

TRIPs negotiations and Indian agriculture

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Summary — The implications of accepting the Dunkel Proposals on TRIPs (Trade Related Intellectual Property Rights) for the Indian Intellectual Property Rights (IPR) regime are analyzed. Attention is focused on the nature of the plant breeders' rights (PBR) regime which will have to be introduced in case India accepts Dunkel proposals. Legal Developments within UPOV (International Union for the Protection of New Varieties of Plants), as a part of the revision of 1991 has greatly narrowed both the farmers' exemption, the right of the farmer to save seed and the breeders' exemption, the right of the breeder to use the protected varieties. These were both present in the 1978 version. It is likely that India will be forced to accept a PBR regime along the lines of UPOV 1978. This version takes away the right of the farmers and seed companies to sell seed although it guarantees the right of the farmers to save seed on their own farms. The PBR to be introduced as per Dunkel Proposals will retard the diffusion of new varieties, since it will prevent the farmers and small seed companies from multiplying protected varieties. There is no firm evidence to show that the introduction of PBR will lead to the increased introduction of new varieties by the private sector. Apart from PBR, the implications for agriculture of introducing patents for microorganisms and life processes are also negative.

Dunkel Proposals on TRIPs would require major changes in the IPR regime in India related to agriculture.

At present Indian law does not recognise any form of IPR in agriculture. The Indian Patents Act 1970 says that Patents cannot be given for 'a method of agriculture or horticulture' or for 'any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or of their products.' (Article 3h and 3i). These two clauses exclude any process patent which would be applicable in agriculture.

Product patents for microorganisms, plants, and animals also need to be understood to be excluded, since Article 5b excludes substances prepared by chemical processes and therefore by extension also the products of microbiological and biological processes.

These provisions of the Indian Patents Act 1970 are in general conformity with the laws and practices which existed in most other countries till recently as far as life forms are concerned. In 1980 the first patent for a microorganism *per se* was given in the United States. Till 1985 no patent had been given for a plant in the United States and till 1989 in Europe. What these countries did have was another form of IPR known as

Plant Breeders' Rights (PBR), designed specifically for plants.

But India has not had any system of PBR either. During the Green Revolution all the new varieties introduced were in the public domain and were 'unprotected'. The situation has continued in the same manner till now.

Yet the current regime will have to be changed in case the Dunkel Proposals are accepted. This is because the Dunkel Proposals do not give the member countries the freedom to exclude certain areas from the scope of patenting. But this was acceptable practice in the International Patent Regimes so far. Article 27 of the TRIPs proposals states that patents shall be available for any invention, whether products or processes. Apart from standard exclusions related to moral order, surgical methods, etc., exclusions are only allowed for

"plants and animals other than microorganisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, PARTIES shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or any combination thereof. This provision shall be reviewed four years after the entry into force of this agreement".

What is immediately obvious is that it enjoins us to introduce some form of IPR in plants. Patents themselves are not considered obligatory but in its absence a *sui generis* form is demanded. *Sui generis* means a form of intellectual property rights which is derived from itself or in other words which is not a part of the patent system. Although *sui generis* only means that, normally it implies the system of PBR.

Hence it is clear that the following three changes will have to be made by India if it adheres to the Dunkel proposals.

- (i) Recognise plant breeders' rights for new varieties of plants,
- (ii) Recognise patents for microorganisms, and
- (iii) Recognize patents for microbiological processes for the production of plants and animals.

Each of these steps will have significant implications for agriculture. But in this paper we focus on the implications of the introduction of plant breeders rights as required by the Dunkel proposals. At the same time it is important to note that Article 27 has the provision for a review after four years and then even patenting of plants and animals might be made obligatory or the type of plant breeders' right regime might get specified. Therefore the long-term implications could be different from what we assess on the basis of the current Proposals.

Developments in Plant Breeders' Rights

The implications of PBR would depend on the nature of the PBR regime which India would be forced to introduce on signing the Dunkel Proposals. Therefore it is important to consider the International changes which are taking place in the area of PBR. The focal point of the discussions on PBR is the UPOV which coordinates the minimum amount of 'protection' to be given to the plant breeders.

The UPOV Convention which was signed by some European states in 1961 was joined by the United States in 1978. At present 21 countries are members of UPOV¹. Plant Breeders' rights as recognised in the UPOV system is the right given to the breeders of new varieties of plants to prevent others from selling the same varieties. Plant breeders rights certificates are given to those who breed new varieties which are distinct, uniform, and stable.

The UPOV regime continued essentially in its original form till 1991 when it was amended for the third time. The amendment of 1991 made drastic changes in the nature of the PBR regime codified in the UPOV. We have elsewhere discussed the broad histori-

cal context of the evolution of pre- and post- UPOV system of Plant Breeders Rights². Below we focus only on the status of two salient features of the UPOV regime namely farmers' exemption and breeders' exemption.

Farmers' Exemption

The right of the farmer to save seed was an integral part of the UPOV system, and it is highly unlikely whether any system of PBR could have ever evolved if this right of the farmer to save seed was not recognised. Yet this exemption to the breeders' right which is nowadays also known as farmers' privilege was always an anathema to the seed companies³. This exemption has been severely weakened in the latest revision of the UPOV Convention and has changed from being a fundamental exemption to an optional exemption.

According to the UPOV system from its inception in 1961 to its 1991 amendment, the rights conferred on the breeder extended only to:

- production for purposes of commercial marketing,
- the offering for sale, and
- the marketing of the reproductive or vegetative propagative material, as such, of the variety⁴.

This naturally gave farmers the right to save seed for their own use, since the seed production was not being done for commercial marketing giving rise to 'farmers exemption'.

But developments in Europe and USA have been severely eroding the space left to the farmers to multiply seed even within the 1978 UPOV Convention.

In Europe, the farmers used to save their seeds and get them cleaned at the factories owned by their co-operatives under farmers' exemption. The farmers' exemption came under severe attack in France when orders were issued prohibiting the farmers from having their seeds cleaned outside the farms. A big movement began in France in defiance of this ban which included demonstrations and court battles⁵.

The decision of a district court in Iowa, USA gives a portent of the compression of farmers' exemption which can take place even within the framework of UPOV (1978). United States introduced its form of PBR in its Plant Variety Protection Act 1970 (PVPA). This led to the existence of two types of legal systems to cover the same crop, Plant Patent Act 1930 to cover asexual reproduction and PVPA 1970 to cover sexual reproduction. Therefore, USA could not adhere to the UPOV Convention because the Convention specifically contained a ban on double protection. In the revision of

1978, the ban was temporarily lifted in order to allow USA to join UPOV⁶. Therefore the farmers' exemption of PVPA 1970 has to be considered to be in conformity with the UPOV and perhaps represent the outermost limit.

PVPA 1970 allowed "a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes ... (to sell) such saved seed to other persons so engaged, for reproductive purposes." (7 U S C section 2543). Therefore, under this section farmers were allowed to sell seed to other farmers up to 50% of their income and this allowed a large leeway for the farmers' enterprise.

But in 1991, the District Court for the Northern District of Iowa ruled in a case brought by ASGROW seed company (subsidiary of the multinational Upjohn) against Dennis and Becky Winterboer, that PVPA only allowed farmers to save at maximum, the amount of protected seed necessary to plant the acreage for subsequent crop year. Therefore the maximum amount of seed that could be sold by a farmer who raised 500 acres of protected variety of soybeans and who farmed total of 1,500 acres would be only 1,500 bushels⁷. It is clear that there is a large gap between selling seeds up to 50% of income and selling left over from what is 'saved'. This decision if upheld, effectively removes the farmer to farmer sales which existed in the US under UPOV (1978).

The 'farmers exemption' has been further severely eroded in the latest revision which took place in March 1991. In this revision the scope of the rights of the breeder (Article 14) was changed in order to cover :

- (i) Production or reproduction (multiplication)
- (ii) Conditioning for the purpose of propagation,
- (iii) Offering for sale, selling or other marketing,
- (iv) Exporting,
- (v) Importing, and
- (vi) Stocking for any of the purposes mentioned in (i) to (ii), above.

It is clear from the manner in which the scope of the rights of the breeder has been defined in the 1991 revision that the right of the farmer to save seed is not automatically included as in the earlier case, since what it covers is not production for commercial purposes but production itself. Indeed there was tremendous pressure from the seed industry to remove the right of the farmer to save seed altogether. But in the final Act, the right to save seed was introduced as an option which the member countries could grant to their farmers (Article 15.2). Even this option was made subject to many

riders, such as 'within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder' Not even satisfied with these riders the Diplomatic Conference passed a separate recommendation on Article 15.2 which said that such a farmers privilege cannot be granted where such a practice was not the traditional practice. Therefore, it is clear that the farmers' right to save seed has been severely eroded in the 1991 revision of the UPOV Convention

The incorporation of the 1991 revision of the UPOV Convention into the domestic legislation is taking place currently in Europe. In many of the European countries the legislation is awaiting the decisions on the Community Breeders' Rights being negotiated at the European Community level. But Germany has already taken the steps to remove 'farmers exemption' for woody plants, fruits, and ornamental plants in its amendment of March 1992 of the Plant Variety protection Law. (Article 10.2)⁸.

Breeders' Exemption

Breeders' exemption allows other breeders to use a protected variety to develop new varieties. Thus Article 5 of UPOV (1978) Convention also laid down that :

"authorization by the breeder shall not be required either for the utilization of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties".

This became the basis of what has been known as 'breeders exemption'.

The existence of breeders' exemption has been considered to be a characteristic of the PBR system which made it more suitable for plants than the patent system. Linked with it is the other characteristic of PBR that it is given for a given physical entity and not for an inventive idea. This has been especially pointed out to be tailor made for the needs of plant breeding. Yet, the 'breeders exemption' has also been severely truncated in the new revision. This also means that the PBR is not given for a specific physical entity but for a broader concept from which many other varieties are considered to be derived. In the new revision, the right to use a protected variety as a source of variation is not available in case the variety to be developed is close enough to the protected variety to be considered as 'essentially derived'. Article 14.5.c. of the Convention clarifies that :

"essentially derived varieties may be obtained, e.g., by the selection of a natural or induced mutant, or of a somaclonal variant, the selection

of a variant individual from plants of the initial variety, backcrossing or transformation by genetic engineering".

Thus we can see that the monopoly given to the breeder has been greatly enhanced to include many varieties which are distinct from the variety which is protected. This effectively precludes competition for almost a decade with a new type of variety. But what is even more important is that it obstructs the adaptation of new varieties to local conditions. In spite of the obvious negative impact it has on the development of new varieties the extension of the right of the 'breeder' has been extended so that larger profits can be obtained.

Nature of Plant Breeders' Rights

Given the variation in the different types of PBR regimes, it is clear that the implications of the introduction of PBR would crucially depend on the type of PBR which would have to be introduced if the Dunkel Proposals are accepted. This depends on the meaning that will be given to the terms 'an effective *sui generis* system' in the Dunkel Proposals. Although the Dunkel Proposals do not mention any specific type of PBR system, it does not mean that India will have the freedom to introduce any type of PBR it wishes to have. It will be only free to introduce a regime which the GATT system, i.e., the developed countries, are prepared to accept as 'effective'.

This emerges from the fact that the agreement on TRIPs is to be subjected to the dispute settlement mechanism being discussed in GATT. Therefore, in case the Indian regime of PBR is not satisfactory to the developed countries it can be hauled up before GATT and cross-retaliation could follow if the GATT recommendations are not followed⁹.

The interpretation that the Dunkel Proposals do not give India the freedom to introduce any type of *sui generis* system which it wishes to adopt, is indirectly recognized by the Indian Ministry of Commerce. The Ministry in its note¹⁰ on the Dunkel Proposals says that the government would seek to have "adequate safeguards for farmers against plant breeders rights." Such a submission is necessary only if the Dunkel Proposals also implicitly lay down the norms to be followed in the PBR system. In fact we should assume that these would be the norms of UPOV. The moot question is the version of the UPOV Convention to which adherence would be demanded.

Earlier¹¹ we had discussed the implications of Dunkel Proposals based on the understanding that the 1991 UPOV regime is what would satisfy the

developed countries. But on the basis of the discussions which have taken place between the delegations at Geneva, it appears that the pre-1991 UPOV norms would be acceptable to the developed countries. This should also be considered more likely since the 1978 UPOV is still open for joining by the developing countries till 1995 and countries like Argentina are shortly expected to join the UPOV by adhering to the 1978 version of UPOV.

Implications

We would argue that even if India is forced to accept a 1978 form of PBR, such a system will have many negative implications for Indian agriculture.

The introduction of PBR is normally associated with a set of positive and negative impacts. It is considered by the proponents of PBR that the positive impacts outweigh the negative impacts. The negative impact include the higher price of seeds, impact on genetic erosion, higher concentration of the seed industry and dependence on multinational corporations¹². All this is expected to be neutralized by the increased availability of better quality seed which is supposed to be become available due to the incentive of PBR. In this note we would critically examine only the positive contributions due to the introduction of PBR.

Diffusion of New Varieties

We would argue that the very assumption that PBR makes better quality seed available itself needs to be questioned. To begin with, the process of making better quality seed available has two components. One is the component of introducing new seeds and the other is the component of diffusing these seeds through the whole of the agricultural sector. While PBR is considered to be an incentive for the introduction of new varieties, it is seen as a disincentive for diffusion. Therefore it is self-evident that the total impact of the introduction of PBR would depend on the relative importance of these two factors in the upgradation of the technical level of the agricultural sector.

In Indian agriculture, the main bottleneck is not the lack of adequate varieties but the slow diffusion of the available varieties. This is illustrated by Table 1 showing the difference between the average yields and the best practice, provided by Rai¹³. He has argued that 20-25% enhanced yield could be realized just by replacing the old varieties with new varieties which are already available. He provides data to show the tremendous increases in yield which could take place even in crops such as pulses and oilseeds where it is felt that not

Table 1 — Potential of newly evolved oilseed varieties/hybrids

Crop/variety	Yield, q/ha	Yield, q/ha	Yield, q/ha
	Average	Highest	National average
Groundnut			8.2
ICGS - 11	27.0	52.7	
Girnar	20.4	37.7	
Yellow Sarson			7.2
YSB 19-17 C	10.4	15.3	
Indian Mustard			
RH819	13.4	21.8	

Source : Ref. 13, Table 3

much work has been done. Table 1 shows the yield potential of new varieties in oilseeds against the national averages.

Therefore it will be suicidal to try to introduce a system which will retard the diffusion of new varieties while promising to develop new varieties.

PBR even of the 1978 variety will greatly affect the diffusion of new varieties because it forbids the small seed companies from multiplying and selling the new varieties over which proprietary rights exist. Even more importantly it will prevent the farmers from multiplying and selling the seed to other farmers. This type of farmer to farmer sale is very important in India and has played a crucial role in the diffusion of the new high yielding varieties. One of the paradoxes of Indian agriculture is the fact that the agriculturally advanced states of Punjab and Haryana behave like backward states as far as the utilization of seed is concerned. It is generally accepted that for a healthy agriculture it is necessary to replace the seed used by the farmer, once in four years. Yet in India, in the case of wheat, Punjab and Haryana have very low Seed Replacement Rates. The rate in the case of Panjab was as low as 1.2% in 1988-89, even lower than the 2 % of Madhya Pradesh¹⁴. This apparent paradox is solved when we realise that the high agricultural productivity of Punjab is not in spite of the low Replacement Rate but because of the 'invisible' seed replacement. The enterprising farmers of Punjab and Haryana have set up a massive farmer to farmer seed exchange to fulfil their requirement of new seed. Farmers have been getting seed from the agricultural universities and multiplying it for their own use and selling it to other farmers. This sharing of seeds between the farmers can truly be considered to be the

life-line of Indian green revolution. It is this life-line of the old green revolution which will be cut in case PBR is allowed to be introduced.

Multinationals with monopoly control over the seed industries cannot be expected to promote the spread of new varieties as much as a decentralized system of small seed companies, farmers' cooperatives and farmers with adequate scientific support. And such a system will not be possible with an UPOV type of PBR.

Therefore, by slowing down the more crucial component in the system for supplying new varieties to the farmer, the process of diffusion, the PBR system would, in fact, delay the availability of new varieties to the farmer.

Incentive to Innovate

Apart from the impact on the diffusion of new varieties, even the basis of the assertion that PBR promotes the introduction of new varieties needs to be questioned. PBR is expected to promote the introduction of new varieties in two ways, one by inducing the multinational corporations to bring in new varieties which they have developed elsewhere and the other is by inducing the private sector to develop new varieties.

As far as the introduction of new varieties by MNCs is concerned, it is unlikely that PBR would be the overriding factor to determine it. A review of the experience of Australia after the introduction of PBR has argued that access to overseas varieties cannot be considered as a major reason for the introduction of PBR. It also points out that although evidence was given to the Senate Standing Committee that many overseas varieties, especially Dekalb Shand wheat was not available to Australia due to the absence PBR, even three years after the introduction of PBR the Dekalb wheat was not registered in Australia¹⁵.

There is also very little hard evidence to show that the propensity of the private sector to release new varieties would increase with the introduction of intellectual property rights. There is even less evidence to show that the productivity of the released varieties would be higher than what would have been the case if no intellectual property system existed.

This is very clearly illustrated by some of the studies conducted in USA after the 1980 amendment to the Plant Variety Protection Act (PVPA) 1970 (refs 16 & 17) Soybean has been often quoted as a case in which the incentive is supposed to have had a major impact. But a closer analysis shows that the increase in the number of varieties released by the private sector is more affected by the increase in the market for the seeds

rather than by the monopoly rights granted by PVPA 1970.

The lack of impact of PVPA on the productivity of new varieties is even clearer. Foster and Perrin's¹⁸ graphical representation of the data collected earlier by Perrin *et al.*¹⁷ shows that there might even be a reduction in the yields of the varieties released after the introduction of plant breeders' rights than before it (Fig. 1). And we must remember that this is what is important for the farmer rather than the number of varieties which very often only reflect the cosmetic breeding which might be taking place. While the IPR system may not lead to more innovations, it does help the private sector to reap the advantages of any new technologies rather than letting it all go to the farmers.

What is important is that while it is definite that there would be an increase in the price of seeds, there is no reason to show that the system would be any better than what would be in case the public sector continued to lead in the release of new varieties. Even the advanced agricultural countries including USA till recently relied on public breeding to support their agriculture. No one can argue that this obstructed their agricultural development. Not only that, the fact that the study by Butler and Marion¹⁶ did not notice many negative features after the introduction of PBR in 1970 in USA is related to the co-existence of public sector varieties at that time. But since then the public sector has been pushed to the background and the same is being demanded in India and other developing countries also by the combined efforts of the World Bank and the GATT.

The increase in the price of seed has been normally defended by the argument that the increase is offset against the advantages the farmer would reap due to the increased productivity of the new varieties. As we have seen even while there is no certainty about the positive impact of the introduction of PBR on the release of new

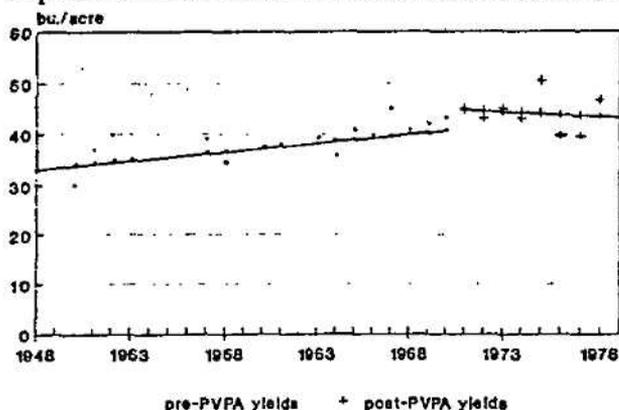


Fig. 1 — Impact of PVPA 1970 on soybean test yields

varieties, it is still used as an argument to support a system which would certainly lead to an increase in prices.

Food Security

Another important factor which needs to be kept in view is that the developed countries have introduced monopoly rights for plants much later in the day, when their food security was assured and they were actually faced with food surpluses. Although the USA introduced its Plant Patent Act in 1930, it granted monopoly rights only for asexually propagated species and specifically excluded tuber propagated species. This excluded potato, an essential food crop. It is very unlikely that they could have allowed monopoly rights on food crops in those days. Similarly when the Netherlands introduced its system of Plant breeders rights system in 1941 it allowed its potato farmers and other agriculturists the right to freely multiply the seeds. This system continued till 1968. Now under GATT such a system is being imposed on countries which are still plagued by droughts and famines and whose population still does not have two square meals a day.

Patents For Life Forms

The Dunkel Proposals also demand the granting of patents for microorganisms. Our patent act does not even grant product patents for chemicals and therefore the demand that patents be given for a living thing, a microorganism goes far beyond the monopoly rights our law makers were prepared to grant.

In case this demand of Dunkel is accepted it will have major consequences for agriculture. New strains of microorganisms such as rhizobium and blue-green algae can be patented. These are the new biofertilizers with enormous potential for agriculture. In the current context, when the subsidy on chemical fertilizers are being withdrawn and are even otherwise being reduced due to environmental and energy use considerations, the use biofertilizers such as the above gain added importance. Now the Dunkel draft will ensure that these biofertilizers become the monopoly of the multinational corporations.

Indeed the monopoly rights demanded under patents are such that for twenty years no one will be able to use them even to develop new strains.

Patenting Life Processes

As we have seen Indian Patents Act 1970 precludes the granting of patents for any "process for the treatment of animals or plants to render them free of disease

or to increase their economic value or of their products". This provision of the Patent Act is contradicted by the provision in Dunkel Draft which demands the extension of patenting to microbiological processes for the production of plants and animals.

The Dunkel provisions would extend patent protection to genetic engineering methods which would result in the production of new plants. This would happen in spite of the explicit proviso that essentially biological processes can be excluded from patentability. This is in fact what happened in Europe in spite of the fact that Article 53 (b) of the European Patent Convention (EPC) had laid down that essentially biological processes for the production of plants and animals could not be patented.

It was argued that genetic engineering methods are not dealing with biological processes but with microbiological processes. Not only bacteria but genes, plasmids (genetic material outside the nucleus) and undifferentiated cells of plants and animals were also considered as microorganisms. This opinion did not emerge as a result of a consensus among biologists but was decided by lawyers in order to circumvent the problems posed by EPC. But the funny thing is that after defining these processes as microbiological, they not only claimed the first process but also the following processes which were undoubtedly biological and the products of those biological processes, ie the plants and animals themselves.

Since the current exclusion in the Dunkel Draft gives a country the option of excluding plants and animals and not only plant and animal varieties as in EPC the products of these processes when they are plants and animals might be excluded. But certainly the Dunkel proposals do not give one the option of excluding the biological processes which are really the processes of life. These are the processes in which the self-replication of the objects plays the fundamental role.

The Dunkel Proposals therefore would make it obligatory for India to grant patents for genetic engineering methods applied to plants and animals. Some of these processes which are being claimed in the developed countries are very broad patents such as the patent for the fundamental genetic engineering process granted to Stanley Cohen and Herbert Boyer. Such patents by allowing monopoly over widely applicable processes are retarding the growth of science and technology and vitiating the atmosphere of free exchange which existed between scientists. Scientific methods which would otherwise have been disclosed to the public through scientific publications are being first turned into proprietary knowledge. This appropriation

is used to claim the products of these processes which otherwise could not be claimed since they are very often not novel products.

Therefore, although patents on plants and animals themselves can be excluded the patenting of useful biotechnological processes would affect the development of agriculture.

Concerted Move

The implications of this attempt at extending the scope of intellectual property system has to be seen along with the other changes proposed in the Dunkel Draft on TRIPs, such as the practical removal of the provision on compulsory licensing and the consideration of importing as working of the patent. These provisions would mean that it will be difficult for the government to force a company which chooses to import the seeds into India from Thailand, Pakistan or where ever, to undertake local multiplication of seeds. It will also be difficult for anyone else to start production in case the company refuses to license the production. The TRIPs negotiations play a very crucial role in ensuring the hegemony of multinational corporations over Indian agriculture which is orchestrated through the various sections of the Dunkel Proposals.

Conclusions

By accepting the Dunkel Proposals on TRIPs, India will be forced to make major changes in its IPR system, since it requires the introduction of PBR, patenting of microorganisms and biotechnological processes for the production of plants and animals. The PBR to be introduced will have to consistent with UPOV 1978. The consequent retardation of the diffusion of new varieties is seen not to be countered by the increased incentive of the private sector to introduce new varieties. Therefore the expected increase in the introduction of new varieties cannot be expected to neutralize the other negative impacts such as that of increase in prices, genetic erosion, increased concentration and increased dependency. In sum, by signing the Dunkel Proposals on TRIPs the modernization of Indian agriculture would be threatened.

References and Notes

- 1 Membership as on October 9, 1992, See Report on Activities during the First Nine Months of 1992, *UPOV Council Twenty Sixth Ordinary Session, Geneva, October 29, 1992, C/26/3, October 9, 1992, p. 1.*
- 2 Menon Usha, Evolution of Intellectual Property Rights in Plants, presented at the Session on *Intellectual Property Rights at the Golden Jubilee Seminar of the Indian Society of*