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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL

**Nineteenth Ordinary Session
Geneva, October 17 and 18, 1985**PROGRESS REPORT ON THE WORK OF THE
ADMINISTRATIVE AND LEGAL COMMITTEEprepared by the Office of the Union

1. Since the eighteenth ordinary session of the Council, the Administrative and Legal Committee (hereinafter referred to as "the Committee") has held two sessions: its fourteenth on November 8 and 9, 1984, and its fifteenth on March 27 and 28, 1985.

2. The Committee's Biotechnology Subgroup (hereinafter referred to as "the subgroup") set up on a decision taken by the Council at its eighteenth ordinary session (see document C/XVIII/14, paragraph 82) has met twice, at the time of each of the above sessions of the Committee.

3. The Committee has considered a wide range of subjects, but two major themes may be distinguished:

(i) legal questions related in one way or another to the evolution of plant breeding technology, especially genetic engineering, and more specifically:

(a) the implications of biotechnology for plant variety protection;

(b) the interpretation of Article 2(1) and related provisions of the Convention;

(c) virus diseases and plant variety protection;

(ii) questions related to the national lists of protected species and to cooperation in variety examination.

Implications of Biotechnology for Plant Variety Protection

4. This highly topical subject has already been covered by earlier work within UPOV. In particular, a symposium was held in 1982, and in April 1984 the Committee exchanged views on the basis of a document produced by the Office of the Union. There was moreover a second symposium on the subject in October 1984.

5. At its fourteenth session the Committee noted the activities of two other international organizations on the legal protection of inventive activity in the biotechnology field, namely:

(i) the World Intellectual Property Organization (WIPO), which had organized the meeting of a WIPO Committee of Experts on Biotechnological Inventions and Industrial Property from November 5 to 9, 1984;

(ii) the Organisation for Economic Co-operation and Development (OECD), which had entrusted a group of experts with drawing up an international report on patent protection and biotechnology.

It should be mentioned in this connection that the above report will be published under the responsibility of the Secretary General of the OECD and will mention expressly that it represents only the opinion of its authors.

6. The reports on the activities of the above organizations gave rise to a brief general discussion, from which the following significant points emerged:

(i) As a general rule, it is necessary that plant variety protection experts take part in the various kinds of work on the legal protection of the results of biotechnological work. That participation should take the form of concerted effort and not conflict, on the one hand because due account has to be taken of the fact that the UPOV Convention affords no protection to methods, and on the other hand because a balance has to be struck between the relative requirements and interests of genetic engineering enterprises and "classical" breeding enterprises.

(ii) It is also necessary to make a serious effort towards improving information: The discussions carried on at present are sometimes based on wrong conceptions, if not total ignorance, of the plant variety protection system. It should be noted in this connection that the Office of the Union receives more and more requests for information from patent agents or legal consultants of firms concerned with genetic engineering.

(iii) From a legal standpoint, it has been considered essential to preserve the freedom of variety creation written into Article 5(3) of the UPOV Convention.

(iv) Also from a legal standpoint, it is expected to be difficult for agricultural circles to accept a situation where genetic engineering work with limited aims (for instance the introduction of a gene affording resistance to a weedkiller) might be given more extensive protection, through patenting, than "classical" plant breeding work.

7. At its fourteenth session the Committee also agreed on the composition of the subgroup, consisting of the following experts acting in their personal capacities, in addition to the Vice Secretary-General: Miss N. Bustin (France),

Mr. K.A. Fikkert (Netherlands), Mr. H. Kunhardt (Federal Republic of Germany), Mr. S.D. Schlosser (United States of America) and Mr. M. Tsuchiyama (Japan). Mr. Schlosser was invited to assume the chairmanship of the subgroup.

8. The subgroup decided that the study to be drawn up would contain the following parts:

(i) a paper on the history of UPOV;

(ii) a paper on the plant breeding techniques and recent developments in plant biotechnology;

(iii) a comparative survey of plant variety protection and the patent systems in Europe, the United States of America and Japan;

(iv) a study of conflicts, overlappings, loopholes, inadequacies, etc.

9. At its second session, the subgroup had an initial exchange of views on the comparative survey mentioned in paragraph 8(iii) above. The discussions were based on a preparatory document drawn up, as agreed, by Mr. K.A. Fikkert and on correspondence exchanged between him and Mr. H. Kunhardt. The document reflected the position in Western Europe. At the time of writing this report, the Office of the Union has a revised document in its possession which also describes the position in Japan. This document will be considered at the next meeting of the subgroup, which it is proposed should be held at the time of the present session of the Council. Moreover, the chairman of the subgroup announced that he too would be submitting a document to the next session.

10. At its second session the subgroup was also presented with a draft of the part dealing with the historical development of the protection systems concerned, written as agreed by the Office of the Union. The draft took the form of an introduction to the subgroup's final report. The Office of the Union further presented an outline for the part mentioned in paragraph 8(ii) above. It was agreed that that part would not be written until the content of the legal part, which was the most important one, was better known.

Interpretation of Article 2(1) and Related Provisions of the Convention

11. At its fifteenth session the Committee had an in-depth discussion, on the basis of a document of the Office of the Union, on whether it was possible, under the provisions of the UPOV Convention, to grant industrial patents for plant varieties in addition to titles based on the rules and principles of that Convention. The discussions were based solely on the Convention, and took no account of the content and interpretation of whatever other sources of law were relevant.

12. No conclusion reflecting a unanimous opinion emerged from the discussions. That was no doubt due to the complexity of the question, the differences between national circumstances and the different ways in which the subject could be addressed. The Office of the Union nevertheless considers that the discussions may be summarized as follows:

(i) The relevant provisions of the Convention are: Article 1(1) (summary of the obligation subscribed to by member States), Article 2(1) and Article 37 (definition of the forms of protection and the principles governing their

possible coexistence) and also Article 4(2) (obligation to extend the Convention progressively to the largest possible number of botanical genera and species), as well as the Preamble.

(ii) A State that subscribes to the rules and principles of the Convention should not protect plant varieties otherwise than by legislation that meets the conditions provided for in the Convention.

(iii) The fact that certain States have not ruled out all varieties from patentability, but only the varieties of those genera and species that are governed by the provisions of the plant variety protection law, does not contradict the aforementioned principle. In this respect, the present circumstances of member States are conditioned by their circumstances prior to their membership of UPOV:

(a) For those that did not protect plant varieties before becoming members of UPOV, the Convention--through the agency of the national law--created a law from scratch. By undertaking to protect plant varieties according to a legal system conforming to the Convention, those States in fact undertook to abstain from making a form of protection available to varieties that rivalled the one based on the Convention.

(b) For those that recognized the protection of plant varieties--at least in theory--by means of an "industrial" patent, the Convention provided a better system of protection, because it was a tailor-made system. By implementing the Convention at the national level, the majority of those States did not want to, or could not, deprive breeders of the patent route in the case of genera and species not (yet) covered by the specific system of protection based on the Convention.

(iv) In the case of genera and species covered by the system of protection conforming to the Convention, no other, additional, system of protection is allowed.

Virus diseases and plant variety protection

13. At its fifteenth session the Committee was presented with a question raised by a professor of the University of Cork (Ireland). He and a post-graduate student had created an assortment of special pelargoniums by taking advantage of changes induced by infectious agents of viral type. It should be mentioned here that those agents are not transmitted naturally, so that the alteration of a plant and the creation of a modified clone called for human intervention. The question therefore was whether the modified plants qualified for plant variety protection. The professor who submitted the question mentioned on the one hand that the use of the above agents anticipated the use of gene vectors consisting of manipulated viruses, and on the other hand that he was in favor of recourse to plant variety protection.

14. After a brief exchange of views, the Committee decided to seek first the opinions of the Technical Committee on the subject.

Harmonization of Lists of Protected Species

15. For a certain number of member States, representing the majority, it is not possible at the present time, for various reasons, to extend protection to all botanical genera and species. Those States have consequently drawn up limitative lists specifying the protected genera and species by name. That has not prevented some of the States from covering the "useful" plant kingdom in its virtual entirety. However, gaps may yet exist, and they have to be filled. In that connection the Committee has taken two decisions:

(i) At its fourteenth session it decided to enter a standing item on the agenda for its sessions which would allow information to be exchanged on developments in variety creation activities. That decision was based on the fact that the ornamental plant sector had become a sector subject to fashion, and that it would be advisable to provide as soon as possible for the protection of fashionable species, or species that would become fashionable, in order to encourage plant breeding.

(ii) At its fifteenth session the Committee adopted draft recommendations, the text of which appears in the Annex to this document, and decided to submit them to the second meeting with international organizations (on October 15 and 16, 1985).

Cooperation in Examination

16. It is recalled that in 1983, at the seventeenth ordinary session of the Council, the Delegation of Israel initiated a debate on the problems raised by climatic conditions for cooperation in examination (see document C/XVII/15, paragraphs 51 to 54). At its fourteenth session the Committee noted the conclusion of the Technical Committee to the effect that the question had to be considered in greater depth from a technical standpoint. It also noted the considerations of an administrative and legal nature presented by the Office of the Union.

Meetings with International Organizations

17. At its fourteenth session the Committee completed the work of evaluating the results of the first meeting with international organizations (for the first conclusions, presented to the last ordinary session of the Council, the reader is referred to document C/XVIII/9). The Committee for the most part noted the conclusions of the Technical Committee on the question of minimum distances between varieties.

18. At its fifteenth session the Committee considered the drafts of documents that were to serve as the basis for the discussions of the second meeting with international organizations, and gave instructions for putting them in final form.

Program of Future Work

19. Subject to the decisions of the Council, the program of future work of the Committee will consist mainly in the evaluation of the results of the second meeting with international organizations. In that connection it will

concern itself with two important questions which should be mentioned at the present time:

(i) application of the Convention to botanical genera and species, considered from two angles: the draft recommendations (see paragraph 15(ii) above) and the exclusion of certain types of varieties from protection;

(ii) scope of protection.

20. In due time the Committee will do the follow-up and evaluation work on the pilot projects put in hand concerning the centralized examination of variety denominations (the system reported on to the eighteenth ordinary session of the Council--see paragraph 12 of document C/XVIII/9) and the streamlined examination of mutants submitted by the breeder of the parent variety and distinguishable from it by one or more characteristics entered in a limitative list (the system was reported on to the seventeenth ordinary session of the Council--see paragraph 9 of document C/XVII/9).

21. The subgroup will continue its work according to its terms of reference. It is not possible to determine either the scale of that work or its diversity for the moment. In particular, specific questions may emerge from the second meeting with international organizations. These may have to be considered by the Committee itself.

22. The Council is requested:

(i) to note the work of the Committee and of the subgroup and also the results that they have achieved;

(ii) to take the necessary decisions on the future work of those bodies.

[Annex follows]

C/XIX/9

ANNEX

DRAFT
UPOV RECOMMENDATIONS
ON THE HARMONIZATION OF THE LISTS OF PROTECTED SPECIES

adopted by the Committee on March 28, 1985

The Council of the International Union for the Protection of New Varieties of Plants,

Considering that Article 4(1) of the International Convention for the Protection of New Varieties of Plants provides that the Convention may be applied to all botanical genera and species;

Considering that the member States have undertaken under Article 4(2) of the Convention to adopt all measures necessary for the progressive application of the provisions of the Convention to the largest possible number of botanical genera and species;

Considering further that Article 7(1) of the Convention requires that protection be granted after examination of the variety in the light of the criteria defined in Article 6 and that such examination is to be appropriate to each botanical genus or species;

Referring to the statement noted with approval by the Council at its tenth ordinary session in 1976 that "it is clear that it is the responsibility of the member State to ensure that the examination required by Article 7(1) of the UPOV Convention includes a growing test and the authorities in the present UPOV States [in 1976] normally conduct these tests themselves";

Taking into account the fact that the main obstacle to the application of the Convention in the member States to the largest possible member of botanical genera and species is the limitation on the economic and technical and on the scientific possibilities of carrying out variety examination;

Referring to the fact that Article 30(2) of the Convention specifically sets out the possibility of the competent authorities of the member States concluding special contracts with a view to the joint utilization of the services of the authorities entrusted with the examination of varieties in accordance with the provisions of Article 7 and with assembling the necessary reference collections and documents;

Noting with satisfaction that the member States have already made extensive use of that possibility, both in order to keep the cost of protection for new plant varieties at the lowest possible level and also to extend their lists of protected species;

Convinced that further progress can be achieved in this field and that such progress is also called for to maintain or even improve the effectiveness of new plant variety protection as a tool in the development of agriculture and the safeguarding of breeders' interests;

Recommends the member States of the Union:

(a) to extend protection to every genus or species for which the following conditions are met:

(i) The genus or species is the subject of plant breeding work, or it is expected that the extension of protection will be an incentive for such work to be undertaken;

(ii) There is a real or potential market in the member State of the Union concerned for reproductive or vegetative propagating material of varieties from that genus or species;

(iii) Examination facilities are existing or will be set up for the genus or species, either in the member State of the Union concerned or in another member State which offers its services for examination pursuant to the provisions of Article 30(2) of the Convention;

(iv) There are no legal, climatic or other obstacles to such extension;

(b) to offer their services to the other member States for the examination of varieties, particularly in those cases in which the other States participating in the cooperation system do not yet protect the genus or species concerned, by means of concerted action to concentrate examination of the varieties at an optimum number of the authorities concerned;

(c) to inform the other member States as early as possible of their intentions to extend protection to a given genus or species, giving sufficient details, and to offer the services of their authorities for the examination of varieties of such genus or species to enable the other States, as appropriate, to put in hand the procedures required by their legislation for an extension of the same kind.

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