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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-ninth Session

Geneva, October 21 and 22, 1991

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its twenty-ninth session on October 21 and 22, 1991, under the chairmanship of Mr. J.-F. Prevel (France). The list of participants is given in the Annex to this report.
2. The session was opened by the Chairman, who welcomed the participants.

Adoption of the Agenda

3. The agenda was adopted as given in document CAJ/29/1, subject to addition of the following item: "Report on the twenty-eighth session of the Committee."

Guidelines Relating to Essentially Derived Varieties

4. Discussions were based on document CAJ/29/2 and on an unofficial document distributed by the Delegation of Japan during the session.
5. Document CAJ/29/6--containing proposals made by the ASSINSEL group for the implementation of the new principle of essentially derived varieties contained in the 1991 Act of the Convention--was distributed during the session, but was not examined. It was emphasized that the document simply reflected initial thoughts.

6. Several delegations announced that, due to the belated distribution of the background document, they would only be able to add their first thoughts to the discussion.

7. Several delegations signaled their agreement with the conclusion in paragraph 5 of document CAJ/29/2 that the guidelines would have to be of a different nature to similar documents drawn up by UPOV since the system of essentially derived varieties would have to be managed not by the plant variety protection authorities, but by the breeders themselves or, in the event of disagreement, by the courts. Guidelines addressed to the breeders could be useful in finding an amicable settlement to a dispute, but would not represent a compulsory legal basis. Three possible aims for such a document, which responded to a need for harmonization at international level, were identified:

(i) to draft recommendations or guidelines for lawmakers, who would have to incorporate the provisions of the 1991 Act in their domestic law, particularly with regard to the onus of proof;

(ii) to constitute a doctrinal opinion for the use of courts when hearing disputes between breeders;

(iii) to provide detailed information for the technical experts required to assist the courts, most of whom would probably be members of plant variety protection authorities.

8. With regard to the part to be played by the plant variety protection authorities in administering the system of essentially derived varieties, the delegation of France said that it would be opposed to publication of information on the genetic origin of varieties; its reason was that such information depended basically on the good faith of breeders in a matter which, since it did not concern the conditions for protection, had no effect on the decision to grant breeders' rights. Access to such information would nevertheless remain open under the provisions on consultation of registers and files. The delegation of Germany wondered whether, in fact, such information could be required of an applicant in view of the provisions in Article 5 of the 1991 Act. The particulars furnished on the technical questionnaire were of a different nature since they were given voluntarily for examination purposes.

9. It was explained, in reply to the delegation of Japan, that in the phrase "while retaining the expression of the essential characteristics" the words "essential characteristics" referred to both quantitative and qualitative characteristics. The delegation of France, pointing to the term "important characteristics" used in the 1978 Act, suggested that it would be almost impossible to give an abstract definition of "essential characteristics."

10. It was further pointed out that a slight change in the genotype, a single-gene mutation for instance, could have considerable phenotypic consequences affecting numerous characteristics. Several delegations felt that the retaining of essential characteristics had to be assessed overall and not characteristic by characteristic. The delegation of the United States of America, basing itself on the background of Article 14(5) and on the fact that the delegation of Japan had not wished to introduce a substantive change into the Basic Proposal during the Diplomatic Conference, considered that the criterion had to be assessed at the genotype level. That was also the feeling of the delegation of France. In that context, the delegation of Denmark noted that paragraph 20 of document CAJ/29/2 was confusing.

11. Several delegations felt that it would be useful to hold a discussion with the breeders' organizations--particularly ASSINSEL, which had already begun examining that matter--in view of the part the breeders would be required to play in managing the system of essentially derived varieties. A symposium could be held for that purpose on the occasion of the 1992 session of the Council and document CAJ/29/2 could be considered as an initial discussion paper, which in no way committed UPOV.

12. With regard to the succession of statutory texts over time (retroactiveness), the delegation of France emphasized that the matter was one for the constitutional law of each country and that no specialist in such law was a member of the Committee. The delegation of Japan pointed out, with respect to the questions raised in paragraph 22 of document CAJ/29/2, that dependency existed irrespective of protection for an essentially derived variety.

13. As for the example 2.1 given in the Annex to document CAJ/29/2 (selection within a variety), the delegation of Germany noted that, in cases (a), (b) and (c), elements A and B could only differ in characteristics that would not have been chosen when examining the initial variety; element B did not therefore satisfy the condition of distinctness. In case (d), covered by tolerance with regard to homogeneity, it was not possible to make a definite statement; on the contrary, it was necessary to refer to the three conditions set out in Article 14(5)(b). That example, just as the others, showed up the limitations of the document which, as had already been ascertained by the Technical Committee, could in no way provide the basis for a decision.

14. With regard to example 6 (natural and induced mutations) and the unofficial document by the delegation of Japan, several delegations pointed to the two basic rules for extending breeders' rights to essentially derived varieties:

(i) Such extension could only exist where the initial variety was protected. It was inconceivable that a variety in the public domain--either because its breeder had not had it protected or because protection had expired--should return to the private domain on account of someone having obtained an essentially derived variety from it.

(ii) An essentially derived variety could not generate a right in a variety essentially derived from it since that right had been designed to protect the interests of the person who had created the original genotype or original combination of genotypes and not of the person who had transformed it.

Examination of Distinctness under Article 7 of the 1991 Act of the Convention

15. Discussions were based on document CAJ/29/3.

16. In general, the Committee agreed with the analysis made by the Office of the Union and its conclusion that the new wording of the distinctness condition did not require changes in the examination procedures.

17. The delegation of Czechoslovakia pointed out that, in some countries, the comparative basis for examining distinctness was worldwide for the purposes of plant variety protection and national for the purposes of the system of national lists of varieties authorized for sale. It stressed that unification would be desirable.

18. With regard to the question raised in paragraph 27 of document CAJ/29/3, the delegations of Denmark, France, Germany, the Netherlands and the United Kingdom held that it was not appropriate to undertake activities for promoting or perfecting the system for cooperation in examination within UPOV. Those delegations stressed the extent of the activities carried out on a bilateral basis and in the European context as also the already heavy workload of the plant variety protection authorities that were required to contribute to adaptation of national legislation to the 1991 Act and to the drafting of regional legislation.

19. The delegation of Germany nevertheless admitted that the current system of cooperation had been set up by States which carried out growing trials on a closely harmonized basis and that other States could experience difficulties in participating in the system. It would have no objection to the matter being reexamined at a later juncture.

20. To conclude the discussion, the Chairman stressed the fact that the decision recorded in paragraph 18 above was based on the present situation.

Interactive Access to International Data--International Data Base on Variety Denominations

21. Discussions were based on document CAJ/29/4.

22. All delegations spoke in favor of the principle of setting up an international data base and of the need to carry out a feasibility study in the very short term.

23. Several delegations felt that the data base should be initially limited to published data and should therefore exclude technical data that was hard to interpret. The delegation of Denmark considered that a data base of that kind could be usefully supplemented by means of an international system of examination of the variety denominations. In that respect, the delegation of France announced that an international system had been developed in France and should therefore be taken into account in the feasibility study. The delegation of Spain, for its part, pointed to the problems arising from differences in pronunciation. Finally, the delegation of Australia drew attention to the need for technical parity and even administrative parity since those were both a prior condition for an efficient international system.

24. On October 22, Mr. Paul Claus, Director-Advisor, World Intellectual Property Organization (WIPO), gave a demonstration of the ROMARIN system referred to in document CAJ/29/4. The subsequent discussions highlighted the advantage for UPOV of a system employing regularly updated CD-ROMs.

Coverage by Fees of the Costs of the Plant Variety Protection Offices

25. Discussions were based on document CAJ/29/5.

26. The delegation of Czechoslovakia stressed that the problem of fees also arose in those States that were in transition towards a market economy. The disparity between the purchasing power of national currency and its value on the exchange market meant that fees based on costs would be prohibitive for national applicants and at the same time very low for foreigners. He inquired --and was given a negative reply--whether it would not be possible to have fees that varied depending on the origin of the applicant.

27. With regard to the questions raised in paragraph 4 of document CAJ/29/5, several delegations felt that:

(i) it was not appropriate to make recommendations on the method of financing the plant variety protection authorities since UPOV could hardly influence national policies on the cost of administrative services;

(ii) it was not appropriate, for the same reasons, to make recommendations on the basis for calculation of self-financing or the structure of the schedules of fees;

(iii) there was no need to update the Recommendation on Fees in Relation to Cooperation in Examination since that Recommendation contained an escape clause.

28. The delegation of Germany stressed, however, that there were problems in the field of cooperation in examination and that the issue would have to be reexamined in a year or two.

29. The delegation of New Zealand stated that the self-financing had been restricted in its country to activities on behalf of the breeders and that it did not cover those concerning advice to government.

Form of the Reports Given in Council by the Representatives of Member States on the Situation in the Legislative, Administrative and Technical Fields in their Countries

30. Several delegations drew attention to the need to make Council sessions more attractive for observers from non-member States and from organizations to ensure large and fruitful participation. It would also be opportune to give thought to the interface between the Consultative Committee and the Council. Others felt that the sole concern should be the effectiveness of the Council in carrying out its tasks.

31. The Committee finally recommended the system of written reports submitted sufficiently early for them to be compiled and presented in the various working languages and asked the Office of the Union to suggest a model format to the member States.

Report on the Twenty-eighth Session

32. The delegation of Denmark announced that it had orally informed the Vice Secretary-General on March 4, 1991, on the occasion of the opening of the Diplomatic Conference, of its wish to make a change to paragraph 62 of the report (document CAJ/28/6). Unfortunately, the final report had been drawn up before the delegation had been able to communicate the amended text. It requested that the text be recorded in the report on the current session.

33. The text read as follows:

"62. The delegation of Denmark explained that it would be difficult for Denmark to ratify, within a short time, a new Convention unless it was possible to include in the final text a provision providing for exceptions with respect to territories corresponding to Article 36 of the 1978 Convention. The reason was that a Danish

plant variety protection act would require acceptance by the competent authorities of the Faroe Islands and of Greenland before becoming applicable to their territories. [Rest unchanged]"

That wording replaced the following text:

"62. The delegation of Denmark asked whether it would be possible to include in the final text a provision corresponding to Article 36 of the 1978 Convention."

34. This report has been adopted by correspondence.

[Annex follows]

ANNEXE/ANNEX/ANLAGE

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