



## APBREBES Report on the UPOV Spring Session 2023

An extraordinary intersessional Council was held in particular to elect the new Vice-Secretary General of UPOV. The occasion was also used to hold meetings of various Working Groups and a symposium on New Breeding Technologies and Essentially Derived Varieties.

### Working group on harvested material and unauthorized use of propagating material (WG-HRV/3), March 21, 2023

The terms of reference (ToRs) of this Working Group have been based on the concluding remarks delivered at the 2021 Seminar on the breeder's right in relation to harvested material. This Seminar was unfortunately very biased and primarily represented the interests of the breeders. An important trigger of the debate was the so-called Nadorcott case, in which the European Court of Justice set limits on the enforcement of breeders' rights. It seems that certain stakeholders are trying to invalidate this decision of the Court with the revision of Explanatory Notes (see also our remarks on the Working Group in our [report on the 2022 UPOV Session](#)).

The first point on the agenda of the third meeting of the Working Group was to discuss **Proposals concerning the Explanatory Notes (EXN) on Propagating Material under the UPOV Convention** ([document WG-HRV/3/2](#)). This very brief EXN describes the factors upon which to decide whether plant material is propagating material. This question is of some importance as the term "propagating material" appears in various articles of the UPOV Convention.

The wish of the industry was to extend the definition of propagating material to the full, especially because the Nadorcott court case made it more difficult to enforce the rights towards harvested material. Therefore, the industry associations wanted to delete the list of factors altogether and impose stricter guidance. The list was however rightly retained, as the same EXN also says that "The UPOV Convention does not provide a definition of propagating material" and that these "factors should be considered in the context of each member of the Union and the particular circumstances."

Nevertheless, some points of the list and its preamble were amended. Besides other changes, there is a new factor asking whether the material could be used as propagating material through the use of propagating techniques (e.g. cuttings, tissue culture). In a rather spontaneous decision, the factor indicating that plant material could be considered as propagating material upon the intention of using it that way was deleted.

Finally, there was a consensus on the changes and the revised EXN will be forwarded to the Administrative and Legal Committee (CAJ) for adoption in October.

Much more controversial was the discussion on the **Perspectives on “unauthorized use” under Article 14(2) of the 1991 Act of the UPOV Convention** (documents [WG-HRV/3/3](#) and [WG-HRV/3/3 Add](#)). The explanation of "unauthorised use" in the current EXN is short and clear:

“Unauthorized use” refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder’s right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force.”

Various actors now want to broaden the definition. Japan, for example, would like to limit unauthorised use beyond the Acts mentioned in Art. 14.1, and add “planting and ongoing cultivation” to the acts needing authorization. The seed industry would like to delete the mention limiting unauthorised use to countries where varieties are protected. One problem they seek to solve is the uncontrolled import of material from a country where the variety has no protection into a country where the variety is protected. However, several member states made it clear that at least some of these demands would go beyond the UPOV Convention and would require that it is amended. The EU said the proposals had been examined by a lawyer who found that they contradicted the European Court of Justice's interpretation of the Convention (as in the Nadorcott case). Rather, the problem described by Japan could be solved through Article 16 of the Convention (exhaustion). (See the [detailed submission of the EU](#).) These widely differing views prevented an agreement and the Working Group decided to commission a study. The exact terms of reference and the author of the study still have to be clarified separately. The next meeting of the Working Group will take place in October.

The **Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention (document WG-HRV/2/5)**, although mentioned on the agenda, were not discussed.

## Seminar on the interaction between plant variety protection and the use of plant breeding technologies, March 22, 2023

All presentations of the seminar and the biographies of the speakers can be found on the [related UPOV website](#).

The Seminar was convened because of a deadlock in the negotiations on the Explanatory Note (EXN) in 2022 (see also our [report of the UPOV Session 2022](#)). Draft 3 of the new EXN, favoured by the seed industry and some Member States, did not find consensus in the Consultative Committee, so it was decided the Working Group (this time without observers) should carry on and a Seminar be convened to clarify open questions. The basic question to be answered is whether plant varieties produced with new breeding technologies should always be Essentially Derived Varieties (EDV). By UPOV standards, the Seminar was refreshingly controversial. During the last seminar on EDV in 2019, all speakers supported the seed industry’s request to adapt the EXN on EDV. On 22 March, the tone was different, at least partially. Various presentations hailed the great benefits of the new breeding technologies for innovation in plant breeding (while possible risks were not mentioned in any way). Many speakers also stressed the importance of the Breeders Exemption within UPOV. The key question remained whether the users of the new breeding technologies should also benefit from the Breeders Exemption. If all (monoparental) products of new breeding technologies are designated as

EDV these breeders cannot benefit from the Breeders Exemption but are dependent and need a licence from the breeder of the original variety to commercialize their product. Many speakers presented different opinions on this issue. The industry associations expressed their concern that new breeding technologies can quickly and easily improve their premium varieties obtained through a long process and subsequently take over the market without compensating the breeder of the original variety. Moreover, if instead of crosses, only small interventions are made on the best varieties, diversity would be diminished. Others said that what matters is how much the new variety differs from the original one and its added value compared to the original variety (regardless of the breeding technology). The absence of the Breeders Exemption would also limit the much-needed innovation. Some said that even mutation breeding does not always result in an EDV. Several speakers expressed the opinion that optimal integration of the new breeding technologies into the UPOV system would only be possible through an amendment of the UPOV Convention - and adapting the EXN is not the appropriate means for this.

Many of these positions mentioned above were not discussed in the negotiations of the Working Group on EDVs so far. It is now up to member states to draw the right conclusions from this.

## Council Extraordinary Session (C EXTR), March 23, 2023

The Council suggested that all three candidates get a new post and decided to:

- (a) appoint Ms Yolanda HUERTA CASADO (Spain) as the new Vice Secretary-General of UPOV;
- (b) promote Mr Leontino REZENDE TAVEIRA (Brazil) to a newly created position of Director of Global Development and Technical Affairs at the D1 level;
- (c) appoint Mr Martin Ake EKVAD (Sweden) as Director of Legal Affairs on the D1 level post vacated through the appointment under (a) above;

The [report of the Meeting](#) is already posted on the Website.

## Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (WG-SHF/3), March 24, 2023

The third meeting of the Working Group followed the lines of argumentation of previous meetings. Japan and part of the industry made it clear that they did not want any changes to the EXN and wanted to end the discussion. They rejected any softening of the interpretation of "private and non-commercial use" that would, for example, also allow certain sales.

The European Union, on the other hand, said that this discussion needs to be continued as it is an important issue which also affects UPOV's reputation and that it therefore also needs a gesture from UPOV on this issue. They are ready to work on a revision of the EXN and the FAQ. Norway, The Netherlands, and Switzerland also supported the work on the EXN and FAQ.

An intermediate position was taken by Canada, which could only support work on the FAQ as a first step. Argentina pointed out that it was not the right time to work on the EXN.

South Africa, faced with the issue at the national level, emphasized its importance and indicated their wish to revise the EXN.

APBRES shared the following views:

*We have intensively discussed the experts' proposal (and especially the flow chart) in the past meetings of the Working Group (proposing a limited possibility to exchange and sell protected varieties by smallholder farmers). It is therefore very strange that this flow chart – or at least the idea behind it, is not mentioned at all in the*

*present document SHF/3/2, neither in the summary of the previous discussions nor in the options that could be considered in the revision of the Explanatory Note (EXN). Although some voiced criticism against the proposal, it must be noted that many voices were favourable to the idea of adapting the Explanatory Notes in this proposed direction. It is therefore indispensable that a revision of the EXN reflects this view. The current FAQs are in contradiction with the related Explanatory Note – therefore first of all the EXN needs to be revised – and afterwards, the FAQs should be adapted to the new explanations.*

*We must be aware that the farmer seed system, in which varieties with plant variety protection are used, exchanged and sold, is not only central for food security and the conservation and sustainable use of genetic resources, but this system also widely differs from country to country. Because of these large differences – it makes perfect sense to include in an Explanatory Note **various options** for implementing the exception for private and non-commercial use that reflect these differences in the agricultural systems and perspectives. The discussed flowchart should certainly be one of these options. We mentioned at the very beginning of this discussion that the existing Explanatory Note contains an absurdly narrow interpretation. If we do not reach an agreement in further discussions, we, therefore, propose to delete the existing Explanatory Note. It is better to have no guidance – than one that makes no sense and does not reflect the current views of member states.*

Although during the following discussion, some consensus emerged for work on the FAQ, different views were expressed on how this work should be done. Switzerland and Norway mentioned the terms of reference of the Working Group, which clearly focuses on the question of private and non-commercial use. Canada, however, suggested not to overlook the benefits smallholder farmers receive from the IP system.

In the end, the following decision was taken (although there was no clear conclusive summary of the decision and it can therefore only be reproduced approximately). The Working Group agrees to start to explore the possibility to amend the FAQs related to private and non-commercial use and/or smallholder farmers. To do so a notification will be sent out to the WG members inviting them to consider the current FAQs and the issues which have been raised in the document WG SHF/3/2, including the possibility to add new issues. In addition, it should also be explained if these issues would require a revision of the FAQs. In parallel Consultative Committee could discuss (CC) if it is necessary to amend the Terms of Reference of the WG in order to cover all FAQs relating to smallholder farmers.

The next meeting of the WG will take place on October 25 at 6 pm before the CC, in a hybrid format.

## **APBEBES Comment: UPOV at a Crossroads**

The discussions in the March session of UPOV displayed greater than ever differences of opinion among members – and thus a stalemate in efforts to adapt UPOV to new realities.

In the discussion on smallholder farmers, it would be crucial that UPOV takes into consideration the developments of the last 20 years. First of all, the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture, which gave a new basis to farmers' rights and the sustainable use of genetic resources. There is also the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, which was adopted by the UN General Assembly. If UPOV continues to ignore these realities, it will completely undermine its legitimacy. A first step to broaden UPOV's premise would be to amend the EXN on private and non-commercial use.

The discussion on Essentially Derived Varieties is about finding an adequate solution within UPOV for the emergence of new breeding technologies (NBT). When the industry and individual UPOV members argue that products of NBT are always essentially derived varieties (with limited protection), but in other fora repeatedly claim how innovative and important these NBTs are, they are acting in a highly contradictory manner. A central question is how to maintain and increase

genetic diversity in the fields and also reward those who do this work. Trying to change the EXN on essentially derived varieties at a fast pace and leaving these issues out of the discussion has proven to be the wrong approach. Fundamental questions need a well-founded discussion without blinkers.

Finally, the question stands whether the solution to the problems mentioned above can be achieved within the framework of the current Act of the Convention. We are convinced that this is not the case. In order to make UPOV fit for the future, the 1991 Act needs to be amended. Adaptation of Explanatory Notes may allow for some limited re-interpretation – but in the end, this will not be sufficient to provide the necessary solutions.

Simply carrying on as before could also lead UPOV to become irrelevant. If new breeding technologies are not recognised by UPOV - breeders will increasingly try to use the patent system or other protection systems. There is also a tendency (as in the EU) of organic farming to rely more on heterogeneous populations and simplified distinct-uniform-stable (DUS) requirements. For those innovations, UPOV can offer no protection. If this is the future, UPOV is no longer needed. The development of a future-proof PVP System will be taken over by others.

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