



NOTE

from the representatives of the members of the Union to the Council of the International Union for the Protection of New Varieties of Plants (UPOV)

In order to assist the members of the United Nations in their considerations of the “Report of the Special Rapporteur on the right to food” Olivier De Schutter (document A/64/170)(“Report”), which is scheduled to be presented at the United Nations General Assembly (Third Committee) on October 21, 2009, the representatives of the members of the Union to the Council of the International Union for the Protection of New Varieties of Plants (UPOV) would like to comment as follows:

UPOV is an intergovernmental organization, established by the International Convention for the Protection of New Varieties of Plants (the “UPOV Convention”). The Mission of UPOV, based on the UPOV Convention, is: “[t]o provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.”

As of October 21, 2009, UPOV has 67 members. Furthermore, 18 States and one intergovernmental organization have initiated, with the Council of UPOV, the procedure for becoming members of the Union and 44 other States have been in contact with the Office of the Union for assistance in the development of legislation on plant variety protection (see Appendix to this Note).

In the UPOV Report on the Impact of Plant Variety Protection (UPOV Publication No. 353 (E)), the Secretary-General of UPOV explained that “the introduction of the UPOV system of plant variety protection and membership of the International Union for the Protection of New Varieties of Plants (UPOV) can open a door to economic development, particularly in the rural sector. [...] an important conclusion is that the UPOV system of plant variety protection provides an effective incentive for plant breeding in many different situations and in various sectors, and results in the development of new, improved varieties of benefit for farmers, growers and consumers.” In the same Report, Ing. Enriqueta Molina Macías, Director, National Service for Inspection and Seed Certification (SNICS), Mexico and former President of the UPOV Council stated that “as a representative of a developing country, it has been particularly interesting to see that, in addition to the benefits seen from the introduction of plant variety protection based on the UPOV Convention, specific positive impacts have been seen with regard to membership of UPOV. [...] As the study concludes ‘farmers, growers and breeders have access to the best varieties produced by breeders throughout UPOV member territories’.”

The Second World Seed Conference held at the Headquarters of the Food and Agriculture Organization of the United Nations (FAO) in Rome, from September 8 to 10, 2009 concluded that “[...] countries are urged to participate in the internationally harmonized systems of the Organization for Economic Cooperation and Development (OECD), the International Union for the Protection of New Varieties of Plants (UPOV), the International Treaty on Plant and Genetic Resources for Food and Agriculture (ITPGRFA) and the International Seed Testing Association (ISTA). Participation in those systems will facilitate the availability of germplasm, new plant varieties and high quality seed for the benefit of their farmers, without which their ability to respond to the challenges ahead will be substantially impaired”(www.worldseedconference.org).

With regard to the “Report of the Special Rapporteur on the right to food” (document A/64/170), there are a number of matters that would benefit from further clarification. The following two examples are provided for illustration:

(1) Paragraph 39 states that:

“Intellectual property rights reward and encourage standardization and homogeneity, [...]. In addition, intellectual property rights [...] can constitute a direct impediment to innovation by farmers.”

The aim of the UPOV system is to encourage the development of new varieties of plants, for the benefit of society. With regard to innovation by farmers, the “breeder’s exemption” in Article 15(1)(iii) of the 1991 Act of the UPOV Convention, means that acts done for the purpose of breeding other varieties are not subject to any restriction.

(2) Paragraph 40 states that:

“The strengthening of breeders’ rights in the 1991 UPOV Convention is also a concern in this regard. This convention prohibits the commercialization of varieties which are essentially derived from a PVP-protected variety (article 14 (5)), and farmers are now prohibited from exchanging or selling seeds saved from the harvest of protected varieties (article 15). In order to circumvent these limitations, developing countries where the function of traditional, farmers’ seed systems is most important both for the prevention of genetic erosion and for the livelihoods of farming communities should design sui generis forms of protection of plant varieties which allow these systems to flourish, even if this means adopting non-UPOV compliant legislation; and if they do join UPOV, they should use all the flexibilities available to them.”

It should be clarified that there has been no change in the 1991 Act of the UPOV Convention with regard to the need for the authorization of the breeder as far as the selling of seed of a protected variety is concerned.

The 1991 Act of the UPOV Convention contains in its Article 15(1)(i) a compulsory exception to the breeder’s right whereby the breeder’s right does not extend to acts done privately and for non-commercial purposes. Therefore, activities of subsistence farmers, where these constitute acts done privately and for non-commercial purposes, are excluded from the scope of the breeder’s right and such farmers benefit from the availability of protected new varieties.

The provision in the 1991 Act of the UPOV Convention on “farm-saved seed” is an optional mechanism provided by the UPOV Convention (Article 15(2)), under which members of UPOV may permit farmers, on their own farms, to use part of their harvest of a protected variety for the planting of a further crop. Under this optional exception, members of UPOV are able to adopt solutions, which are specifically adapted to their agricultural circumstances. However, this provision is subject to reasonable limits and requires that the legitimate interests of the breeder are safeguarded, to ensure there is a continued incentive for the development of new varieties of plants, for the benefit of society. For example, certain members of UPOV apply the provision on farm-saved seed only to certain species and limit its application using criteria such as the size of the farmer’s holding or the level of production.

In order to assist the members of the United Nations in their considerations, the Office of the Union would be glad to provide further information on the provisions of the UPOV Convention, the functioning of the UPOV system and its impact and benefits.

[Appendix follows]

APPENDIX

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)

I. Members of UPOV

as of October 21, 2009 (67)

Albania ³	Chile ²	France ²	Latvia ³	Republic of Korea ³	Tunisia ³
Argentina ²	China ²	Georgia ³	Lithuania ³	Republic of Moldova ³	Turkey ³
Australia ³	Colombia ²	Germany ³	Mexico ²	Romania ³	Ukraine ³
Austria ³	Costa Rica ³	Hungary ³	Morocco ³	Russian Federation ³	United Kingdom ³
Azerbaijan ³	Croatia ³	Iceland ³	Netherlands ³	Singapore ³	United States of America ³
Belarus ³	Czech Republic ³	Ireland ²	New Zealand ²	Slovakia ³	Uruguay ²
Belgium ¹	Denmark ³	Israel ³	Nicaragua ²	Slovenia ³	Uzbekistan ³
Bolivia (Plurinational State) ²	Dominican Republic ³	Italy ²	Norway ²	South Africa ²	Viet Nam ³
Brazil ²	Ecuador ²	Japan ³	Panama ²	Spain ³	
Bulgaria ³	Estonia ³	Jordan ³	Paraguay ²	Sweden ³	(Total 67)
Canada ²	European Community ^{3,4}	Kenya ²	Poland ³	Switzerland ³	
	Finland ³	Kyrgyzstan ³	Portugal ²	Trinidad and Tobago ²	

¹ 1961 Convention as amended by the Additional Act of 1972 is the latest Act by which one State is bound.

² 1978 Act is the latest Act by which 22 States are bound.

³ 1991 Act is the latest Act by which 43 States and one organization are bound.

⁴ Operates a (supranational) Community plant variety rights system which covers the territory of its 27 members.

II. States (18) or Organizations (1) Which Have Initiated With the Council of UPOV the Procedure for Becoming Members of the Union

Armenia, Bosnia and Herzegovina, Egypt, Guatemala, Honduras, India, Kazakhstan, Malaysia, Mauritius, Montenegro, Oman, Peru, Philippines, Serbia, Tajikistan, The former Yugoslav Republic of Macedonia, Venezuela, Zimbabwe, as well as the African Intellectual Property Organization (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, Togo (16)).

III. Other States Which Have Been in Contact with the Office of the Union for Assistance in the Development of Legislation on Plant Variety Protection (44)

Afghanistan, Algeria, Bahrain, Bangladesh, Barbados, Burundi, Cambodia, Congo (Democratic Republic of), Cuba, Cyprus, Djibouti, Dominica, El Salvador, Fiji, Ghana, Greece, Guyana, Indonesia, Iraq, Islamic Republic of Iran, Jamaica, Lao People's Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Madagascar, Malawi, Mongolia, Myanmar, Nepal, Pakistan, Saudi Arabia, Seychelles, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Thailand, Tonga, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Yemen, Zambia.

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