

Vague Results Question the Need for Harmonized PVP Filing System in UPOV

Sangeeta Shashikant (London) – A major issue at the upcoming meetings of the International Union for the Protection of New Varieties of Plants (UPOV) will be whether there is a need for a centralized harmonized mechanism for the filing, examination and administration of applications for plant variety protection (PVP).

UPOV's main rule-making body, the Consultative Committee will be meeting on 28th October to review information provided by the Secretariat (in CC/90/10) about the need for a proposed mechanism also known as the "International System of Cooperation". Other UPOV bodies will also be meeting in Geneva from 26th to 29th October 2015.

Observers of UPOV processes referred to information provided by the Secretariat in CC/90/10 as "vague" and said that such a system is "unjustified".

The proposal to establish the ISC is a demand of the International Seed Federation (ISF), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOPORA) and CropLife International (CLI), facilitated by the UPOV Secretariat.

ISF, CIOPORA and CLI jointly represent the interests of the mainstream seed industry, including multinational seed companies such as Monsanto, Syngenta, Bayer, DuPont Pioneer, and DowAgroSciences (which continue to control about 75% of all private sector plant breeding research, and 60% of the commercial seed market) and seed giants in the ornamental and fruit sectors.

The proposal was first presented at the 2014 autumn meetings of UPOV. In March of this year, the UPOV Secretariat presented to the Consultative Committee a detailed paper (CC/89/6) highlighting 30 issues for the consideration of UPOV members.

However UPOV members were unconvinced with several raising concerns over the need for such a mechanism.

During the March session, the Russian Federation countered the proposal stating that there were no "cogent arguments in favour of ISC idea ... On the contrary, when reading it, the question arises: What kind of problems in the existing international cooperation system within UPOV was a cause for idea of ISC creation?".

It further highlighted that in 2014, it received 740 applications, out of which 184 were from foreign applicants, adding that DUS (distinctness, uniformity and stability) examination of

varieties applied for plant breeders' rights (PBRs) and registration on the national seed list is carried out in 38 testing stations.

It further stated that most of the foreign applications are received in Russia 2 to 4 and more years later after the first application is filed which allows Russia "to receive DUS examination results from the authorities of the first application". Based on this, Russia said that it considered "that international cooperation system within UPOV exists, develops and works successfully". It further stressed that the ISC would lead to "distraction" from national systems of PVP administration in member states, loss of experienced personnel, a delay of at least one year in the granting of PBRs and substantial additional costs.

Observers of UPOV's processes have also questioned the need for ISC, arguing that the UPOV Secretariat's approach to the ISC proposal is "flawed" and downplays the implications that ISC will entail for UPOV members. They argued that the ISC proposal is UPOV-plus with legal implications for individual UPOV members in particular affecting the independence and sustainability of national PVP offices.

Thus the March session of the Consultative Committee concluded that the matter should be considered further at its 90th session (which takes place on 28th October) and that the UPOV Secretariat should produce a document with more information about the need for an international system, providing a business analysis and cost estimate.

[Industry's proposal for the establishment of ISC entails a centralized mechanism for filing PBR application, with standardized requirements and forms, which would then be assessed for compliance with formal requirements and novelty by selected "preliminary examining office(s)". The application form would then be distributed to UPOV members designated by the breeder. The system would also encompass centralized DUS examination systems whereby accredited DUS testing stations would issue test reports for other UPOV members.

Additionally the system would include *inter alia*: standardized fees paid to centralized systems, monitoring of DUS examination, receiving and maintaining reports of decisions on granting of PBR; addressing objections concerning conduct of the DUS examination; maintaining and publishing all relevant "bibliographic" information concerning PBR applications; maintaining standard UPOV variety descriptions, information on varieties of common knowledge included in the DUS examination, harmonization with regard to status and disposition of any propagating material provided by the breeder and information relating to pedigree and parental lines of hybrids (to be maintained as confidential) and could include a search for relevant varieties of common knowledge against which the application variety may be compared.

Industry anticipates that the establishment of the proposed ISC will result in "More PBR applications by more breeders in more crops, countries and regions" as "it will be easier for breeders to file applications, so more applications can be expected by the PBR offices in countries where previously there have been few applications".]

Need for An International System of Cooperation

In response to the Consultative Committee's request, the Secretariat has prepared CC/90/10, which contains a business analysis and cost estimate, international survey by ISF/CIOPORA/CLI and some information from its PLUTO database.

Business analysis and cost estimate

Except to present a rough cost estimate, the UPOV document fails to present a concrete detailed business analysis or even to provide a breakdown of the estimated initial cost.

According to estimates received, the UPOV document states "that the initial cost of setting up the IT infrastructure for an ISC would be of the order of CHF220,000. In addition, there would be IT costs for annual maintenance and for expanding the system to include additional PVP offices and crops/species. The design of the ISC would be for the system to operate automatically; however, there would be a need for staff to administer the system in a similar way to the PLUTO and GENIE databases".

Observers of UPOV processes argue that this costing is an underestimate as it does not include relevant IT systems that might need to be installed at the national level to operationalize ISC, organization of member states meetings to agree on the details of the ISC system; costs for establishing an accredited system or another means of conveying objective information on DUS examination capacity (see Issue 8, Annex IV, CC/90/10); costs for dealing with objections concerning DUS examination; trainings of stakeholders and member states on use of the ISC etc. Further, once set up there will be costs for annual maintenance of the system including the need for additional staff, additional UPOV meetings to sort of details of administration.

Survey by the CIOPORA, ISF and Croplife International

To address the need for ISC, the Secretariat document relies on a CIOPORA/ISF/CLI conducted survey of. Questions of the survey are:

- Question (a): From which organization did you receive the survey?
- Question (b): Location of the organization that responded.
- Question (c): Types of crops/species in which you are breeding
- Question (d): Number of PBR applications made
- Question (e): UPOV members in which PBR applications made (2014)
- Question (f) Number of varieties for which applications were made in more than 1 UPOV members
- Question (g): Languages in which you made applications (2014)
- Question (h): Do you make applications in all the UPOV members in which your

varieties would have a value for farmers and growers

- Questions (i): If no, what are the barriers to making such applications (more than one option possible)?
- Question (j): Would a system that made it easier to file applications in other territories result in your making more applications.
- Question (k): If a system provided you with a single systems to: view an application form of a country/organization in the language of your choice; complete a form online/upload data from your database; and re-use existing data for subsequent applications what is the maximum cost per application that would be viable
- Question (l): if a system provided you with the facilities in the preceding question and avoided the need for an additional DUS examination, what is the maximum cost per application that would be acceptable?

The survey received 61 responses: 40 from ISF members, 2 from Croplife members and 19 from CIOPORA members. Two ignored the survey, suggesting that the survey was sent out to 63 companies. Many of the questions were not completed by all 61 companies.

Except for tables and charts showing responses to the questions, no explanation is provided even of information provided in the tables and charts.

Further, no explanation is provided as to why only a small set of companies responded to the survey while ISF consists of 238 members from 73 countries, Croplife has 8 company members and 15 member associations (mainly made up from regional branches of the same global corporations) and CIOPORA has 125 members in 27 countries.

The survey results also do not provide information about companies that responded to the survey, the nature of their business in the countries they are located (e.g. is it a plant breeding company, is it a small, middle sized company or a multinational or a subsidiary of a multinational company, what it does in the country of the location, etc.).

In the absence of information, a concern with the survey is that of duplication as there is often an overlap in the membership of CIOPORA, ISF and Croplife.

The survey results also show that the absence of ISC has not prevented or discouraged companies from filing PVP applications in 2014 in several UPOV members as 34% of the 47 companies that responded to the question filed PVP applications in the jurisdiction of more than 6 UPOV members.

The survey results further show that companies are quite confident about making applications in different language and few found language to be a barrier to making PVP applications.

Interestingly only about 29 companies responded to the question “what are the barriers to making such applications (more than one option possible)”. The responses to this question

were as follows: Cost of application (15); Cost of DUS examination (11); Language (4); Lack of knowledge of system in other territories (7), Administration of application in other territories (11), Other (13).

The survey results to Question (i) are unreliable due to duplication. For example, those that may have issue with the cost of application are also likely to have issue with cost of DUS examination and perhaps also other elements listed. So basically the numbers are capturing the same companies repeatedly.

To Question (j) "Would a system that made it easier to file applications in other territories result in your making more applications.", out of the 52 responses only 15 companies said "definitely" while 10 companies said "No". The rest were in between, with 14 saying probably and another 14 saying possibly.

Responses to Question (k) and (l), made clear that few were willing to pay more than USD 500 for the application and USD500 for DUS examination.

It is apparent that the industry's survey results do not provide a clear and sound justification for an ISC system.

A representative of APBREBES (Association for Plant Breeding for Benefit of Society), an observer following UPOV processes, said the "case for ISC has not been made".

UPOV Secretariat document CC/89/6 highlights a number of tools in place in UPOV (e.g. PLUTO Database, GENIE database, Electronic Application System (EAS), variety similarity search tool etc.) that already address many of the proposed elements of ISC, thus questioning the need for the ISC.

The same document points out that main users of cooperation in DUS examination are the European Union and its Community Plant Variety Office (CPVO) and that "cooperation agreements [in DUS examination ... have not increased in line with the number of genera and species for which practical experience has been declared by Union members" (paragraph 14). It also mentions that the proportion of members of the Union regularly attending UPOV session has declined substantially in recent years (paragraph 16 of CC/89/6).

These observations highlight the lack of need and interest in cooperation/harmonization as proposed by industry. The EU, which may have some interest, already has in place arrangements for cooperation particularly in the context of its CPVO. This calls into question the value of establishing ISC, bearing in mind the significant resource implications of such an endeavor.

Further, examination of plant variety statistics for the period 2009 to 2013 show that in many countries non-resident applications are either comparable or far exceed resident

applications. For instance Canada had 1396 non-resident applications and 289 resident applications; Chile had 405 non-resident applications and 40 resident applications; Ecuador had 243 non-resident applications and 29 resident applications. This suggests that it is unnecessary to continue with the ISC initiative.

Apart from the questionable need for ISC, there are a number of other concerns with the ISC. This includes: elements proposed as part of ISC are UPOV-plus; the flawed legal basis put forward by the UPOV Secretariat to operationalize ISC; the ISC reports/decisions on matters addressed by ISC would have the practical effect of “binding” national PVP authorities; reduction of fees which might affect sustainability of national PVP offices; loss of sovereignty as PVP administration is increasingly centralized.

[For more analyses on the ISC See [Multinational seed industry pitches for further harmonization in UPOV](#) and

[A simple “agreement” proposed to accommodate Industry’s UPOV-plus demands](#)]