



APBRES

Association for Plant Breeding for the Benefit of Society

## Reply by APBRES to Circular E-21/077

### Comments by APBRES on the document “Developments on the Plant Variety Protection Act (Act 1050 of 2020) of Ghana” (document C/Developments/2021/1)

We are pleased to comment on the document “Developments on the Plant Variety Protection Act (Act 1050 of 2020) of Ghana”<sup>1</sup>. This commentary was prepared jointly and with the support of Food Sovereignty Ghana. Although there are various elements in the document that are of major concern (e.g. Clause 60 on offences), we will focus on Clause 22 in the new Plant Variety Protection Act.

The amended Clause 22 reads as follows:

*Measures regulating commerce*

*“22. ~~23~~. A plant breeder right ~~shall be independent of~~ is subject to any measure taken by the Republic to regulate, within Ghana, the production, certification and marketing of material of a variety or the importation or exportation of the material.”*

[The changes in the 2020 Act compared to the 2013 draft law are underlined and crossed out.]

First of all it has to be noted that the amendments made compared to the draft law of 2013 have turned the meaning of the article into the opposite (shall be independent of -> is subject to).

Reading the clause as it stands now, the meaning is that the grant “is subject” to other national measures pertaining to production, certification, marketing, importation or exportation of the material. This would presumably include subject to laws pertaining to biosafety, access and benefit sharing, seed certification etc..

This wording is diametrically opposed to Article 18 of the 1991 Act of the UPOV Convention on Measures Regulating Commerce which reads:

*“The breeder’s right **shall be independent of** any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.”*

Clause 22 contradicts the position taken so far by UPOV. For example in the “Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD)”<sup>2</sup>, it stated “UPOV Convention requires that the breeder’s right should not be subject to any further or different conditions than the ones required to obtain protection.”

The same position has also been adopted when the Office of the Union reviewed other draft laws. For instance in Document C(Extr.)/22/2, EXAMINATION OF THE CONFORMITY OF THE PROTECTION OF NEW PLANT VARIETIES ACT 2004 OF MALAYSIA WITH THE 1991 ACT OF THE UPOV CONVENTION<sup>3</sup>, the Office of

<sup>1</sup> [https://www.upov.int/edocs/mdocs/upov/en/c\\_55/c\\_developments\\_2021\\_1.docx](https://www.upov.int/edocs/mdocs/upov/en/c_55/c_developments_2021_1.docx)

<sup>2</sup> [https://www.upov.int/export/sites/upov/news/en/2003/pdf/cbd\\_response\\_oct232003.pdf](https://www.upov.int/export/sites/upov/news/en/2003/pdf/cbd_response_oct232003.pdf)

<sup>3</sup> [https://www.upov.int/edocs/mdocs/upov/en/c\\_extr/22/c\\_extr\\_22\\_2.pdf](https://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf)

the Union stated clearly *“It is also to be noted that as required by Article 18 of the 1991 Act, the breeder’s right shall be independent of measures regulating commerce.”*

In the Document “Developments on the Plant Variety Protection Act (Act 1050 of 2020) of Ghana” a further explanation has been introduced to explain clause 22:

*14. In the letter of April 21, 2021, addressed to the Secretary-General of UPOV (see Annex I), the Attorney-General and Minister for Justice, Mr. Yeboah Dame, clarified that reference to “a plant breeder right” in Section 22 “Measures regulating commerce” of the Act 1050 of 2020 should be understood to refer to “the material of the variety covered by a plant breeder right.”*

First of all, the minister's statement is surprising because it gives a whole new meaning to clause 22. The question therefore arises whether the fundamental reinterpretation of clause 22 stands up to closer scrutiny.

A) First, it is questionable if a Minister can unilaterally provide an interpretation that is inconsistent with the actual text of Clause 22. Perhaps the only proper authority would be the national courts.

B) Based on the reading of clause 22, the interpretation in the Minister's letter is not comprehensible. A “plant breeder right” is obviously not the same as “the material of the variety covered by a plant breeder right”.

C) In order to know the intention of the legislator, it is crucial to know what basis and information the legislator had at hand when he passed the law. This includes first and foremost the Memorandum attached to the Plant Varieties Protection Bill, 2020, where the Attorney-General and Minister Responsible for Justice, Mrs Gloria Afua Akufo states: *“Clause 23 makes the plant breeder right subject to any measure taken by the Republic to regulate within Ghana, the production, certification and marketing of material of variety or the importation or exportation of the material.”* This confirms the fact that the clause is to be understood exactly as it was written down.

D) The fundamental change in clause 22 was no coincidence, but stems from demands made by civil society. For many years a lot of interventions by Civil Society were focused on clause 22.

The arguments put forward in points A-D, which follow the usual interpretation of laws, are certainly to be given more weight than the interpretation in the Minister's letter to UPOV, which appears out of nowhere without further justification and after the conclusion of the legislative process.

Summary and Conclusion:

- 1) Clause 22 of the Plant Variety Protection Act of Ghana clearly contradicts Art. 18 of UPOV 1991. The 1991 Act makes it clear that the breeder’s right shall be independent of any measure taken by a Contracting Party to regulate commerce, while Clause 22 emphasizes that the breeder’s right shall be subject to any measure taken to regulate commerce. The inconsistency is evident.
- 2) Clause 22 must be understood as written. This can be concluded in particular from the Memorandum, which was the basis for the legislative process. Interpretation provided in a Minister's letter cannot overturn the text of the law adopted by the Parliament.
- 3) It is therefore incomprehensible how the Office of the Union can come to the conclusion that the changes introduced in the Act during the parliamentary procedure do not affect the substantive provisions of the 1991 Act of the UPOV Convention. The opposite is the case, the new clause 22 is clearly contradictory to Art. 18 of the 1991 Act.
- 4) If the Council takes a positive decision on the conformity of the Plant Variety Protection Act of Ghana with the provisions of the 1991 Act of UPOV, this would be a fundamental change compared to previous decisions by the Council and an interesting precedence, opening the possibility to other new members to introduce clauses into their law making the breeders right subject to other requirements such as requirements under access and benefit sharing legislations, biosafety legislation, certification legislation etc..