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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

COUNCIL

Thirty-Seventh Ordinary Session
Geneva, October 23, 2003

REPORT

adopted by the Council

Introduction

- *1. The Council of the International Union for the Protection of New Varieties of Plants (UPOV) held its thirty-seventh ordinary session in Geneva, on October 23, 2003, under the chairmanship of Mr. Karl Olov Öster (Sweden).
2. The list of participants is reproduced in Annex I to this document.
- *3. The President extended a warm welcome to the Delegation of Tunisia, a State which had become a member of UPOV on August 31, 2003.
4. The declaration made to the Council by the Delegation of Tunisia is reproduced in Annex II to this document.
- *5. The President informed the Council that the 1991 Act of the UPOV Convention entered into force for Poland on August 15, 2003.

* An asterisk next to the paragraph number indicates that the text has been taken from the Record of the Decisions (document C/37/21).

Adoption of the Agenda

*6. The Council adopted the revised draft agenda C/37/1 Rev. and noted the additional document C/37/20 concerning item 7.

Adoption of the Report on the Thirty-Sixth Ordinary Session

*7. The Council adopted the report as reproduced in document C/36/13 Prov.

Appointment of Dr. Kamil Idris as Secretary-General of UPOV for the Period December 1, 2003, to November 30, 2009

*8. The President introduced document C/37/14.

*9. The Council

(a) unanimously decided to re-appoint Dr. Kamil Idris as Secretary-General of UPOV for the period December 1, 2003, to November 30, 2009;

(b) noted with appreciation that Dr. Idris did not wish to receive an indemnity from UPOV, and decided that this saving should be used for the UPOV program and budget for financing activities of particular interest for developing countries.

10. The Council paid tribute to the contribution of Dr. Kamil Idris to the work and development of the Union over the last six years. The President recalled the speech that Dr. Idris addressed to the sixty-sixth session of the Consultative Committee on October 22, 2003, and which is reproduced in Annex III to this document.

Extension of the Appointment of the Vice Secretary-General

*11. The President informed the Council that the term of appointment of Mr. Rolf Jördens would expire on November 30, 2003.

*12. The Council unanimously decided to extend the term of Mr. Rolf Jördens as Vice Secretary-General of UPOV until November 30, 2006.

*13. The President congratulated the Vice Secretary-General on the excellence and distinction with which he had accomplished his duties.

*14. The Vice Secretary-General expressed his gratitude to all delegations for their support in executing his tasks. He thanked the Secretary-General for his trust and his continued support. He praised the staff members of UPOV and emphasized the excellent team spirit which existed in the Office. He expressed his thanks to staff members of the World Intellectual Property Organization (WIPO) for the services they rendered to UPOV.

Examination of the Conformity of the Legislation or Proposed Legislation of any State or Organization Having Submitted a Request Under Article 34(3) of the 1991 Act of the UPOV Convention

Hashemite Kingdom of Jordan

*15. Discussions were based on document C/37/16.

*16. The Council decided

(a) to advise the Government of Jordan that the Law in its main provisions incorporates the substance of the 1991 Act, and that it may deposit an instrument of accession to the 1991 Act;

(b) to further advise the Government of Jordan that it may wish to supplement the texts of its legislation, as provided in paragraphs 16 and 21 of document C/37/16, so as to avoid recourse to the CivilCode Provision.

17. The Delegation of Jordan thanked the Council for accepting the Law and hoped that Jordan would, at some point in the future, become as active as the other members of the Union.

Republic of Iceland

*18. Discussions were based on document C/37/17.

*19. The Council decided

(a) to advise the Government of Iceland that the Law, in its main provisions, incorporates the substance of the 1991 Act, but that it still needs some amendments, as provided in paragraphs 9, 11, 12, 21, 23 and 30 of document C/37/17, in order to fully conform with the 1991 Act;

(b) once the amendments are incorporated in the Law, Iceland may deposit its instrument of accession to the 1991 Act.

20. The Delegation of Iceland welcomed the analysis of the Law. It advised that it hoped to complete the necessary amendments shortly and would notify the Office of the Union when that process was finalized.

Republic of Uzbekistan

*21. Discussions were based on document C/37/18.

*22. The Council decided

(a) to advise the Government of Uzbekistan that the Law, in its main provisions, incorporates the substance of the 1991 Act, and that it may deposit an instrument of accession to the 1991 Act;

(b) to further advise the Government of Uzbekistan that it may wish to supplement the texts of its legislation, where necessary, so as to avoid recourse to the Constitutional Provision.

Republic of Singapore

*23. Discussions were based on document C/37/19.

*24. The Council decided

(a) to advise the Government of Singapore that the Draft Act, in its main provisions, incorporates the substance of the 1991 Act, but that it still needs to include complementary provisions in Section 33 concerning variety denominations, as provided in paragraphs 21, 22 and 23 of document C/37/19, and in Section 25 concerning cancellation of grants, as provided in paragraph 26 of document C/37/19, in order to fully conform with the 1991 Act;

(b) once the Act has been enacted with the incorporation of the above-mentioned complementary provisions, Singapore may deposit its instrument of accession to the 1991 Act.

25. The Delegation of Singapore thanked the Council for its analysis and noted that it would make amendments to incorporate the recommendations.

Report by the President on the Work of the Sixty-Fifth and Sixty-Sixth Sessions of the Consultative Committee; Adoption of Recommendations, if Any, Prepared by That Committee

26. The Council noted the report by the President and adopted Annex II to document C/37/20 entitled "Access to genetic resources and benefit-sharing" as a suitable reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD). This reply is reproduced in Annex IV to this document.

Report by the Secretary-General on the Activities of the Union in 2002; Supplementary Report on Activities During the First Nine Months of 2003

*27. The Council approved the report by the Secretary-General on the activities of the Union in 2002, given in document C/37/2, and noted the report on activities during the first nine months of 2003, given in document C/37/3.

*28. The Council expressed appreciation to the Office of the Union for the work it had carried out, and also to WIPO for the assistance it provided.

Progress of the Work of the Administrative and Legal Committee

*29. The Council noted the work of the Administrative and Legal Committee (CAJ) as described in document C/37/9 and in the oral report made by the Chairperson of the CAJ.

Progress Report of the Work of the Technical Committee, the Technical Working Parties and the Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular

*30. The Council noted the work of the Technical Committee, the Technical Working Parties and the Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular, as given in document C/37/10, and approved the programs of work set out in that document.

Designation of the Auditor

*31. The Council unanimously decided to renew the designation of Switzerland as auditor of the accounts of UPOV up to and including the year 2007. It expressed its gratitude to the Swiss authorities for their assistance.

Interim Financial Statement for 2002; Arrears in Contributions as of October 17, 2003

*32. The Council noted document C/37/12, and no decision was called for under this agenda item.

33. The Delegation of Belgium apologized for its arrears, explaining that this had been the result of a need for a Royal Decree. That Decree had since been adopted and the outstanding contribution would be paid very quickly.

Examination and Approval of the Draft Program and Budget of the Union for the 2004-2005 Biennium

34. The Vice Secretary-General introduced document C/37/4. With particular regard to operating expenses, he explained that there had been a very positive experience in the Technical Working Parties (TWPs) with the distribution of documents via the Website. Therefore, with immediate effect, paper copies of documents would no longer be issued to the TWPs and, in due course, the same measure would be taken for documents of the Technical Committee (TC) and the Administrative and Legal Committee (CAJ). The only exception would be the mailing of invitations to sessions together with the respective draft agendas and the mailing of draft reports to participants for adoption by correspondence.

*35. The Council approved the proposals contained in document C/37/4, draft Program and Budget for the 2004-2005 Biennium, including the amount of contributions from members, the proposed maximum ceiling of expenditure in the regular budget and the total number of posts for the Office of the Union.

36. The Delegation of Spain advocated a search for solutions concerning the financial situation of the Union. It recalled that, at the sixty-sixth session of the Consultative Committee held on the previous day, it had expressed concerns at the reduced activities and staff levels required to meet the budget level set for the 2004-2005 biennium. It appreciated the activities and the staff of the Office of the Union and considered that Spain, like some other countries, had benefited more from membership of UPOV than was reflected in the level of contribution. Therefore, it was endeavoring to increase its number of units of contribution from 1.5 to 2 and encouraged other members of the Union to follow that approach.

Establishment of the Official Text of the 1991 Act of the UPOV Convention in the Russian Language

*37. The Vice Secretary-General introduced document C/37/13.

38. The Delegation of the Russian Federation explained that the Russian unofficial text, which had been developed by the Office of the Union in 1992, had been used as the basis for its national law and for its understanding of the 1991 Act of the UPOV Convention. In 1997, at the invitation of the Office of the Union, it had taken part in a revision of the unofficial text which produced many amendments and resulted in a new text. In particular, the new text contained an incorrect translation concerning Article 16(1)(ii) of the 1991 Act of the Convention.

*39. Following the request made by the Government of the Russian Federation, and supported by the Governments of Belarus, the Kyrgyz Republic, the Republic of Moldova and Ukraine, as members, and Armenia and Azerbaijan, as observers, the Council decided to designate, for the purposes of Article 41(2) of the 1991 Act of the UPOV Convention, Russian as a language in which the official text of the 1991 Act of the UPOV Convention shall be established.

*40. The Council noted that the Secretary-General, in consultation with the interested Governments, will establish the official text of the 1991 Act of the UPOV Convention in the Russian language, using the existing unofficial text as a basis.

Calendar of Meetings in 2004

*41. The Council approved the calendar of meetings in 2004 as presented in document C/37/8.

Election of the New President and the New Vice-President of the Council

*42. The Council elected, in each case for a term of three years ending with the fortieth ordinary session of the Council, in 2006:

- (a) Mrs. Enriqueta Molina Macías (Mexico), President of the Council; and
- (b) Mr. Doug Waterhouse (Australia), Vice-President of the Council.

*43. The Council expressed its appreciation to the outgoing President, Mr. Karl Olov Öster (Sweden), for the work carried out during his term.

Situation in the Legislative, Administrative and Technical Fields

*44. The Council noted documents C/37/5, C/37/6, C/37/7 and C/37/15, and no decisions were called for under this agenda item.

45. *The present report has been adopted by correspondence.*

[Annex I follows]

ANNEXE I / ANNEX I / ANLAGE I / ANEXO I

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS /
TEILNEHMERLISTE / LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des États / in the alphabetical order of the names in French of the States / in alphabetischer Reihenfolge der französischen Namen der Staaten / por orden alfabético de los nombres en francés de los Estados)

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Vladimir DERBENSKIY, Consultant

[L'annexe II suit/
Annex II follows/
Anlage II folgt/
Sigue el Anexo II]

ANNEX II

Declaration by the Delegation of the Tunisian Republic

Mr. Chairman,
Ladies and Gentlemen,

In the name of the Government of the Tunisian Republic and on behalf of the Ministry of Agriculture, the Delegation of Tunisia expresses pleasure at the warm welcome extended to it by UPOV. We are very honored to have become members of the Union.

Tunisia deposited its instrument of accession to the 1991 Act of the UPOV Convention on July 31, 2003, and became the fifty-third member of UPOV on August 31, 2003.

On September 9, 2000, the Tunisian Republic requested the examination of the Tunisian Law Relating to Seeds, Seedlings and New Plant Varieties, adopted on May 10, 1999, to determine its conformity with the UPOV Convention. The UPOV Council has since decided that the provisions of the Tunisian Law conform in substance to those of the 1991 Act of the UPOV Convention.

Plant variety protection is governed in Tunisia by Law No. 99-42 of May 10, 1999, and by such general provisions and implementing regulations as may be enacted by decree or order.

The Ministry of Agriculture of the Tunisian Republic is the national entity responsible for the implementation of the UPOV Convention.

We wish to draw attention to the assistance offered to the Tunisian Republic by UPOV, for which we express our sincere thanks. We also wish to thank the national institutions of other UPOV member States, and the experts of UPOV itself, for their support and cooperation.

[Annex III follows]

ANNEX III

Speech of Dr. Kamil Idris, Secretary-General of UPOV,
at the Sixty-Sixth Session of the Consultative Committee on October 22, 2003

Mr. President,

I would like first of all to thank you personally for your able leadership in chairing the Council and Consultative Committee of UPOV. Your leadership has been critical to the successful development of UPOV's activities.

I would like to thank all delegations for their support and am greatly honored by your recommendation today to re-appoint me as Secretary-General of UPOV for the period from December 1, 2003, to November 30, 2009. My goal over the coming years is to continue to earn the trust placed in me by the member States and to carry out my duties to the best of my ability, discretion, conscience and with humility. In the process, I know I can count on the goodwill and constructive collaboration of the members of the Union and the invaluable commitment, dedication and professionalism of the staff of UPOV.

New varieties of plants are most effective tools in promoting sustainable agriculture, food production and overall economic development. The protection of new plant varieties is essential in encouraging breeders to pursue and enhance their search for improved varieties with higher yield, better resistance to pests and diseases, drought and other adverse conditions.

The number of UPOV members has increased rapidly in recent years, growing from 20 members at the end of 1992 to today's 53 members, all benefiting from international harmonization through UPOV, which strengthens the quality of protection and reduces costs at national level. It is also gratifying to note the increased interest of developing countries in UPOV's activities.

UPOV is a dynamic organization with growing importance in the international community. The enhanced interest in UPOV has also reached other international fora, such as the World Trade Organization, the Food and Agriculture Organization of the United Nations and the Conference of the Parties to the Convention on Biological Diversity.

The conservation of and access to genetic resources and the development of modern biotechnology are major issues with implications for effective plant breeding. UPOV also continues to monitor issues concerning the co-existence of plant variety protection with other forms of intellectual property rights. I believe that UPOV represents a well-balanced system for encouraging the development of new varieties of plants for the benefit of society as a whole.

Over the past six years, UPOV has continued to be an efficient and open organization where new members are warmly welcomed and quickly benefit from the fruitful achievements of the Organization. The increasing importance of UPOV will likely lead to continued growth in membership. This will be a key challenge for the future, and will require efficient management, enhanced cooperation among members and collaboration with interested circles while continuing to improve services to members.

Distinguished delegates, your invaluable commitment and contributions to the growth of the Organization and the dedication and professionalism of the Office are a continuing source of encouragement and inspiration.

Thank you for your attention.

[Annex IV follows]

C/37/22

ANNEX IV



INTERNATIONALER
VERBAND
ZUM SCHUTZ VON
PFLANZENZÜCHTUNGEN

GENÈVE, SCHWEIZ

UNION INTERNATIONALE
POUR LA PROTECTION
DES OBTENTIONS
VÉGÉTALES

GENÈVE, SUISSE

UNIÓN INTERNACIONAL
PARA LA PROTECCIÓN
DE LAS OBTENCIONES
VEGETALES

GINEBRA, SUIZA

INTERNATIONAL UNION
FOR THE PROTECTION
OF NEW VARIETIES
OF PLANTS

GENEVA, SWITZERLAND

ACCESS TO GENETIC RESOURCES
AND BENEFIT-SHARING

*Reply of UPOV to the Notification of June 26, 2003, from the
Executive Secretary of the Convention on Biological Diversity (CBD)*

adopted by the Council of UPOV
at its thirty-seventh ordinary session
on October 23, 2003

Introduction

1. The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization, established by the International Convention for the Protection of New Varieties of Plants (the “UPOV Convention”). The UPOV Convention was adopted on December 2, 1961, and revised in 1972, 1978 and 1991. The Mission of UPOV, based on the UPOV Convention, is: *“To 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.”*

2. As of July 31, 2003, UPOV has 53 members¹. Furthermore, 18 States and two intergovernmental organizations have initiated, with the Council of UPOV, the procedure for becoming members of the Union and 53 other States have been in contact with the Office of the Union for assistance in the development of legislation on plant variety protection. It is therefore anticipated that more than 100 States or intergovernmental organizations may be members of UPOV in the future.

3. UPOV supports the view that the Convention on Biological Diversity (CBD) and relevant international instruments dealing with intellectual property rights, including the UPOV Convention, should be mutually supportive.

4. It should be recalled that the Conference of the Parties to the CBD, in its Decision IV-24, taken at its sixth Meeting (COP-6) held in The Hague, Netherlands, from April 7 to 19, 2002, acknowledged relevant work being carried out by other intergovernmental organizations, such as the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization of the United Nations (FAO) and UPOV, on issues related to access to genetic resources and benefit-sharing.

5. UPOV has developed a reply based on the principles of the UPOV Convention in order to provide some guidance on UPOV’s views on the “process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing.”

Access to Genetic Resources

6. UPOV considers that plant breeding is a fundamental aspect of the sustainable use and development of genetic resources. It is of the opinion that access to genetic resources is a key requirement for sustainable and substantial progress in plant breeding. The concept of the “breeder’s exemption” in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain greatest progress in plant breeding and, thereby, to maximize the use of genetic resources for the benefit of society.

¹ More detailed information concerning UPOV’s membership can be found at:
<http://www.upov.int/en/about/members/index.htm>

Disclosure of Origin

7. The requirement for “distinctness” in the UPOV Convention² means that protection shall only be granted after an examination to determine if the variety is clearly distinguishable from all other varieties, whose existence is a matter of common knowledge³ at the date of filing of the application, regardless of the geographical origin. Furthermore, the UPOV Convention provides that, if it is discovered that a breeder’s right has been granted for a variety that was not distinct, that right shall be declared null and void.

8. The breeder is usually required, in a technical questionnaire that accompanies his application for protection, to provide information concerning the breeding history and genetic origin of the variety. UPOV encourages information on the origin of the plant material, used in the breeding of the variety, to be provided where this facilitates the examination mentioned above, but could not accept this as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability and a suitable denomination and does not allow any further or different conditions for protection. Indeed, in certain cases, for technical reasons, applicants may find it difficult, or impossible, to identify the exact geographic origin of all the material used for breeding purposes.

9. Thus, if a country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection. A separate mechanism from the plant variety protection legislation, such as that used for phytosanitary requirements, could be applied uniformly to all activities concerning the commercialization of varieties, including, for example, seed quality or other marketing-related regulations.

Prior Informed Consent

10. With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, UPOV encourages the principles of transparency and ethical behavior in the course of conducting breeding activities and, in this regard, the access to the genetic material used for the development of a new variety should be done respecting the legal framework of the country of origin of the genetic material. However, the 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. UPOV notes that this is consistent with Article 15 of the CBD, which provides that the determination of the access to genetic resources rests with the national governments and is subject to national legislation. Furthermore, UPOV considers that the competent authority for the grant of the breeder’s rights is not in a position to verify whether the access to genetic material has taken place in accordance with the applicable law in this field.

² Reference to the UPOV Convention in this document should be understood as a reference to the latest Act of the UPOV Convention (the 1991 Act). The full text of the UPOV Convention can be found at: <http://www.upov.int/en/publications/conventions/1991/content.htm>

³ The matter of common knowledge is considered further in UPOV document “The Notion of Breeder and Common Knowledge” (C(Extr.)/19/2 Rev.). This document can be found at: http://www.upov.int/en/about/key_issues.htm

Summary

11. Since the legislation on access to genetic material and the legislation dealing with the grant of breeders' rights pursue different objectives, have different scopes of application and require a different administrative structure to monitor their implementation, UPOV considers that it is appropriate to include them in different legislation, although such legislation should be compatible and mutually supportive.

Benefit-Sharing

Breeder's Exemption

12. UPOV would be concerned if any mechanism to claim the sharing of revenues were to impose an additional administrative burden on the authority entrusted with the grant of breeders' rights and an additional financial obligation on the breeder when varieties are used for further breeding. Indeed, such an obligation for benefit-sharing would be incompatible with the principle of the breeder's exemption established in the UPOV Convention whereby acts done for the purpose of breeding other varieties are not, under the UPOV Convention, subject to any restriction and the breeders of protected varieties (initial varieties) are not entitled to financial benefit-sharing with breeders of varieties developed from the initial varieties, except in the case of essentially derived varieties (EDV). Furthermore, a benefit-sharing mechanism within the legislation to grant breeder's rights, would seem to tax only "protected" varieties and, instead of creating incentive mechanisms to develop new varieties, may provoke the opposite effect, whereby breeders would not develop new varieties or would not seek protection (favoring a legally insecure environment).

13. The Food and Agriculture Organization of the United Nations (FAO), at its 31st Conference, on November 3, 2001, adopted the International Treaty on Plant Genetic Resources for Food and Agriculture. This Treaty (Article 13.2. (d)(ii)) recognizes the concept of the breeder's exemption, in that breeders are excepted from financial benefit-sharing whenever their products are "available without restriction to others for further research and breeding ...".

Subsistence Farmers

14. In addition to the breeder's exemption and the research exemption, the UPOV Convention contains another 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 freely benefit from the availability of protected new varieties.

Farm-Saved Seed

15. The provision on "farm-saved seed" (also known as the "farmer's privilege") is an optional benefit-sharing mechanism provided by the UPOV Convention, under which UPOV members 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 provision, 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 or limit its application using criteria such as the size of the farmer's holding or the level of production.

Summary

16. Mechanisms of benefit-sharing should take into account the need for a relationship of mutual supportiveness in respect of the essential principles of the UPOV system of plant variety protection and, in particular, of the breeder's exemption provision.

Conclusion

17. UPOV considers that plant breeding is a fundamental aspect of the sustainable use and development of genetic resources. It is of the opinion that access to genetic resources is a key requirement for sustainable and substantial progress in plant breeding. The concept of the "breeder's exemption" in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain greatest progress in plant breeding and, thereby, to maximize the use of genetic resources for the benefit of society. In addition, the UPOV Convention has inherent benefit-sharing principles in the form of the breeder's exemption and other exceptions to the breeder's right and UPOV is concerned about any other measures for benefit-sharing which could introduce unnecessary barriers to progress in breeding and the utilization of genetic resources. UPOV urges the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing to recognize these principles in its work and to ensure that any measures it develops are supportive of these principles and, therefore, of the UPOV Convention.

[End of Annex IV and of document]