



APBRES Association for Plant Breeding for the Benefit of Society

Report on the UPOV Autumn 2015 Session

By Sangeeta Shashikant (Third World Network) and Susanne Gura (APBRES).

The UPOV Council, the Consultative Committee (CC), and the Administrative and Legal Committee (CAJ) met from 26 to 29 October 2015. Among the key matters discussed were: industry's proposal to establish a centralized harmonized system for the administration and examination of plant breeder applications known as the "International System of Cooperation" (ISC); UPOV's policy on documents; Draft Program and Budget for the 2016-2017 Biennium; Interrelations with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), especially its Article 9 which concerns Farmers' Rights; and examination of conformity of Iran's legislation on Plant Variety Protection with the 1991 Act of UPOV, and various "Explanatory Notes" intended to provide guidance with regard to implementation of the 1991 Act.

Meeting documents for the UPOV Council are available at http://www.upov.int/meetings/en/details.jsp?meeting_id=26467

while for the CAJ are available at http://www.upov.int/meetings/en/details.jsp?meeting_id=37027.

UPOV does not provide access to meeting documents for the Consultative Committee. Access to such documents are however available on the APBRES's website at <http://www.apbres.org/UPOV-Restricted-Area>. APBRES gains access to these documents using the Freedom of Information Acts of UPOV member states.

Below is a brief update on key issues discussed and decisions taken at the UPOV Meetings.

1. CONSULTATIVE COMMITTEE AND COUNCIL

1.1 Proposal concerning an "International System of Cooperation" (ISC)

The "International Systems of Cooperation" (ISC) is an initiative begun by the International Seed Federation (ISF), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOPORA) and CropLife International (CLI). This initiative is aimed at establishing a harmonized mechanism for the filing and examination of applications for plant breeders' rights (PBRs), with standardized requirements and forms which would then be assessed for compliance with formal requirements and novelty by selected preliminary



examining office(s) as well as centralized testing of DUS (distinctness, uniformity and stability).

Since it was first introduced, a number of UPOV members have questioned the proposal in particular the need for such a harmonized mechanism and its implications for national and regional plant variety offices. To facilitate discussion on this agenda item, Secretariat prepared information (in CC/90/10) about the need for ISC. However several Member states and observers found the information to be "vague" and inadequate to justify embarking on a harmonization initiative in UPOV.

According to sources, several member states said that the survey in CC/90/10 was not sufficiently representative to confirm the need for such a system. They also noted that a limited number of stakeholders were consulted and the responses did not present unambiguous arguments for an immediate decision on the project.

Some member states also pointed out that UPOV had existing mechanisms such as the PLUTO and GENIE databases, that help expedite the work and promote, to some extent, cooperation with respect to DUS testing, thus the need for more concrete evidence of the need for a new system, as well as on the cost-benefit analysis for the establishment of an ISC.

A number of other issues were also raised such as the impact of the new system for Members at different levels of development and on regional systems; the average cost of protection; the financial impact of the new system on national offices, the legal options for the creation of the system, bearing in mind the basis for the establishment through a contract, vis-à-vis other alternatives, such as a Patent Cooperation Treaty or Madrid-like agreement.

UPOV members also questioned if the proposal benefits all of UPOV's membership, with several indicating that the matter was not sufficient mature for adoption and the subject needed further discussions to deepen understanding about the initiative.

Thus the Consultative Committee concluded with the following decision point, which was endorsed by the UPOV Council:

"The Consultative Committee agreed that more information, including statistical information, and a legal analysis was needed with regard to a possible ISC and agreed to request the Office of the Union to prepare a document containing a draft mandate and terms of reference for a possible working group (ISC-WG) to explore the issues concerning a possible international system of cooperation (ISC), as presented in the document of the eighty-ninth session of the Consultative Committee and additional issues raised by members of the Union, to be considered by the Consultative Committee at its ninety-first session, to be held in Geneva in March 2016. That document would also present the additional issues provided in writing by members of the Union".

For more background information on the ISC, see [Vague Results Question the Need for Harmonized PVP Filing System in UPOV; A simple "agreement" proposed to accommodate Industry's UPOV-plus demands](#) and [Multinational seed industry pitches for further harmonization in UPOV](#).

1.2 Interrelations of the ITPGRFA with UPOV and WIPO

On the subject of interrelations, the Consultative Committee noted developments concerning possible areas of interrelations and agreed as a first step to invite the Secretary of the ITPGRFA to make a presentation at its ninety-first session (in March 2016) on possible areas of interrelations between the ITPGRFA and the UPOV Convention.

The Consultative Committee also agreed that members of the Union should be invited to comment on the areas of interrelations identified by ITPGRFA and suggest any other areas of interrelations. It also agreed that the information should be compiled by the Secretariat for discussion at the ninety-first session in conjunction with the presentation by the Secretary of the ITPGRFA. The Consultative Committee further discussed the idea of a symposium in which Contracting Parties would present information on their experiences in implementing the UPOV Convention and the ITPGRFA.

Reacting to the decision of the Consultative Committee, APBREBES recalled that Farmers' Rights are a core component of the ITPGRFA and to the achievement of the Treaty's objectives. There are concerns that UPOV 91 undermines implementation of Farmers' Rights as to implement UPOV 1991, countries (that are members of the Treaty) have to do away with provisions upholding Farmers' rights.

APBREBES expressed disappointment that this important issue will be discussed in the Consultative Committee, which is closed to observers. APBREBES appealed that this matter be discussed openly and such discussion should include diverse perspectives and experts. By discussing it only in the Consultative Committee, UPOV members are denying themselves the benefit of hearing different perspectives on the matter.

The Council endorsed the decision of the Consultative Committee.

For background information see [APBREBES Updates Issue #17, October 26, 2015](#) and [APBREBES Updates Issue #14, May 8, 2015](#)

1.3 Special Project Fund (CC/90/3), UPOV Training and Assistance Strategy (CC/90/7) and Communication Strategy (CC/90/8)

UPOV's Consultative Committee also adopted several strategies that stressed on the expansion of UPOV's membership, promotion of the benefits of 1991 Act, facilitating the filing of more PB applications and providing technical assistance to non-UPOV members in implementing a plant variety protection system in accordance with the UPOV Convention of 1991. The technical assistance activities will include assistance in drafting legislation, development and operation of distance learning courses, training of non-UPOV staff to act as trainers (training of trainers), supporting projects to introduce and implement the UPOV system and awareness raising activities.

These activities are conducted in partnership with proponents of an IP maximalist system such as WIPO, the US Patent and Trademark Office (USPTO), Ministry of Economic Affairs of the Netherlands; Naktuinbouw (Netherlands); the Japan International Cooperation Agency (JICA) and the Korean Seed & Variety Service (KSVS) / Korean International Cooperation Agency (KOICA).

UPOV's focus on providing technical assistance is of great concern as many experts have concluded that UPOV 1991 is not an appropriate legal framework for plant variety protection for agricultural systems of developing countries and adversely impacts the informal seed sector.

Most recently the report of the UN Secretary General titled "Agriculture development, food security and development" (August 2015) has stated:

"An additional challenge that has advanced to the forefront is the pressures exerted on small-scale farming stemming from the provisions of the 1991 Act of the International Union for the Protection of New Varieties of Plants. Restrictions on seed management systems can lead to a loss of biodiversity and in turn harm the livelihoods of small-scale farmers "as well as weaken the genetic base on which we all depend for our future supply of food". As smallholders rely predominantly on informal seed systems, the restriction imposed by the Act on the use of farm-saved seeds and the prohibitions on their exchange and sale cause considerable concern.

Although only a handful of developing countries have implemented plant variety protection, small-scale farmers and other stakeholders are often excluded from participation in developing and reforming plant variety protection laws."

There is also evidence that UPOV 1991 actually undermines effective implementation of the Convention of Biological Diversity, Nagoya Protocol on Access and Benefit Sharing and ITPGRFA.

1.4 UPOV documents and publication of information

At this session, the Consultative Committee also considered its policy on documents including communications by observers. APBREBES had also formally proposed that:

- All documents of the Consultative Committee should be made publicly available on the UPOV website.
- Statements made by UPOV Members and observers should be reproduced verbatim in their entirety in the reports of the UPOV Council, the Consultative Committee and the Administrative and Legal Committee.
- Written Comments including those provided by observers should be promptly posted on UPOV's website and circulated to UPOV Members in advance of consideration of the agenda item that is commented on or within a week of receipt by the Secretariat, whichever is earlier.

APBREBES's proposals were aimed at improving transparency of UPOV's proceedings, which are inconsistent with international standards. For instance UPOV's host organisation the World Intellectual Property Organisation (WIPO) reproduces verbatim all statements of its Member states, while documents to be discussed at its proceedings are publicly available.

However, the Consultative Committee bypassed the opportunity to bring its policy on documents in line with international standards. It simply "endorsed the current practice that statements made by members or observers at sessions of UPOV bodies would not be reproduced in the reports on decisions, reports on conclusions, or reports on UPOV bodies, unless otherwise agreed by the UPOV body concerned, except where a member of the Union

requested its statement to be included in the report, and statements made by States and organizations in relation to the examination of laws and on becoming UPOV members.” (para 35 of C/49/16).

The Consultative Committee also “agreed that, in general, in cases where the Office of the Union received written comments in relation to a matter to be considered by a UPOV body, those comments would, if so requested, be circulated to the UPOV body concerned; however, for example in the case of documents that were to be considered by correspondence, the Consultative Committee agreed that the UPOV body concerned may, on an ad hoc basis, agree to publish written comments on the webpage of the UPOV body concerned.” (para 36 of document C/49/16).

1.5 Examination of the conformity of the “Act of Plant Varieties Registration, Control and Certification of Seeds and Plant Materials of 2003” of the Islamic Republic of Iran with the 1991 Act of the UPOV Convention (C(Extr.)/32/8)

Conformity of Iran’s legislation on plant variety protection with the 1991 Act was discussed by the Consultative Committee based on UPOV Secretariat’s analysis of Iran’s legislation, which found its legislation to be inconsistent with UPOV 1991. The Committee recommended that Iran incorporate the additional provisions and amendments in the “Act of Plant Varieties Registration, Control And Certification of Seeds And Plant Materials of 2003”, as provided in document C(Extr.)/32/8 and to resubmit the draft legislation for further examination in conformity with the 1991 Act.

The main legal framework in Iran for the protection of plant varieties is its “By-law on Registration of Plant Varieties. This by-law provides for exceptions that allow use of the protected material for non-commercial purposes, which should include exchange of seeds and propagating material, and for small farmers to save seed of the protected variety. UPOV Secretariat recommends that provisions of Article 15 of the 1991 Act be incorporated, effectively narrowing the scope of exceptions currently provided in Iran’s by-law on PVP. UPOV’s Guidance on Article 15 is restrictive, as it does not allow sale and exchange of seeds/ propagating material when using the protected variety. Farmers are allowed to save seeds on farmers’ own holding, however subject to certain limitations.

1.6 Adoption of Explanatory Notes and other Information Materials

A series of revisions of Explanatory Notes were adopted:

- Explanatory Notes on Cancellation of the Breeder's Right under the UPOV Convention (Revision)
- Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (Revision)
- Explanatory Notes on Provisional Protection under the UPOV Convention (Revision)

The Russian delegation proposed a further revision of the Explanatory Notes on Provisional Protection.

Furthermore, the revisions of four Technical Guidance Protocols were adopted, as well as the revisions of three Information documents. For a complete list see UPOV/INF-EXN/8.

1.7 Election of the new President and Vice-President of the Council

The UPOV Council elected Mr Luis Salaices Sanchez (Spain) as the new President and Mr Raimundo Lavignolle (Argentina) as the new Vice-President of the Council for a term of three years ending with the autumn session of 2018.

2. ADMINISTRATIVE AND LEGAL COMMITTEE (CAJ)

2.1 Rescheduling of meetings of the Administrative and Legal Committee (CAJ)

The CAJ discussed reducing its sessions to a single two-day session rather than its current practice of holding a one-day CAJ session in March/April and a two-day CAJ session in October/November. It suggested a rescheduling of its meetings i.e. the autumn sessions will decide whether a one-day spring session would take place in the following year. The CAJ agreed not to hold a CAJ session in March 2016 and to hold a two-day CAJ session in October 2016.

2.2 Explanatory Notes

The CAJ considered revised drafts of Explanatory Notes on Essentially Derived Varieties and on Propagating Material. It is important that these Notes do not include a prescriptive interpretation of the UPOV Convention. For APBREBES's comments on the Explanatory Notes made at CAJ 70 see [APBREBES statements on Explanatory Notes](#).

Explanatory Notes on Essentially Derived Varieties (document UPOV/EXN/EDV/2 Draft 6)

The notion of essentially derived varieties was introduced in the 1991 Act, leaving it to its Members to define it. More than 20 years later, the issue remains unresolved.

The CAJ endorsed the proposal for the Secretariat to organize a meeting to exchange information with the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), the International Seed Federation (ISF) and the World Intellectual Property Organization (WIPO), in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters.

The CAJ session also discussed amendments to the Draft Explanatory Note, which includes the following text:

- "The requirement of predominant derivation from an initial variety means that a variety can only be essentially derived from one initial variety. The intention is that a variety should only be essentially derived from another variety when it retains virtually the whole genotype of the other variety. A derived variety could not, in practice,

retain the expression of the essential characteristics of the variety from which it is derived unless it is almost entirely derived from that initial variety.”

- “The phrase “while retaining the expression of the essential characteristics” requires that the expression of the essential characteristics conforms to and be derived from the initial variety.”
- “The derived variety must retain almost the totality of the genotype of the initial variety and be distinguishable different from that variety by a very limited number of characteristics.”

The next CAJ session will discuss the revised draft of the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision).

The European Seed Association (ESA) and the International Seed Federation (ISF) will also provide to the next CAJ session, proposed text regarding essential derivation from the parent lines of hybrids, and the use of molecular data, for further discussion at the 73rd session of the CAJ.

Explanatory Note on Propagating Material under the UPOV Convention (document UPOV/EXN/PPM/1 Draft 5)

The understanding and definitions of propagating material varies considerably among the member states. The UPOV Conventions does not provide a definition of “propagating material”. Industry has been attempting to incorporate a broad and prescriptive definition of “propagating material” to have more opportunities to enforce their plant breeders’ rights.

The CAJ agreed *inter alia* to amend paragraph 1 of the Draft Explanatory Note as follows

“The UPOV Convention does not provide a definition of ‘propagating material’. Propagating material encompasses reproductive and vegetative propagating material. The following are non-exhaustive examples of factors that have been considered by members of the Union in relation to whether material is propagating material:

“(i) plant or part of plants used for the variety reproduction;

“(ii) whether the material has been used to propagate the variety;

“(iii) whether the material is capable of producing entire plants of the variety and is factually used for propagating purposes;

“(iv) whether there has been a custom/practice of using the material for propagating purposes or, as a result of new developments, there is a new custom/practice of using the material for that purpose;

“(v) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);

“(vi) if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is “propagating material”; or

“(vii) the variety material where conditions and mode of its production meet the purpose of reproduction of new plants of the variety but not of final consumption.”

This revised Draft Explanatory Note will be considered for adoption at the March session of the UPOV Council in 2016.

2.3 Propagating and Harvested material

The CAJ heard presentations made by Argentina, the European Union and the Russian Federation on harvested material, which are reproduced in the Annexes to document CAJ/72/4 Add.

The CAJ agreed to propose to the Council to organize a one-day seminar on propagating and harvested material to be held in conjunction with the UPOV sessions in October 2016. The seminar should include speakers to report on cases in which the notions of harvested material and/or propagating material have been considered, and speakers from relevant academic institutions and judicial authorities to provide perspectives on the subject. CAJ members and observers would be invited to propose speakers. The Office of the Union, Chair of the CAJ and President of the Council would prepare a draft program for consideration by the Consultative Committee and approval by the Council in March 2016.

The Council endorsed this proposal. The seminar will take place on 24th October 2016.

At its previous session, CAJ had agreed that for the time being it would not be appropriate to develop a revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" (document UPOV/EXN/HRV/1). However industry continues to push for a revised Explanatory Note that protects its interests.