same place 23 years ago. The arguments and the counterarguments regarding the novelty of parent lines are still the same. Three years ago, a survey showed that interpretations differ among the different UPOV members. In 2001 the CAJ agreed *«that the text of the Convention allowed for both interpretations and therefore it was not possible to reach a common conclusion [...] it was not necessary to change the previous interpretation on that matter»*.

This is still correct today. And there is therefore no reason to limit the national sovereignty of UPOV members to adopt an interpretation that best suits their circumstances.

### **Measures to enhance cooperation in the DUS examination**

The Office of the Union reported on the survey of members of the Union on the policy or legal barriers that could prevent international cooperation in the examination of distinctness, uniformity, and stability (DUS). The survey revealed that 70% of respondents (43 member states) do not use DUS test reports from other UPOV members on a routine basis for the following reasons (among others):

- Policy decision to maintain domestic capacity for DUS examination (70% of responses).
- Environmental influence on the expression of characteristics.
- Use of breeders' premises (30% of responses).

Although these are plausible reasons, the aim is to remove these so-called barriers to cooperation. One delegate expressed the view that any hurdle in the acceptance of DUS tests from other countries would have a negative impact on farmers. He added that DUS testing requires a lot of financial resources - but that this cost should not be a hurdle for new UPOV members.

Finally, the CAJ agreed to invite the Office of the Union to prepare a document for its next session to continue discussions on possible measures to increase opportunities for international cooperation in the DUS examination. This document will also include a proposal to organize a seminar on cooperation with breeders in the DUS examination.

## Working Group on harvested material and unauthorized use of propagating material (WG-HRV/4), October 25, 2023

All documents of this Working Group can be found [here](#). First, the Working Group approved the proposals for the amendment of the Explanatory Notes on Propagating Material, which were elaborated at the last meeting (see page 2 of this [document](#)). These adjustments are minor in nature. However, it is helpful to remove the "intention" of the person concerned as a factor in determining whether the material is propagating material, as such "intention" is difficult to prove. The proposal will be submitted to the CAJ meeting next year for adoption.

Second, the Working Group discussed the scope of a study to assist in 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. The most contentious issue was whether to look at existing case law, such as the decision of the European Supreme Court in the Nadorcott case. Some delegates did not want to include the decisions of the European Court of Justice in the basis for the study (including those who would like to use these discussions within UPOV to question this decision). In the end, however, the scientific logic of including all important bases in the study prevailed (see our remarks on this conflict in our earlier [report](#) on page 2). The final scope and authorship of the study will be decided at the next meeting of the Working Group.

Then the Working Group discussed for the first time the [proposals](#) for revising the Explanatory Notes on Provisional Protection under the UPOV Convention (Article 13 in UPOV91). As in other discussions within this Working Group, industry or individual member countries have made proposals that are beyond the scope of an Explanatory Note or are not compatible with UPOV 91. Such as, for example, the requirement that provisional protection in all UPOV member States must begin at the date of filing of an application in any Member State (which is in blatant contradiction to the principle of territoriality in IP law). The industry repeatedly tried to sell its interpretation as the generally valid one, although it is the task of an Explanatory Note to show objectively how the Convention can be interpreted. Fortunately, such demands were therefore rejected. There was a lengthy discussion on the interpretation of Article 8 of the Explanatory Notes. The current word of the EXN is: *"8. The use of the text "at least" clarifies that it is possible, for example, that the provisions on provisional protection in the law governing breeders' rights provide the holder of the breeder's right with the full scope of the breeder's right."* The industry representatives, initially supported by Japan, wanted to add further text modules to emphasise the need for full protection. In the end, however, the Working Group decided to keep the existing text. The industry representatives should write a note on why such protection is necessary. (What is to be done with this note remained open).

The next meeting of the Working Group will take place virtually on 21 March 2024.

## Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (WG-SHF/4), October 25, 2023

The Working Group has managed to add another loop to its negotiations. But first, let's look back: During the last meeting (see [APBREBES Report](#) page 3), it was decided not to work on a revision of the Explanatory Note, but to first look at all FAQs that affect farmers in some way. One of the aims was to draw attention to the benefits of UPOV for farmers. This decision to proceed was clearly outside the mandate of this Working Group, which is tasked to develop *"guidance concerning*

*smallholder farmers in relation to private and non-commercial use, which would be the basis for a revision of the "Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention" (document UPOV/EXN/EXC) and a revision of the Frequently asked questions (FAQs) on exceptions to the breeder's right."* Norway clearly stated that the Working Group should focus on its mandate. In its written submission, APBEBES also clearly opposed the Working Group going beyond its terms of reference.

Nevertheless, [various proposals](#) were now on the table to adapt the FAQs. APBEBES also presented a [submission](#), but strictly oriented towards the question of "private and non-commercial use".

In addition to APBEBES, the EU and the Netherlands have also formulated proposals that would under certain circumstances allow the exchange and sale of protected seeds under the exception of private and non-commercial use.

Right at the beginning of the meeting, Japan, and in a somewhat softened form, the United States and Chile, stated that they reject such a broader interpretation. Others such as Norway, the Netherlands, the EU, and Switzerland supported a broader interpretation of private and non-commercial use. The EU emphasised that this issue is also about UPOV's reputation, others said that an adjustment could make it easier to attract new members. APBEBES made it clear that reputation should not be the main concern, but that ultimately it is about the human right to food.

It quickly became clear at the meeting that these opposing positions made it pointless to discuss the various proposals to amend the FAQs. So at least the attempt to shift the negotiations to areas that did not concern the core issue has been stopped. But what should be negotiated if you obviously can't agree on the main issue and a discussion of countless FAQs simply makes no sense? At this stage, the Working Group was at a considerable loss as to how to proceed. The only thing the Working Group could agree on was that there was probably still too little information to make a decision.

*It was decided that "the Office of the Union should issue a circular to the members of the WG-SHF with a request to identify questions and to whom they should be addressed, in order to collect information for the WG-SHF to continue its work. Based on the replies to the Circular, the Office of the Union would prepare a questionnaire for consideration by the WG-SHF at its next meeting".*

This additional loop will delay the Working Group by at least another year. In the end, however, there will be no way around the question of whether the exception of private and non-commercial use should allow smallholders to exchange and sell seeds (or at least to make it clear that contracting states can interpret this exception in this way). This question needs an unequivocal answer. Listening to the discussions of the Working Group, it is not very likely that they will issue a clear statement at the end.

The next meeting of the Working Group will take place virtually on 22 March 2024. In its meeting on October 26, the Consultative Committee explicitly emphasised that this work should be finalized in accordance with the terms of reference.

## Consultative Committee (CC), October 26, 2022

As usual, the proceedings of the Consultative Committee were closed to observers and its documents are not publicly available. Nevertheless, using the Right of Information Act, APBEBES will get access to the documents and will make them available on its [website](#). Decisions taken by the Committee are reported to the UPOV Council and this [report](#) is publicly available on the UPOV's website.

## Council(C), October 27, 2023

Below are a few highlights from the Council Meeting discussion. The official report of the meeting can be found [here](#).

### **The launch of e-pvp**

In his opening remarks Daren Tang, Secretary General of UPOV, mentioned the launch of e-pvp in Vietnam on September 28, 2023, a major milestone in the development and digitalization of UPOV services. In addition, there was a small ceremony during the Council at which Canada, the Community Plant Variety Office (CPVO) of the European Union, and the Netherlands signed an expression of commitment to join the UPOV e-PVP DUS Report Exchange Module. The delegates expressed their hope that e-pvp will facilitate the accession of new countries.

UPOV e-PVP provides the following components:

- UPOV PRISMA: online application tool for making applications to PVP Offices (which has already existed for several years)
- UPOV e-PVP Administration Module: a digitalized system for PVP offices to manage applications and grants, communicate with applicants and holders, publish information, and transmit data to the PLUTO Database
- UPOV e-PVP DUS Report Exchange Module: a platform for PVP offices to exchange DUS reports
- PLUTO database: information on plant varieties UPOV e-PVP (which has also existed for many years)

### **Report by the President on the work of the hundred and first session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee**

The Consultative Committee finalised a FAQ on the complementarity between the UPOV Convention, the Convention on Biological Diversity (CBD), and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and recommended it to the Council for adoption (text of the FAQ could be found in the [report](#) of the Council meeting at page 2).

APBEBES raised its flag regarding the process and the content. Regarding the process, we criticised the fact that the new FAQ to be approved had not been shared with the Council before the meeting, which makes a thorough analysis impossible. We have therefore asked to postpone the approval of the FAQ until the next Council, which was denied. We nevertheless used the opportunity to share one thought with the Council about the content of the FAQ where it says that a coherent implementation of «*CBD, ITPGRFA and the UPOV Convention, in the Contracting Parties concerned, is beneficial for achieving the desired outcomes of those treaties*». APBEBES does not agree with this paragraph and we doubt if it is based on any scientific evidence. Various studies show that there can be problems of coherence between these agreements. For example, a study done by the Centre for International Sustainable Development Law with the financial support of the Swiss Federal Office for the Environment concluded that «*Sui generis PVP systems adopted outside of the UPOV Convention framework – as permitted by TRIPS – may provide a way to better balance rights and obligations relating to the Nagoya Protocol, Plant Treaty, and PVP*» APBEBES proposed to delete the current last paragraph and replace it with the text quoted from the study, which was rejected.

## **Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention**

In 2022, to the surprise of some, the Consultative Committee did not approve the proposed new Explanatory Notes on Essentially Derived Varieties (EDVs). As a result, a Working Group of the Consultative Committee (without observers) was set up and various controversial parts of the draft were reviewed. During this UPOV session, the [new draft](#) was approved by the Consultative Committee and the Council.

One significant change compared to the existing Explanatory Notes is still present in the draft that has now been adopted: *«Varieties with a single parent (“mono-parental” varieties) resulting, for example, from mutations, genetic modification or genome editing are per se predominantly derived from their initial variety. »*

Nevertheless, the question of the precise definition of EDVs will continue to keep us busy in the future. The Council has decided that “Updates from UPOV members and observers relating to the implementation of the concept of essentially derived varieties” will be added as a standing item on the CAJ agenda. Based on these updates, the CAJ would advise the Council on whether it would be appropriate to develop further guidance on essentially derived varieties.

Another indication that there are still unresolved issues is shown by the brief discussion that took place when the Council's report was discussed. The representative of CIOPORA requested that his statement be included in the report, in which he explained that the breeders' associations welcomed the revision *«for the main reason that in the breeders' view, it was now clear that it was no longer a precondition for an essentially derived variety to retain all essential characteristics of the initial variety.»* The Dutch delegate then suggested deleting "in the breeders view", as this was the generally recognised view. However, Switzerland, Australia, and the United States opposed this, so the report now states that this statement is just the breeders' view.

## **PVP-Statistics**

As a recurring agenda item, the [new statistics](#) on granted plant variety rights were also presented during the Council. In particular, the [animated graphics](#) impressively show the dominance of China in terms of granted plant variety rights. The presentation of the figures was also used in 2023 to highlight the increasing popularity of the UPOV system. But is this really the case? If we subtract the figures for China from the number of plant variety rights granted, we see that in all other UPOV member countries, slightly fewer plant variety rights were granted in 2022 than in 2018 (2018: 10,879, 2022: 10,834), although the number of member countries has increased.

It is also interesting to note that 7 of the 78 member states did not have a single plant variety right title in force in 2022. The statistics on the African Intellectual Property Organisation (OAPI), which has been a member of UPOV 91 since 2014 and covers 17 West African countries, are also revealing. In 2022, there were only 7 plant variety protection titles in force in the OAPI countries! This figure is in stark contrast to the promises made to developing countries to encourage them to become UPOV members. There is always talk of improved access to modern varieties or of future investments by the seed industry. The case of OAPI shows that these promises cannot be substantiated by the facts.

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