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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Forty-Eighth Session
Geneva, October 20 and 21, 2003

ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING

Document prepared by the Office of the Union

Introduction

1. On June 26, 2003, the Executive Secretary of the Convention on Biological Diversity (CBD) issued a notification concerning the invitation of the Inter-sessional meeting on the Multi-Year Programme of Work of the Conference of Parties up to 2010, for “Parties, other Governments, indigenous and local communities and relevant organizations to submit their views on the process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing” to the Secretariat of the CBD by September 15, 2003. This information will be compiled by the Executive Secretary and made available for the second meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, to be held from December 1 to 5, 2003. That Notification* is reproduced in Annex I to this document.

2. The Administrative and Legal Committee (CAJ) is invited to note the contents of the Notification and to provide comments on the draft reply in Annex II “Access to Genetic Resources and Benefit-Sharing.”

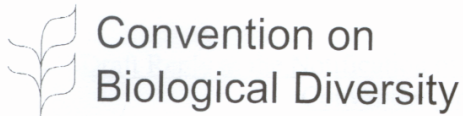
* This Notification has also been placed on the Website of the CBD:
<http://www.biodiv.org/doc/notifications/default.asp?thm=abs>

3. It is proposed that, on the basis of the recommendation to be made by the CAJ and the Consultative Committee, the Council of UPOV approve Annex II of this document as the reply to the Notification. In addition, it is proposed that, on the same basis, Annex II would be adopted by the Council of UPOV as a UPOV position paper at that same session.

4. The contents of this document (CAJ/48/6) and its related Annexes will also be contained in document CC/66/5 “Biodiversity, Plant Genetic Resources and Plant Variety Protection” in order to inform the Consultative Committee, at its sixty-sixth session, on October 22, 2003, that this matter will be discussed by the CAJ. If the comments provided by the CAJ and the Consultative Committee concerning the draft reply in Annex II provide a basis for a document to be submitted to the Council, at its thirty-seventh ordinary session, on October 23, 2003, it is proposed to revise the draft agenda of the Council in order to include a new item and the corresponding document.

5. The CAJ is invited to note the contents of the Notification in Annex I and comment on Annex II as a suitable reply and as a UPOV position paper in accordance with the procedure set out in paragraphs 3 and 4, above.

[Annex I follows]



Secretariat

Ref.: SCBD/SEL/VN/36208

26 June 2003

Dear Madam/Sir,

NOTIFICATION

Follow up to the Intersessional meeting of the Multi-Year Programme of Work of the Conference of the Parties: international regime on access and benefit sharing

The Plan of Implementation of the World Summit on Sustainable Development, held in Johannesburg in September 2002, called for action to “*negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources*”. In light of this outcome, the issue of an international regime on access and benefit-sharing was addressed by the Inter-sessional meeting on the Multi-Year Programme of Work of the Conference of the Parties up to 2010, in March 2003. The Inter-sessional meeting recommended that “*the Ad Hoc Open-ended Working Group on Access and Benefit-sharing should, in its consideration of other approaches, in accordance with its mandate as specified in decision VI/24A, consider the process, nature, scope, elements and modalities of an international regime and provide advice to the Conference of the Parties at its seventh meeting on how it may wish to address this issue*”.

The Inter-sessional meeting invited “*Parties, other Governments, indigenous and local communities and relevant organizations to submit to the Executive Secretary their views on the process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing prior to the second meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing*”. The Executive Secretary is requested to compile these views for the second meeting of the Working Group on Access and Benefit-sharing.

In light of the above, indigenous and local communities and relevant organizations are hereby invited to provide their views on this matter to the Secretariat **by 15 September 2003**, in order for this information to be compiled by the Executive Secretary and made available for the second meeting of the Working Group on Access and Benefit-sharing from 1 to 5 December 2003.

Yours sincerely,

Hamdallah Zedan
Executive Secretary

To: Indigenous and local communities and relevant organisations

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[Annex II follows]

ANNEX II

ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING

Proposed Draft Reply of UPOV to the Notification of June 26, 2003, by the
Executive Secretary of the Convention on Biological Diversity (CBD)

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 position 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 and is concerned about any potential restrictions on access to genetic resources for the purposes of plant breeding.

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

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.

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. Therefore, UPOV is not opposed to the disclosure, *per se*, of countries of origin or geographical origin of genetic resources in any way that will facilitate the examination mentioned above, but could not accept this as an additional condition of protection. Indeed, in certain cases, for technical reasons, applicants may find it difficult, or impossible, to identify the exact source/origin of all the material used for breeding purposes. Furthermore, 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.

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

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

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.

Recommendation

11. Thus, UPOV recommends that the legislation on access to genetic material should not be included in the legislation dealing with the grant of breeder's rights. These laws pursue different objectives, have different scopes of application and require a different administrative structure to monitor their implementation.

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 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 as a fundamental form of benefit-sharing and, consequently, 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 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.

Recommendation

14. UPOV recommends that, should a mechanism on benefit-sharing be considered necessary, it should be dealt with in a separate legal framework. This separation would allow the matter to be addressed in a more global manner. Furthermore, any such legislation should be developed in a way which would avoid jeopardizing the essential principles of an effective plant variety protection system and, in particular, the breeder's exemption provision. In addition, any such legislation should recognize the inherent benefit-sharing aspects contained within the UPOV Convention as explained above.

Conclusion

17. UPOV considers that plant breeding is a fundamental aspect of the sustainable use and development of genetic resources. The UPOV Convention is built on the principle that plant breeders need 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. UPOV is, therefore, concerned about any potential restrictions on access to genetic resources for the purposes of plant breeding. 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 II and of document]