



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

CBD

October 31, 2005

Dear Mr. Zedan,

I refer to Notification Ref. SCBD/SEL/VN/GD/48027, dated April 12, 2005, in which relevant intergovernmental and non-governmental organizations are invited to contribute to the preparatory work for the fourth meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-Sharing (WG-ABS), which is planned to be held in Spain in January 2006.

I have the pleasure in sending you hereafter the contribution of the International Union for the Protection of New Varieties of Plants (UPOV) to the work of the WG-ABS. UPOV's contribution is based on the 1991 Act of the UPOV Convention and the reply of UPOV to the Notification of June 26, 2003, "Access to Genetic Resources and Benefit-Sharing", adopted by the Council of UPOV on October 23, 2003, and sent to you under cover of a letter dated October 27, 2003. The reply is also placed on the UPOV website as follows:

http://www.upov.int/en/news/2003/intro_cbd.html (in English)
http://www.upov.int/fr/news/2003/intro_cbd.html (in French)
http://www.upov.int/es/news/2003/intro_cbd.htm (in Spanish)
http://www.upov.int/de/news/2003/Intro_cbd.html (in German)

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Mr. Hamdallah Zedan
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Canada

By fax: 001-514-288 6588 (10 pages)

Mr. Hamdallah Zedan, Montreal – October 31, 2005

UPOV's contribution is related to the following sections of the Notification:

International Regime on Access and Benefit-Sharing (pages 1 and 2 of the Notification):

Annex I to this letter contains UPOV's comments on Annex A of the Notification.

Information has not been provided on the basis of the matrix contained in Annex II of the recommendation (reproduced as Annex B to your notification of April 12, 2005) because that matrix concerns "analysis of gaps in existing national, regional and international legal and other instruments relating to access and benefit-sharing". As explained in the reply of UPOV to the Notification of June 26, 2003, the UPOV Convention is not an instrument relating to access and benefit-sharing. However, as explained more fully in the comments on Annex A (Annex I of this document), there are certain measures under consideration in the international regime, in particular concerning disclosure of origin in relation to applications for intellectual property rights, which could be contrary to the UPOV Convention. Therefore, in the same manner as CBD wishes to ensure that "intellectual property rights do not undermine the international regime", we would request that consideration is made that any measures pursued in the international regime do not undermine plant variety protection according to the UPOV Convention. For its part UPOV supports the view that the CBD and relevant international instruments dealing with intellectual property rights, including the UPOV Convention, should be mutually supportive.

Articles 5, 7 and 15 of the 1991 Act of the UPOV Convention are the most relevant provisions on which UPOV's comments are based. Those Articles are reproduced in Annex II to this letter.

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Mr. Hamdallah Zedan, Montreal – October 31, 2005

Use of terms, definitions and/or glossary, as appropriate (pages 2 and 3 of the Notification):

UPOV has not developed any views on whether additional terms need to be considered, but would draw attention to the fact that the UPOV Convention has defined the terms “breeder”, “breeder’s right” and “variety” in the 1991 Act and would have concern that any use of these terms with a different definition would cause confusion. UPOV’s definitions of these terms are included in Annex III, corresponding to Annex C of the Notification.

Sincerely yours,

Rolf Jördens
Vice Secretary-General

ANNEX I

UPOV's comments on Annex A of the Notification

General comments on Annex A

The following is an extract from paragraph 17 of the reply of UPOV to the Notification of June 26, 2003, "Access to Genetic Resources and Benefit-Sharing".

"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."

Comments on specific parts of Annex A

Reference to the Notification:

(Page 11 of the Notification)

“ Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights”

(Page 13 of the Notification)

“VI Disclosure of legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights”

UPOV's comments:

With respect to the above, the Council of UPOV has commented as follows (paragraphs 7 to 10 of the Reply of UPOV to the Notification of June 26, 2003, “Access to Genetic Resources and Benefit-Sharing”):

“Disclosure of Origin

7. *The requirement for “distinctness” in the UPOV Convention 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 knowledge 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."*

Reference to the Notification:

(page 15 of the Notification)

- “Measures to ensure that intellectual property rights do not undermine the international regime.”
- “Measures to ensure mutual supportiveness between the Convention on Biological Diversity and intellectual property rights-related treaties.”
- “Relationship with other international legal instruments.”

UPOV’s comments:

With respect to the above, the Council of UPOV has commented as follows (paragraphs 3, 11 and 16 of the Reply of UPOV to the Notification of June 26, 2003, “Access to Genetic Resources and Benefit-Sharing”):

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.*

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.*

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.*

[Annex II follows]

ANNEX II

Article 5

Conditions of Protection

(1) [*Criteria to be satisfied*] The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

(2) [*Other conditions*] The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 20, that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

Article 7

Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

Article 15

Exceptions to the Breeder's Right

(1) [*Compulsory exceptions*] The breeder's right shall not extend to

- (i) acts done privately and for non-commercial purposes,
- (ii) acts done for experimental purposes and

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

(2) [*Optional exception*] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

[Annex III follows]

ANNEX III

UPOV's Comments on Annex C of the Notification (Extract from Article 1 of the 1991 Act of the UPOV Convention)

Use of terms

Terms	Definition
breeder	“breeder” means - the person who bred, or discovered and developed, a variety, - the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or - the successor in title of the first or second aforementioned person, as the case may be;
breeder's right	“breeder's right” means the right of the breeder provided for in this Convention (1991 Act of the International Convention for the Protection of New Varieties of Plants)
variety	“variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be -defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, -distinguished from any other plant grouping by the expression of at least one of the said characteristics and -considered as a unit with regard to its suitability for being propagated unchanged;

[End of Annex III]