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Council for Trade-Related Aspects of Intellectual Property Rights

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REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)

Information from the Republic of Zambia

Addendum

The present document represents the information requested by the Council for Trade-Related Aspects of Intellectual Property Rights which the Secretariat has received from Zambia, by means of a communication from its Permanent Mission, dated 1 February 1999.

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1. INTRODUCTION

The Patents Act Cap. 400 of the Laws of Zambia regulates the grant of protection for inventions in Zambia.

The Act does not exclude any field of technology from protection. However, the Registrar has the discretion to deny protection to inventions deemed to be contrary to public morality or law. Further, substances used as food or medicine which are mere mixtures of known ingredients, or a process for obtaining such mixture are excluded from patentability. Section 38 herein refers.

2. PROTECTION OF PLANT VARIETIES

As earlier indicated, Section 18 allows the Registrar on a discretionary basis to refuse certain classes of applications for a patent. However, plant varieties do not fall within any of the classes. Therefore by interpretation, it is possible for the Registrar to grant a patent for a plant variety, but only if it can meet the criteria of an invention and if the complete specification "fully described the invention and the manner in which it is to be performed". (Section 14(3) of the Act). What would need to be resolved, however, in such a situation would be the question of obviousness and reproducibility.

Industrial property rights (IPRs) are private rights. This means that once a patent is granted the owner enjoys exclusive rights to his invention. Therefore, the grant of a patent for a plant variety would mean "to grant to the patentee, subject to the provisions of the Act and the conditions full power, sole privilege and authority by himself, his agents and licencee during the term of the patent, to make use, exercise and vend the invention within Zambia in such a manner as to him seems meet, so that he shall enjoy the whole profit and advantage accruing by reason of the invention during the term of the Patent".

This would mean that the patentee would be empowered to control, totally, the use of his plant varieties including the saving of seed and its re-use on farms. The legislation does not provide for "farmers privilege".

3. TRIPS AGREEMENT: ARTICLES 27.3(b)

This Article provides, *inter alia,* that only plants and animals and essentially biological processes for the production of plants or animals may be excluded from patentability. However, the same provision stipulates that micro-organisms, as well as micro-biological and non-biological processes are not covered. They have to be patented. However, Members are obliged to provide protection for plant varieties either by patents or by an effective sui-generis system or by a combination thereof.

4. IMPLICATIONS OF PATENTING PLANT VARIETIES AND LIFE FORMS

Article 27.3(b) has been viewed as one that will make developing countries lose control over their own biodiversity and the benefits they derive therefrom. Developing countries are rich in biodiversity and giving of monopolies over these will curtail the enjoyment by communities. Opting to extend the patent laws to plant varieties will be setting up a system of private rights over individuals to prevent others from making, using or selling the protected variety or any product that might have patented genetic information. Consequently, farmers will not be able to freely access or re-use their seed, nor will they be able to save and/or exchange seed.

Patenting of plant varieties does not provide for benefit sharing as this is a private right to the exclusion of anybody else. Major companies will have monopolies and secure ownership of plant varieties which contain genetic information obtained from the farmers own fields in the developing countries, which would then be sold back to them with a royalty charge added thereto.

5. SUI-GENERIS SYSTEM

As already stated, Article 27.3(b) also provides for the protection of plant varieties through an "effective *sui-generis* system". This term has, however, not been defined sufficiently. It is difficult to determine what effective *sui generis* systems for plant varieties will entail. It is most likely that it might be on the lines of the UPOV inspired system. However, the *sui-generis* system allows developing countries to provide for the protection of plant resources by a model that is suitable with their culture. Legislation on protection of plant varieties should be developed which would accord recognition to innovations of indigenous peoples and local communities. In terms of definition, such statute should define innovation to include any inventive input done collectively, accretionally, intergenerationally and over time in relation to genetic resources. Such a system would effectively protect ownership rights of farmers and indigenous peoples over their plant varieties and seeds.

Currently, Zambia has in place a draft Plant Breeders Rights Act. It would appear that the same is based on the principles of the 1991 Act of the UPOV Convention. Under UPOV 1991, parties are free to protect plant varieties by plant breeders rights. The Act works basically in the interest of the farmer at local community level. It would be advisable, therefore, if the Plant Breeders Rights Act was to be used in Zambia as an alternative to patenting of plant varieties in Zambia.

6. SUMMARY

As the world integrates and calls for equitable sharing of benefits derived from the global trading system, and as it calls for the conservation and sustainable use of biological resources, countries world over are faced with a number of challenges as they strive to attain these objectives.

Considering that Article 27 of the TRIPS Agreement hinges on matters that concern both the enhancement of trade, on the one hand, and conservation and preservation of the environment, on the other, it is imperative that the TRIPS review meeting take into account the concerns of the world.

As a country whose rural community depends solely on agriculture the following concerns are expressed as regards the TRIPS Agreement in its present state:

– Lack of recognition of indigenous knowledge within the provisions of the TRIPS Agreement;

– No clear understanding within the provision of Articles 27.3(b) on the conservation and sustainable use of biological materials;

– No clear understanding of what constitutes the *sui generis* system of protection.

7. RECOMMENDATIONS

The review meeting should ensure that the TRIPS Agreement provides for a clear understanding within the provisions of Articles 27.3(b) on the conservation and sustainable use of biological materials. It should also endeavour to provide for a clear understanding of the coverage of a *sui generis* system, whether indigenous knowledge and eco-system protection fall within its coverage.

Since most least developed countries depend much on farming, there is need to recognize the contribution of farming and indigenous communities to genetic resource conservation and enhancement.

As rapid changes take place in plant varieties much of the diversity contained in landraces and farmers' varieties are under great threat from their replacement by new varieties. It should also be borne in mind that genetic engineering, and its products in food, has its own consequences, whose full impact on the health of human beings has not fully been assessed. This poses the danger of causing unrepairable damage. Moreover, many developing countries do not even have the capacity to conduct such assessment.

The plant variety protection route should not deprive farmers of their own rights and, therefore, whatever *sui generis* system is adopted, it should include provisions to either protect the farmer's privilege, or provide wider space in the plant variety protection law for farmers as breeders and/or conservers (the right to compensation for the commercial use of their materials).