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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL**Thirty-Sixth Ordinary Session
Geneva, October 24, 2002****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-sixth ordinary session in Geneva on October 24, 2002, under the Chairmanship of Mr. Karl Olov Öster (Sweden).
2. The list of participants is given in Annex I to this document.

Opening of the Session

- *3. The President extended a warm welcome to the Delegation of Latvia, a State which had become a member of UPOV on August 30, 2002.
4. The Delegation of Latvia made a statement, the text of which is included in Annex II to this document.

* An asterisk next to the paragraph number indicates that the text has been taken from the Record of the Decisions (document C/36/12) adopted by the Council at the end of the session.

Adoption of the Agenda

*5. The Council adopted the agenda as proposed in document C/36/1, with the deletion of item 4 (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) and the following corrections to the Spanish version:

Agenda item 6 to refer to the year 2002 with regard to document C/36/3.

Agenda item 13 (a) to refer to document C/36/11.

Adoption of the Report on the Thirty-Fifth Ordinary Session

*6. The Council adopted the report as given in document C/35/14 Prov.

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

7. The President reported that the sixty-third session of the Consultative Committee, held on April 19, 2002, had recommended to grant to Mr. Rolf Jördens an extension of his contract as Vice Secretary-General up to November 30, 2003, in line with the term of office of the Secretary-General and to promote Mr. Jördens to the same level as the Deputy Directors General of the World Intellectual Property Organization (WIPO), as of July 1, 2002. Also at its sixty-third session, the Consultative Committee had considered document C(Extr.)/19/2 "The Notion of Breeder and Common Knowledge in the Plant Variety Protection System Based upon the UPOV Convention" and proposed to the Council that, subject to modification of paragraph 14, it be adopted as a UPOV position paper. Furthermore, the Consultative Committee, having discussed document C(Extr.)/19/3, recommended to the Council that it adopt that document, with the amendments agreed by the Technical Committee (TC) and the Administrative and Legal Committee (CAJ) included in document C(Extr.)/19/3 Add., and amendments proposed to the Spanish version, as document TG/1/3 "General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants." The President noted that all these aforementioned recommendations of the Consultative Committee, to the Council, were adopted by the Council at its nineteenth extraordinary session, held on April 19, 2002. The Consultative Committee, having made certain amendments to documents CC/63/3 and CC/63/3 Add., agreed that the text of the Annex to document CC/63/3 Add. "UPOV Statement at the Sixth Conference of the Parties of the Convention on Biological Diversity, April 7 to 19, 2002, The Hague" might be used as a basis to represent the UPOV position, concerning these matters. He concluded by reporting that the Consultative Committee had also considered a document on developments in the TRIPS Council Concerning the Review of Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").

8. With regard to the sixty-fourth session of the Consultative Committee, held on October 23 2002, the President reported that there had been a preliminary examination of the conformity of the Protection of Plant Varieties and Farmers' Rights Act of India with the 1978 Act of the UPOV Convention. The Consultative Committee had concluded that

clarification concerning the Law of India and its implementing regulations, and a review of any laws pertaining to these clarifications, was required before the Council of UPOV would be able to decide if India could be deemed as to have the legal basis for the protection of new plant varieties in line with the 1978 Act. Pending such clarification, the Consultative Committee had requested the Office of the Union to continue to provide legal and technical assistance to the Government of India in the development of the UPOV system of plant variety protection and to consider those aspects of the Law of India which, although not in direct conflict with the Articles of the 1978 Act, nevertheless might undermine the effectiveness of the plant variety protection system provided by the Law of India. The Consultative Committee had considered the financial situation of the Union and had agreed that the Office of the Union should prepare a document for consideration by the Consultative Committee at its sixty-fifth session. That document would set out options for the level of contributions from members of the Union, ranging from no increase through to an increase of 20%. Those options would be presented with the associated levels of activities. The document would also make proposals for the establishment of a stable budgeting procedure for the future. The Consultative Committee had also considered documents on: Study of the Impact of Plant Breeders' Rights; WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments; Developments in the Council for TRIPS Concerning the Review of Article 27.3(b) of the TRIPS Agreement; Biodiversity, Plant Genetic Resources and Plant Variety Protection, and had received a presentation on International Developments in Plant Variety Protection by the Office of the Union.

Report by the Secretary-General on the Activities of the Union in 2001; Supplementary Report on Activities During the First Nine Months of 2002

*9. The Council approved the report by the Secretary-General on the activities of the Union in 2001, given in document C/36/2, and noted the report on activities during the first nine months of 2002, given in document C/36/3.

Report by the Secretary-General on the Financial Situation of the Union at December 31, 2001

*10. The Council unanimously approved the report by the Secretary-General on the financial situation of the Union at December 31, 2001, as given in document C/36/4.

Report on the Auditing of the Accounts of the 2000-2001 Biennium

*11. The Council noted the report of the auditor on the accounts of the 2000-2001 biennium, contained in document C/36/4, Annex B, and expressed its gratitude to the Government of Switzerland for its cooperation in this matter.

12. In response to a question from the Delegation of Mexico concerning the recommendation of the auditor in Annex B, paragraph 17, of document C/36/4, Mr. Philippe Favatier, Director, Finance Division, WIPO, reported that the figure used by WIPO for calculating the separation reserve was 1.5% percent of salaries and advised that this would correspond to around 60,000 to 70,000 Swiss francs for UPOV.

*13. The Council noted that the recommendation in Annex B, paragraph 17, of document C/36/4 would be considered by the Consultative Committee at its sixty-fifth session to be held in April 2003.

Progress of the Work of the Administrative and Legal Committee

*14. The Council noted and approved the work of the Administrative and Legal Committee (CAJ), as described in document C/36/9 and in the oral report made by the Chairperson of the CAJ.

15. In her oral report, the Chair of the CAJ, Ms. Nicole Bustin (France), reported on the work of the forty-sixth session of the CAJ, which was held on October 21 and 22, 2002, and which had not been covered by document C/36/9. She reported that the CAJ had concluded its examination of documents relating to the interface between plant breeders' rights and patents. This had given rise to very rich debate which enabled discussion of various hypothetical cases in which the breeders' exemption, being a basic feature of the Convention, could, to a greater or lesser extent, be rendered ineffective. The CAJ looked at hypotheses on the basis of concerns raised within professional circles and, in particular, had looked at this from the strict jurisdiction of UPOV. This review had underscored the fact that the provisions in the 1991 Act of the UPOV Convention, with respect to essentially derived varieties, respected the balance between the necessary reward for plant breeders and access to protected varieties for the purpose of breeding new plant varieties. It had also been noted that a solution to deal with the absence of a breeders' exemption in the patent system, by means of establishing a cross-compulsory license system, would be very difficult. The CAJ also noted the consequences for breeding progress if the breeder's exemption was negated or inhibited through the presence of patented inventions in plant varieties and had drawn the attention of national authorities to the need to consider whether the nature of the research exemption in their patent laws concerning plants might inhibit the breeder's exemption.

16. The CAJ had approved a draft questionnaire which would be sent by the Office of the Union to national authorities and to one intergovernmental organization as part of a study on the administrative, legal and financial issues linked to publication of variety descriptions.

17. The Chair reported that the CAJ had identified certain concerns with regard to the use of materials supplied by plant breeders to distinctness, uniformity and stability (DUS) examination centers and decided to include this matter on its agenda for future work. That item would determine the limits within which UPOV could consider that matter and also the type of document which might be prepared to clarify the situation and to offer reassurance to plant breeders.

18. The CAJ had received a report on the work of the *Ad hoc* Working Group on Variety Denominations and, following that report, had decided to include an item relating to possible improvements of the UPOV-ROM in its future agenda. The CAJ had noted, within the framework of a specific item on the effect of the protection of parent lines on hybrids, that the situation was not absolutely clear in all circumstances in the 1978 Act, but noted that the 1991 Act was clear. Thus, according to the 1991 Act, protection for a parent line would extend to hybrid varieties provided that the protected parent line was used repeatedly for the production of the hybrid variety. It was concluded that it was a matter for the plant breeder to determine whether they wished to rely on the extension of protection from a parent line to the hybrid or to obtain protection for the hybrid itself by making a specific application.

19. The Chair concluded by noting that an agenda item created in response to an issue raised by ornamental plant breeders, relating to the interpretation of the concept of essentially derived varieties, had, due to time constraints, been deferred to the next session.

Progress 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

20. The UPOV Secretariat made a report concerning document C/36/10. The Council was reminded that, as agreed at its thirty-fifth session held on October 25, 2001, the present document contained the reports of the Technical Working Parties meetings held in year 2001, but not the reports of the meetings in 2002, which, it considered, should first be reported to the Technical Committee. It highlighted the fact that a document for the revised “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties” (document TG/1/3) had been agreed by the TC at its thirty-eighth session, held from April 15 to 17, 2002, and noted that the Council had adopted document TG/1/3 at its nineteenth extraordinary session. The Secretariat further highlighted the adoption of 21 Test Guidelines at its thirty-eighth session.

*21. 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/36/10, and approved the programs of work set out in that document.

Calendar of Meetings in 2003

*22. The Council approved the calendar of meetings in 2003 as presented in document C/36/8.

Election of New Chairmen

*23. The Council elected, in each case for a term of three years ending with the thirty-ninth ordinary session of the Council, in 2005:

(a) Mr. Carlos Gómez-Etchebarne (Uruguay), Chairman of the Technical Working Party for Agricultural Crops;

(b) Mr. Uwe Meyer (Germany), Chairman of the Technical Working Party on Automation and Computer Programs;

(c) Mr. Erik Schulte (Germany), Chairman of the Technical Working Party for Fruit Crops;

(d) Mr. Chris Barnaby (New Zealand), Chairman of the Technical Working Party for Ornamental Plants and Forest Trees;

(e) Mr. Kees van Ettehoven (Netherlands), Chairman of the Technical Working Party for Vegetables;

(f) Mr. Gerhard Deneken (Denmark), Chairman of the Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular.

Situation in the Legislative, Administrative and Technical Fields

24. The Council was invited to consider documents C/36/5, C/36/6, C/36/7 and C/36/11.

25. The Delegation of Canada reported on the 10-Year Review of Canada's Plant Breeders Rights Act, which had been submitted to the Canadian Parliament. It noted that the main overall findings of the report were that there had been an increase in investment in plant breeding and an improvement in access to foreign varieties in both agricultural and horticultural sectors, since the enactment of Canada's Plant Breeders Rights Act. Plant breeders rights had been found to be one factor which had produced a positive impact on the availability of improved varieties. It reported that one of the concerns of the users of plant breeders' rights had been that amendments to bring Canada's Plant Breeders Rights Act in line with the 1991 Act of the UPOV Convention had not been enacted.

*26. The Council noted that the Czech Republic had deposited, on October 24, 2002, its instrument of accession to the 1991 Act of the UPOV Convention.

27. The Delegation of Austria reported that it had submitted proposals to its Parliament for the accession to the 1991 Act of the UPOV Convention in Summer of 2002. However, it noted that consideration of this proposal had been deferred because of the impending parliamentary elections. It also reported that, as a part of a reorganization, the Plant Variety Protection Office had been incorporated into an agency concerned with food standards.

28. The Delegation of Hungary reported that it had adopted a law in line with the 1991 Act of the UPOV Convention.

29. The Delegation of Chile reported that it was developing legislation in line with the 1991 Act of the UPOV Convention and anticipated that this process would take around two to three years to complete.

30. The Delegation of China added that, in relation to the plant variety protection statistics in the area of forest trees, China had separate offices for agriculture and forest trees. By the end of 2001, the State Forestry Administration of China had received 172 domestic applications and granted protection to 43 varieties. Furthermore, it had published two lists, covering 24 species, for which protection was available.

31. The Delegation of the Republic of Korea noted that it had acceded to the UPOV Convention on January 7, 2002, and reported that, by the end of September 2002, the total number of applications for plant variety protection had been 1,136, and the number of registrations had been 331. The number of variety applications had increased each year. It further reported that, in 2002, 317 variety applications had been made by foreign breeders, these being from Germany, Italy, Japan, Netherlands, New Zealand and the United States of America. Most of these varieties entered by foreign breeders had been for chrysanthemum, dendrobium, hot pepper, impatiens, petunia, poinsettia and rose.

32. With regard to document C/36/5, the Delegation of Croatia advised that it had ratified a bilateral agreement with Hungary, and Hungary was performing DUS testing for alfalfa,

soybean, sunflower and tobacco on behalf of Croatia. Croatia was also developing cooperation with France, which was performing DUS testing for oil pumpkin for Croatia for the time being. In addition, Croatia was performing DUS testing of maize, winter barley and winter wheat on behalf of Slovenia.

33. The Delegation of Italy provided information on the administrative structure in its country.

34. The Delegation of Belgium noted that it would provide the Office of the Union with further information for document C/36/5 concerning, in particular, cooperation for hybrid begonias and cereals.

35. The representative of the European Community reported that his Organization was developing improved guidelines concerning variety denominations and was also developing a project on the introduction of a centralized database of variety denominations to improve harmonization within the European Union. He emphasized that it was intended to coordinate the development of that database with the Office of the Union. The representative reported that the Administrative Council of the Community Plant Variety Office (CPVO) had adopted 26 technical protocols and was developing a further 43, all of which were based on the UPOV Test Guidelines. He noted that these technical protocols were also applied with respect to variety listing. He also reported that the CPVO granted, in September 2002, the 10,000th plant variety right since its coming into existence in 1996. He noted that 68% of the applications received in the CPVO related to ornamentals, 18% to agricultural crops and 8% to vegetables, with fruit and miscellaneous being responsible for the remainder. He stressed that there were no political or financial reasons why the accession of the European Community to the UPOV Convention was not yet effected. There were legal reasons that formed an impediment for accession in the very short term, but he hoped that those legal impediments would be solved relatively quickly and that next year he would speak as a representative of a member of the Union rather than in an observer status. He remarked that, notwithstanding its current status, the CPVO cooperated intensively with UPOV in its different Committees, and tried to play a constructive role. It had very good contacts with the Secretariat and with the Vice Secretary-General, in particular, and hoped that this close cooperation would continue in the future.

36. The representative of the Food and Agriculture Organization of the United Nations (FAO) presented an oral report of its activities, in advance of a written report to be submitted to the Office of the Union.

37. The representative of the Organization for Economic Co-operation and Development (OECD) presented an oral report on developments concerning the OECD seed schemes, in advance of a written report to be submitted to the Office of the Union.

*38. The Council noted documents C/36/5, C/36/6, C/36/7 and C/36/11, and the oral reports made by Austria, Belgium, Canada, Chile, China, Croatia, Czech Republic, Hungary, Italy, Republic of Korea, FAO, OECD and CPVO.

39. The Council noted that written reports by representatives of States and intergovernmental organizations on the legislative, administrative and technical fields, handed in at the session of the Council, or sent to the Office of the Union, would be included in an addendum to document C/36/11.

40. At the close of the session, the Council adopted document C/36/12 as a Record of the Decisions taken.

Retirement

41. The President noted that Mr. Hans Jørgen Andersen (Denmark) would be retiring before the next session of the Council and thanked him, on behalf of the Council, for his service to the Union.

42. The Council unanimously adopted this report at its thirty-seventh ordinary session, on October 23, 2003.

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

ANNEX II

Declaration Made by the Delegation of Latvia

Mr. President,
Ladies and Gentlemen,

On behalf of the Government of the Republic of Latvia, on behalf of the Ministry of Agriculture, Latvia appreciates the warm welcome into the UPOV family. We are very honored to be a member of UPOV.

On July 30, 2002, Latvia deposited its instrument of accession to the UPOV Convention (1991 Act). On August 30, 2002, Latvia became the fifty-first member of UPOV.

The Law on the Protection of Plant Varieties was adopted on April 6, 1993, and amended in 1995 and 1999.

On February 22, 2001, Latvia requested the Council of UPOV to examine the conformity of the Law with provisions of the 1991 Act. According to proposals of the Office of the Union and executing body of the Law in Latvia, the new Plant Variety Protection Law was adopted by the Parliament of the Republic of Latvia on May 2, 2002. The Law was published in the official newsletter of Latvia "Latvijas Vēstnesis" on May 17, 2002 (No. 74 (2649)), and entered into force on May 31, 2002.

Plant breeders' rights in Latvia are guided by the State Plant Protection Service. This institution has the necessary staff and equipment for granting and protection of plant breeders' rights. The staff had good training in Denmark and other countries relating to plant breeders' rights.

Latvia has cooperation in DUS test with Estonia, Lithuania and Poland. Latvia is performing DUS tests for fruit plants and certain species of ornamental plants. Other species are sent to Estonia or Poland.

I would like to emphasize the assistance offered by UPOV, especially by Mr. Rolf Jördens, Vice Secretary-General, for preparing the new Plant Varieties Protection Law of Latvia.

Also I would like to convey thanks to experts from Finland (Mr. Arto Vuori) and Estonia and from other national institutions of UPOV member States for their help and cooperation.

Thank you!

[End of Annex II and of document]