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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Fourteenth Session

Geneva, November 8 and 9, 1984

HARMONIZATION OF LISTS OF PROTECTED SPECIES Document prepared by the Office of the Union

1. At its thirteenth session, the Administrative and Legal Committee decided to enter the harmonization of lists of protected species on the agenda for its fourteenth (present) session following the report by the representative of Denmark on the intentions of his country regarding amendment of its plant variety protection law. This report and the comments forthcoming were recorded as follows in the report on the session (paragraphs 6 and 8 of document CAJ/XIII/8):

"6. The representative of Denmark announced that the Committee set up by the Ministry of Agriculture to study a revision of the law on plant variety protection had met recently. Furthermore, two matters of current concern to the interested circles, mainly the horticultural producers, were:

(1) ...

(11) The fact that one or the other species was not protected by all member States, thereby leading to a distortion of competition at international level.

"7. ...

"8. As for the second matter, it was decided to enter on the agenda for the next session an item headed 'harmonization of the lists of protected species.' It was also pointed out that the fact that a species was covered by a plant variety protection system in two member States did not mean that the breeder of a variety would ask for protection in those two States nor that he would grant licenses on the same terms in those States and therefore distortion of competition resulting from the breeder's commercial policy remained quite possible."

2. The UPOV Convention permits member States to draw up a limitative list of botanical genera and species to which they apply their domestic legislation on plant variety protection and, therefore, the Convention. This possibility is mainly contained in Article 4(2) of the Convention, stipulating that "the member States of the Union undertake to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species." This provision is supplemented

by others that set out the minimum rate at which application of the Convention is to be extended (Article 4(3) of the 1961 text--which moreover refers to a list of the names of genera and species which must necessarily be protected, a system not retained when the Convention was revised in 1978--and Article 4(3) to (5) of the 1978 text). The said possibility stems from the wish of the drafters of the Convention to set up an effective system of protection, presupposing examination carried out by official services, during which the variety is grown in the field or under glass in order to verify its distinctness, homogeneity and stability. In view of the limited means available to those services, it was not considered possible to demand application of the Convention to the whole of the vegetable kingdom, either immediately or in the future.

3. However, it should be the aim of each member State to give effect to Article 4(1) of the Convention, which stipulates that it applies "to all botanical genera and species." Currently, three member States are already applying the Convention to all or almost all genera and species: Hungary, New Zealand and the United States of America. The other member States have all drawn up a limitative list of a varying number of protected species. It may be noted in this context, however, that the size of the list should not be judged simply on the number of entries since to give protection to orchids, for example, implies some dozens of genera and, to say the least, some hundreds of species.

4. The following possibilities exist for harmonizing the list of protected species between UPOV member States:

(i) Extension of the protection to all genera and species. The most far-reaching but at present probably unrealistic solution would consist in following the example of the three above-mentioned member States and extend the protection to all botanical genera and species. It could be argued that at least for those States which today have long limitative lists the practical difference would not be too great. This could even be demonstrated in comparing the species for which applications are filed in the United States of America with those species which form part of the limitative list of the Federal Republic of Germany or the United Kingdom, if due account is taken of the fact that due to differences in climatic conditions as well as production and consumption habits for a number of species eligible for protection in the United States applications will not be filed in the European States (peanut, cotton plant etc.). Nevertheless those countries which are performing official growing tests can go this way only if a satisfactory solution is found for the testing or varieties of those species for which they have no own testing facilities (trained personnel, reference collections, storing possibilities).

(ii) The problem of the availability of testing facilities can be solved by adopting a system under which for a certain species the examination can be based on testing performed by the breeder himself. It is recalled that in the United States of America the testing of varieties is left entirely or almost entirely to the breeders/applicants while in New Zealand a mixed system is practiced. The other member States have so far considered such system unacceptable for them, but it should be discussed whether it could not be introduced for those species for which the establishment of governmental testing facilities would be unreasonable on account of the few applications that could be expected. These would at the same time be those species which, for the whole of the national economy of such a State, were rather unimportant. It should be considered whether such a dual system was not preferable to a system under which certain breeders were completely denied protection under the plant breeders' rights system which means unequal treatment of breeders of varieties of different species.

(iii) The breeders have since many years requested that at least protection should be provided in each member State for those species for which sufficient testing facilities exist in other member States. CIOPORA has for instance proposed at the 1978 Revision Conference and at other occasions to insert in Article 4 of the Convention a provision obliging member States to apply the provisions of the Convention "within eight years to all genera and species to which any of the other member States of the Union apply the Convention or for which such State is already able to carry out the preliminary examination required by Article 7" (see page 90 of the Records of the 1978 Conference,

UPOV publication No. 337(E)). Such automatism might not be acceptable for all member States but it should be examined whether the basic elements of that proposal could not be embodied in a recommendation of the Council of UPOV to member States. It could for instance be recommended to member States that they make the following effort;

(a) to extend protection to every species already protected by another member State under the condition that the latter State offers its services for examination within the framework of an agreement of cooperation and furthermore provided that such cooperation does not seem to be unreasonable for geographic, climatic or similar reasons;

(b) to offer their testing facilities in cases where they provide for protection for a species to other member States in which that species is not yet eligible for protection;

(c) to supplement these recommendations by a further recommendation that States intending to extend protection to a given species should inform the other member States about that intention as soon as possible and in sufficient detail in order to allow them to start the legislative measures necessary under their law for a similar extension. It is recalled in this context that some of the distortions mentioned by the Danish delegation are due to the fact that extension of protection to further species needs to be achieved by legislative acts (law or ordinance) which takes a certain time before it can be realized.

(iv) Should none of the above proposals seem to be acceptable, the harmonization of the national list of genera and species eligible for protection could only be promoted as in the past by a discussion between the representatives of member States on the question which taxonomic units in member States having limitative lists should be given priority for the extension of protection. It is recalled that for the facilitation of such discussions an annual "list of the taxa protected in the member States of UPOV and in the signatory State of the 1978 Act of the Convention" is prepared, an updated version of which is presented to each ordinary Council session and published in the "Collection of the Texts of the UPOV Convention and Other Important Documents established by UPOV."

5. Attention should finally be drawn to the fact that the harmonization of the list of genera and species will be improved if member States agree as far as possible to use the same nomenclature. If only from a formal point of view it is indeed regrettable that the case of *zygocactus* and its neighboring genera the three European member States that currently have extended protection to them have each used a different taxonomic system.

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