

## **APBREBES Report on the UPOV 2015 Spring Session**

**The UPOV Council, the Consultative Committee (CC), and the Administrative and Legal Committee (CAJ) met on 26 and 27 March, 2015.** Among the key matters discussed were: a proposal to establish a centralized harmonized system for the administration and examination of PBR applications known as “International System of Cooperation” (ISC); examination of the conformity of the “Draft provisions of Book Four ‘Plant Varieties’ of Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights” of Egypt; matters concerning the interrelations between the International Treaty Plant Genetic Resources for Food and Agriculture (ITPGRFA), UPOV and WIPO; 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=35046](http://www.upov.int/meetings/en/details.jsp?meeting_id=35046), while for the CAJ are available at [http://www.upov.int/meetings/en/details.jsp?meeting\\_id=35055](http://www.upov.int/meetings/en/details.jsp?meeting_id=35055)

UPOV does not provide access to meeting documents for the Consultative Committee. APBREBES provides [access to the documents](#) based on Freedom of Information Acts of UPOV member states.

### **1. Consultative Committee (CC 89) & UPOV Council (32<sup>nd</sup> Extraordinary Session)**

#### **1.1. Proposal concerning an “International System of Cooperation”**

The proposal to establish a centralized harmonized system for the administration and examination of PBR applications known as the “International System of Cooperation” (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). These entities 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 main objective of the Industry is to ease filing procedures and increase the number of Plant Breeders' Rights applications.

Industry first presented the proposal to the 88<sup>th</sup> session of the CC in October 2014 in CC/88/9. At the 89<sup>th</sup> session of the CC, the UPOV Secretariat presented document CC/89/6 aimed at clarifying issues raised with regard to Industry's proposal and to propose possible ways forward with regard to ISC.

During discussion several reservations were raised on the ISC proposal. 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 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 examination of varieties applied for 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 2-4 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 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 and will involve significant administrative, resource and financial implications. See [Multinational seed industry pitches for further harmonization in UPOV and A simple “agreement” proposed to accommodate Industry’s UPOV-plus demands.](#)

The CC concluded that more time was needed to discuss the issues raised by a possible international system of cooperation and agreed that the matter should be considered further at its 90<sup>th</sup> session in October 2015. In order to facilitate its considerations, the CC agreed 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.

## **1.2 Examination of Conformity of the PVP laws of Egypt and Iran with the 1991 Act**

The UPOV Council confirmed the conformity of the “Draft provisions of Book Four ‘Plant Variety Protection’ of Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights” (“Draft Law”) of Egypt with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants. This confirmation opens the path for Egypt to accede to the 1991 Act once the Draft Law is adopted with no changes and the Law is in force.

CIOPORA had sent a letter to the Ministry of Agriculture & Land Reclamation, inviting Egypt to declare to the UPOV Consultative Committee and the Council that its tort law and its customs law are applicable to plant breeders’ rights. The Egyptian delegation confirmed that this is the case.

With regard to 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, the Council, at the request of the Seed and Plant Certification and Registration Institute of the Islamic Republic of Iran, deferred the examination to its 49<sup>th</sup> ordinary session to be held in October 2015.

### **1.3 Interrelations of ITPGRFA with UPOV and WIPO**

Another agenda item before the CC was the interrelations of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) with UPOV and WIPO. This issue is the result of the ITPGRFA Governing Body Resolution 8/2013 requesting the Secretary of the ITPGRFA to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments. The Resolution concerns implementation of Farmers' Rights (Article 9 of the ITPGRFA).

The CC was informed that Mr. Francis Gurry, in his capacity as Director General of WIPO and Secretary-General of UPOV had received a letter from Mr. Shakeel Bhatti, Secretary of the ITPGRFA, concerning interrelations among the respective international instruments of UPOV, WIPO and the ITPGRFA.

The letter indicated "the second meeting of the Ad Hoc Technical Committee on Sustainable Use of Plant Genetic Resources for Food and Agriculture (ACSU) would include agenda item 5 "Identification of interrelations between the International Treaty, especially its Art. 9, and relevant instruments of UPOV and WIPO" and further indicated that "[A]fter the Ad Hoc Technical Committee will have processed the identified interrelations, the results will be transmitted to you and, based on the interrelations thus identified, jointly a small team of 3-4 experts will be agreed and an initial outline for a joint report be prepared and made available for public comment by membership and stakeholders of the respective instruments".

The CC was also informed that the ACSU considered document IT/ACSU-2/15/4 "Interrelations between the International Treaty and relevant instruments of UPOV and WIPO" which, in its paragraph 8, contained an indicative list of some of the issues that were received by the Secretary of the ITPGRFA. The list is as follows:

"8. Some of the issues on possible interrelations of the International Treaty and the relevant instruments of UPOV and WIPO, which are mentioned in the submissions received by the Secretary in response to Notification GB6-028 and through the "Farmers' Rights Comments Submissions" webpage and which are compiled in document IT/ACSU-2/15/Inf.5, can be summarized as follows:

- a) The implementation of Farmers' Rights under the International Treaty in light of obligations that countries have under the International Convention for the Protection of New Varieties of Plants (UPOV Convention), as revised in 1978 and 1991.
- b) The implementation of rights of farmers to save, use, exchange and sell farm-saved seed/propagating material, in light of the UPOV Convention, as revised in 1978 and 1991.
- c) The implementation of rights of farmers to save, use, exchange and sell farm-saved seed/propagating material, in light of relevant sui generis national legislation.
- d) The protection of traditional knowledge relevant to plant genetic resources for food and agriculture (PGRFA) in relation to the UPOV Convention, as revised in 1978 and 1991.
- e) The right of farmers to equitably participate in sharing benefits arising from the utilization of PGRFA in relation to the UPOV Convention, as revised in 1978 and 1991.

- f) The right of farmers to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA in relation to the UPOV Convention, as revised in 1978 and 1991.
- g) The participation of farmers in decision making processes, at the regional level, on matters related to the conservation and sustainable use of PGRFA in relation to the UPOV Convention, as revised in 1978 and 1991.
- h) The “farmers’ privilege” under UPOV 1991 in comparison to the concept of “Farmers’ Rights” under the Treaty.
- i) The concept of “essentially derived varieties” under UPOV 1991 in relation to the concept of “Farmers’ Rights” under the Treaty, especially with regard to farmer-breeders and to informal seed systems.
- j) Recognition of farmers as breeders under the Treaty and relevant instruments of UPOV and WIPO.
- k) The concept of “Farmers’ Rights” as a collective right in comparison to the generally individual character of intellectual property rights in the instruments of UPOV and WIPO.
- l) The DUS (distinct, uniform, stable) criteria of UPOV and farmers’ varieties, farmers’ informal seed systems and farmers’ traditional knowledge.
- m) The “breeders’ exemption” under the UPOV Convention and the right of farmers to equitably participate in benefit sharing under Article 9 of the Treaty.
- n) Patents in plants or plant varieties and their possible impact on Farmers’ Rights.
- o) Possible impact of the technical assistance provided by WIPO relating to PGRFA on the implementation of farmers’ rights and the objectives of the Treaty.
- p) Possible impact of WIPO’s instruments and processes, including the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC), on the implementation of Farmers’ Rights.
- q) The enforcement provisions and mechanisms in the three instruments, with special regard to the potential enforcement of Farmers’ Rights.”

The CC was further informed that the ACSU recommended to forward the entire list in slightly amended form to UPOV and WIPO, grouped under four elements of Article 9 of the ITPGRFA, namely the rights mentioned in its subparagraphs 9.2 a), 9.2 b), 9.2 c) and 9.3.

The Treaty Secretariat drew the issues identified from the various [submissions](#) made on the matter of interrelations.

Doc CC/89/9 Add. also adds that “it would be matter for the Council of UPOV to decide on any matters concerning a joint initiative.”

The CC merely noted the “developments concerning possible areas of interrelations among the international instruments of the ITPGRFA, WIPO and UPOV” and provided no further guidance on the matter.

When the same matter came up before the UPOV Council (which is open to observers), Francois Meienberg from APBEBES enquired as to which "developments" were noted. He further said that APBEBES member organisations were engaged in the FAO Seed Treaty negotiations and APBEBES therefore would like to know whether UPOV is ready to engage in the process to identify interrelations between the International Treaty and relevant instruments of UPOV and WIPO with regard to implementation of Article 9 of the ITPGRFA which concerns farmers' rights. It sought clarity whether "UPOV would be part of the process to jointly agree on a small team of experts which will prepare an initial outline for a joint report to be made available for public comment by the membership and stakeholders of the respective instruments". "Can the noting by the Consultative Committee be taken as a YES", Meienberg asked.

Peter Button, the Vice Secretary-General of UPOV responded that a communication from the Secretariat of the Treaty had not yet taken place, so UPOV would consider this issue at its next meeting.

Meienberg from APBEBES pointed out that the next Consultative Committee meeting will take place after the meeting of the Governing Body of the ITPGRFA, adding that thereafter the subsequent Governing Body meeting will take place two years later. Effectively the process will be delayed by more than two years. Meienberg asked whether another option was available. However, he received no response from the UPOV Secretariat.

#### **1.4 Access to UPOV documents and publication of information**

On the issue of UPOV documents, the CC noted that information on historic documents that had been uploaded on the UPOV website; information concerning consultants that had been used by UPOV in 2014 would be presented to the CC at its 90<sup>th</sup> session, in October 2015.

The CC also agreed to consider proposals in relation to a policy on documents, including communications provided by observers, at its 90<sup>th</sup> session.

#### **1.5 Special Project Fund and Review of the UPOV Training and Assistance Strategy**

The CC considered Secretariat's Report (CC/89/4) on the planned use of the Special Project Fund for training purposes, in conjunction with a presentation of a review of the UPOV training and assistance strategy.

The Council, at its 31<sup>st</sup> extraordinary session in 2014, had decided to create a special project fund for the amount of the reserve fund exceeding 15 percent of the total income for the 2012-2013 Biennium. This amounts to 184.000 Swiss francs. The Council at its 48<sup>th</sup> ordinary session in 2014 approved the use of the special project fund for training purposes.

The Report states that “the creation of the Special Project Fund, combined with an overall total increase in extrabudgetary funds (funds in trust) has led to a review of UPOV’s strategy with regard to training and assistance”. It further adds “the review has also been conducted in anticipation of a substantial increase in demand for training and assistance as a result of the African Intellectual Property Organization (OAPI) becoming a member of UPOV and of developments concerning plant variety protection in the African Regional Intellectual Property Organization (ARIPO)”. The Report also adds that “it has been necessary to consider how to deliver a substantially larger program of training and assistance in 2015, and possibly in future years, within existing UPOV staff resources” and “recognizes the need of the Office of the Union to collaborate with partners in order to improve the effectiveness of its services in relation to the training and assistance needs of both current members and potential new members”.

The Report adds that the “purpose of the UPOV training and assistance strategy is to develop and deliver, in the most effective way with the available resources, training and assistance to address the needs of UPOV members and States and organizations in the process of becoming UPOV members”.

It further lists the basic principles for the training as follows:

- (a) facilitating the use of UPOV materials (e.g. guidance, experience, databases, publications, FAQs) available via the UPOV website;
- (b) maximizing the effectiveness of UPOV standard training programs;
- (c) building partnerships to deliver training activities, particularly in those aspects of the implementation of the UPOV system where the Office of the Union does not have sufficient expertise or resources, while ensuring a UPOV perspective in those training activities;
- (d) collaboration with members of the Union, organizations and academic institutions to provide a range of training opportunities at national and regional levels; and
- (e) providing effective pre-training and post-training support (e.g. distance learning courses) to optimize the impact of training programs and activities.

The Report also identifies training activities and resources for 2015 and beyond which includes a “Course on Plant Variety Protection” for ARIPO Member States, organized by Naktuinbouw in conjunction with UPOV and with the financial assistance of the Ministry of Economic Affairs of the Netherlands.

The Report also discusses strategies to expand training and awareness about UPOV. For instance paragraph 24 of the Report states “.....at an appropriate time, a circular may be sent to UPOV members and observers in order to obtain information on relevant training and academic programs with PVP content to which UPOV does not currently contribute, and training and academic programs with intellectual property, plant breeding/biotechnology content, for which there might be an interest to introduce a PVP module. Based on a priority assessment and available resources, UPOV representatives and UPOV-trained trainers will be involved, as appropriate, in relevant follow-up actions”.

The Report also mentions development of an UPOV training and assistance webpage in the training and assistance section that is only accessible via a password issued to UPOV representatives, alternates and UPOV-trained trainers.

The CC approved the review of the UPOV training and assistance strategy and the use of the Special Project Fund for training purposes in the context of the UPOV training and assistance strategy.

Secretariat's Report CC/89/4 raises significant concerns as obviously the aim of the Secretariat is to promote adoption of the 1991 Act by LDC and developing countries despite widespread acknowledgement of the lack of suitability of the 1991 regime for the agricultural systems of LDCs and developing countries and the adverse implications for the implementation of Farmers rights particularly as set out in the ITPGRFA. Concerns have also been expressed over the lack of transparency with regard to assistance provided by UPOV and the misleading and biased information that is provided by UPOV's training programmes and materials.

## **1.6 Extension of appointment of the UPOV Vice Secretary-General**

The UPOV Council extended the appointment of the Vice Secretary-General of UPOV Mr. Peter Button for the period 1<sup>st</sup> December 2015 to 30<sup>th</sup> November 2018.

## **2. The Administrative and Legal Committee (CAJ)**

The 71<sup>st</sup> meeting of the CAJ discussed, among others, several Explanatory Notes as well as the issue of Molecular Techniques.

### **1.1 Explanatory Notes**

A series of Explanatory Notes were discussed under agenda item "Development of information materials concerning the UPOV Convention" :

- Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (Revision)
- Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention
- 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 CAJ considered the following documents: CAJ/71/2, CAJ-AG/14/9/6, UPOV/EXN/PPM/1 Draft 4, UPOV/EXN/CAN/2 Draft 3, UPOV/EXN/NUL/2 Draft 3 and UPOV/EXN/PRP/2 Draft 3.

With regard to the revision of the *Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention*, the 9<sup>th</sup> session of the CAJ Advisory Group (CAJ-AG), concluded that “it would not be appropriate to seek to develop a revision.... for the time being”. At that session APBREBES made extensive [comments](#) on the Draft presented, with regard to implications for developing countries.

However on the request of the industry (CIOPORA), the Vice-Secretary-General suggested that UPOV members “take a step back” (i.e. disregard the conclusion of the CAJ AG) and press ahead with the revision. Thus CAJ agreed to invite UPOV members at its 72<sup>nd</sup> session (in October 2015) to present issues concerning harvested material that should be considered in relation to a possible revision of document UPOV/EXN/HRV/1 as a basis for considering how to proceed.

Discussion on the revision of the *Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the Convention* will continue at the 72<sup>nd</sup> session of the CAJ in October 2015. The CAJ agreed to consider the development of guidance concerning the status of essentially derived varieties that were not granted protection in their own right, after the adoption of the Explanatory Note. The CAJ also agreed to consider, at its 72<sup>nd</sup> session, the proposal for the Office of the Union to organize a meeting to exchange information with CIOPORA, ISF and the World Intellectual Property Organization (WIPO) in order to explore the possible role of UPOV in alternative dispute settlement mechanisms.

The 1991 Act introduced the concept of EDVs. However to date UPOV is grappling with its implementation.

Varied approaches have been adopted in determining whether or not a variety is an EDV. The International Seed Federation tends to promote “arbitration” as a method for resolving disputes concerning EDVs.

The fourth draft of the *Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention* was discussed and finalised. Interventions by Russia and Argentina resulted in provisions of the 1978 Act being included. The paragraph underlining that national laws and definitions of “propagating material” vary widely was maintained. At the 9<sup>th</sup> session of the CAJ-AG, in its [statement](#), APBREBES stressed the importance of acknowledging the existence of different definitions of propagating material at the national level.

The CAJ meeting also finalised revisions of Explanatory Notes on Cancellation of the Breeders’ Right; Nullity of the Breeders’ Right and Provisional Protection. The finalised “Explanatory Notes” will be presented to the Council (UPOV’s highest body) meeting on 29<sup>th</sup> October 2015 for adoption.

The CAJ agreed to discuss the following information materials at the 72<sup>nd</sup> meeting in October 2015

- (i) Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)
- (ii) Explanatory Notes on Variety Denominations under the UPOV Convention (Revision)
- (iii) Explanatory Notes on Propagating Material under the UPOV Convention.



## 1.2 Molecular Techniques (Doc. CAJ/71/8 and CAJ/71/9)

The CAJ took note of the report of the Technical Committee, which had received, among others, a report of the UPOV Working Group on Biochemical and Molecular Techniques and DNA-Profiling in Particular ([BMT/14/20](#)).

The CAJ concluded (para 84-88 Report on conclusions) that it would be useful to repeat the joint workshop at relevant meetings of the OECD and ISTA, and to hold the next BMT meeting in Russia in 2016, including the dedication of a particular date ("Breeders' Day"), for the items on the use of molecular techniques in the consideration of essential derivation and variety identification. It suggested to the Council that in coordination with OECD and ISTA a joint document is developed explaining the principal features of the systems of OECD, UPOV and ISTA (e.g. DUS, variety identification, variety purity, etc.). Further, it was suggested to the Council to develop an inventory on the use of molecular marker techniques, by crop, with a view to developing a joint OECD/UPOV/ISTA document containing that information. The CAJ agreed that it would be necessary to establish criteria and a process for information to be added to the document. Also, the BMT is planning to develop lists of possible joint initiatives with OECD and ISTA in relation to molecular techniques.

With regard to the FAQs on concerning the information on the situation in UPOV with regard to the use of molecular techniques for a wider audience, including the public in general, an initial draft had been prepared:

*"Is it possible to obtain protection of a variety on the basis of its DNA-profile?"*

*"For a variety to be protected, it needs to be clearly distinguishable from all existing varieties on the basis of characteristics that are physically expressed, e.g. plant height, time of flowering, fruit color, disease resistance etc. [Molecular techniques (DNA profiles) may be used as supporting information]."*

*"A more detailed explanation is provided in the FAQ 'Does UPOV allow molecular techniques (DNA profiles) in the examination of Distinctness, Uniformity and Stability ('DUS')?"*

"See also:

*"What are the requirements for protecting a new plant variety?"*

APBREBES delivered a [statement](#) on a crucial aspect of molecular techniques in UPOV, the enforcement of plant breeders' rights titles based on DNA fingerprinting. APBREBES pointed at the costly technical and questionable legal preconditions to be provided by UPOV and its member states.

## 1.3 Matters Concerning Observers in the CAJ-AG

The CAJ agreed to consider matters concerning observers in the CAJ-AG in the event that a session of the CAJ-AG is convened by the CAJ. The CAJ-AG is a UPOV body but closed to observers. In October 2014, the UPOV Council decided that the CAJ-AG will in future not meet regularly, but on an ad-hoc basis.

#### **1.4. Implementation of the Nagoya Protocol on Access and Benefit-Sharing under the Convention on Biological Diversity**

The European Seed Association recalled that at the last CAJ meeting in October 2014, it had addressed its interest to discuss the implementation of the Nagoya Protocol on Access and Benefit Sharing under the Convention on Biological Diversity (CBD) and asked for explanations how this interest is going to be further discussed at UPOV? The Vice Secretary-General reported that the CC and the Council had noted the interest, without further follow up. The EU delegation remarked that it might be useful to discuss it further. Korea said that it is not sufficiently aware of the issue and remarked that guidance or explanation would be helpful. The EU Community Plant Variety Office (CPVO) was of the opinion that many are keen to discuss the implementation of the Nagoya Protocol, and that nothing would prevent any delegation to return on this issue in the Council.

The CAJ noted that the interest to discuss the relationship and effects of the implementation of the “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity” for the breeder’s exemption had been reported to the Consultative Committee and the Council, as set out in document CAJ/71/2, paragraph 48.

#### **1.5 Meeting schedule of the CAJ**

The Vice Secretary-General also suggested that the CAJ should meet only once a year. UPOV members reacted positively to this suggestion and agreed that this proposal should be considered when discussing the 2016 schedule of meetings.