

**ASTA Position Paper on
Addressing EDV System Roles,
Accountabilities and Conditions**

Essentially-derived varieties (EDVs) was a significant, new element in the Act of 1991 for the International Convention for the Protection of New Varieties of Plants Act (UPOV '91) and an important improvement to plant breeders' rights (PBR) and plant variety protection (PVP) across UPOV member countries. The provisions of UPOV '91 established a balanced form of PBR/PVP so the breeder who invests in the development of protected varieties may benefit from additional rights regarding EDVs developed by others from the protected Initial Variety (IV).

In the three decades since UPOV '91, UPOV has issued two Explanatory Notes on EDV (Oct. 2009 and Apr. 2017) with principal emphasis on how many phenotypic characteristics must differ between a new variety and an IV to determine if a new variety is or is not an EDV. In December 2019, with encouragement from UPOV Members and the plant breeding industry, UPOV elected to open and revise the 2017 Explanatory Notes based on Terms of Reference and input from breeders and the plant breeding industry.

The ASTA EDV Position Paper focuses on the EDV system's important roles and conditions, especially scope and limits of rights, accountability, entitlement and authority. The positions identify gaps and issues that deserve attention and should be addressed in the revised UPOV EDV Explanatory Notes. It intentionally does not address the issue of essential characteristics.

ASTA strongly supports the revision of the UPOV Explanatory Notes on EDV taking into account the following views to ensure EDV is operationalized in a consistent and effective form to protect breeder's rights under the 1991 Act of the UPOV Convention.

1. Each UPOV Member should:
 - provide effective and balanced PBR/PVP systems to protect the rights of those who breed, discover and derive new varieties; and
 - ensure the breeder/owner of an initial variety (IV) retains their ownership rights for the IV and the right to authorize commercialization of any EDVs originating from the IV.
2. The PBR/PVP authority of a UPOV Member is mandated to determine whether a new variety is distinct, uniform and stable (DUS), with no consideration given to the economic value or agronomic importance of the new variety. The accountability for determining such economic value or agronomic importance properly resides with other stakeholders and may include national or regional authorities responsible for Value for Cultivation and Use (VCU) and varietal registration.
3. The PBR/PVP authority in a UPOV Member is solely accountable to determine if a new variety qualifies for plant variety protection and is not accountable to determine whether a variety is or is not essentially-derived from a protected variety.
4. UPOV Members shall not implement interpretations of EDV that restrict the IV owner's right to exercise his/her rights under Article 14 of the 1991 Act of the UPOV Convention against a new essentially-derived variety unless it is a matter of public interest and the owner of the IV receives equitable remuneration as specified under Article 17. For example, a PBR/PVP authority shall not use traits with economic, agronomic or societal value, exhibited by a new, distinct variety qualifying for PBR/PVP protection, as the basis to rule said new variety is not an EDV, and thereby diminish the scope of the PBR/PVP rights granted to the IV's owner and deny equitable remuneration to that breeder/owner.
5. The PBR/PVP authority should not adopt accountability to manage and resolve EDV-related disputes including when the owner of an IV asserts his/her rights against commercialization of an EDV. The 1991 Act of the UPOV Convention does not prescribe or specify a role for the PBR/PVP authority to arbitrate and settle EDV-related matters.

6. The breeder/owner of PBR/PVP protected varieties is principally accountable to evaluate new varieties commercialized by others and to make a preliminary determination whether a new variety has been potentially derived from the breeder's protected IV.
7. The owner of an IV may determine predominant derivation by comparing characteristics used by the PBR/PVP authority to determine distinctness, by assessing any other morphological characteristics and physiological traits, and/or by DNA-based genetic analysis.
8. Predominant derivation is most meaningfully measured using DNA-based genetic analysis with sufficient genome coverage and with proven discriminative ability to distinguish cultivars, including those closely related by pedigree or differing by a few or a limited number of phenotypic characteristics being used to determine distinctness.
9. A distinct variety exhibiting a higher than average genetic conformity for the species, when compared to a PBR/PVP protected variety using DNA-based genetic analysis, is likely to be predominantly-derived from the latter even while differing in multiple characteristics.
10. The owner of a PBR/PVP protected IV has the right to exclude the owner of an EDV derived from that IV from undertaking commercial activities regardless of whether the EDV is granted PBR/PVP protection, as specified in the 1991 Act of UPOV.
11. The revised EDV Explanatory Notes should provide clear guidance regarding the process and options available for the owner of an IV to assert his/her rights against the owner of an EDV.
12. If the owner of a PVP/PBR protected variety believes a new variety is predominantly-derived from his/her variety and could therefore be an EDV, the IV owner may at his/her discretion inform the putative EDV owner that there is a strong indication of essential derivation and whether a commercial license is required and available. If the parties are not able to reach agreement, the owner of the IV may choose to pursue one or more of the following options in order to assert his/her rights against the EDV owner.
 - The IV owner may seek to prove the new variety's EDV status by undertaking a formal review and decision with an independent technical panel using a framework and criteria established by the national seed law and/or seed association.
 - The IV owner may request an arbitration panel, convened by a national or international seed industry association, to mediate and resolve a dispute with an EDV owner.
 - The IV owner may bring his/her finding, assertion and complaint to the appropriate judicial body for review and judgment.
13. DNA-based genetic analysis must be the commonly accepted standard under all of these options to assess genetic conformity and to prove predominant derivation for resolving EDV disputes
14. The revised EDV Explanatory Notes should
 - Advocate for continuing education and training by UPOV and breeding industry associations to inform companies and breeders on the operational and technical aspects of the EDV system;
 - Support programs for breeders to collaborate in the development of industry-accepted methodologies and thresholds needed to determine EDV's on a crop-by-crop basis; and
 - Recognize and endorse the EDV thresholds already developed and being developed by the breeding industry.