



**Association for Plant Breeding for the Benefit of Society**

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Ms. Kitisri Sukhapinda,  
President of the Council  
UPOV

Mr. Francis Gurry  
Secretary General  
UPOV

Mr. Peter Button,  
Vice Secretary-General  
UPOV

**UPOV Council Document (C(EXTR.)/31/2: 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**

Dear Sir/Madam,

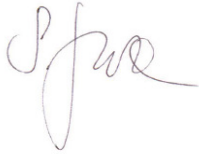
Please find attached Comments by APBREBES on UPOV Council Document (C(EXTR.)/31/2: Examination of the Conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the 1991 Act of the UPOV Convention.

The Comments are based on the Legal Opinion of Prof. Thomas Cottier from the World Trade Institute, Switzerland and seriously questions the conformity of the proposed decision in paragraph 42 of C(Extr.)/31/2 with the 1991 Act. The Legal Opinion is also attached.



We would also request that you share our Comments and the Legal Opinion with the members of the Consultative Committee and the Council.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Gura', written in a cursive style.

Susanne Gura  
Coordinator  
Association for Plant Breeding  
for the Benefit of Society (APBREBES)





**COMMENTS ON UPOV COUNCIL DOCUMENT (C(EXTR.)/31/2:  
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 Secretary-General of ARIPO Mr. Fernando dos Santos, Director General of the African Regional Intellectual Property Organization (ARIPO) has requested the examination of the Draft ARIPO Protocol for the Protection of New Varieties of Plants (hereinafter referred to as the “Draft Protocol”), for conformity with the 1991 Act of the UPOV Convention.

In paragraph 42 of C(Extr.)/31/2, the UPOV Council is invited to take a decision on the Draft ARIPO Protocol. There are 3 elements in the decision text in paragraph 42:

- (i) to take a positive decision on the conformity of the Draft ARIPO Protocol with UPOV 1991;
- (ii) once the Draft Protocol is adopted with no changes and the Protocol is in force, to allow ARIPO to deposit its instrument of accession to the 1991 Act;
- (iii) once the Draft Protocol is adopted with no changes and the Protocol is in force, to allow Contracting Parties to the Protocol to deposit its instrument of accession to the 1991 Act.

We are of the view that the proposed decision before the UPOV Council contravenes provisions of UPOV 1991 for the reasons mentioned below.

1. Article 34 (1)(b) lists 3 requirements for an intergovernmental organization (IGO) to become a party to UPOV 1991. A basic requirement is that the IGO should have its own legislation that is “binding on *all* its member states”. ARIPO as an IGO does not fulfill this requirement as the Draft Protocol is only binding on those member states that ratify the Protocol **and does not bind all its member states as required by Article 34(1)(b)**. Article 1(viii) defines “territory” as “where the Contracting Party is an intergovernmental organization, the territory in which the *constituting treaty* of that intergovernmental organization applies.

The constituting treaty of ARIPO is the Lusaka Agreement and currently about 18 countries are members of the Lusaka Agreement. The Draft Protocol is not binding on these 18 countries. It is only binding on countries that ratify the Draft Protocol. The Draft Protocol comes into force after four States ratify or accede to the Protocol (Article 41 of the Draft Protocol).

On this point the attached opinion of Prof. Thomas Cottier from the World Trade Institute (WTI) under the heading of “Membership not including all ARIPO Member



States” also concludes that “Membership of ARIPO on the basis of the Protocol and thus selected Membership is not compatible with the requirements of the UPOV Convention”.

2. Article 34 (1)(b)(iii) of the 1991 Act also requires that the IGO provides evidence/information that it “has been ***duly authorized, in accordance with its internal procedures***, to accede to this Convention”. There is nothing in C(Extr.)/31/2 that provides such evidence or information. It is mandatory for ARIPO to provide information/evidence that it has been authorized to submit the Draft Protocol for assessment of conformity with the 1991 Act and that it has the legal basis and authority to become a Contracting Party to UPOV 1991.

3. Article 30(2) of the 1991 Act states that “It shall be understood that, on depositing its instrument of ratification, acceptance, approval and accession, as the case may be, **each State or intergovernmental must be in a position, under its laws, to give effect to the provisions of this Convention**”.

Article 30 (1) of the 1991 Act lists the measures that are necessary for the implementation of the Convention i.e.

- (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.

In the attached opinion Prof. Thomas Cottier states “While the items (ii) and (iii) can be delegated to the ARIPO Office...each Member of UPOV is obliged under (i) to provide home legal remedies for the enforcement and implementation of rights”. Prof Cottier stresses that “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, effective 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”.

Prof. Cottier further adds “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 argues that a prerequisite for UPOV membership is that both ARIPO and each individual member state of ARIPO demonstrates that it is in a position to give effect to the provisions of UPOV 1991.



It is worth noting that except for Tanzania (which has an enforceable law which UPOV has concluded is in conformity with UPOV 1991) and Kenya, which has ratified the act of UPOV 1978), no other ARIPO country has enforceable laws that give effect to the UPOV Convention as obligated by Article 30.

Further ARIPO itself has not demonstrated that it can fulfill the conditions of Article 30. Prof Thomas 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”.

4. Article 34(3) of the 1991 Act requires that “Any State which is not a member of the Union....shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention”.

The rationale for Article 34(3) presumably is to ensure that only a State, which is able to give effect to the provisions of UPOV 1991 as envisaged by Article 30(2), becomes a member of UPOV 1991.

Further one could also easily envisage a scenario whereby a State is a Contracting Party to the ARIPO Draft Protocol and yet has a national PVP that is inconsistent with UPOV 1991. The ARIPO Draft Protocol does state in Article 39 that the Protocol “shall be without prejudice to the right of the Contracting States to grant national plant breeders rights for plant varieties”.

The decision point (para 42) suggests that Contracting states of the Draft Protocol can accede UPOV 1991 bypassing Article 34(3). This would result in inconsistency with the basic requirement for UPOV membership (Article 30(2) i.e. that “each State must be in a position to give effect to the provisions of this Convention”.

## **Conclusion**

It is clear that approval by the Consultative Committee and the Council of the decision point in paragraph 42 will result in a violation of or be inconsistent with a number of provisions of the 1991 Act in particular Article 34(1)(b)(ii) and (iii), Article 34 (3) and Article 30(2).

For UPOV to be able to assess the conformity of the ARIPO Draft Protocol with UPOV 1991 and for ARIPO as an IGO to join the 1991 Act as a Contracting Party, provisions of Article 34(1)(b)(ii) and (iii) as well as Article 30(2) have to be satisfied. As argued above, these provisions have not been satisfied.

For any Contracting Party to the ARIPO Draft Protocol to become a UPOV member, it has to satisfy Article 30(2) in connection with Article 34(3).

The proposed decision before the Council has therefore to be rejected in its entirety.

