



APBREBES Report on the 2022 UPOV Session

For the first time since the Covid crisis, member countries' delegates met again physically in Geneva. In addition to the usual meetings (CAJ, CC, Council), a seminar on the role of plant breeding and plant variety protection in enabling agriculture to mitigate and adapt to climate change was organised as part of the closing session. All documents from the seminar (video, reports, biographies, presentation) can be found [here](#).

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 that were taken.

Essentially Derived Varieties (EDVs)

Diverging from the agenda of the CAJ, Mr. Edgar Krieger, Secretary-General of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), made a statement on behalf of the breeding sector, concerning developments in the revision process of the Explanatory Notes on EDVs.

He expressed concerns about the fact that the Consultative Committee had not approved the latest draft of the Explanatory Note, even though the breeding sector supported the draft. (Comment by APBREBES: It is always interesting to see how unaccustomed the seed industry is to the lack of immediate response given to their demands by member countries). Mr. Krieger chose drastic words. He urged member countries to adopt the draft without amendments, on pain of great harm to UPOV. Should the new draft not be adopted, the existing Explanatory Note would have to be repealed, otherwise, it would jeopardise the future of breeding. The Secretariat reminded him that the issue will be discussed by the CC and its decision will be reported to the Council. More information on the history of this dispute can be found [here](#).

Guidance concerning Smallholder Farmers in relation to private and non-commercial use

The only task of the CAJ was to note the [developments](#) on possible guidance concerning smallholder farmers in relation to private and non-commercial use. The decision on whether the Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use will continue its work will be taken by the Consultative Committee.

Nevertheless, during a lively discussion, Japan reiterated that the sale of seeds by small farmers cannot be covered by the exception. The representative of the Seed Association of the Americas added that the exception should neither cover the exchange of seeds by small farmers. Other voices, such as those from the EU, however, argued that the Guidance concerning Smallholder Farmers

involves UPOV's reputation and thus a solution had to be found. Canada spoke in favour of a balanced solution and the continuation of the Working Group. Somewhat surprising was the intervention of Euroseeds (one of the initiators of the discussion together with Plantum and Oxfam), who said that there might be other options than adapting the Explanatory Notes (although they are a proponent of the adaptation).

Harvested Material

The CAJ's task was simply to take note of the work done so far by the [Working Group on harvested Material and Unauthorised use of Propagating Material](#). It had already been decided in advance that the work on various Explanatory Notes would continue in the coming year (the next meeting is scheduled tentatively for March 21). The focus of the work will be on the interpretation of the notion of 'unauthorised use of propagating material'. One of the impulses for this work was the decision of the European Court of Justice in the so-called Nadorcott case in December 2019. And it seems that the industry and individual member states are trying to change the interpretation of the Court by rewording Explanatory Notes. APBEBES already mentioned that this is a pointless undertaking in the first meeting of the Working Group (see box).

Preliminary remarks by APBEBES on the negotiations of the Working Group on harvested Material and Unauthorized use of Propagating Material

The Nadorcott case was mentioned again and again at the 2021 Seminar on the breeder's right in relation to harvested material which was the impetus for the establishment of this Working Group. The breeders' associations were obviously not happy about the decision of the Court of Justice of the European Union in this matter and therefore requested to amend several explanatory notes.

Trying to change the jurisprudence of the highest European court with an adaptation of Explanatory Notes is a completely wrong approach on the following grounds:

The basis for the decision of the European Court of Justice was the UPOV Convention and the European Council Regulation (EC) No. 2100/94 on Community plant variety rights, itself based on the 1991 Act of the UPOV Convention. For their judgment, they interpreted the Council Regulation directly. In doing so, they did not have recourse to explanatory notes in any way. Attempts to counter the interpretation of the Court by adapting UPOV's Explanatory Notes are questionable from a legislative point of view, and will only lead to increased legal uncertainty.

We must be clear that amending the Explanatory Notes to counteract the European Court of Justice's ruling will not change existing jurisprudence. There will only be a greater discrepancy between the jurisprudence, i.e. the interpretation of the law by the highest European Court, and the interpretation by UPOV's member states and this will lead to legal uncertainty. Instead of creating new contradictions, the interpretation of the European Court of Justice should be integrated into the Explanatory Notes.

Dissatisfaction with the existing wording of the Convention or national laws should not lead to efforts to amend non-binding Explanatory Notes. It is not possible to change the Convention by drafting Explanatory Notes.

For this reason, we will suggest the rejection of several proposals for the revision of the different Explanatory Notes. Such proposals would not provide the clarification of existing terms but lead to more legal uncertainty, and this is certainly not the goal.

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

The only topic discussed was whether or not the novelty of the parent lines is lost by the exploitation of the hybrid variety.

Some history: The question about the novelty of parent lines was already raised by the seed industry 20 years ago. 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*».

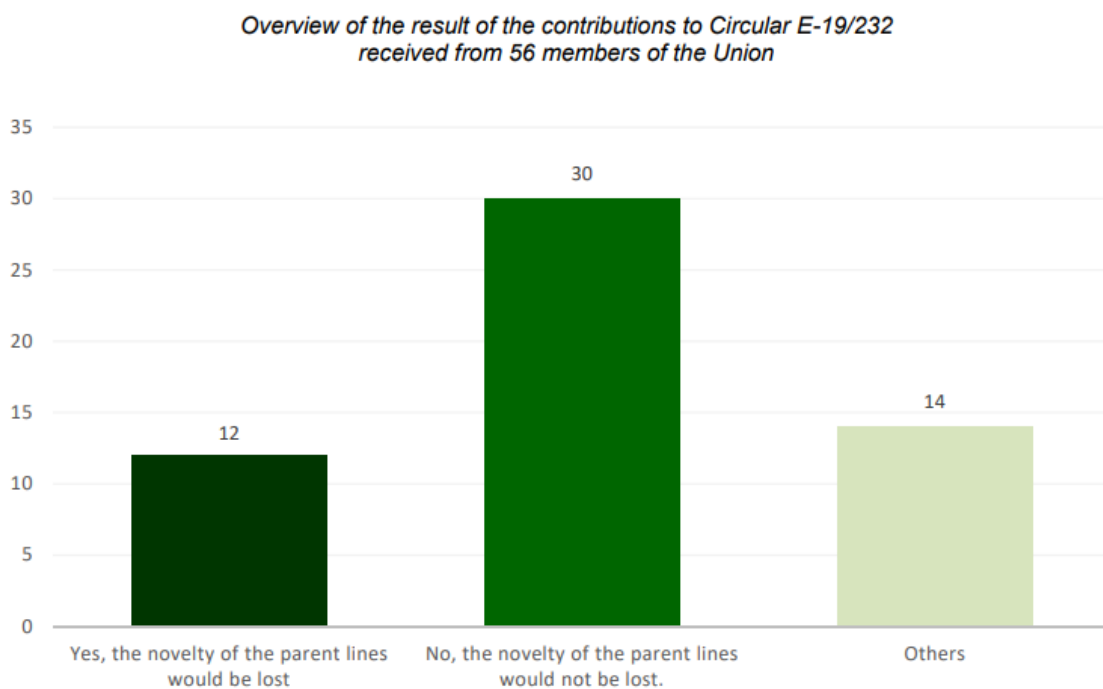
The report of the CAJ in 2001 stated views such as (CAJ/43/8 page 13):

The Delegation of France considered that the wording of the novelty condition had been modified during the Diplomatic Conference of 1991 to state that the novelty of the parental lines was lost by the exploitation of the hybrid and added that the debates in the European Union showed that the 1991 Act failed in that aim. They explained that in French law, the commercialization of the hybrid variety was considered as exploitation of the parental line.

The Delegation of the United States of America considered that, if the novelty of the parental lines was not lost by the commercialization of the hybrid, then it was possible to protect the hybrid in the first instance, to protect the parental lines once the hybrid protection had expired and by that procedure to obtain protection for a very long period. Such longer protection was against public interest and therefore it could not agree with the interpretation of ASSINSEL [Breeders Association].

Two years ago (2020), a new survey was done, which shows that we are at the same point as we have been 20 years ago. Contracting Parties still rely on different interpretations:

8. The following figure provides an overview of the result of the contributions to Circular E-19/232 received from members of the Union.



At the last CAJ, under the same agenda item, APBEBES argued that a balanced representation of the different views of stakeholders had been missing in previous seminars and presentations. Delegates not only have the right but also the duty to consider the whole range of positions, allowing them to reach a balanced decision. In reply to the APBEBES' comment, the Office of the Union expressed its

commitment to ensuring that events were organized with a balance of perspectives. So it was all the more surprising that there was again only one presentation to introduce the debate on the novelty of parent lines, the one of the breeders' associations.

Various breeders' organisations, in a joint presentation, stated that it is unjustified for some PBR offices and national laws to establish that parental lines are not novel in cases when the hybrids, bred with these parental lines, have already been produced and/or sold. The breeding sector advocated for a harmonised system with only one possible interpretation - their own. Legally, they justify their wish by saying that Art. 6 of UPOV 91, which defines novelty, should be read differently. They suggest that instead of «exploitation» according to the text of the UPOV Convention, one should read «commercial exploitation».

In the rather short discussion, some members suggested the establishment of a Working Group or a technical Working Group, but there was no consensus. In the end, a rather vague proposal from Canada, suggesting that the breeders' organisations conduct «a survey on commercial practices relating to the impact of commercial exploitation of the hybrid on the novelty of parent lines» was accepted.

On this basis, discussions will resume in a year. After a single presentation (by the breeders' organisations) this year, we will then have a single study (by the breeders' organisations) as a basis for negotiations. It is always amazing to see how one-sided the input is for decision-making at UPOV.

Consultative Committee (CC), October 27, 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 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 on the UPOV's website. Here are some details on some of the CC's decisions.

Procedure for the appointment of a new Vice Secretary-General

As the acting Vice-Secretary General, Peter Button will be stepping down next year, the process to choose a successor was discussed. Interviews will be conducted with the following three candidates: Mr. Martin Ake EKVAD (Sweden), Ms. Yolanda HUERTA-CASADO (Spain), and Mr. Leontino REZENDE TAVEIRA (Brazil). Thereafter, the Sub-Committee will prepare a report to the Council, which will determine the position of the new Vice Secretary General at an extraordinary and exclusively physical meeting of the Council on 23 March 2023.

The starting point is interesting: Martin Ake Ekvad, the former Chair of the EU's Community Plant Variety Protection Office, is the only candidate not currently working for the UPOV Office, Yolanda Huerta-Casado, UPOVs Legal Counsel and Director of Training and Assistance, would be the first woman in the position and Leontino Rezende Taveira, Head of Technical Affairs and Regional Development (Latin America and the Caribbean) at UPOV would be the first Vice-Director General from the Global South.

Essentially Derived Varieties (EDVs)

Last year, the revision of the Explanatory Notes (EXN) on EDV took an unexpected turn. Surprisingly for many, after the adoption of the EXN in the CAJ last year, there was no consensus in the CC's procedure by correspondence to adopt the new EXN. Switzerland, Morocco, and others raised various objections (for details about the process see [C/56/9](#)). As a result, the topic was discussed again in the CC this year. The CC agreed to establish a new Consultative Committee Working Group

on Essentially Derived Varieties with a different composition. In particular, the WG will now only consist of representatives of member countries. The seed industry, but also APBREBES, will no longer be members of the WG but can be invited for certain meetings to elaborate their perspectives on the matters raised. This change can certainly also be read as a reaction to the way the seed industry has dominated the revision of the EXN in the process so far. The purpose of the WG is still the same: to draft a revision of the EXN on EDVs.

In addition, the Council adopted a proposal to hold a “Seminar on the interaction between plant variety protection and the use of plant breeding technologies” in a hybrid format, on March 22, 2023. At its next meeting, the CC will consider a recommendation to the Council, to replace or repeal the 2017 version of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”.

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

The question is: Should smallholder farmers be allowed to exchange seeds on a limited scale and sell them on the local market under the exception of private and non-commercial use?

As the Working Group has not yet finished its work, the CC decided to extend the Working Group’s mandate. Only Japan opposed the continuation of the WG and argued that selling of a protected variety is not included in the exception of Article 15 section 1 (see also the discussion in the CAJ, above).

A mandate was defined for the Working Group, to provide guidance on the drafting of a revision of the Explanatory Notes on Exceptions to the Breeder’s Right (UPOV/EXN/EXC), to be prepared by the Administrative and Legal Committee; and to draft a revision of the FAQs on exceptions to the breeder’s right. The Office of the Union will prepare a document to assist the WG-SHF in its work.

Communication strategy

After much back and forth, last year and by correspondence, the Consultative Committee approved the FAQ “**What is the relationship between the UPOV Convention and international treaties concerning genetic resources, e.g. the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)**”. The FAQ was then sent to the CBD and the Treaty for their consideration. The comment from the CBD has already been received (see [CC/99/6 Add](#)), and the comment from the Treaty is still pending. Like in other FAQs from UPOV, the benefits of plant breeding are confused with the benefits of the UPOV system. The Consultative Committee also agreed to develop **additional FAQs**. These will unfortunately be of limited use, as they answer questions that are never asked. For example, questions like “Does the UPOV system of plant variety protection only benefit large multinational corporations?» or “Does the UPOV system force farmers to grow protected varieties?».

Somewhat surprisingly, the CC also agreed to consider **planning a symposium on the interrelations** between the Convention on Biological Diversity (CBD), the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), and the International Convention for the Protection of New Varieties of Plants (UPOV Convention) in 2024.

Council(C), October 28, 2021

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

Examination of the conformity of the Draft Law on the Protection of Varieties of Plants of Armenia with the 1991 Act of the UPOV Convention

Back in 2004 the Republic of Armenia already requested the advice of the Council on the conformity of their law with the 1991 Act. At this time the Council advised the Government of Armenia that the Law, in its main provisions, incorporates the substance of the 1991 Act and that it may deposit an instrument of accession to the 1991 Act. However, the Council further advised the Government of Armenia that it may wish to amend and supplement the texts of its legislation, as recommended, to avoid recourse to the general principle in Article 2 of the Law. This somewhat strange advice came about because there were various contradictions with UPOV91 in the Armenian law, but these did not matter because Art. 2 of the draft law of the Protection of Varieties of Plants, states that « Where the international treaties of the Republic of Armenia contain provisions that differ from those set out in this law, the provisions of such international treaty shall apply. »

All the proposed changes by UPOV have now been taken into account by Armenia in the new law and the Council took a positive decision on the conformity of the Draft Law of Armenia with the provisions of the 1991 Act of UPOV. This allows Armenia 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.

Report by the President on the work of the ninety-seventh session of the Consultative Committee

As the most important discussions often take place in the Consultative Committee meeting, which is closed to observers, the report of the Consultative Committee in the Council provides an opportunity for observers to comment on these decisions. Following the contributions of APBEBES:

Explanatory Notes on Essentially Derived Varieties

APBEBES made the following Input:

Mr. President, distinguished Delegates

We think the Consultative Committee made the right decision by not approving the new draft of the Explanatory Note and setting up a Working Group for further work. As you know, we were critical of the process by which draft three of the Explanatory Notes was developed - and a faulty process cannot lead to a good result. It started with a seminar where we only heard the same opinion in different ways and continued when *The Working Group requested the Office of the Union to prepare a preliminary draft text of the EXN on the basis of the proposals presented by the international breeders' organizations*, although there were countless proposals from member states in the process leading to the WG.

In any other multilateral organisation, such an approach and the dominance of one stakeholder would be unimaginable. In this context, it is also interesting to see that the Office of the Union met 10 times with the seed industry in 2021 for meetings concerning the EXN on EDV, when the draft was developed - but there were only four meetings with individual member states.

However, the task now is to look forward. And to do better in the next phase.

We think there are two central points in this regard:

- The Working Group must also listen to opinions and positions that have not been heard so far. Only in direct discussions one can argue with the other positions critically and delegates will be able to develop their opinion.
- Two questions should be examined in depth - and preferably by truly independent experts whose report could serve as a basis for the Working Group. The first question would be which wording of an EXN is compatible with the Convention text and which is not.

And the second would be an impact assessment, again by an independent body: What is the impact of the respective interpretations of EDVs on the innovation of conventional breeding, as well as on the innovation of biotech breeders applying new breeding technologies? It would probably also be necessary to investigate the extent to which users of new breeding technologies and conventional breeders use patents to protect their inventions, and the extent to which they also rely on plant variety protection and the interactions on this matter.

And we just hear now that a seminar on new breeding techniques is planned –in this case, it will also be crucial to hear the whole range of opinions in a balanced way.

We very much hope that such an improved process will lead to an outcome that could be agreed upon by all members.

Thank you for your attention.

The representative of CIOPORA, on behalf of all the breeders' organizations, expressed its disappointment concerning the decision not to adopt document UPOV/EXN/EDV/3 Draft 3 and considered that the decision would harm breeders. He requested that breeders' organizations be part of the composition of the new Working Group on EDVs

In his answer, the President of the Council recalled the terms of reference of the Working Group on EDVs which allow the WG to invite relevant stakeholders and/or experts to elaborate their perspectives on the matters raised.

Guidance concerning Smallholder Farmers in relation to private and non-commercial use

APBREBES made the following Input:

Mr. President, distinguished Delegates

We think it is the right decision to continue with the work within the Working Group. There is still a lot to be done.

Also based on the discussions we had in the CAJ, we would like to state the following:

- The only way to really improve the situation and especially the legal security of subsistence farmers is to change the Explanatory note. The idea to do this in the framework of a Frequently Asked Question would not be appropriate. We already have a FAQ that contradicts the Explanatory Notes on this issue. These contradictions do not create clarity but only increase legal uncertainty. Moreover, it is obvious that when interpreting a law, attention is paid to the Explanatory Notes and not to FAQs.

- We also heard in the discussion in the CAJ proposals that the possibility to sell and even to exchange seeds should be deleted. We would like to note that such a reduction would make an Explanatory Note meaningless, as it would not be oriented toward the realities of subsistence farmers' lives.

If the negotiations for a revision of this EXN fail, this would be a clear message to the small farmers and the poorest of this world that their human rights are given less weight in UPOV than the profit of seed companies.

We are happy to continue to work constructively with the Working Group in the future.

Thank you for your attention.

Election of new Chairpersons

The Council elected, in each case for a term of three years ending in 2025:

Mr. Yehan Cui (China), President of the Council;

Mr. Anthony Parker (Canada), Vice-President of the Council;

Ms. María Laura Villamayor (Argentina), Chair of the Administrative and Legal Committee;

Ms. Minori Hagiwara (Japan), Vice-Chair of the Administrative and Legal Committee;

Ms. Beate Rücker (Germany), Chair of the Technical Committee; and

Ms. Nuria Urquía Fernández (Spain), Vice-Chair of the Technical Committee.

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