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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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FREE ACCESS FOR BREEDERS TO TESTS BEING MADE
BY TESTING AUTHORITIES ACTING FOR OTHER STATES

Document prepared by the Office of the Union

Introduction

1. At its sixth session, the Administrative and Legal Committee decided to include in the agenda of its seventh session the question whether testing authorities acting for other States might give breeders the possibility of visiting test plots, whether or not those breeders themselves had varieties under test (see paragraph 29 of document CAJ/VI/10). This question had been mentioned earlier at the sixteenth session of the Technical Committee, at which the point had been made that the fact of giving access to tests enabled breeders to inform themselves of the varieties bred by their competitors, and thus to abstain from filing applications for protection if varieties of their own that were under development were identical or very similar to those under test.

2. In order to prepare the discussions of the Committee on that item of the agenda, the Office of the Union requested the Delegations of member States to give it their opinions on the subject. The replies are summarized below. It should be mentioned that most of the replies relate also to the general question whether breeders who did not have a variety under test should be given access to the tests, regardless of the implications of cooperation in examination.

3. On the subject of cooperation in examination, 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 translated 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."

Arguments for the Possibility of Giving Access to Tests

4. The Delegation of the Federal Republic of Germany drew attention to Section 31 of its Law, which reads as follows:

"(1) Consultation of the Register of Protected Plant Varieties, of documents relating to licenses of right and of other documents under Section 30(1), third sentence, and, until protection is granted, access to the documents relating to a published application for protection and to test growings of the variety which is the subject of that application, shall be open to everyone.

"(2) Access to documents relating to a title of protection that has been issued and to test growings for the subsequent verification of the maintenance of the variety shall be open to any person who can substantiate a legitimate interest therein."

In the case referred to in paragraph (2), the expression "substantiate a legitimate interest therein" has, according to a recent judicial ruling, to be interpreted so broadly that it has practically always to be accepted in practice that there is a legitimate interest when potentially satisfactory proof is provided, regardless of its nature. There are therefore plans to remove the requirement of substantiation of a legitimate interest in the course of the revision of the Law that is currently in progress, after the example of what is provided in the Patent Law. Removal has an immediate procedural advantage: it spares the Federal Office of Plant Varieties the necessity of ascertaining the existence of a "legitimate interest," and deciding officially whether access to the documents and tests should be given. Such a provision does not seem necessary from a substantive point of view either, as no one has yet requested access to documents and tests without stating grounds that testify to the existence of a "legitimate interest."

5. Moreover, the legislative grounds for allowing access to documents and tests, namely the possibility it gives 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 does not therefore seem advisable to make a distinction based on whether or not the person requesting access has a variety under test. It would seem to be useful, moreover, especially by comparison with patent practices, to give the public access to test plots and varieties under test, which are a source of general information on the "state of the art," so that other breeders may adjust the direction of their research in relation to it.

6. The Delegation of Spain considered it useful to give breeders the opportunity of visiting the test plots for the reasons put forward before the Technical Committee (see the last sentences of paragraphs 1 and 5 above).

7. The same reasons were put forward by the Delegation of Denmark, which added that, in its experience, breeders more often than not had knowledge of their competitors' material, and that it therefore seemed unnecessary, in the majority of cases, to maintain secrecy. Apart from that, in the opinion of the Delegation of Denmark, access to tests should be subject to the following two conditions:

(i) if testing was undertaken on behalf of another member State, that member State had to agree;

(ii) visitors had to be accompanied by members of the testing station staff.

8. The Delegation of Sweden said that in Sweden any person had access to variety tests. Each variety was identified by its number only, and there was no information on the variety or its owner. Under the Law on Secrecy (SFS 1980: 880), information on tests could not be given to any person other than the owner of the variety. In practice only the breeder who had a variety under test was taken through the test plots by the staff, and he received information on his own varieties only. The system had functioned well up to the present, and there was no reason to depart from it.

9. The Delegation of South Africa said that there too varieties under test were identified by numbers only, which were revealed to the owners of the varieties alone. Consequently any breeder, whether or not he had a variety under test, could visit the test plots. Arrangements for the purpose had to be made in advance, and visits took place under the strict supervision of senior executive staff of the Division of Plant and Seed Control.

10. The Delegation of Switzerland referred to the fact that Switzerland did not carry out tests for the moment, and that its opinions could therefore only refer to the interests of Switzerland and of persons who filed applications there. Although the administrative agreements concluded by Switzerland did contain the clauses mentioned in paragraph 3 above, the Delegation considered that the interests referred to were not at risk if third parties visited test plots under such supervision as removed the risk of theft of propagating material. Consequently every testing authority should decide for itself on the conditions under which visits took place, in such a way that the responsibilities of the authorities applying for testing were not involved.

Arguments Against the Possibility of Giving Access to Tests and Miscellaneous Arguments

11. The Delegation of Israel said that a breeder should in no event be given access to tests if he himself had no variety under test. That principle was applicable both where the tests related to varieties that were the subject of national applications for protection and where they were carried out on behalf of another member State.

12. The Delegation of Belgium expressed the opinion that breeders who did not have varieties under test should not be given access to the tests, and drew attention to the UPOV Model Agreement.

13. The Delegation of the United Kingdom said that its first reaction would be to oppose the principle of giving the possibility of visiting test plots to breeders who did not themselves have varieties under test. Breeders' organizations would be consulted on the matter, however.

14. According to the Delegation of France, access to variety tests on the part of breeders who had not themselves deposited varieties could have more drawbacks than advantages. The competent French authority had therefore suggested that time should be allowed for reflection before any decision was taken.

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