



APBREBES report on the UPOV spring 2014 session

The UPOV Council, the Consultative Committee (CC), and the Administrative and Legal Committee (CAJ) met on 10 and 11 April 2014. Among the key matters discussed were the following: the Draft Protocol on Plant Breeders' Right of the African Regional Intellectual Property Organization (ARIPO), matters raised by the International Seed Federation (ISF), UPOV's Communication Strategy and developments of relevance to UPOV in other international fora.

1. THE ADMINISTRATIVE AND LEGAL COMMITTEE (CAJ69)

The CAJ discussed, among others, matters raised by the International Seed Federation (ISF), matters concerning observers in the CAJ-AG (Administrative and Legal Committee Advisory Group), and the program for the development of information materials. For the meeting documents, see http://www.upov.int/meetings/en/details.jsp?meeting_id=31704 , for the report of the CAJ meeting see document CAJ/69/12.

1.1 Matters Concerning Observers in the Administrative and Legal Committee Advisory Group (CAJ-AG), document CAJ/69/2 paragraphs 35 and 36

The Consultative Committee, at its 86th meeting, had 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, as it considers appropriate. However during the 69th meeting, the US delegation again questioned that approach stating that it did not recall that the decision to invite *ad hoc* organisations to present their views would be "automatic".

Upon interventions of the European Seed Association and APBREBES, the Vice-Secretary recalled the reason for that approach being that if UPOV documents are posted shortly before sessions and comments come in, it is almost impossible to have the CAJ-AG first discuss whether observers should be invited or not. Norway was of the view that the current wording (“consider”) implied discretion, but the US insisted on further discussion at the next CAJ-AG. EU also agreed with the current wording of the text, whilst also noting “some form of discretion” should exist for the CAJ-AG.

The decision taken was: *“The CAJ requested to invite the CAJ-AG, at its ninth session, to consider whether the CAJ-AG would need the possibility for some discretion in relation to ad hoc invitations, for observers who had made written comments, to attend the relevant part of the CAJ-AG, and if so, the mechanism for implementation in a timely manner.”*

1.2 Program for the Development of Information Materials, document CAJ/69/2 paragraphs 65-70

A plan was proposed for the circulation and comment of the revised draft Explanatory Notes, prepared by the UPOV Secretariat (e.g. on Essentially Derived Varieties, on Harvested Material, and on Propagation and Propagating Material) for the 9th meeting of the CAJ-AG, to be held in October 2014.

CIOPORA questioned whether observers would also receive the drafts of the Explanatory Notes when they are circulated in May 2014 to the CAJ-AG for comments, noting that everyone would benefit from early circulation. It was confirmed that CAJ members and observers would also be given the opportunity to provide comments on the new draft Explanatory Notes.

1.3 Matters raised by the International Seed Federation (ISF), document CAJ/69/10

In January 2013, the ISF had submitted a wish list of 22 items (See <http://www.twinside.org.sg/title2/susagri/2013/susagri296.htm>). Some of them were referred to the CAJ, others to the Consultative Committee and the Technical Committee. Among the items referred to the CAJ, several are related to confidentiality of material and information that breeders submit to plant variety offices (see document CAJ/69/10, paras 7 and 15-23) which relates to (i) Requests for pedigree information (ii) Providing parental lines for applications concerning hybrids; (iii) Availability and exchange of material; (iv) Confidentiality of the applicant's material when the examination centers are breeding varieties of the same species.

With respect to pedigree information, the ISF had stated in its letter that pedigree information should not be requested, and if countries did decide to request such information then such pedigree information should not become public. During the discussion, EU and France agreed on the need to keep information confidential in case the breeder so wished. The CAJ agreed to the development of further guidance on requests for pedigree information.

On the issue of 'Providing parental lines for applications concerning hybrids', and 'Availability and exchange of material', the CAJ noted the existing guidance in document CAJ/69/10, paragraph 16, and agreed not to develop additional guidance for the time being.

In relation to the 'Availability and exchange of material', the CAJ noted the guidance as set out in document CAJ/69/10, paragraph 19, and agreed not to develop additional guidance for the time being.

On 'Confidentiality of the applicant's material when the examination centers are breeding varieties of the same species', the CAJ agreed to the development of guidance in document UPOV/INF/15 on confidentiality of applicants' material when DUS examination centers have, or have links to, breeding activities.

The EU in particular, voiced support for the development of guidelines in this area, noting if there was a DUS examination centre which was involved in breeding there may be conflict of interest issues.

On the issue of confidentiality, APBREBES stated that since the right holder enjoys significant exclusive rights, in exchange, the information and material should be disclosed. This was seen in the patent system, which with its full disclosure requirement provided support for innovation. Thus ISF's request to keep the pedigree information and the material confidential must not be accepted.

2. CONSULTATIVE COMMITTEE (CC87)

The 87th meeting of the CC preliminarily examined the conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the 1991 Act of the UPOV Convention. Other issues discussed in the CC included matters raised by the International Seed Federation (ISF), as well as documents of relevance to UPOV dealt with in other international fora.

2.1 Preliminary Examination of the Conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the 1991 Act of the UPOV Convention

The Draft ARIPO Protocol was put before the CC for an examination for conformity with the 1991 Act of the UPOV Convention. See Doc. C/(Extr)/31/2.

The ARIPO representative claimed that “the Draft ARIPO Protocol has been driven by the Member States through consultations, reviews and determination of the way forward in a transparent and inclusive manner.” The representative added “Regarding the question of territoriality of ARIPO in relation to the UPOV Convention, on the request made by ARIPO to the UPOV Secretariat, a response was provided by the UPOV Consultative Committee regarding the notion of territory, as provided in document C(Extr.)/31/2. On the basis of this response, the Council of Ministers of ARIPO adopted the Option of all Contracting States to be bound by the Protocol.”

The representative further said “There is a standard provision in all ARIPO Protocols that any State which ratifies or accedes to the ARIPO Protocols shall, by the instrument of ratification or accession, be deemed to have indicated its acceptance to be bound by the provisions of the Lusaka Agreement. The intention is to provide the required flexibility to undertake the commitment to be bound by the substantive matters of the specific Protocol at the appropriate time for the State concerned. Therefore each ARIPO Protocol has different Contracting States” adding that “The Draft Protocol before the Consultative Committee is the result of constructive engagement and consensus building efforts of the Member States of the Organization. ARIPO Council of Ministers, which meets every two years, approved in November 2013 the text of the Draft Protocol on the Protection on New Varieties of Plants for its adoption at the Diplomatic Conference to be held in 2014. Therefore, the consideration by UPOV members of the Draft Protocol at this time is crucial for ARIPO.”

According to a [legal opinion](#) written by Prof. Thomas Cottier from the World Trade Institute, the decision point put before the UPOV Council was not in line with the 1991 Act of UPOV. Article 34 of the 1991 Act requires that an intergovernmental organization (IGO) has its own legislation that is “binding on all its member states”. However the Draft Protocol is only binding on those member states that ratify the Protocol and comes into force after four members have ratified – so it is obviously not binding on **all** ARIPO member states as required by Article 34 of UPOV 91. 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”. Another key issue is linked to Article 30(2) which states that each intergovernmental organization must be in a position to give effect to the provisions of the Convention. Prof. Cottier concludes that “ARIPO as an Organization [...] is not in a position to comply with the requirements of Article 30(2) of the UPOV Convention under the draft Protocol of Accession” since the “Basic requirements of UPOV membership are not fulfilled”. The same

is valid for individual member states as a prerequisite for individual UPOV membership as long as there is no national law in place. APBEBES highlighted these points in its [comment](#) sent to the UPOV Members .

APBEBES had requested for an opportunity to present its views to the CC, however its request was rejected.

The CC ignored the very valid legal issues raised in the legal opinion and recommended to the Council to:

(a) note the analysis in this document;

(b) note that the letters “(c)” and “(d)” of Articles 11, 12(1) and (3), 19(6), in Annex II of document C(Extr.)/31/2, should read “(a)” and “(b)” and that the word “not” should be deleted from Article 27(5) in accordance with the original text of the Draft Protocol;

(c) take a positive decision on the conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, which allows:

(i) the Contracting States to the Protocol that are not members of the Union bound by the 1991 Act, and

(ii) ARIPO, in relation to the territories of the Contracting States bound by the Protocol,

once the Draft Protocol is adopted with no changes and the Protocol is in force, to deposit their instruments of accession to the 1991 Act; and

(d) authorize the Secretary-General to inform ARIPO of that decision.

The Council discussion on the ARIPO Draft Protocol is documented below.

2.2 Matters raised by the International Seed Federation (ISF)

The CC also discussed matters raised by ISF i.e. the development of an international filing system for PBR applications based on the international patent filing system in the World Intellectual Property Organisation (WIPO) set up under the Patent Cooperation Treaty, a central approval system for variety denominations and a quality assurance program for PBR offices.

Several development experts who have analysed the ISF wish list 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 monopolisation by multinational companies of seed systems, some experts say (see <http://www.twinside.org.sg/title2/susagri/2013/susagri296.htm>).

According to sources, the ISF proposals met with questions by Member states particularly on the current problems being faced. ISF could not give reasons for their demands and requested for more time. Additionally, two more industry associations, the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOPORA) and CropLife International asked for an opportunity to provide their input.

The CC agreed to invite ISF, CIOPORA and CropLife International to elaborate on the problems faced and possible solutions offered by an international filing system, an UPOV quality assurance program and a central examination system for variety denominations, at its eighty-eighth session in October 2014.

The CC also requested the UPOV Secretariat to provide relevant information on the international filing systems of the World Intellectual Property Organization (WIPO) at its eighty-eighth session.

2.3 Communication strategy

The CC discussed and agreed on some „frequently asked questions“ (FAQs) which are part of Communication Strategy of the UPOV Secretariat. See Annex II of CC/87/10 for the agreed FAQs available at <http://www.apbrebes.org/content/cc87>.

The CC also requested the UPOV Secretariat to prepare draft questions and answers with regard to the following matters, on the basis of contributions from members:

- the UPOV Convention does not regulate varieties that are not protected by plant breeders' rights
- the possibility for subsistence farmers to exchange negligible or unimportant quantities of harvested food produce against other vital goods within the local community
- under the UPOV system, breeders decide the conditions and limitations under which they authorize the exploitation of their protected varieties. They may, for instance, allow farmers to exchange seeds freely within the local community.
- information on the situation in UPOV with regard to the use of molecular techniques for a wider audience, including the public in general

In addition, the CC noted the communication strategy approved at its eighty-sixth session, as presented in document CC/87/4, Annex I, and agreed to include an item on the agenda of its eighty-eighth session for a report on the implementation of the workplan contained in the communication strategy.

2.4 Developments of relevance to UPOV in other international fora

Regarding the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the CC requested the UPOV Secretariat to identify with the Secretary of the ITPGRFA and the Secretariat of WIPO possible areas of interrelations among the international instruments of the ITPGRFA, WIPO and UPOV with a view to a possible joint publication on interrelated issues regarding innovation and plant genetic resources, and other possible initiatives, and to present proposals for consideration by the CC at its eighty-eighth session.

3. COUNCIL (THIRTY-FIRST EXTRAORDINARY SESSION)

At this 31st extraordinary session the UPOV highest body, the Council assessed the conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with UPOV91, For the documents, see http://www.upov.int/meetings/en/details.jsp?meeting_id=31768

This Draft Protocol has raised significant concerns among experts, civil society and smallholder farmer groups and have argued that UPOV 1991 is not a suitable PVP system for ARIPO members.

In an [open letter](#) addressed to UPOV Members, 75 civil society organisations from all over the world, including the Alliance for Food Sovereignty Africa (AFSA), the African Biodiversity Network (ABN) and La Via Campesina Africa (Region 1), asserted that the Draft Protocol lacks credibility and legitimacy and strongly urged UPOV Members to reject the Draft Protocol, and requesting that the Draft Protocol be sent back to the drawing board; that ARIPO consult with smallholder farmers and civil society in all ARIPO member states; and, especially, that ARIPO discusses an appropriate and equitable PVP regime that reflects conditions and realities prevailing in ARIPO countries, the obligation of protecting biodiversity, incorporates farmers' interests and rights and safeguards to protect public interests and prevent biopiracy. The issues raised in the open letter were not discussed by the UPOV Council.

On this agenda item, APBEBES submitted a [comment](#) based on the 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 its intervention before the UPOV Council, APBEBES highlighted the key points made in its comments and in the legal opinion:

"A key issue is whether ARIPO, an intergovernmental organization is eligible to become a UPOV member. Article 34 lists the basic requirements for an IGO 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 IGO 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 are ratify the Protocol, it is not binding on all ARIPO member states as required by Article 34."

"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(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(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 the UPOV body 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.”

Kenya said that the situation in individual countries was not relevant at this stage and the criticism put forth by APBEBES was preempting a process which was at its initial stage. Kenya underlined that the PVP law would be customized at national level. It was, therefore, of utmost importance that the ARIPO Protocol process would proceed uninterrupted. The accession to UPOV 1991 would enhance productivity in Africa and the mechanism was needed to boost food security, Kenya added.

The Council noted the various interventions and approved the decision proposed by the CC. In sum, the UPOV Council found that the Draft ARIPO Protocol conformed to the 1991 Act of UPOV, allowing Contracting States to the ARIPO Protocol that are not members of the UPOV bound by the 1991 Act, and ARIPO, in relation to the territories of the Contracting States bound by the Protocol, once the Draft Protocol is adopted with no changes and the Protocol is in force, to deposit their instruments of accession to the 1991 Act.

Following the Council meeting, APBEBES issued a press release: [**UPOV breaking its own rules to tie-in African countries.**](#)