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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Ninth Session
Geneva, April 26 and 27, 1982

ACCESS FOR BREEDERS TO TESTS

Document prepared by the Office of the Union

1. At its eighth session, the Administrative and Legal Committee decided to postpone consideration of the question of access for breeders to tests, which it had started at its seventh session (see document CAJ/VII/11, paragraphs 10 to 12), in order that the international professional organizations might give their opinions (see document CAJ/VIII/11, paragraph 6).

2. In order to enable those organizations--namely AIPH, ASSINSEL, CIOPORA and FIS--to give a well-documented opinion, the Office of the Union has transmitted to them the information reproduced in the Annex to this document.

3. The opinions received by the Office of the Union are as follows:

(i) According to the Committee for Novelty Protection of the International Association of Horticultural Producers (AIPH), horticultural circles are of the opinion that testing authorities should only give breeders the possibility of visiting the testing plots of their own varieties. This means that tests must remain confidential and that there should be no possibility for third persons to visit them.

(ii) According to the International Association of Plant Breeders for the Protection of New Plant Varieties (ASSINSEL), breeders should be allowed to visit the testing premises, but only under the following conditions: the plant material should be examined under code numbers; no information should be given on material other than that of the breeder concerned; visitors should be accompanied by members of the staff of the testing station.

(iii) According to the International Community of Breeders of Asexually Reproduced Fruit Trees and Ornamental Varieties (CIOPORA), breeders should have free access to tests, but under strict control. Visits should be limited to watching the plant material in the fields or in the greenhouses. There should be no access to the files, except if required by specific procedure.

[Annex follows]

ACCESS FOR BREEDERS TO TESTS

Information given to the professional organizationsIntroduction

1. The question whether testing authorities should give breeders the possibility of visiting test plots, irrespective of whether or not those breeders have varieties of their own under test, originated with the authorities examining Chrysanthemum varieties. It is well known that resources are stretched to the limit in that area, and it was felt that access to tests would enable breeders to inform themselves of the varieties bred by their competitors, and thus to abstain from filing applications for protection if they themselves had varieties under development that were identical or very similar to those under test. There would be two main advantages, namely:

(i) Breeders could avoid losses by orienting their breeding programs better and refraining from filing applications for protection which were unlikely to be granted;

(ii) Offices would be spared the handling of too many unacceptable applications.

Legal situation

2. Tests for national purposes: The legal situation can best be illustrated by a summary of information received from two Delegations, namely those of the Federal Republic of Germany and Sweden.

3. The law of the Federal Republic of Germany provides that, until protection is granted, access to test growings of the variety which is the subject of that application is open to everyone (Article 31(1) of the Plant Variety Protection Law). The Delegation of the Federal Republic of Germany has indicated that the legislative grounds for allowing access to tests, namely the possibility given to everyone of ascertaining whether an application filed by a third party prejudices his rights, could be present both for a person who does not have a variety under test and for one who does. It therefore seemed inadvisable to make a distinction based on whether or not the person requesting access had a variety under test. Moreover, it would appear to be useful, especially by comparison with patent practice, to give the public access to test plots and varieties under test, which were a source of general information on the "state of the art," so that other breeders may adjust the direction of their research accordingly.

4. In the Federal Republic of Germany any person wishing to visit trials had to state the varieties he would like to see in the trial cultures. The visitor was accompanied and no information was given on varieties not stated. Varieties being examined for other member States may not be visited.

5. In Sweden, each variety is identified by its number only, and no information is given on either the variety or its owner. Under the Law on Secrecy (SFS 1980: 880), information on tests may not be given to any person other than the owner of the variety. In practice only the breeder who has a variety under test is taken through the test plots by the staff, and he receives information on his varieties only.

6. In the other member States legislation tends to be less specific. It was mentioned that visitors were accompanied by staff members. In certain countries breeders visited the trials in groups.

7. Tests in cases of cooperation: Article 6 of the UPOV Model Agreement for International Cooperation in the Testing of Varieties provides as follows:

"Authority A shall give access to the tests and to all details concerning the tests only to the applicant, his accredited agent and persons duly authorized by Authority B. Where any test was or is carried out under a similar agreement, also for the purposes of an authority other than Authority B, access shall likewise be granted in accordance with the rules applicable by such other authority."

The above provisions have been implemented as follows in the majority of bilateral agreements concluded by member States on the basis of the Model Agreement:

"The Contracting Parties shall take all necessary measures to ensure the secrecy of the information included in their files.

"Access to the documents and the test plots shall be given only to the applicant, persons duly authorized by the requesting authority, the staff of the authority that carries out the testing and the special experts called for, who are bound to secrecy in public service. In the case of hybrid varieties, however, the experts shall not have access to the formulas.

"In the case of tests undertaken on behalf of the corresponding authority of a third country under a similar agreement, access may be granted to the documents and the test plots according to the second paragraph of this Article."

Article 8 of the Model Agreement also has a bearing on the subject under consideration. It reads as follows:

"Authority A shall take all reasonable steps to safeguard the propagating material provided under this Agreement by Authority B or pursuant to the instructions of Authority B and material derived therefrom. Authority A shall not furnish such propagating material or material derived therefrom to third persons except with the specific authorization of Authority B."

8. The Administrative and Legal Committee has drawn the provisional conclusion that the UPOV Model Agreement on International Cooperation in the Testing of Varieties enables the member States carrying out trials both to adopt the policy of their choice as regards the varieties examined on their own behalf and to provide all necessary guarantees as regards the varieties they examine for other member States.

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