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منظمة الأغذية
والزراعة
للأمم المتحدة

联合国
粮食及
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Food
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des
Nations
Unies
pour
l'alimentation
et
l'agriculture

Organización
de las
Naciones
Unidas
para la
Agricultura
y la
Alimentación

Item 8 of the Provisional Agenda

**COMMISSION ON GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

Seventh Session

Rome, 15-23 May 1997

**BACKGROUND DOCUMENTATION PROVIDED BY
THE INTERNATIONAL UNION FOR THE PROTECTION
OF NEW VARIETIES OF PLANTS (UPOV)**

At its Third Extraordinary Session, the Commission asked the Secretariat to invite “the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the International Union for the Protection of New Varieties of Plants (UPOV), and the Convention on Biological Diversity to present or transmit relevant background documentation in their areas of competence in good time before the next Session, especially documentation related to access and benefit-sharing, with regard to plant genetic resources and agricultural biodiversity, that may inform the Commission in its important negotiations, recognizing that some of these organizations have international mandates related to intellectual property rights.” The Director-General accordingly wrote to these organizations, enquiring whether they wished to make any such documentation available.

Attached is a document provided by UPOV in response to this request. It is available in the languages in which it was provided: English, French and Spanish.

BACKGROUND DOCUMENTATION PROVIDED BY THE INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)

WHAT IS UPOV?

1. The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization with headquarters in Geneva (Switzerland). UPOV has been established by the International Convention for the Protection of New Varieties of Plants (the "UPOV Convention"), which was signed in Paris in 1961. The Convention entered into force in 1968. It was revised in Geneva in 1972, 1978 and 1991.

2. UPOV is working in close contact with the World Intellectual Property Organization (WIPO), an organization with which it has concluded a cooperation agreement under which UPOV receives logistical support from WIPO. UPOV is thus associated with the family or organizations of the United Nations.

3. UPOV currently has 32 member States:

Argentina, Australia, Austria, Belgium, Canada, Chile, Czech Republic, Colombia, Denmark, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Paraguay, Poland, Portugal, Slovakia, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom, United States of America, Uruguay.

4. All of them are members of UPOV on the basis of the 1978 Act, with the exception of Belgium and Spain, which are still party to the 1961 Act, as amended by the 1972 Additional Act.

5. From the point of view of international treaty law, the 1991 Act is not yet in force; its entry into force requires the deposit of five instruments of ratification, acceptance, approval or accession, and only three have been deposited so far (by Denmark, Israel and the Netherlands).

6. A number of current member States and future member States already apply the 1991 Act at national level. In particular, the European Union has introduced a supranational protection system (under which a single application leads to a single right effective on the territory of 15 States) based upon the 1991 Act; the member States of the Cartagena Agreement (Bolivia, Colombia, Ecuador, Peru and Venezuela) are in a position to implement the 1991 Act at national level, and some have already done so. Most member States are in the process or revising their laws. It has been calculated that at March 1, 1997, plant variety protection conforming with the 1991 Act was being granted in respect of some 26 States. The 1991 Act must be regarded as the new international protection standard.

7. The UPOV Convention provides that any State wishing to become a member of UPOV must seek an advice from the Council of UPOV on the conformity of its laws with the relevant Act of the UPOV Convention. *Belarus, Bolivia, Brazil, Bulgaria, China, Ecuador, Kenya, Morocco, Panama, the Republic of Moldova, the Russian Federation and Trinidad and Tobago*—and also the *European Community*—have submitted their laws to the Council, whereas *Mexico* has taken steps with a view to ratifying the 1978 Act. Many other States are in the process of preparing laws and regulations.

8. The purpose of the UPOV Convention is to ensure that the member States of the Union acknowledge the achievements of breeders of new plant varieties, by making available to them an exclusive property right, on the basis of a set of uniform and clearly defined principles.

9. Protection is afforded to new varieties of plants not only to safeguard the interests of plant breeders, but also as an incentive to the development of agriculture, horticulture and forestry. Improved varieties are a necessary, and very cost-effective, element in the quantitative and qualitative improvement of the production of food, renewable energy and raw material.

10. The right granted to the breeder is not just a reward for his achievement and a tool for recovering his costs and accumulating the funds necessary for further investment in plant breeding; it also requires the breeder to maintain the variety and enables him to participate actively in the distribution of the variety, thus ensuring that past investments are not wasted.

11. The breeder's right is of advantage to both private and public breeding.

PLANT VARIETY PROTECTION AND GENETIC RESOURCES

Creation and Conservation of Genetic Resources

12. Plant variety protection provides a strong incentive for the development of genetic diversity for use in agriculture, horticulture and forestry and for its conservation, both as commercial varieties (breeders are required to maintain their varieties throughout the period of protection) and as raw material for further breeding work (breeders maintain and evaluate extensive germplasm collections). It is in the nature of plant breeding that the more breeders at work, the better are the chances of achieving genetic progress.

The "Breeder's Exemption"

13. It is also in the nature of plant breeding that a common strategy for creating a new variety, adapted to a given agro-ecological environment, is to cross superior plants, typically from recent varieties adapted to the same environment, and to select from the progeny one or more varieties representing a step up in performance (in terms of yield, quality, adaptation, resistance to pests, diseases, abiotic stresses, etc.).

14. Breeders also use wild or unimproved material and make "wide crosses" between material of differing origins. The use of such material frequently destroys the balanced genetic structure that is characteristic of high-performing varieties. Considerable efforts are then necessary to restore the original balance. Accordingly the use of such materials is often a minor feature of practical breeding programs.

15. The plant variety protection system reflects the nature of plant breeding in that it provides that a protected variety must be freely available as an initial source of variation—as a genetic resource—for the creation (and subsequent exploitation) of new varieties. This principle is usually referred to as "breeder's exemption" and is a cornerstone of the UPOV system.

16. The "breeder's exemption" represents a trade-off: in return for free access to the starting material, the breeder of a new variety accepts that his variety, together with all improvements built into it, becomes freely available as starting material for others.

17. The "breeder's exemption" is qualified in the case of inbred lines used for the production of hybrids and in the case of "essentially derived varieties" (typical examples are a genetically modified variety or a mutant variety that differ from the mother variety by a single

breeders involved so that the protection system provides proper incentives for all kinds of breeding work.

The Benefits from Plant Variety Protection—The “Farmer’s Privilege”

18. Through the protection of his variety the breeder acquires an exclusive right over the exploitation of the variety. This right rarely implies that the breeder enjoys a monopoly for it is in the nature of agricultural production that varieties are used by a large number of farmers and that a sophisticated chain of operators is needed to provide quality seed to farmers. In such cases, the breeder will be happy to license seed production widely and to collect a royalty on the seed sold, the level of which royalty will be dictated by market forces.

19. One of the market forces is the fact that farmers are able, for certain species, to produce their own seed. The UPOV Convention enables member States to make an exception from the breeder’s right in respect of seed produced and used on the same farm (the so-called “farmer’s privilege”). However, neither the 1978 nor the 1991 Act obliges them to make such an exception. The privilege is implicit under the 1978 Act (i.e. it comes into existence when a State defines the national scope of protection in accordance with the minimum scope set out in that Act) and explicit under the 1991 Act (i.e. it must be specifically defined in national legislation, and must be so “within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder”). The “farmer’s privilege” is a matter that should be dealt with at national level and cannot be the subject of a fixed international norm.

20. The breeder’s right does not apply—in accordance with a well-established principle of intellectual property—to “acts done privately and for non-commercial purposes.” This exception applies to seed and planting material used by a subsistence farmer or by an amateur gardener.

UPOV AND THE REVISION OF THE INTERNATIONAL UNDERTAKING

21. A written statement has been made available at earlier meetings of the Commission. Its most salient points are as follows:

- UPOV recognized and continues to recognize the importance of adequate support, both financial and otherwise, for the *in situ* and *ex situ* conservation of plant genetic resources useful for food, agriculture and horticulture, and welcomed the approach of the Agreed Interpretation in eliminating the possibility of interpreting the Undertaking so as to create conflicts between the interests of plant breeders and others.
- UPOV welcomes the current activity of the Commission in seeking to revise the International Undertaking. The UPOV Convention establishes a system for the granting of specific rights to specific persons in respect of specific plant varieties, which plant varieties are thus private property, not part of the public domain. The Convention is silent on the subject of plant genetic resources which are in the public domain and constitute the subject matter of the International Undertaking.
- The member States of UPOV are conscious of the great contribution to increasing both the quantity and quality of world food supplies that has resulted from the free availability of germplasm for plant improvement. They are conscious that plant breeding is one of the principle means of increasing production in a sustainable manner. They would view with disquiet restrictions upon the free availability for breeding purposes of germplasm of species used for food, agriculture and horticulture.
- Projected increases in world population call for future increases in world food

sustainable way may be prejudiced if the existing UPOV principle of free availability of plant germplasm is called into question.