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Erklärung von Bern - The Berne  
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## **The Accession of ARIPO to the Union of the Convention for the Protection of New Varieties of Plants (UPOV)**

Dear Mr Meienberg:

Thank you for recently submitting three questions relating to the impending accession of ARIPO to the UPOV Convention. They may be summarized as follows:

1. Is ARIPO, as a Regional Intellectual Property Organization eligible as an intergovernmental organization as described in the UPOV Convention?
2. What is the implication that membership will be only binding upon four ARIPO Member States (out of currently 18 States)?
3. Is it possible that Member States of ARIPO can deposit their instruments of accession to the UPOV Convention without having national legislation in place in accordance with the UPOV Convention?

We are pleased to address these questions briefly below. The answers were prepared in cooperation and with support of Mr Hojjat Khademi, doctoral student at the World Trade Institute.

## Related Materials

1. International Convention for the Protection of New Varieties of Plants (UPOV) of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.
2. Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO Agreement) adopted by the Diplomatic Conference for the adoption of an Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO) at Lusaka (Zambia) on December 9, 1976, and amended by the Administrative Council of ARIPO on December 10, 1982, December 12, 1986, November 27, 1996, November 21, 2003 and November 26, 2004 and as amended by the Council of Ministers on August 13, 2004.
3. Draft Legal Framework of ARIPO Protocol for the Protection of New Varieties of Plants (ARIPO Protocol) adopted by 14th Session of the ARIPO Council of the Ministers which was held in Kampala, Uganda from November 28 to 29, 2013.

## Eligibility of ARIPO

The UPOV Convention requires that intergovernmental organizations may become a party to the Convention if they are duly authorized, in accordance with respective internal procedures, to accede to this Convention.<sup>1</sup> We briefly examine whether ARIPO meets the qualifications of a proper international organization under international law and whether internal procedures to accede to the UPOV Convention have been followed.

Members of ARIPO are States and thus in line with normal membership of International Organizations under international law.<sup>2</sup> The Organization came into life and force by the

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<sup>1</sup> International Convention for the Protection of New Varieties of Plants, 24 April 1998, 1861 UNTS 281 [UPOV Convention] at art 34(1)(b)(iii).

<sup>2</sup> See Vienna Convention on the Law of Treaties, 27 January 1980, 1155 UNTS 331 [VCLT] at art 2(i); Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, DocA/CONF67/16 [Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character] at art 1; Vienna Convention on Succession of States in respect of Treaties, 6 November 1996, 1946 UNTS 3 [VCSST] at art 2; Vienna Convention on the Law of

Lusaka Agreement.<sup>3</sup> It is subject to international law and thus responds to the necessary requirements.<sup>4</sup> ARIPO moreover possesses legal personality and is represented by proper organs.<sup>5</sup>

ARIPO complies with all the necessary qualifications of an international organization under international law. It therefore, in its own rights, is eligible to join other Organizations to the extent that those allow doing so. Whether or not ARIPO qualifies for membership to the UPOV Convention thus depends upon the terms of the UPOV Convention, and not of ARIPO.

### **Membership not including all ARIPO Member States**

The Consultative Committee of UPOV discussed three options in view of the accession of ARIPO. The first one entails all the Member States. The second one is limited to those Member States which sign up to the present Draft Legal Framework of ARIPO Protocol for the Protection of New Varieties of Plants (ARIPO Protocol). The third one was based upon the Harare Protocol on Patents and Industrial Designs. It was decided to proceed on the basis of the second option.

The UPOV Convention stipulates that any intergovernmental organization may become a party to the Convention<sup>6</sup> if it has its own legislation providing for the grant and protection of breeders' rights binding on all its member States.<sup>7</sup> There would be no problem with the first

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Treaties between States and International Organizations or between International Organizations, 25 ILM 543 (1986) [VCLT-IO] at art 2.

<sup>3</sup> Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO), 9 December 1976 [Lusaka Agreement] at art IV – Membership: Membership of the Organization shall be open to the States members of the United Nations Economic Commission for Africa or the African Union.

<sup>4</sup> International Law Commission, “Draft articles on the responsibility of international organizations” (2011), online: <[http://legal.un.org/ilc/texts/9\\_11.htm](http://legal.un.org/ilc/texts/9_11.htm)> at art 2(a).

<sup>5</sup> Lusaka Agreement, supra note 3 at art IX – Status, Privileges and Immunities: (1) The Organization shall in the territories of the members of the Organization enjoy international legal personality and shall have the legal capacity required for the performance of its functions and to acquire or dispose of movable or immovable property.

<sup>6</sup> UPOV Convention, supra note 1 at art 1(vii): “Contracting Party” means a State or an intergovernmental organization party to this Convention.

<sup>7</sup> Ibid at art 34 (1)(b)(ii).

option as it entails all the Members of ARIPO and will submit them to the same set of rights and obligations under the UPOV Convention. The second and selective option for Membership causes inconsistencies with the UPOV Convention. While ARIPO will be a Member of UPOV, not all its Member States are bound by the instrument. Membership in essence is defined by means of the Protocol which is limited in its effects to those Members of ARIPO which signed the instrument and for which it is in force. At the same time, ARIPO as an international organization is a Member to UPOV in its own rights. The constellation is in contradiction with the requirement that the Convention is bound to apply to the entire territory of the Member. As Article 1(viii) stipulates: “Territory in relation to an intergovernmental organization means the territory in which the constituting treaty of that intergovernmental organization applies.”

We therefore conclude that Membership of ARIPO on the basis of the Protocol and thus selected Membership is not compatible with the requirements of the UPOV Convention.

### **Membership without the Existence of Implementing Legislation**

According to Article 30 UPOV Convention, Contracting Parties shall:

- “(i) provide for appropriate legal remedies for the effective enforcement of breeders’ rights;
- (ii) maintain an authority entrusted with the task of granting breeders’ rights or entrust the said task to an authority maintained by another Contracting Party;
- (iii) ensure that the public is informed through the regular publication of information concerning
  - applications for and grants of breeders’ rights, and
  - proposed and approved denominations.”

These requirements can be summarized to comprise the essential tools for the realization of breeders’ rights under the Convention, entailing the means of effective enforcement and legal remedies, operating an authority entrusted to grant rights, and making available the necessary tools for publication of the applications and approved denominations. While the items (ii) and (iii) can be delegated to the ARIPO Office or in fact to other Members, each Member of UPOV is obliged under (i) to provide at home legal remedies for the enforcement and implementation of rights. Art. 30(2) UPOV Convention states:

It shall be understood that, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organization must be in a position, under its laws, to give effect to the provisions of this Convention.

Normally, such effect and protection can only be granted and realized by domestic legislation established in the course of introducing plant breeders' rights. Unless a country can show that by means of granting direct effect to the UPOV Convention and as established in constitutional and domestic case law, effect and sufficient protection is granted under general procedural rules applicable to intellectual property rights, the requirements cannot be met short of domestic legislation prepared in the process of joining the Convention.

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.

ARIPO as an Organization therefore is not in a position to comply with the requirements of Article 30(2) of the UPOV Convention under the draft Protocol of Accession. Basic requirements of UPOV membership are not fulfilled.

Kind regards

**World Trade Institute**



Prof Thomas Cottier  
Managing Director