



## APBREBES Report on the 2024 UPOV Session

The 2024 UPOV Session, took place from 22 to 25 October. With its decision to suspend the work of the Working Group on smallholder farmers for two years, UPOV is sending a clear message to the world: For UPOV, the concerns of small farmers are secondary, and any work that could improve their situation is put on the never-do list. The unilateral strengthening of plant breeders' rights remains the dogma of UPOV.

On the other hand, 19 years after the request was first made by NGOs and farmers' organisations, the Consultative Committee has now decided to end the restricted area of the UPOV website and to make the documents of the Consultative Committee available to the public. For the past 10 years, APBREBES obtained these documents through the Right to Information Act, and published them on the APBREBES website. It seems that our activities have now led to the resolution of one of UPOV's governance deficiencies - but there is still a lot of work to be done.

### Working Group on Harvested Material and Unauthorized Use of Propagating Material (WG-HRV/6), October 22, 2024

All documents of this Working Group can be found [here](#).

The main agenda item of the WG-HRV was to adopt the Terms of Reference for a study.

The WG-HRV confirmed an earlier decision that the study would include 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, including the notions of "unauthorized use" and "reasonable opportunity". A second part would include summaries of court cases from UPOV members bound by the 1991 Act.

The WG agreed on the following team of authors:

• 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)

APBREBES asked for the following additions to the Terms of Reference:

The ToR must explicitly mention that all conflicts of interest have to be disclosed. These could be

personal or social relationships, current and past professional relationships, or affiliations with industry groups that could benefit from or be affected by the research. This is particularly important as it is obvious that at least two of the authors have strong ties with the seed industry.

APBRES also asked that the ToR clarifies that the study's sponsors (in this case UPOV and Japan) will not influence the results and their publication in any way.

These requirements were not questioned by any of the participants, but the Working Group could not agree to include them in the ToR. Instead, the EU proposed to include the principle of disclosure of conflicts of interest in the report of this meeting and to include it in the contract with the authors, which was accepted.

Some participants asked how the WG Working Group could respond to an initial draft of the study. The first draft should be presented to the Working Group in March 2025 but without the possibility of comments. The Working Group is only expected to take stock of the work's advancement and answer any questions the authors might have. The Working Group's next meeting will take place on 20 March 2025.

## Administrative and Legal Committee (CAJ), October 23, 2024

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. Here is a small selection of the topics discussed and the decisions taken.

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

The discussion was based on a [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, which was already presented and discussed at the last CAJ Meeting, 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 of the ongoing discussions is to remove these so-called barriers to cooperation. The following Roadmap is planned;

- Preparatory webinars in 2025
- Seminar in October 22, 2025
- Compiling information for training module, by December 2025
- Gathering information / practices /examples to be presented in UPOV bodies' meetings in 2026

One of the main focuses of this process will be the cooperation with breeders in DUS examinations. The European Union pointed out that matters relating to independence and conflicts of interest need to be discussed in this context.

### **Novelty of parent lines about the exploitation of the hybrid variety**

For the background on this discussion see our [report of the CAJ meeting in 2022](#), (page 4) and our [report](#) of last year's Session (page 1). The question is whether or not the novelty of the parent lines is lost by the exploitation of the hybrid variety.

During this session, Germany made a presentation on how the novelty of the parent lines was affected by the exploitation of the hybrid variety. Germany is one of the countries where novelty is lost when the hybrid variety is exploited. This is based on Art. 6 of their Plant Breeders' Rights legislation.

Germany noted that they never encountered problems with this interpretation, and breeders have never complained. The novelty of parental lines was never an issue. It was interesting to see the large difference in protection between different species, such as:

Maize: No protection of hybrids – 90% of parental lines protected

Rapeseed: 15% of hybrids are protected – 75% of parental lines

Rye: 80% of hybrids are protected – no protection of parental lines

Sugar beet: no protection of hybrids – only a few parent lines are protected.

Although the presentation did not reveal any problems with the status quo, the breeders' organisations proposed to amend the explanatory notes on novelty to move to a situation where the sale of the hybrids does not affect the novelty of the parental line. This was a rather surprising proposal since at the last meeting, South Africa asked if this discussion was intended to adapt the Explanatory Notes, after which they had been assured that it was only to raise awareness and that there should be no dogmatic outcome. However, the proposal was not supported by any Member State, and it was decided that this topic should no longer be on the agenda of the CAJ.

## Working Group on Guidance Concerning Smallholder Farmers in relation to Private and Non-commercial Use (WG-SHF/6), October 23, 2024

We summarised the development of this Working Group in our report [UPOV turns a deaf ear to the concerns of smallholder farmers](#). The basis for the sixth meeting of the working group was the [answers to a questionnaire](#) that was agreed upon at the last meeting (see our [report of the last UPOV Session](#)), and a [compilation of statements](#) regarding a possible seminar. However, since the expected decisions were very unclear the meeting lacked a clear thread. The discussion was extremely chaotic - and the positions expressed were miles apart.

On one side was Japan, which said, as it had in previous meetings, that it couldn't agree to any changes to the Explanatory Note (EXN) as there was no real problem here. The Japanese Delegate noted that Plant Breeders' Rights are indeed helping farmers and Japan does not want to discuss the widening of loopholes in UPOV. The European Union and other members noted that almost none of the most affected developing countries participated in the survey. However, South Africa had prepared the most carefully drafted submission, which was simply ignored by the developed countries. During the meeting, South Africa made a clear call for the development of guidelines for smallholder farmers - and said that we were moving away from this purpose in the discussions of the Working Group. This call for work on the Explanatory Notes was supported by Norway and Switzerland. Norway responded to Japan that private and non-commercial use is not a loophole, but a standard in IP law. Switzerland clarified that the topic is the interface between UPOV and the informal system and that we should not be afraid to look at the definition of private and non-commercial use. It became completely absurd when Canada and others insisted that more information was needed to discuss the issue. Yet these were the same countries that refused to gather information from smallholders, research institutions, or the Special Rapporteur on the Right to Food at the last session.

Toward the end of the discussion, APBEBES made the following statement: "*We have received the answers to the questions we asked. APBEBES has already pointed out at the last meeting that we should ask other questions. APBEBES continues to believe that an adaptation of the Explanatory Notes, as proposed by the Project Group, would be a great relief for many small farmers and would free them*

*from illegality. We therefore suggest that the working group should now finally deal with the revision of the Explanatory Notes.*

*This is precisely what can be concluded from the responses from South Africa, which has discussed the questions raised with a large number of stakeholders and has come to the conclusion that (I quote) "the Explanatory Notes need to be looked at in order to address and clarify issues related to the implementation of Art. 15.1 of the UPOV 91 Convention (end of quote).*

*This is a clear mandate. We therefore propose that proposals for adaptation of the Explanatory Notes should be submitted by members and stakeholders for the next meeting and that these, together with the proposals of the project team, should then serve as a starting point for our further discussions.*

*And with regard to the idea of organising a seminar, APBREBES stated that, first of all, the purpose of this working group is "to develop guidance for small 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 and a revision of the FAQs on Exceptions to the Breeder's Right. "The organisation of a seminar is beyond the mandate of the Working Group. If a member state thinks it is a good idea - they could propose it in the Consultative Committee - but it is not the task of this working group to make a recommendation in this respect. And secondly, there has already been a seminar. Back in 2016, where we discussed the relationship between the International Treaty and UPOV. And at that seminar, several speakers mentioned the benefits of revising the Explanatory Notes on Exceptions to Plant Breeders' Rights as a way to reduce the contradictions between UPOV and the Treaty. And as you know, some of them worked together after the seminar on a proposal on how to amend the Explanatory Note to give more freedom to small farmers. And our working group was given the task to work on this proposal. If this working group now decides that we should not change the explanatory notes - but we should organise another seminar - it sounds like a joke. We are going round in circles because we do not want to talk about a new definition of private and non-commercial use. But going round in circles does not help anyone - least of all the small farmers who would benefit from a revised definition. And it is even more absurd when the seminar is not about new spaces for smallholders - but about the benefits of UPOV for smallholders; it means that UPOV refuses to include the needs of smallholders in a new definition of private and non-commercial, and instead decides to maintain the status quo and simply sell it as being totally helpful to these farmers. It just doesn't make sense.*

Not surprisingly, the Working Group decided that, contrary to its mandate, it would not work on the Explanatory Notes, but could organise a seminar in 2026 to gather more information. A refusal to work could not be any clearer.

## Consultative Committee (CC), October 24, 2024

As usual, the meeting of the Consultative Committee was closed to observers and its documents are not available to the public. In the past, however, APBREBES has published the documents it has received under the Right to Information Act. But the era of restricted documents is coming to an end (see below). The decisions of the Committee are reported to the UPOV Council, and this report is publicly available on the UPOV website.

## Council(C), October 25, 2024

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

## **Developments on the Draft Law on Plant Variety Protection of the United Arab Emirates**

The Council noted the changes in the Draft Law on Plant Variety Protection of the United Arab Emirates, as last modified in 2024, and reaffirmed the decision on the conformity with the UPOV 91 Act. The Delegation of the United Arab Emirates expressed its appreciation for the positive decision of the Council and is looking forward to working closely with UPOV for its accession to the UPOV Convention.

## **Examination of the conformity of the Law of the Lao People's Democratic Republic with the 1991 Act of the UPOV Convention**

The Council decided to take a positive decision on the conformity of the Law with the provisions of the 1991 Act, which allows the Lao People's Democratic Republic to deposit its instrument of accession to the 1991 Act. The Delegation of the Lao People's Democratic Republic expressed its appreciation for the positive decision of the Council and is looking forward to working closely with UPOV for its accession to the UPOV Convention.

Although the Law in Lao is totally in line with UPOV 91, CIOFORA criticised the law on the grounds that the farmers' privilege did not explicitly exclude horticultural crops.

## **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 whole Report can be found [here](#). We would like to mention two topics:

### **Discontinuation of the restricted area of the UPOV Website.**

Under agenda item 16 "Communication strategy", the Consultative Committee agreed to discontinue the restricted area of the UPOV website. Since it was an age-old demand of APBEBES, we took the liberty of taking the floor to detail the long history of this demand.

*«APBEBES congratulates UPOV on the decision to discontinue the restricted area of the UPOV website and to make the documents of the Consultative Committee available to the public. Allow me to take a brief look at the past.*

*In 2005, the UPOV Council discussed the rules for access to UPOV documents. Prior to that, the NGOs that later formed APBEBES, as well as the European Organisation of Smallholders, sent an [open letter](#) to the member states. One of the main demands in this letter was, and I quote "Access to all documents relevant to UPOV discussions and activities is an essential component of effective public participation. Official UPOV documents should be made available to the public in a timely manner through the Internet or other appropriate means". But this demand was not taken into account. There were even two restricted areas. One for the CAJ and the Technical Working Parties and an even more guarded one for the Consultative Committee.*

*In 2011, two members of APBEBES published the [study](#) "Observer Status and Access to Documents Comparative Analysis across Selected International Organisations", which concluded that UPOV's practices were not in line with those of other intergovernmental organisations and were not in accordance with international principles of good governance, including transparency and participation. Our recommendations at that time were*

- 1. Make all UPOV documents publicly available;*
- 2. Invite all observers to participate in its work, with a view to achieving a balanced representation of different stakeholders;*
- 3. Open the Consultative Committee to observers.*

Again, none of our recommendations were taken into account. In response, since 2012 we have been publishing on our [website](#) the documents of the Consultative Committee that we received through the Freedom of Information Act.

We are pleased that we can now stop this publication work and that the CC documents are now publicly available. As you can see - sometimes it takes a bit longer.

Let us hope that the fulfilment of our other demands from 2011 - a balanced representation of the different stakeholders in the negotiations and the opening of the Consultative Committee to observers - will not take another 20 years... »

### **Report on the Working Group on Guidance concerning Smallholder Farmers in relation to private and noncommercial use (WG-SHF)**

It was reported that the Consultative Committee agreed that the Office of the Union would organize a seminar in October 2026 and reach out to UPOV members who took the floor during the Consultative Committee to identify proposals for the draft program and examples and data to be presented during the seminar. On the above basis, a seminar's draft program would be presented for consideration by the Consultative Committee at its session on October, 24 2025. The Consultative Committee agreed that no meetings of the WG-SHF would be organised before the Seminar.

APBREBES also took the floor on this Agenda item and stated the following:

« With its decision to suspend for two years the Working Group on Smallholders in relation to private and non-commercial use, UPOV is sending a clear message to the world and to smallholders. These farmers and their concerns are not a priority for UPOV.

The decision of the Consultative Committee raises several questions. It is inconceivable that such a vague mandate from the Consultative Committee will lead to a seminar that will take the work forward. The discussion during the Working Group meeting was a chaotic mix of very different voices rather than a clear definition of a framework for a seminar. If we are going to invest time and money in a seminar, we need a clear objective. Organising a seminar without knowing why we are doing it is not helpful. APBREBES therefore proposes to the Council that the following clarifications be included in the report: The objective of the seminar is to provide information to enable the Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use to fulfil its mandate as defined in the Terms of Reference.

Such clarification would provide a clearly defined framework for the seminar and ensure that it supports the further work of the Working Group".

Japan argued against the APBREBES proposal, which consequently was not supported.

### **Procedure for the External Auditor's appointment**

This is only a side note – but a noteworthy one. The 79 UPOV Member States were unable to find an external auditor for UPOV from among their ranks. As a result, the Audit Board of Indonesia, which is not a member of UPOV, had to step in as auditor.

### **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 China's dominance in terms of granted plant variety rights. UPOV boasted that at the end of 2023, 195,356 titles were in force worldwide, "a record-breaking number safeguarding plant varieties across UPOV members". A closer look reveals that this new record is due to the large increase in newly granted plant variety rights. But

this extreme growth (2022: 14'860; 2023: 42'893 titles delivered; = +28'033) has two main sources: Due to Brexit, plant variety rights formerly issued in the EU have been retained in the United Kingdom, which led to an increase of 22'771 new rights granted in the UK. Additionally, there was another major growth in China (+ 8'933 new titles issued, compared to 2022). If we subtract these two exceptional cases, the number of new plant breeders' rights granted in the rest of the world has shrunk again (3'671 fewer titles issued), as it did last year. The much-vaunted boom in plant variety rights is thus limited to special cases and should not be sold as a global success story. It is also interesting to note that in 2023, for the first time, more than half (56%) of all new applications filed worldwide were filed in China, and 96% of these were granted to Chinese residents. These results show that over 60% of the new applications submitted worldwide were filed in countries that are members of UPOV 78. This raises the question of whether enforcing UPOV 91 is indeed crucial to promote innovation, or whether a more balanced level of protection under UPOV 78 is just as effective.

November 2024