



APBRES Report on the 2021 UPOV Session

Since last year, all Meetings of the Session have taken place in a virtual environment. COVID-19 measures also included the adoption of various documents by correspondence in all UPOV Bodies.

Administrative and Legal Committee (CAJ), October 27, 2021

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

Essentially Derived Varieties

At last years' CAJ Meeting a Working Group comprising of 13 member countries and the European Union, 6 breeder organisations, and APBRES was formed. The Working Group started its work in December 2020 and later held three more meetings to develop a proposal for the revision of the Explanatory Notes (EXN) on Essentially Derived Varieties (EDV). The reports and all the Working Group's working documents can be found [here](#). A report by APBRES on the negotiations in the working group can be found [here](#). The way the Working Group carried out its mandate demonstrates the great influence of the seed industry on UPOV and on important decisions.

In the run-up to the CAJ meeting, the Office of the Union contacted APBRES to discuss a proposal addressing [APBRES' main objections](#). This proposal included the deletion of Section 3 and its main parts, as well as an amendment of the preamble. The office of the Union presented these changes during the CAJ-Meeting. They were welcomed by APBRES, supported by Switzerland, and agreed by the CAJ.

The discussion concerning the Spanish proposal regarding the definition of an EDV was more conflictual. It was the representative of the EU who introduced the text proposal, which for certain cases recommended a case-by-case analysis, to determine whether a variety was an EDV.

Unsurprisingly, the industry opposed this motion - being supported by the US and Canada. But Spain, Australia, and Argentina spoke in favour of the EU proposal. Despite this support, the EU subsequently withdrew its proposal because there were divergent views on this and they did not want to hold up the process.

The CAJ finally approved the Explanatory Notes on Essentially Derived Varieties with some last changes and agreed that the document be circulated for approval by the Consultative Committee and adoption by the Council by correspondence.

Harvested Material

Main decisions on this topic have already been taken by the CAJ by correspondence in September 2021. The CAJ agreed to initiate a revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention", the "Explanatory Notes on Propagating

Material under the UPOV Convention”, and the “Explanatory Notes on Provisional Protection under the UPOV Convention”. The terms of reference (ToRs) had been agreed on by correspondence. They are based on the concluding remarks 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. The conclusions of the seminar, therefore, do not form a good basis for the upcoming negotiations. At the meeting, the CAJ adopted the composition of the Working Group on Harvested Material and Unauthorized Use of Propagating Material (WG-HRV) (WG-HRV), including 17 member states, 5 breeders associations, the International Association of Horticultural Producers (AIPH), and APBEBES. The first meeting will take place on March 15, 2022, by electronic means.

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

In the draft decision on this topic it was proposed to hold a seminar in 2022 on the novelty of parent lines with regard to the exploitation of hybrid varieties. Presentations by five breeders’ associations and by members of the Union were scheduled to take place. It was proposed to already decide now, that on the basis of these presentations and discussions, the Office of the Union should prepare common guidance on that matter. In its intervention during the CAJ meeting, APBEBES stated that in the past the presentations at UPOV Seminars were often one-sided, but that delegates not only have the right but also the duty to consider the whole range of positions. Only this way could they make a balanced decision. Moreover, the process would only be credible if the outcome of a seminar and the discussion are not predetermined. In line with its intervention, APBEBES proposed some adjustments to the decision. The proposal was supported by Norway and accepted by the CAJ in principle. The Office of the Union *“expressed its commitment to ensuring that events were organized with a balance of perspectives.”*

Consultative Committee (CC), October 28, 2021

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 gets access to the documents and makes them available on its [Website](#). Decisions taken by the Committee are reported to the UPOV Council and this [report](#) is publicly available from the UPOV’s website. Here are some details on some of the CC’s decisions.

Possible guidance concerning smallholder farmers in relation to private and non-commercial use

This agenda item is about the longstanding discussion on a new interpretation of acts done privately and for non-commercial purposes, which are not affected by the Breeder’s Rights. A proposal to change the corresponding Explanatory Note was put forward back in 2016 by several stakeholders, including APBEBES. Since then the discussion on this topic has consistently been postponed. At the last CC meeting, Oxfam, Plantum, and Euroseeds made a joint presentation concerning smallholder farmers based on their [project results](#).

In the follow-up members of the Union were invited to share their experiences and views on the implementation of the exception of acts done privately and for non-commercial purposes for smallholder farmers. All these contributions by members and observers can be found [here](#).

In the meeting the CC finally decided to

- *establish a Working Group to develop guidance concerning smallholder farmers in relation to private and non-commercial use, including drafting a revision of the “Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention” and drafting a revision of the FAQs on exceptions to the breeder’s right;*
- *agreed that the terms of reference of the Working Group be approved by the Consultative Committee by correspondence;*
- *agreed that the Working Group be composed of those members of the Union and observers to the*

*Council that reply to a Circular expressing an interest to be part of the Working Group;
- agreed that the first meeting of the Working Group be held on March 17, 2022, by electronic means;*

Developments of relevance to UPOV in other international fora

Under this topic, the developments concerning the World Seed Partnership (WSP) were presented. The WSP is an initiative including the International Seed Federation, ISTA, OECD, UPOV, and the World Farmers' Organisation. This is a cooperation that naturally raises many governance questions. For example, why UPOV cooperates with some stakeholders and not with others. In the draft decision on this topic, it was proposed that the Consultative Committee agrees that the World Seed Partnership explores possible synergies with the Food and Agriculture Organization of the United Nations (FAO). But the Consultative Committee did not agree to do so.

Communication strategy

The FAQ on the interrelations between the UPOV Convention, the Convention on Biological Diversity (CBD), and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) seems to be a never-ending story. The office of the Union presented a new draft that does not speak anymore about interrelations, but about synergies between these international treaties. It was also proposed that the CBD and the ITPGRFA should be invited to review the preliminary draft of this Frequently Asked Questions (FAQ). For an International Convention to ask other International Conventions for feedback on a preliminary draft of FAQs, is a proposal that seems unusual, to say the least. But it will not come to that, because the CC decided that the preliminary draft FAQs, with the proposed revisions presented by Norway, will first be commented on by the members of the Consultative Committee. Based on the replies, the Office of the Union will prepare a new draft for consideration by the Consultative Committee by correspondence.

Council(C), October 29, 2021

Here are some comments on the Council discussion regarding the Report of the Consultative Committee. The official report of the Council Session can be found [here](#).

Extension of the appointment of the Vice Secretary-General and procedure for the appointment of a new Vice Secretary-General

The Council had extended, in the procedure by correspondence, the appointment of the Vice Secretary-General from December 1, 2022, until October 22, 2023, and had approved the procedure and timetable for the appointment of the new Vice Secretary-General.

Examination of the conformity of the New Plant Variety Protection Acts with the 1991 Act of the UPOV Convention (Jamaica, Nigeria, Ghana)

The Council took a positive decision on the conformity of the New Plant Varieties (Rights of Breeders) Bill, 2021, of Jamaica ("Draft Law") with the provisions of the 1991 Act of UPOV, which allows Jamaica, once the Draft Law is adopted, with no changes, and the Law is in force, to deposit its instrument of accession to the 1991 Act.

Already in September, in a procedure by correspondence, the same decision was taken for the Plant Variety Protection Act of Ghana. In the case of Ghana, this is remarkable because Clause 22 of the Plant Variety Protection Act of Ghana clearly contradicts Art. 18 of UPOV 1991. The 1991 Act makes it clear that the breeder's right shall be independent of any measure taken by a Contracting Party to regulate commerce, while Clause 22 emphasizes that the breeder's right shall be subject to any measure taken to regulate commerce. The inconsistency is evident. APBREBES raised this issue in a [comment submitted to UPOV](#). Surprisingly, the Council nevertheless confirmed conformity with the 1991 Act of UPOV and in this way set an interesting precedent.

In August, also in a procedure by correspondence, the Council reaffirmed its 2019 decision on conformity of the Plant Variety Protection Act of Nigeria with the 1991 Act of the UPOV Convention. Interestingly, constitutional challenges to the new PVP laws have now been filed in both Ghana and Nigeria. More information on these lawsuits can be found in our [newsletter #48](#) (Nigeria) and [#50](#) (Ghana).

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