



Association for Plant Breeding for the Benefit of Society

APBRES Statement
at the 31st Extraordinary Meeting of the UPOV Council
Geneva, 11 April 2014

Thank you Chair for allowing APBRES to take the floor.

On this agenda item, APBRES has submitted comments and a legal opinion by Professor Thomas Cottier from the World Trade Institute, a well known expert on international law and Intellectual Property who also chaired WTO Dispute Settlements. In this statement APBRES would like to highlight the key points made in our comments as well as in the legal opinion regarding the decision Paragraph 42 which has 3 elements.

A key issue is whether ARIPO, an intergovernmental organization is eligible to become a UPOV member. Article 34 of the UPOV 1991 Act lists the basic requirements for an intergovernmental organisation to become an UPOV member. In particular, it requires that the IGO has its own legislation that is "binding on all its member states".

Also relevant is Article 1 (viii) which in relation to an intergovernmental organisation defines territory as "the territory in which the constituting treaty of that intergovernmental organization applies".

Clearly the intent is that, for an IGO to become a contracting party to the UPOV, its PVP legislation must be binding on all its member states. This is the situation in relation to the EU which is also a member of UPOV.

But in the case of ARIPO, the constituting treaty is the Lusaka Agreement and there are 18 countries that are members of the Lusaka Agreement. However, the Draft Protocol is only binding on those member states that ratify the Protocol, it is **not** binding on **all** ARIPO member states as required by Article 34 of the UPOV 1991 Act.

It is for this reason that Prof. Cottier concludes in his opinion that "Membership of ARIPO on the basis of the Protocol, and thus selected Membership, is not compatible with the requirements of the UPOV Convention". We agree with this opinion.

Another key issue is Article 30 (2) which states that each intergovernmental organization must be in a position to give effect to the provisions of the Convention.

Article 30 (1) lists measures that are necessary for the implementation of the Convention.

Prof. Cottier questions the ability of ARIPO to comply with the requirements in the absence of domestic legislations. It is worth noting that most ARIPO member states do not have enforceable laws that give effect to the UPOV Convention.

Thus Prof. Cottier argues "ARIPO, comprising the territory of all its Member States, needs demonstrating that these requirements are met by **all** its Member States, either by domestic legislation or, by granting direct effect to UPOV Convention rights. The same requirements need to be met by individual Members as a prerequisite for individual UPOV membership. They either need to prepare legislation or, demonstrate that Convention rights are otherwise given domestic effect."

Prof Cottier thus concludes "ARIPO as an Organization therefore is not in a position to comply with the requirements of Article 30 subpara (2) of the UPOV Convention under the draft Protocol of Accession" since basic requirements of UPOV membership are not fulfilled.

Finally the decision point in paragraph 42 suggests that Contracting states of the Draft Protocol can accede UPOV 1991 bypassing Article 34 (3) which requires countries to proof conformity of national legislation with the 1991 Act before becoming members.

It would seem to us that paragraph 42 is inconsistent with the basic requirement for UPOV membership in Article 30 subpara (2). As it stands, the decision paragraph would allow countries which have ratified the ARIPO Protocol to become a party of UPOV, even if they have no national law in place, but also if they have a law for national filings which is in contradiction with UPOV. This would certainly increase the legal uncertainty.

In conclusion -, we have raised crucial key legal issues. Noting that UPOV is a rules based organization in that it requires countries joining the 1991 Act to strictly conform to the Act, it would be truly puzzling and even concerning that UPOV's organs that is the Consultative Committee and the Council as well as the UPOV office fails to require compliance with the basic requirements set out in the 1991 Act.

We do realize that these legal issues are being raised at a very late stage. But the document was issued on 14th March and we have had only about 3 weeks to work on the document. We did request to address the Consultative Committee on this issue, although this request was not accepted.

There seems to be different legal views on it. We would thus suggest that the matter be postponed to the next UPOV session giving all an opportunity to better understand the legal implications of the UPOV Council approving the proposed decision points.