

APBREBES Summary of Key Issues Discussed by UPOV Bodies – the Consultative Committee & the UPOV Council (October 2013)

The International Union for the Protection of New Varieties of Plants (UPOV) held a series of meetings of its various bodies between 21st and 25th October 2013.

UPOV's Administrative and Legal Committee (CAJ) that mainly deals with matters of an administrative and legal nature met on 21st October. The Consultative Committee met on 23rd October. This Committee advises UPOV's highest body, the UPOV Council, which met on 24th October. The CAJ Advisory Group (CAJ-AG), a sub-group formed by the CAJ met on the afternoon of 21st October and on 25th October.

A report on the UPOV Seminar on essentially derived varieties held on 22nd October is available at http://www.apbrebes.org/files/seeds/APBREBES%20rep%20EDV%20Sem%2022%20Oct%2013_0.pdf. A report on discussions held in the CAJ-AG is available at <http://www.apbrebes.org/files/seeds/F%20Apbrebes%20on%20CAJ-AG%20%281%29.pdf>.

During the week-long session, these UPOV bodies considered a number of critical matters. This summary attempts to capture some key issues discussed by UPOV members in the Consultative Committee and the Council.

The following topics are covered by this Summary:

- **Participation of observers in the Advisory Group of the Legal and Administrative Committee (CAJ-AG).**
- **South Centre's request for observer status.**
- **Friends World Committee for Consultation (FWCC) request for observer status.**
- **Matters raised by the International Seed Federation (ISF).**
- **UPOV's Communication strategy**
- **Conformity of the Law for the Protection of New Varieties of Plants of Bosnia and Herzegovina with the 1991 Act of the UPOV Convention.**
- **Developments concerning the Plant Breeders' Bill of Ghana**
- **Information on Resolution on Implementation of Farmers' Rights, Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).**
- **ARIPO Draft Legal Framework for the Protection of New Varieties of Plants**
- **Program & Budget for the 2014-2015 Biennium.**
- **Adoption of documents.**

Issues discussed by the Consultative Committee

Participation of observers in the Advisory Group of the Legal and Administrative Committee (CAJ-AG) (CC/86/7 and CC/86/7 ADD). Participation in the CAJ-AG (a sub-group of the CAJ) is

presently limited to Member States. Observers may be invited on “an ad hoc basis”. It is worth noting that CAJ-AG has Terms of Reference, which are discriminatory and biased (i.e. it states “Observer organizations, in particular those representing the interests of breeders, might be invited by the advisory group to present their views”). In the case of other CAJ sub-groups such as the BMT Review Group and Working Group on Variety Denominations, these sub-groups have invited the seed industry to their meetings even without a basis in their respective Terms of Reference.

At the 65th CAJ session in March 2012, APBREBES called on UPOV to improve participation of observers in the CAJ-AG. It proposed two options (i) setting aside a limited number of permanent places for observers representing various stakeholder groups such as farmers, breeders and certain other observer non-governmental organizations (NGOs) (e.g. two per stakeholder group) in the CAJ-AG and to allow the stakeholder groups to coordinate among themselves on the persons who would occupy those places at each session of the CAJ-AG; (ii) All observers of CAJ be granted observer status in CAJ-AG. The matter has been on the UPOV agenda since then without any resolution.

The Consultative Committee (CC) that met on 23rd October 2013 once again considered the APBREBES proposal, and invited APBREBES to make a presentation on the matter.

In his statement, Francois Meienberg of APBREBES emphasized that rules for observers in all CAJ sub-groups should be transparent, coherent, non-discriminatory, inclusive and easy to implement, and this was not the case with the current rules. For the full statement see http://www.apbrebes.org/files/seeds/131023%20APBREBES%20Intervention%20CC%20Observer%20Status%20CAJ-AG_def.pdf.

The CC however rejected APBREBES’s proposal and endorsed the current approach whereby the CAJ-AG invites, on an ad hoc basis, organizations that have observer status in the CAJ to present their views at the relevant part of the CAJ-AG.

The CC also agreed not to transmit the document on “Observers in UPOV Bodies” to APBREBES, which had requested the document to facilitate preparation of its presentation on observer status to the CC.

The CC disregarded the fact that APBREBES already had on the basis of Freedom of Information Acts in UPOV Member States access to UPOV Restricted Area documents and had made them available on its website. For more information on APBREBES’s use of freedom of information see <http://www.apbrebes.org/news/freedom-information-legislation-puts-upovs-restricted-area-question>

South Centre’s request for observer status (Doc. CC/86/13). The South Centre (SC) an intergovernmental organization of developing countries requested observer status in the UPOV Council and the CAJ on the basis that it “provides policy advice and technical and other assistance to developing country governments, aimed at enhancing the understanding of the options

available for the implementation of international treaties that they may be party to or in the process of joining, such as the TRIPS Agreement and the UPOV Convention". SC has observer status at the World Intellectual Property Organization (WIPO) and the UN General Assembly.

However at this UPOV session no agreement could be reached on SC's request as some developed countries raised concerns and doubts over its involvement in UPOV, sources say.

It was agreed that SC would be invited to make a presentation at the October 2014 session of the CC to explain how its constituent treaty provided the basis to determine "competence in areas of direct relevance in respect of matters governed by the UPOV Convention"

Friends World Committee for Consultation (FWCC) request for observer status (Doc. CC/86/12; CC/86/12 ADD). The Quaker UN office (QUNO) through the FWCC requested observer status in the UPOV Council as well as in the CAJ stating that QUNO seeks to increase understanding and public discussion of international policy relating to intellectual property and plant breeding.

The CC agreed to invite FWCC to explain at the October 2014 session how its statutes provided the basis to determine "competence in areas of direct relevance in respect of matters governed by the UPOV Convention".

Matters raised by the International Seed Federation (ISF) (Doc. CC/86/11). ISF presented to the Consultative Committee a wish list aimed at further harmonizing the application, examination and granting of plant breeders' rights (PBRs).

ISF represents the interest of the mainstream of the seed industry, including the multinational seed companies such as Monsanto, Syngenta, Bayer, DuPont Pioneer, DowAgroSciences, which continue to control about 75% of all private sector plant breeding research, and 60% of the commercial seed market.

The wish list includes new initiatives such as developing an international filing system for PBR applications based on the international patent filing system in the WIPO set up under the Patent Cooperation Treaty, a central approval system for variety denominations and a quality assurance program for PBR offices.

At first, ISF outlined its recommendations in a letter to the Vice Secretary-General of UPOV, Mr. Peter Button, dated 21 January 2013. According to the letter, the recommendations are based on a thorough discussion by the ISF Intellectual Property Committee and the ISF Breeders Committee of replies to a questionnaire sent out to its members asking them about problems they have encountered with the application for, and examination and granting of PBRs.

On receiving the letter, the UPOV Secretariat converted the ISF wish list into an annex of an official document (CC/86/11) of the Consultative Committee proposing ways in which the ISF wish list can be accommodated.

According to sources the ISF recommendations were strongly backed by the UPOV Secretariat including by its Secretary-General, Mr. Francis Gurry.

Several development experts who have analyzed the ISF recommendations have expressed concern that these recommendations would lead to loss of policy space and flexibilities, as they will regulate areas not currently regulated by the two existing Acts of 1978 and 1991 of the UPOV Convention. A Patent Cooperation Treaty-like filing system for UPOV will further reinforce the monopolization by multinational companies of seed systems, some experts say.

[The Patent Cooperation Treaty makes it possible to seek patent protection for an invention simultaneously in each of the large number of countries by filing an "international" patent application. The Treaty regulates in detail the formal requirements with which any international application must comply.]

For more details on ISF's recommendations to the Consultative Committee on application, examination and granting of PBRs and the decisions of the CC, see <http://www.twinside.org.sg/title2/biotk/2013/biotk131101.htm>

UPOV's Communication strategy (Doc. CC/86/5). The Secretariat presented to the Consultative Committee a Communication Strategy in CC/86/5 aimed at raising awareness of the benefits of the UPOV system of plant variety protection; provide improved information for members of the Union on the operation of the UPOV system; and to enhance the understanding of the UPOV system by stakeholders.

Components of the Strategy include Frequently Asked Questions (FAQ) about the UPOV system; a brief, illustrative explanation of the benefits of the UPOV system; an update of the Impact Study, with a plan for the updating to be presented in 2014.

Sources say some countries expressed concern over the way in which certain FAQ were approached by the Secretariat. This includes for e.g. information regarding the relation between the Convention on Biological Diversity and UPOV, biopiracy, and the relation between plant breeders' rights and patents.

With a few amendments the CC approved the communication strategy as contained in the Annex to CC/86/5. The CC also approved some of the frequently asked questions. See C/47/15 Rev paragraph 34 for a list of FAQs that were approved.

The CC also agreed to consider answers to other FAQ, on the basis of comments to be sent to the Secretariat by November 30, 2013. The new draft answers will be discussed by the CC at its next session (87th session) in April 2014

Issues discussed by the Council

Conformity of the Law for the Protection of New Varieties of Plants of

Bosnia and Herzegovina with the 1991 Act of the UPOV Convention (Doc. C/47/17).

The Council examined the conformity of the PVP Law of Bosnia and Herzegovina with the provisions of UPOV 1991 as presented in C/47/17 and agreed to allow Bosnia and Herzegovina to deposit its instrument of accession to the 1991 Act. During the discussion the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA) commended Bosnia and Herzegovina for a law stronger than UPOV 91, and requested a broad definition of propagation and propagation material.

Developments concerning the Plant Breeders' Bill of Ghana (Doc. C/47/18).

The UPOV Council at its session in November 2012 confirmed, subject to certain changes, the conformity of the Bill with the provisions of UPOV 1991 provisions. However, during the first reading of the Bill, additional changes were proposed and these changes are presented in UPOV document C/47/18. The CC agreed that the changes do not affect the substantive provisions of the 1991 Act and accordingly reaffirmed the conformity of the Bill with the UPOV 1991.

An important development to note alongside the above is a statement issued by Food Sovereignty Ghana calling on the country's President to not join UPOV 1991. Food Sovereignty Ghana is a grass roots movement dedicated to the promotion of food sovereignty in Ghana. The statement issued on 26th October 2013, titled "President Mahama, Don't Join UPOV 91" states: *"The bill is a danger to the way we farm and to Ghana's rich variety of seeds. It is a danger to how we develop our own varieties of seeds, and how we farm in Ghana. It is a give-away to foreign agribusiness corporations, which is why UPOV 91 has been nicknamed the Monsanto law in some countries."* For the full statement see <http://foodsovereigntyghana.org/311/>

Information on Resolution on Implementation of Farmers' Rights, Article 9 of the

International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

A representative of the Food and Agriculture Organization of the United Nations (FAO) informed the Council that the fifth session of the Governing Body of the ITPGRFA that met in Oman, from 24th to 28th September, 2013, had adopted a Resolution on Implementation of Article 9 on Farmers' Rights under the Agenda item "Report by the President on the work of the eighty-sixth session of the Consultative Committee" (C/47/15 Rev).

The Council noted that the resolution requests the Secretary of the Governing Body "to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments." (C/47/15 Rev., paragraph 54). For the complete Resolution on Farmers' Rights, see <http://www.apbrebes.org/news/itpgrfa-governing-body-takes-decisions-regarding-upov>

ARIPO Draft Legal Framework for the Protection of New Varieties of Plants. The African Regional Intellectual Property Organization (ARIPO) is considering a regional draft legal framework for plant variety protection. The UPOV Secretariat assisted ARIPO in developing the draft legal framework to be in conformity with UPOV 1991. The process of developing the framework and its substance has been criticized by numerous civil society organisations and small-farmer groups for simply replicating UPOV 1991, without consideration of the local needs or the conditions prevailing in the region. The framework undermines the role of the informal seed system that represents 80 % of the local seed supply for the dominant subsistence agriculture production. The critique of the draft legal framework is available at <http://tinyurl.com/a4v5gte>.

During the Council meeting, an ARIPO official informed UPOV members that the UPOV Secretariat, the United States Patent and Trademark Office (USPTO), the European Community Plant Variety Office (CPVO) and the seed industry such as the African Seed Trade Association (AFSTA), the French National Seed and Seedling Association (GNIS) and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), had been consulted and attended a workshop that took place 22-23 July 2013 in Lilongwe, Malawi. The official also claimed that CSOs had also been involved in drafting the proposed legal Framework, adding that the draft would soon be communicated to the UPOV Office.

APBEBES made an intervention on this matter, referring to document C/47/3 as well as various sources that the UPOV Office has been involved in supporting ARIPO in drafting of the Draft Legal Framework for the Protection of New Varieties of Plants. It referred to a statement issued by the Alliance for Food Sovereignty in Africa (AFSA), a broad based alliance of African regional farmers' networks and African NGO networks, expressing serious concerns with the approach taken by the ARIPO Draft Legal framework on PVP.

APBEBES said that the AFSA statement raises a number of concerns such as loss of sovereign rights as the draft legal framework is proposing a centralized PVP regime in the region, and the lack of mechanisms to adequately deal with its impact on the dominant subsistence farming systems in ARIPO Member States.

But overall the main question civil society groups raised is the suitability of UPOV 1991 as a PVP regime for the ARIPO Member States, APBEBES said.

It was also pointed out that 12 out of 18 members of the ARIPO region are Least Developed Countries (LDCs), which means the poorest of the poor with extremely vulnerable economies. According to AFSA the framework being developed does not address their needs. LDCs are also under no international legal obligation to put in place a PVP regime, APBEBES added.

Members of UPOV 1991 today are mostly economically advanced, engaged in commercial farming and professional breeding, but these conditions do not exist in most of the new countries including ARIPO Member States who would like to join UPOV, APBEBES said, adding that there has been no independent assessment or analysis of any kind that proves beyond doubt that UPOV 1991 corresponds to the needs of the region. It further urged the ARIPO Secretariat and the UPOV

Office to reconsider the approach of the ARIPO draft legal framework in view of the challenges facing the region.

APBREBES also highlighted AFSA's concerns that the process of developing the legal framework has not been inclusive or participatory. In stating so, it acknowledged that at a meeting in Malawi a civil society representative was allowed to be present on very short notice, adding that this clearly was an inadequate representation for the entire ARIPO region. Further, civil society and farmer groups that have submitted detailed concerns over the process have yet to receive any formal written response on issues they have raised, according to APBREBES, urging ARIPO, the UPOV Office and donors involved in this process to make the process more participatory and inclusive.

The ARIPO official countered that a large number of civil society representatives had participated amply in the Malawi workshop to discuss the draft ARIPO law.

For the full AFSA statement see: http://www.grain.org/bulletin_board/entries/4802-aripo-s-plant-variety-protection-law-criminalises-farmers-and-undermines-seed-systems-in-africa

Program & Budget for the 2014-2015 Biennium (C/47/4 REV.). The Council approved the Program and Budget for the 2014-2015 biennium, amounting to Swiss Francs 794,000 (representing a 0.1% decrease from the 2012-2013 Biennium). Several concerns with regard to the Program and Budget were raised in the Consultative Committee at the last UPOV session. For the APBREBES report on the last session see <http://www.apbrebes.org/news/apbrebes-report-spring-2013-session-upov-bodies>.

Adoption of documents. The Council adopted the following documents:

- Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention (Revision) (document UPOV/INF/6/3)
- Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD/1)
- Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV/1)
- Glossary of Terms Used in UPOV Documents (Revision) (document TGP/14/2)
- Guidance on the Use of Biochemical and Molecular Markers in the Examination of Distinctness, Uniformity and Stability (DUS) (document TGP/15/1)
- Exchangeable Software (Revision) (document UPOV/INF/16/3)
- List of UPOV/INF-EXN Documents and Latest Issue Dates (Revision) (document UPOV/INF-EXN/5)
- List of TGP documents and latest issue dates (Revision) (document TGP/0/6)

All adopted documents will be included in the UPOV Collection at http://www.upov.int/upov_collection/en/

Relevant UPOV Documentation

- UPOV Council documents are available at http://www.upov.int/meetings/en/details.jsp?meeting_id=2962
- Administrative and Legal Committee documents are available at http://www.upov.int/meetings/en/details.jsp?meeting_id=29784
- Consultative Committee documents are restricted. However some documents were obtained by APBREBES through the Freedom of Information Act. These documents are available at <http://www.apbrebes.org/UPOV-Restricted-Area>
- The Report of the President on the Work of the 86th Session of the Consultative Committee is contained in C/47/15 Rev., available at http://www.upov.int/edocs/mdocs/upov/en/c_47/c_47_15_rev.pdf
- Decisions of the UPOV Council are contained in C/47/19 and available at http://www.upov.int/edocs/mdocs/upov/en/c_47/c_47_19.pdf
- Press Release issued by UPOV is available at http://www.upov.int/edocs/mdocs/upov/en/c_47/c_47_16.pdf