

## **Multinational seed industry pitches for further harmonization in UPOV**

London, 13 November (Sangeeta Shashikant) – The multinational seed industry is pressing for more international harmonization of the plant breeders' rights protection system that will intensify corporate control.

The International Seed Federation (ISF), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CLOPORA) and CropLife International (CLI) argued for this at the 88<sup>th</sup> session of the Consultative Committee (CC) of UPOV, calling for an international filing system, an UPOV quality assurance program and a central examination system for variety denominations. The CC met in Geneva on 15 October 2014.

The 87<sup>th</sup> session of the CC agreed to invite the ISF, the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CLOPORA) and CropLife International (CLI) to elaborate on the problems faced with the current situation and possible solutions offered by an international filing system, a UPOV quality assurance program and a central examination system for variety denominations", for consideration by the CC at its 88<sup>th</sup> session.

The invitation was based on a letter presented by the ISF to UPOV members in October 2013, outlining a wish-list to further strengthen breeders rights by harmonizing the application, examination and granting of plant breeders' rights (PBRs).

ISF, CLOPORA 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 88<sup>th</sup> session of the CC considered a document prepared by the Secretariat (CC/88/9) - which contained in Annex I a summary of the International Patent Filing System: Patent Cooperation Treaty (PCT); the International Trademark System: Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement (Madrid) and the International Design System: Hague Agreement Concerning the International Registration of Industrial Designs (Hague).

Annex II of Doc. CC/88/9 contains a joint written contribution by ISF, CLOPORA and CropLife International that focuses on "elaborating the outlines and advantages of an international filing system" which the proponents refer to as an "International System of Cooperation". Annex II is divided into 3 parts (i) Introduction; (ii) Elements of an international system of cooperation in processing of applications for plant breeders' rights; and (iii) Perceived benefits of an international system of cooperation in processing of applications for plant breeders' rights.

The main aim of the seed industry is to consolidate and expand their control globally over the seed sector by enhancing their rights as well as to strengthening their ability to claim plant breeders' rights (PBRs), as easily and quickly as possible, in many more countries, and on many

more crops.

According to sources, when the matter came up for discussion, some developing countries raised concerns and made clear that they were not in favor of taking forward the industry proposal. On the other hand, the UPOV Secretariat and some developed countries appeared to favor exploring the matter further.

The CC concluded its discussion on the industry proposal by noting the information contained in CC/8/9 and the joint presentation by ISF, CIOPORA and CropLife International.

Further, the CC requested the Secretariat “to prepare a document to clarify the issues raised and possible ways forward with regard to an international system of cooperation, for consideration by the Consultative Committee at its eighty-ninth session, in March 2015”.

A civil society representative of the Association for Plant Breeding for the Benefit of Society (APBREBES), an accredited observer to UPOV, expressed concern over the inequitable consultation process held over the industry proposal as no opportunity was provided to other stakeholder groups to present their views on the proposal.

[Documents and proceedings of the Consultative Committee are only accessible to UPOV member states. Unless invited by the CC, observers are not allowed access to the CC documents or the proceedings of the CC].

## **The Seed Industry Proposal**

The industry proposal is to develop an international system of cooperation (ISC) with regard to filing, processing and examination of applications for PBRs. It is proposed that with this system, breeders using the ISC should be able to file an application in any number of UPOV members using a single application form prepared by the breeder in their language of choice, regardless of the breeder's nationality or residence and locus of the breeding activity. Thereafter, the ISC receiving and processing offices will facilitate distribution of the processed applications to UPOV members designated by the breeder without further effort on the part of the breeder.

It is further proposed that the ISC route PBR applications through international phase examination conducted by leading examination office(s) that will review all formal (i.e., non-DUS testing) matters. This phase could include a search for relevant varieties of common knowledge against which the application variety may be compared. The ISC would then forward this preliminary review, along with the international search report to the UPOV Members designated by the breeder for DUS (Distinct, Uniform and Stable) testing.

The industry paper proposes that UPOV members should share DUS testing responsibilities and centers of excellence should be developed to facilitate take-over of test reports. Applicants would send plant material as well as DUS fees directly to the testing station of their choice.

According to the proposal, the ISC shall send the DUS test report, plus any other required fees, to all destination countries for which the breeder has applied and on the basis of the DUS report, the countries shall grant the title. The ISC would not have a role in the DUS examination, but would coordinate and monitor the DUS examination process including receive a report from each destination UPOV member as to the final decision to grant or not to grant PBRs for the subject variety and any changes in the status of the granted rights, such as lapse, forfeiture, invalidation or expiration of the rights, and the disposition of the propagating material received by each UPOV member examining authority. Objections against proper

conduct of the DUS report would be filed with the ISC, according to the industry proposal.

The multinational seed industry proposal stresses on maintaining “confidential” information provided by the applicant relating to pedigree and parental lines of hybrids. It also envisages centralized information storage and publication with regard to the applications it receives.

The industry further proposes that the ISC should bind UPOV members by contract to implement and apply the system’s procedures and standards uniformly and consistently.

In support of its proposal, the seed industry states that the proposed system will simplify the process and costs for filing and processing PBR applications, consequently resulting in more PBR applications by more breeders in more crops, countries and regions. It argues that its proposal will benefit small and medium sized breeders; higher quality PBRs, more employment opportunities, breeding and innovation will prevail, and that more countries and regions will become UPOV members.

Industry further argues that the harmonized regime of the EU Community Plant Variety Rights (CPVR) demonstrates the advantages of adopting a uniform and more harmonized approach to the deployment of PBR via UPOV.

## **Critique of the Industry Proposal**

Industry’s proposal raises a number of concerns.

Within the current UPOV legal framework (the 1978 and 1991 Acts), the legal basis of industry’s proposal is questionable. The proposal speaks of harmonized and centralized filing and examination procedures as well as DUS testing stations, elements that fall outside the scope of the current legal framework.

WIPO’s harmonized filing systems (the PCT system, Hague Agreement & Madrid Protocol) are independent treaties, which came about through an intergovernmental process. Industry’s proposal appears to be an attempt to bypass such an intergovernmental process and to develop a cooperation system on the basis of a contract.

Notwithstanding the legal standing of the proposal, the seed industry proposal raises other significant concerns. It is essentially advocating for another round of harmonization with regard to PVP, this time in relation to the filing and examination procedures. Effectively this would enable multinational companies to introduce UPOV 1991 plus measures (e.g. requiring confidentiality over pedigree and parental lines of hybrids, harmonizing requirements and centralizing systems for filing and examination), and accordingly reduce the flexibility available to UPOV members with regard to the processing and examination of PVP applications.

For example, the industry proposal envisages that procedures and information required for filing applications will be standardized. Examination of the application will be handled by “leading examination offices”, while DUS testing will be handled by specific centers, of the breeder’s choice. This suggests that the entire process of filing and examination would be outsourced to specific offices, with the role of national PBR offices reduced to merely being “ceremonial” with regard to either granting or refusing to grant on the basis of outcome determined by foreign offices. By increasing dependence of national PBR offices on foreign offices, the proposal reduces capacity of national PBR offices.

The industry proposal also proposes that fees for DUS testing should be paid to the testing

station of the breeder's choice, suggesting that local PBR authorities may no longer be able to charge DUS fees for separate DUS testing, if the authority is dissatisfied with the DUS testing that has been conducted, thus effectively making DUS test reports produced by the centralized DUS testing stations binding on the local PBR authority. The proposal to centralize DUS testing fails to take into account that tests conducted in a particular country with particular climatic conditions may not be relevant to another country or region with different climatic conditions.

The proposal also mentions "one time application payment" from a "universally applicable fee schedule" suggesting that governments will lose their right to determine the amount of fees that is payable for an application as well as government's ability to generate revenue.

It further adds "applicants would send plant material directly to the testing stations of their choice", suggesting that governments would no longer have access to the plant material for which PBR is sought.

Further the requirement to keep the pedigree information and parental lines confidential facilitates biopiracy on a massive scale.

These elements highlight the significant loss of capacity, flexibility and sovereignty that developing countries are likely to face should the industry proposal be taken forward.

The proponents' (ISF, CIOPORA, CropLife International) proposal is premised on general, misleading and unsubstantiated claims.

The proponents claim that the system will result in "grants of high-quality PBRs". However analyzing the impact of the PCT system (a harmonized patent filing system administered by WIPO), it is obvious that the claim is flawed. The PCT system facilitated worldwide proliferation of frivolous patent applications. As a result, today there is widespread concern that more and more poor quality patents are being granted, creating barriers to further innovation and access. When challenged, many of these patents are often invalidated.

Further as evidenced by the PCT system, a harmonized filing and examination system will increase the number of PBR applications filed in a country and thus the number of protected varieties. While the seed industry may view this as a positive, there are significant consequences for agro-biodiversity, small-scale farmers and the right to food.

More protected varieties does not automatically translate into availability of affordable or appropriate varieties or even further breeding in a country. The majority of these varieties produce results with the use of specific inputs (which tend to be costly) and under certain climatic conditions. Further varieties may be protected simply for purposes of enforcement (i.e. to prohibit others from using the protected variety and reduce potential competitors), with no intention of making available the variety including breeding the variety in the country.

Moreover, as more crops are protected in more countries, small-scale farmers will be adversely impacted as UPOV restricts the free use, exchange and sale of seeds, a practice that underpins the informal seed sector, which is widespread in developing countries. Access to seeds will become more costly and thus difficult, consequently affecting many livelihoods. And as more food crop varieties are protected, right to food will also be affected.

The proponent's proposal is premised on the EU Community Plant Variety Rights (CPVR) established through EU Council Regulation (EC) No 2100/94. The CPVR is a uniform system of community plant variety rights, which the proponents state "demonstrated the advantages of adopting a uniform breeding and more harmonized approach to the deployment of PBR via

UPOV”.

In reality, the benefits of the CPVR system have been very uneven across members of the CPVR system. In 2013, most of the applications originated from Netherlands (1226), France (509) and Germany (440). Other countries had significantly fewer applications: Denmark (152), Italy (102), United Kingdom (91), Spain (90), Belgium (52), Poland (34). The rest of the CPVR membership had less than 15 applications each or no applications. A similar trend can be seen in past years.

As for non-EU members (benefitting from the CPVR harmonized regime), the US accounted for 198 applications, Switzerland – 86, Japan - 58, Australia - 46, Israel – 40 and Thailand – 38, Taiwan – 19, New Zealand – 16, China – 13, Argentina – 9, South Africa – 8, Brazil – 2, Chile – 2, Canada – 1, Monaco – 1, French Polynesia – 1.

A 2011 evaluation of the CPVR done by GHK Consulting with Adas UK found that “Only three countries account for more than 60% of all CPVRs (i.e. the Netherlands, Germany and France)”.

The same evaluation found that “There is little evidence that directly links the CPVR ... to the development of EU agriculture”. The evaluation also found certain stakeholders highlighting some drawbacks with regard to the CPVR including reduced access to diversified food options as the CPVR system favors standardized varieties for industrial agriculture, reduced environmental benefits since varieties that are best adapted to organic or low-input agriculture often do not conform to the CPVR criteria and reduced biodiversity and genetic erosion; does not support locally adapted variety cultivation by farmers, does not adequately support innovation for marginal or orphan species.

Another major concern with the proposal is that it will facilitate further concentration in the seed market. A study commissioned by the Greens/EFA Group in the European Parliament revealed that five companies (also producing agrochemical products) control more than 50% of the seed market, with major consequences for farmers, agro-biodiversity, innovation and food security. It further found that the top 5 seed companies applied for 91% of intellectual property right protection. In 2011, Monsanto and Syngenta were responsible for 57% of PBR applications for tomato, against only 12% in 2000.

This clearly shows that a few multinational corporate breeders from a handful of developed countries are likely to be the main beneficiaries from such a harmonized system.+  

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