

Report on the UPOV's 2016 Spring Session

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

The UPOV spring meetings concluded with several decisions: the holding of a joint symposium with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) on interrelations between Article 9 of the ITPGRFA and instruments of UPOV; UPOV Members to provide comments on a possible "International System of Cooperation" (ISC) and the mandate and terms of reference for a possible ISC working group; deferring the adoption of an Explanatory Note on Propagating Material and referring the matter back to the Administrative and Legal Committee (CAJ); agreeing on the programme for a Seminar on Harvested Material and Propagating Material to be held on 24th October and the preparation by the UPOV Secretariat of a draft FAQ on the relevance of the UPOV system of plant variety protection for the UN Sustainable Development goals (SDGs).

These decisions were taken on 17th March 2016 by UPOV's executive arm, its Consultative Committee and endorsed by its apex body, the Council.

Meeting documents for the UPOV Council are available at http://www.upov.int/meetings/en/details.jsp?meeting_id=36742

Access to meeting documents for the Consultative Committee is restricted to UPOV Members. Access to such documents are however available on the APBREBES's website at <http://www.apbrebes.org/UPOV-Restricted-Area>. APBREBES gains access to these documents using the Freedom of Information Acts of UPOV member states.

Below is a brief update providing insights into some discussions at the Consultative Committee and the Council, on the abovementioned matters.

1. Interrelations: Article 9 of the ITPGRFA and instruments of UPOV

The subject of interrelations emerged in 2013 with the adoption of a Resolution on "Implementation of Article 9, Farmers' Rights" by the ITPGRFA Governing Body.

Motivated by concerns that the activities of UPOV and the World Intellectual Property Organization (WIPO) were undermining implementation of Article 9 (which concerns Farmers' Rights), the Resolution requested the ITPGRFA Secretariat "to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments".

On this agenda, the Consultative Committee heard a presentation by Shakeel Bhatti, the Secretary to the ITPGRFA, as well as several statements by observers and UPOV Members. The meeting ended with a decision to hold a joint symposium on 26 October with the ITPGRFA on the interrelations between the Treaty (its Article 9) and the UPOV Conventions. For the full decision see below the extract from the Report by the Consultative Committee to the UPOV Council.

However the outcome is a far cry from expectations many had with the process of identification of inter-relations, such as the commissioning of an independent study that examines the extent to which the activities of UPOV and WIPO support or hinder farmers' rights, and if a symposium is held, that it should adequately include speakers who are keen on the full realization of Article 9 and particularly from the peasant farming community.

In February of this year, more than 50 civil society and farmer organizations in a [letter to Bhatti](#), stressed that the suggestion to hold a symposium whereby Contracting Parties present information on their experiences in implementing the UPOV Convention and ITPGRFA was inadequate for the

identification of possible areas of inter-relations between the Treaty and relevant instruments of UPOV and WIPO. The signatories of the letter urged the Treaty Secretariat to identify independent experts with extensive expertise on Farmers' rights to undertake an investigation on implementation of Article 9 by UPOV and WIPO.

For a more detailed account of the discussions in the Consultative Committee see '[Outcome on FAO Treaty/UPOV inter-relations, far cry from expectations](#)'

See also APBEBES Press Release '[UPOV's Symposium on Interrelations between ITPGRFA & UPOV, Inadequate to Implement "Farmers Rights" Resolutions](#)'

Extract from the Report by the Consultative Committee to the UPOV Council, which endorsed the approach.

25. The Consultative Committee considered the possible elements of a symposium program presented by the Secretary of the ITPGRFA, as follows:

Welcome remarks by UPOV and ITPGRFA

Session 1: Overview of UPOV and the ITPGRFA

- Overview of UPOV
- Overview of the ITPGRFA

Session 2: Analysis of the Inter-relations between Farmers' Rights and Plant Breeders' Rights Under the ITPGRFA and the UPOV Convention

- Presentation by 4 experts
- Discussion

Session 3: Experiences of the Contracting Parties in Implementing the UPOV Convention and the ITPGRFA

- Experiences shared by 4 Contracting Parties
- Discussion

Session 4: Overview of initiatives involving the ITPGRFA and UPOV

- Information initiatives (joint workshops)
- Practical initiatives (Platform for Co-development and Transfer of Technology; Public Private Partnership on Pre-breeding)
- Mutual attendance, participation, and information exchange (Committees, enhancement, etc)
- Discussion

Closing Remarks by UPOV and ITPGRFA

26. The Consultative Committee endorsed the above elements of the program whilst noting that more than four presentations by Contracting Parties might be necessary and noting that it would be useful to provide information on real problems experienced by farmers and breeders.

27. The Consultative Committee noted that the draft program would need to be considered within the ITPGRFA. If there were substantial changes proposed by the ITPGRFA, the Consultative Committee would be consulted by correspondence. If agreement could not be reached by correspondence, the Consultative Committee agreed that it would need to reconsider the matter further at its ninety-second session.

28. The Consultative Committee recommended to the Council to approve the organization of a "Symposium on possible interrelations between 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)”, to be held at UPOV Headquarters in Geneva, on October 26, 2016, as follows:

- (a) the draft program for a symposium, as presented by the Secretary of the ITPGRFA (see paragraphs 25 and 26 above);
- (b) four experts, to be agreed by the Office of the Union, in consultation with the President of the Council, and the Secretary of the ITPGRFA, to be invited to present their views at the Symposium;
- (c) Contracting Parties to the UPOV Convention and the ITPGRFA would present information on their experiences in implementing the UPOV Convention and the ITPGRFA;
- (d) invitations to the Symposium to be sent to members and observers in UPOV bodies and to Contracting Parties and observers to the ITPGRFA and the Symposium to be open to the public with advance registration, with the presentations and a video of the Symposium being made available on the UPOV website after a suitable broadcast delay;
- (e) a joint publication of the proceedings of the Symposium to be produced by the ITPGRFA, containing the speakers’ written contributions and a summary of discussions, to be made available on the UPOV website at a later date;
- (f) UPOV to provide the venue for the Symposium and to cover the interpretation costs in English, French, German and Spanish.

29. The Consultative Committee agreed to consider the outcome of the Symposium at its ninety-second session and to consider any possible further action concerning interrelations at that time.

For background information see APBREBES Updates [Issue # 21, March 15, 2016 APBREBES Updates Issue #17, October 26, 2015](#), and [APBREBES Updates Issue #14, May 8, 2015](#)

2 Proposal concerning an “International System of Cooperation” (ISC)

The 91st session of the Consultative Committee agreed that UPOV Members would be given until May 20, 2016, to:

- (a) provide additional issues concerning a possible ISC;
- (b) comment on the draft mandate and terms of reference; and
- (c) indicate their wish to participate in a working group to explore the issues concerning a possible ISC.

The “International Systems of Cooperation” (ISC) is an initiative that emerged from a joint proposal by the International Seed Federation (ISF), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOPORA) and CropLife International (CLI), 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 the distinctness, uniformity and stability of the variety.

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 plant variety offices. For the UPOV session in October 2015, 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. See [Newsletter Issue # 19, December 10, 2015](#)

For the 2016 spring session, the UPOV Secretariat compiled comments from Denmark, Japan, New Zealand, Norway and Russia on the possible ISC as well as presented draft Terms of Reference for the setting up of a working group for a possible ISC (see CC/91/5).

The comments by UPOV Members clearly question the need for ISC, its legality vis-a-vis the UPOV Conventions, and the impact of such a system on national PVP systems and the policy space of UPOV Members.

The Russian Federation expressed opposition to a possible ISC and the setting up of a working group on that matter. In its comments, the Russian Federation states: "We feel it should be inappropriate to discuss about so called 'International System of Cooperation' (ISC) and therefore about the ad hoc working group on this issue (ISC-WG), because it is about centralized administration of PBR applications" adding that "Currently existing international cooperation between authorities of the UPOV Member states under the auspices of the UPOV Office includes all important steps that ensure the breeder's right grant is applied with minimum cost and in minimum time".

Norway in its comments notes that full implementation of the ISC implies harmonization of the application form and the publication of the application, adding that removing the current flexibility of Member States also removes the possibility to adjust to specific needs of Member States and their breeders. It further adds that the "ISC assumes that different Member States and the diversity of breeders have congruent needs" and raises concerns that removing flexibility would alter the content of UPOV Conventions and thus the need to examine the legal framework of UPOV.

Norway also expressed concern that centralized preliminary examination offices "may drain competence in the Member State".

It also calls on the importance to examine and describe the relation between ISC, the ITPGRFA and the Nagoya Protocol, and the effect of ISC on those instruments as well as the positive and negative impacts of a possible ISC.

Denmark raised, *inter alia* questions about the financial consequences of ISC.

Other UPOV Members raised similar concerns during discussions in the Consultative Committee.

The ambiguity and lack of empirical evidence over the need for ISC, its legality vis-à-vis UPOV Conventions and its implications for UPOV members, strongly suggests that a Working Group which develops proposals for a possible ISC is premature and thus undesirable.

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](#).

3. Explanatory Notes on Propagating Material under the UPOV Convention

The Consultative Committee considered [Draft 6 of the Explanatory Note on Propagating Material](#) which states the following

“FACTORS THAT MIGHT BE CONSIDERED IN RELATION TO PROPAGATING MATERIAL

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 draft is based on the agreement reached at the Administrative and Legal Committee (CAJ), which met in October 2015 and was set to be adopted by the Council at its spring session.

The definition of propagating material varies considerably among UPOV Members, as UPOV Conventions do not provide a definition of "propagating material". While UPOV Members are keen on reflecting the differences in understanding of "propagating material", industry has been pushing for a broad and prescriptive definition of "propagating material" presumably to have more opportunities to enforce their plant breeders' rights.

Ahead of the Consultative Committee meeting, several industry association (CIOPORA, Croplife, ISF and European Seed Association) submitted letters to UPOV Members calling for the deletion of "is factually used for propagating purposes" from indent (iii).

Discussions on this matter resulted in the postponement of the adoption of Draft 6. The matter has been referred back to the 73rd session of the CAJ, which will meet in October 2016, for its consideration taking into account comments made on Draft 6 and at the Seminar on Propagating Material to be held on 24th October. The following suggestions were made to modify the text of Draft 6.

“FACTORS THAT ~~MIGHT BE~~ HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL

“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:

[...]

(ii) whether the material has been or may be 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;

[...]”

The proposed changes broadens the scope of what may be considered as propagating material.

4. Seminar on Propagating and Harvested Material

The Council approved the draft program for a Seminar on propagating and harvested material in the context of the UPOV Convention that is to be held on 24th October and is open to the public with advance registration.

The program reflects the following sessions: Session I: Perspectives on the notions of propagating material and harvested material; Session II: Analysis of court decisions on propagating material and harvested material; Session III: Experiences of cases concerning propagating material and harvested material.

The program mainly features speakers from the industry, academic institutions and national PVP offices. A representative from Via Campesina (European Coordination) is the sole voice of peasants on the program.

This Seminar is the result of contentious discussions over the need for an Explanatory Note on harvested material and on the scope of the definition of propagating material.

5. Developments of relevance to UPOV in other international fora

Under this agenda item it was agreed that Secretariat will prepare a draft FAQ on the relevance of the UPOV system of plant variety protection for the UN Sustainable Development goals (SDGs).