

Who Calls the Shots at UPOV?

US Government and Multinational Seed Industry Force UPOV to Abandon Critique of Terminator

After two days of intense diplomatic wrangling in Geneva, US patent officials succeeded in turning the expert advice of an intergovernmental secretariat critical of Terminator technology into little more than a promotional paper for plant breeders' rights.

On April 10-11, US government representatives worked hard in Geneva to convince 51 other countries that the expert advice of the Union for the Protection of New Varieties of Plants (UPOV) is wrong and that UPOV is "not competent" to comment on the possible intellectual property implications of Terminator seeds. The paper in question, a memorandum prepared by UPOV's Secretariat at the request of member governments of the UN Convention on Biological Diversity (CBD), was presented to an Expert Panel convened by the CBD in Montreal, February 19-21. The Expert Panel met to examine the implications of Terminator seed technology for small farmers, indigenous peoples and local communities. Although UPOV's paper was presented at the Montreal meeting, and had been available on UPOV's web site since January, UPOV bowed to US pressure and gutted the memorandum, replacing it with a sanitized and shorter "position paper" that carries none of the criticisms of the original report.

What is UPOV? *The International Union for the Protection of New Varieties of Plants (UPOV), the Geneva-based body that promotes plant breeders' rights, has spent the last decade trying to convince Third World governments that they must adopt UPOV's legal framework to give plant breeders sui generis protection for new plant varieties. UPOV membership, once limited to a small club of industrialized nations, has expanded in recent years because developing countries are obligated by WTO's Trade-Related Intellectual Property (TRIPs) chapter to adopt some form of intellectual property for plant varieties. UPOV has lobbied hard to attract new developing country members. But does UPOV represent the interests of the South? The recent squabble over Terminator illustrates who's calling the shots at UPOV.*

UPOV Prepares Comments on Terminator: For five years running, Terminator technology has been the most controversial issue on the agbiodiversity agenda at the Convention on Biological Diversity (CBD), where civil society organizations and many governments have called for a ban on the technology. Last year, the Biodiversity Convention requested UPOV's opinion on the potential conflict between intellectual property regimes and genetic use restriction technology (GURTs – the technical term for Terminator). Since the technology uses genetic engineering to ensure that seeds harvested by farmers are sterile, it has a built-in biological control that far exceeds the legal monopoly granted through conventional intellectual property mechanisms. For

the same reason, the Biodiversity Convention has been concerned that GURTs (or Terminator) could negatively impact biological diversity and undermine the food security of farming communities and indigenous peoples – 1.4 billion of whom rely upon farm-saved seed for their survival. In 1998, the Biodiversity Convention proposed a moratorium on the introduction of Terminator. In January of this year, UPOV offered its advice to CBD in a dry but insightful 6-page analysis of Terminator.

In its January 10 memo, UPOV's primary conclusion is that Terminator technology "may have considerable disadvantages for society." The memo gives a candid assessment of the drawbacks of Terminator in comparison to plant breeders' rights: "Plant material of varieties containing GURTs cannot be used as genetic material for further breeding; free access to genetic resources will be hindered by GURTs. GURTs does not provide any benefit sharing."¹ The UPOV memo also points out that, in comparison to plant breeders' rights, Terminator technology is a much stronger appropriation tool. Unlike plant breeders' rights, Terminator is not time-limited, there is no user exemption for farmers, researchers or breeders, and "no provision for public interest."²

Seedy Squabble: The UPOV memorandum exposed a rare rift between the Plant Breeders' Rights Convention and corporate plant breeders. At the Montreal meeting where the paper was discussed, members of the International Seed Federation (the Nyon-based seed trade association) presented a counter document extolling the theoretical merits of Terminator as a vehicle to bring more options to farmers and a "green" means of containing gene contamination from genetically modified plants. The seed industry's pro-Terminator position was supported by the US government's representative who also served on the Expert Panel. (The US government, however, is not a member of the Convention.)

"The meeting was terribly unproductive," said Hope Shand of ETC Group, who served on the CBD's Expert Panel in Montreal, "because the USA and industry were determined to prevent any new negative comments on Terminator."

"Not surprisingly, the United States is looking out for its commercial interests," said Silvia Ribeiro of ETC Group, noting that the US Department of Agriculture holds three patents on Terminator which it jointly owns with Delta & Pine Land (the world's largest cotton seed breeder and one of the original inventors of the technology).³

US Government and Seed Industry Protest UPOV's Memo: With progress blocked in Montreal, the US government and the seed industry turned their attention to Geneva to try to have the UPOV memorandum withdrawn.

On March 13, Lois Boland, Administrator for External Affairs at the United States Patent and Trademark Office (US PTO) wrote to UPOV's Vice-Secretary General, Rolf Jördens, requesting that UPOV's memo on GURTs be withdrawn. Boland expressed her dismay that the UPOV Council did not discuss the memo prior to its preparation. "Even more troubling," she writes, "the document submitted to the CBD is not a neutral presentation of facts and prevailing opinions; instead, it represents a one-sided negative view of GURTs."⁴ Boland continues, "We have serious concerns as to whether this accurately reflects the positions of all the UPOV members."⁵ Her letter ends by

requesting that the substance of the memo be discussed at the scheduled meeting of UPOV's Administrative and Legal Committee on April 10, 2003.

UPOV responded to Boland's letter on March 17, explaining that UPOV's Consultative Committee had been informed of the CBD's request, and offering that the Consultative Committee would be given the opportunity to consider the memorandum at its April 11 meeting. But the US government was not satisfied. Boland wrote back to UPOV on March 28, informing Jördens that, "we are unable to agree with your approach." Boland insisted that the "proper forum" for addressing the memo would be UPOV's Administrative and Legal Committee (CAJ), not the Consultative Committee. "The United States strongly believes," wrote Boland, "that an open discussion by the CAJ is necessary at the upcoming UPOV meeting in order to seek Member State consensus on procedural and substantive issues relating to this document." The US government also attached a 5-page proposal outlining its position. On March 31, UPOV responded to Boland, this time conceding that the controversial GURTs memo would be discussed by UPOV's Administrative and Legal Committee on April 10.

On March 31, the Secretary-General of the International Seed Federation, Bernard Le Buanec also wrote to UPOV's Vice-Secretary General, Rolf Jördens, echoing the concerns raised by the US government about the UPOV memo on Terminator. Le Buanec wrote, "ISF is really concerned by the memorandum, as it presents a variety of unbalanced views."⁶

The original UPOV memo and the correspondence between UPOV and the US government, as well as the ISF letter to UPOV, can be viewed here:

<http://www.etcgroup.org/documents/USAvsUPOV.pdf>

UPOV Forced to Abandon Critique of Terminator: Ultimately, the memorandum was debated at both the Legal Committee on April 10 and at UPOV's Consultative Committee the following day. Given the pressure to reach consensus – and the refusal of the United States to allow any criticism of Terminator – all critical comments and analysis of the technology were stricken from the memorandum. According to the UPOV Secretariat, it was only the US government that raised concerns about the January 10 Memorandum on GURTs.⁷ But at the April 10 meeting, governments concluded that UPOV was "not the competent body to provide advice to CBD on GURTs."⁸

On 11 April UPOV posted a new document on its web site which states: "This document supersedes the memorandum prepared by the Office of the Union on the genetic use restriction technologies (GURTs) and sent to the CBD, dated January 10, 2003."⁹ The new document is available at:

http://www.upov.int/en/about/pdf/gurts_11april2003.pdf

The new, sanitized version of the UPOV commentary on Terminator is drastically changed. All references to GURTs have been removed, except to say that UPOV has not examined substantively the intellectual property implications of GURTs, and to point out that varieties containing GURTs may be eligible for plant breeders' rights. The new UPOV document contains no analysis – critical or otherwise – regarding the intellectual property implications of Terminator technology. What remains is merely a bland text highlighting key features of the UPOV 1991 Convention.

In withdrawing its memo on GURTs, UPOV has allowed the US government, owner of three patents on Terminator technology, to sanitize and erase the intergovernmental organizations' perspective on an important policy issue with direct relevance to plant intellectual property.

UPOV's new document is completely irrelevant because it fails to respond to the CBD's request and offers no new information about the intellectual property implications of Terminator. The withdrawal of the UPOV memo has also confounded the work of the CBD's Expert Panel on GURTs that met in February to consider the impact of Terminator on small farmers, indigenous people and local communities.

Terminating UPOV? The seedy squabble over Terminator technology illustrates the bigger issue of UPOV's diminishing position in today's rapidly changing intellectual property climate. On the one hand, the Americans and Japanese continue to stretch the boundaries of conventional patents to supersede and override UPOV-style plant variety protection. On the other hand, new technologies such as Terminator threaten to make legal forms of monopoly control over plant germplasm obsolete. Why bother with plant variety protection when Terminator gives you timeless, limitless protection without the need for lawyers and courts?

The Bottom Line: UPOV has succumbed to the strong-arm tactics of the US government and the multinational seed industry, both of whom have vested financial interests in Terminator technology. If member governments of UPOV had any doubts about who determines policy within the Union, they need only examine the recent case of Terminator.

Terminating Ethics?

No ethics please, we're American

UPOV is not the only international body whose hand is being slapped for criticizing Terminator. In the closing hours of March 31st, during the FAO Committee on Agriculture (COAG), the US delegation pounced on the budget for the Panel of Eminent Experts and Ethicists arguing that it be dismantled.¹⁰ In September 2000 the Panel had the audacity to criticize Terminator technology saying unanimously "that the 'terminator seeds' generally are unethical." First established by the Director-General of FAO, Jacques Diouf, in 2000, the Panel has brought together world-famous scholars, scientists and ethicists to consider the implications of food and agricultural policies and practices. Immediately following the US attack on the Ethics Panel, Australia took the floor to support the termination of the Panel. As delegates were packing up to leave, Costa Rica rose to the defense of the Panel. The Aussies charged over to the New Zealand desk and, moments later, New Zealand not only joined the campaign to cut the Ethics Panel but also accused Costa Rica of bowing under pressure from the FAO Secretariat – a diplomatic affront to any ambassador. Indeed, the astonishing thing was that the Director-General's representative sat dumbly on the podium without raising a hand to defend one of the DG's prized initiatives. Dr. Diouf has also come out publicly against Terminator. Whatever the final outcome, the message has been delivered: don't look at the ethics of suicide seeds.

Terminal Reservations?

Royal Society/Greenspan reserve on patents

The overreaction of the U.S. Patent and Trademark Office may, in part, be its nervous response to a growing series of criticisms of intellectual property coming from some very surprising sources. For example, on the same day that the United States was fighting to eliminate the FAO Panel, no less a figure than Alan Greenspan, the powerful chairman of the U.S. Federal Reserve, mused from the lectern of the 2003 Financial Markets Conference in Atlanta, GA that there might be some problems balancing the interests of society and the interests of inventors through the intellectual property system.¹¹ Greenspan's musings routinely sink ships or raise fleets and his comments rang round the patent world.

Then, as the fight unfolded in Geneva, the Royal Society in London delivered its own broadside.¹² In a refreshing piece critical of the impact of intellectual property on the free flow of information and ideas, the Royal Society went so far as to recommend that South governments should not have to accept the WTO's TRIPS (the Trade-Related Intellectual Property chapter) rendering the Royal Society a prime candidate for the US PTO's "axis of evil" listing.

**For more information please see, "Terminator Five Years Later," a new ETC Communique that provides additional updates on Terminator, new patents, and more. The full text is available on the ETC web site:
<http://www.etcgroup.org/article.asp?newsid=389>**

¹ UPOV, "Memorandum Prepared by the Office of UPOV on the Genetic Use Restriction Technologies," January 10, 2003, p. 5.

² *Ibid.*, p. 6.

³ The US Department of Agriculture and Delta & Pine Land jointly own the following three US patents: US Patent No. 5,723,765; US Patent No. US 5,925,808; US Patent No. 5,977,441.

⁴ Letter from Lois Boland, US Patent & Trademark Office, to Rolf Jördens, Vice-Secretary General, UPOV, March 13, 2003.

⁵ *Ibid.*

⁶ Letter from Bernard Le Buanec, International Seed Federation, to Rolf Jördens, Vice-Secretary General, UPOV, March 31, 2003.

⁷ Personal communication with Mr. Makoto Tabata, UPOV Secretariat, 15 April 2003.

⁸ *Ibid.*

⁹ UPOV, "Position of the International Union for the Protection of New Varieties of Plants Concerning Decision VI/5 of the Conference of Parties to the Convention on Biological Diversity (CBD)," April 11, 2003.

¹⁰ Personal communication with Patrick Mulvaney, Intermediate Technology Development Group, 16 April 2003.

¹¹ Alan Greenspan, "Market Economies and Rule of Law", 2003 Financial Markets Conference of the Federal Reserve Bank of Atlanta, Georgia, April 4, 2003

¹² The Royal Society's report is entitled, "Keeping science open: the effects of intellectual property policy on the conduct of science," April, 2003. Available on the Internet: <http://www.royalsoc.ac.uk/policy/>

The Action Group on Erosion, Technology and Concentration, formerly RAFI, is an international civil society organization headquartered in Canada. The ETC group is dedicated to the advancement of cultural and ecological diversity and human rights. www.etcgroup.org. The ETC group is also a member of the Community Biodiversity Development and Conservation Programme (CBDC). The CBDC is a collaborative experimental initiative involving civil society organizations and public research institutions in 14 countries. The CBDC is dedicated to the exploration of community-directed programmes to strengthen the conservation and enhancement of agricultural biodiversity. The CBDC website is www.cbdcprogram.org.