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UPOV

CAJ/VI/4

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Sixth Session

Geneva, November 13 and 14, 1980

REPORT ON THE FIRST SESSION OF THE SUBGROUP OF THE
ADMINISTRATIVE AND LEGAL COMMITTEEadopted by the SubgroupOpening of the Session

1. The subgroup of the Administrative and Legal Committee (hereinafter referred to as "the Subgroup") held its first session in Geneva on June 23 and 24, 1980. The list of participants appears in Annex I to this document.
2. The session was opened by Dr. H. Mast (Vice Secretary-General of the Union), who welcomed the participants.

Election of the Chairman

3. The Subgroup elected Dr. H. Mast (Vice Secretary-General of the Union) Chairman.

Adoption of the Agenda

4. The Subgroup adopted the agenda as appearing in document CAJ/SG/I/1.

List of the Topics to be Discussed in the Future, Notably by the Administrative and Legal Committee, Relating to the Development of the Union

5. Discussions were based on document CAJ/SG/I/2.
6. The Chairman gave a brief account of the circumstances that had led the Union to consider its development, the terms of reference given to the Subgroup by the Administrative and Legal Committee and the main areas of activity identified by the latter. They are the following:
 - (i) Intensification of the existing cooperation based on bilateral administrative agreements, for instance by means of multilateral concerted action with a view to further centralizing the examination of varieties and facilitating the taking over of examination results, thereby reducing the cost of plant variety protection;

- (ii) Harmonization of national legislation, procedures, forms, etc.;
- (iii) Examination of a system--or systems--of cooperation as outlined in document CAJ/IV/2.

7. The Subgroup exchanged information on the progress of the activities that were to result in ratification of the Revised Text of the Convention or accession to it. Those activities involve in particular the amendment of national legislation on the protection of new plant varieties. The following information was obtained:

(i) Two States (South Africa and Switzerland) have already made considerable progress towards amending their legislation and ratifying the Revised Text of the Convention;

(ii) One State (the Netherlands) is considering amending its legislation in two stages, in adapting it to the Revised Text of the Convention in the first stage and revising it entirely in the second;

(iii) A certain number of States are considering legislative revision of greater scope than that required by the Revised Text of the Convention.

8. Of the latter, some intend to present revision Bills to Parliament in the near future. One of those is the Federal Republic of Germany, whose plant variety protection and seed trade control authorities intend to refer the matter to Parliament in 1981. As a result, the activities concerning national legislation are urgent and should be given priority. They should include an exchange of information on experience in the practical application of existing laws and on the plans of the competent authorities for the amendment of those laws, without however excluding the consideration of harmonization possibilities. It was agreed in that connection that any question on which a State wished to compare its legislation with that of other States, and perhaps bring its legislation closer to that of other States, deserved to be given full attention.

9. The Subgroup then studied the lists of questions concerning plant varieties protection law that had been submitted by the Delegation of the Federal Republic of Germany (Annex II to document CAJ/SG/I/2) and France (Annex IV to the same document), after having noted that the observations of Belgium (Annex III of this document) and Switzerland (Annex IV of this document) concerned the introduction of a cooperative system that went beyond the framework of the examination of varieties, and that those of the Netherlands (Annex V to document CAJ/SG/I/2) concerned mainly the intensification of present cooperation in variety examination. It decided to draw up a consolidated list in the order of the corresponding provisions of the Convention, specifying the main directions in which the discussion on each question should be steered. The list appears in Annex II to this document. The questions that will have to be given priority at the sixth session of the Administrative and Legal Committee are marked with asterisks.

10. Regarding the intensification of present cooperation on the basis of bilateral administrative agreements concerning the examination of varieties, the Subgroup noted that all States set great store by it, some of them indeed being tempted to give it priority. However, in view of the fact that the present system of cooperation rested on a relatively solid foundation, at least from the administrative point of view, the Subgroup considered that the work on further strengthening the system could be carried on parallel to the activities concerning national legislation and other activities, whenever the need was felt to resolve a particular problem. In that connection it was noted that a form could be devised which would be used by the service that had received the plant material for examination in order to notify receipt to the service with which the application for protection had been filed (see document CAJ/VI/6).

11. It was also noted that, in certain cases, the conclusion of a bilateral agreement for the examination of a species entailed the obligation on the State making the examination to complete its reference collection, with a resulting increase in the cost of examining a variety. For the cooperative system to operate smoothly, that increase in cost borne by the State making the examination should be offset by savings made on the examination of another species, which would be

entrusted to another State. Moreover, where two States carried out the examination of one and the same species, it was desirable, indeed necessary, that the reference collections should be harmonized so that one of the States may take over the results of an examination made by the other. The examination also had to be harmonized, particularly with regard to the characteristics studied and methods used.

12. With regard to a cooperative system, or systems, that went beyond the bounds of variety examination, the Subgroup agreed that the introduction of such a system was necessary for a number of reasons:

(i) during the course of the Diplomatic Conference on the Revision of the Convention many countries had declared that accession to the Union was dependent upon a system of cooperation because they did not have the means, financial or otherwise, to set up a complete infrastructure for the protection of new plant varieties;

(ii) the present member States needed to rationalise their activities not only to increase their plant breeders' rights activities but in some cases to maintain them at their present levels; and

(iii) the existence of unified seed trade legislation in certain member States made it desirable that plant breeders' rights matters be harmonised to a greater degree in order to avoid possible friction in the future.

Although the introduction of such a system was a medium or long term objective, the Subgroup considered that the work should begin promptly as soon as the study of the questions of plant variety protection law had progressed sufficiently: clearly the work would be long and difficult, and any delay in starting it would delay correspondingly the date on which the system could become operational. Finally, the Subgroup considered that document CAJ/IV/2, containing a draft Special Agreement on International Procedure Concerning New Plant Varieties, and the contributions of Belgium (Annex III to this document) and Switzerland (Annex IV to this document) were good base material for initial discussions on the question.

13. This report has been adopted by the Subgroup by correspondence.

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

I. MEMBER STATES/ETATS MEMBRES/VERBANDSSTAATENDENMARK/DANEMARK/DÄNEMARK

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II. OFFICER/BUREAU/VORSITZ

Dr. H. MAST, Chairman

III. OFFICE OF UPOV/BUREAU DE L'UPOV/BÜRO DER UPOV

Dr. H. MAST, Vice Secretary-General
Dr. M.-H. THIELE-WITTIG, Senior Technical Officer
Mr. A. WHEELER, Legal Officer
Mr. A. HEITZ, Administrative and Technical Officer

[Annex II follows/
L'annexe II suit/
Anlage II folgt]

ANNEX II

LIST OF TOPICS CONCERNING PLANT VARIETY PROTECTION LAW*

established by the Subgroup of the Administrative
and Legal Committee

1. National Treatment; Reciprocity (Article 3)

The discussion should be concerned with:

- *(i) whether it is necessary for certain member States to amend their legislation owing to the amendment of the Convention, or also owing to the fact of their belonging to the European Communities;
- (ii) whether the reciprocity rule should be based on the country of origin of the variety or the nationality, residence or registered office of the applicant.

2. Botanical Genera or Species Which Must or May be Protected (Article 4 and 2(2))

The discussion should be concerned with:

- (i) the principles according to which the lists of genera and species are drawn up and added to;
- (ii) the limitation of the application of the Convention within a genus or species to varieties with a particular manner of reproduction or multiplication or a certain end-use.

3. Rights Protected; Scope of Protection (Article 5)

The discussion should be concerned with:

- *(i) the extension of protection, or the adaptation of the definition of reproductive or vegetative propagating material so as to cover seedlings produced from seeds and intended for plantation;
- *(ii) the extension of the right provided for ornamentals in the third sentence of Article 5(1) to other vegetatively propagated species, notably fruit species;
- *(iii) the extension of protection to the marketed product in the case of ornamental plants, either in a general way or in a more limited way when the marketed product has been produced in a country without protection and imported into a member State;
- *(iv) the principle of the exhaustion of rights and its application;
- (v) reciprocity in every detail.

* The topics are listed in the order of the provisions of the Convention, those that should be given priority being preceded by an asterisk. The Subgroup considered that the debate within the Administrative and Legal Committee should include an exchange of information on experience in the practical application of existing laws and on the plans of the competent authorities for the amendment of those laws.

4. Novelty (Article 6(1)(b))

The discussion should be concerned with:

- * (i) the introduction of a one-year period of grace (for all species or only some);
- (ii) circumstances destructive of novelty, and in particular:
 - (a) the definition of offering for sale and marketing,
 - (b) the subject matter of the offering for sale or marketing (variety, reproductive or vegetative propagating material, other product of the variety),
 - (c) the consequences of offering for sale or marketing without the consent of the breeder.

5. Conditions of validity of an application for protection and conditions for the grant of an application number and date*6. Provisional Protection (Article 7(3))*7. Period of Protection (Article 8)

The discussion should be concerned with the criteria governing the duration of protection.

8. Restrictions in the Exercise of Rights Protected (Article 9)

The discussion should include an exchange of information on legal provision for action to safeguard the public interest, for instance compulsory licensing.

9. Right of Priority (Article 12)

The discussion should be concerned with:

- * (i) the maintenance of the present level of harmonization by concerted use of the option, offered by the second sentence of Article 12(3), of demanding that additional documents and material be furnished in advance where the application whose priority is claimed is rejected or withdrawn;
- (ii) the possibility of obtaining from the applicant a sample of the variety for which priority has been claimed, in order that an examination may be made of the distinctive characteristics of the other varieties on trial;
- (iii) the eventuality of conflict between two rights of priority, one owing its origins to the UPOV Convention and the other to the Paris Convention for the Protection of Industrial Property.

10. Variety Denomination (Article 13)

After having noted that the Administrative and Legal Committee had decided to include the item "Variety Denomination" in the agenda of its sixth session, the Subgroup considered that the discussion should be concerned mainly with the relation of the variety denomination to the trademark and more specifically with the legislative provisions that ensure that "no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the

variety." The discussion should also be concerned with the question of antecedence. In substance, the question involves determining, when two applicants have proposed the same denomination for two varieties of the same species or two closely related species, in whose favor the denomination has to be registered (see Annex V of document CAJ/SG/I/2, under iv).

- *11. Transitional Limitation of the Requirement of Novelty (Article 38)

[Annex III follows]

LETTER DATED JUNE 9, 1980, FROM MR. J. RIGOT,
DIRECTOR AT THE MINISTRY OF AGRICULTURE OF BELGIUM,
TO THE VICE SECRETARY-GENERAL OF UPOV

With reference to your Circular No. U 563/084 of May 28, 1980, I have the honor to convey to you my thoughts on the program of closer cooperation between member States (document CAJ/IV/2 of October 5, 1979), and a list of questions to be studied, in order of priority.

I. General remarks

The items in the program of cooperation that concern the receipt and administrative examination of applications and variety denominations and the issue of titles of protection do not seem to present any difficult problems.

UPOV member States that are also members of the European Communities will, however, have to do their utmost to abide by the Community rules on the acceptance of varieties for seed marketing (catalogue system).

It is a fact that in those States the examination of varieties for distinctness, homogeneity and stability is generally performed for the purposes of both the inclusion of varieties in a catalogue and the grant of protection.

It is moreover desirable that cooperation should lead as far as possible to a sharing of the examination of varieties among member States with relatively similar conditions of exploitation (for example Western Europe), with international examining authorities performing the examination of the varieties of certain species for the benefit of all other member States.

It is necessary therefore for catalogue authorities and breeders' rights authorities to accept the same international examining authorities and the same species to be examined.

In order to achieve perfect cooperation, it is necessary for all member States to agree on the same examination system, under which they would apply the same methods for the examination of distinctness, homogeneity and stability in the varieties of all the species concerned, both for the catalogues and for protection.

I do not underestimate the reluctance that any proposal to realize such a program will encounter, yet that is the price of true cooperation.

II. Questions to be studied, in order of priority

A. Questions concerning the design of a cooperation system

1. Receipt of the international application

The "receiving authority" would normally be the national authority of each contracting State. The applicant would have to specify in his application whether he wished to obtain a breeder's certificate either only in the State in which he had filed his application or in that and other States, which he would then have to specify.

Certain contracting States lacking the necessary facilities would have to be allowed to assign receiving functions to another State within the group (that would be the case with Luxembourg).

Examination of application forms, power of attorney forms, etc.

2. Administrative examination of applications

Each national administrative authority recognized by the Assembly would become an international administrative authority empowered to carry out the administrative processing of international applications.

The international administrative authorities of the regional group of UPOV member States should preferably be existing plant variety protection authorities.

Only one international administrative authority would be competent for the processing of each international application.

3. Examination of varieties

The examination of the varieties of a given species would take place in one or another international examination center, each member State being entitled, however, to reserve certain species or groups of varieties for national examination. In the latter case, namely the case of varieties examined at the national level, the possibility of granting an international certificate should be provided, in view of the uniform application of the Test Guidelines by all member States. Indeed this is already so: when examination reports are taken over by a State, that State recognizes ipso facto the examination carried out by another State.

4. Examination of the proposed variety denominations

This examination should be international but entrusted to the national authority of the State that has received the application.

It does not appear necessary to designate a special international variety denomination authority. There would, moreover, be a risk of delays in the forwarding of information.

5. Issue of the plant variety certificate

On the basis of the international reports on the examination of the variety and of the variety denomination, national certificates or an international (regional) certificate would be granted, depending on the provisions of the special agreement concluded between the States forming the regional group.

6. Fees to be paid

The system proposed in document CAJ/IV/2 seems reasonable as a basis for discussion. The idea of a scale of fees that decreases in relation to the number of States concerned by the application should be retained.

7. Tasks of the Office of UPOV and examination of the financial implications of the program for the UPOV budget

This matter would have to be examined at each stage of the program.

B. Questions relating to the harmonization of legislation

The study appearing in document CAJ/V/2 appears to be a valuable basis for the evaluation of the possibilities of harmonizing the legislation of member States that desire such harmonization.

C. Questions relating to international cooperation in examination

Given the special situation of Belgium regarding the examination of varieties (plans to set up an examination institution), it is too early to make proposals for the moment.

LETTER DATED JUNE 3, 1980, FROM DR. W. GFELLER,
HEAD OF THE PLANT VARIETY PROTECTION OFFICE OF SWITZERLAND,
TO THE VICE SECRETARY-GENERAL OF UPOV

Subject: UPOV - closer cooperation

The Swiss Delegation said several times that closer cooperation between UPOV member States was a desirable aim. The last session of the Administrative and Legal Committee gave the impression that, although all delegations were in favor of closer cooperation, it was clearly going to be difficult to embark on concrete negotiations, despite the excellence of documents CAJ/III/2 and CAJ/IV/2. We have now tried, within a small working group which was also attended by a representative of the interested circles, to make an inventory of the minimum requirements for a system of closer cooperation, and we should like to inform you here, perhaps as a basis for discussions at the forthcoming session of the Subgroup, of our conceptions on those minimum requirements.

The arrangement should at least provide for the following:

1. The breeder should be able to file an application with effect for all designated States in the country in which he has his residence or headquarters;
2. All designated States should decide on the basis of one technical examination of the variety whether protection can be granted;
3. The breeder should have sufficient time to file an application for protection in a designated State (mainly in the case of varieties of species for which there is a national list of varieties, in which case protection is only meaningful if the variety has been passed nationally for trade and cultivation);
4. A preliminary decision should be taken centrally (in other words by the UPOV Secretariat) on the acceptance of variety denominations, designated States being however allowed to give their opinions on the subject;
5. The UPOV Secretariat should publish international applications, such publication being binding on all designated States;
6. Each designated State should decide according to its national law whether it can grant protection and accept the variety denomination;
7. The breeder should be assured of the option to file an application for protection under the national law of the country in which he has his residence or headquarters or, if he so desires, under the national law of another State.

We wish to assure you of our availability for assistance in the working out of an arrangement of this kind.

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