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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

COOPERATION IN EXAMINATION BETWEEN STATES ENJOYING VERY DIFFERENT  
CLIMATIC CONDITIONSDocument prepared by the Office of the Union

1. At its seventeenth ordinary session from October 12 to 14, 1983, the Council discussed the difficulties arising in cooperation between States enjoying very different climatic conditions. The report on those discussions (paragraphs 51 to 54 of document C/XVII/15) is reproduced as Annex to this document.

2. When approving the program of future work of the Administrative and Legal Committee, the Council noted that the questions that had been raised during the discussions might also need to be examined by the Technical Committee (see paragraph 113 of document C/XVII/15). This examination will be carried out during the 20th session of the Technical Committee that is to take place on the two days preceding the session of the Administrative and Legal Committee. This will follow on from a brief examination that the Administrative and Legal Committee already carried out at its twelfth session in November 1983. On that occasion, the Administrative and Legal Committee came to the following conclusions (see paragraphs 37 and 38 of document CAJ/XII/8):

(i) The problems discussed at the Council session--i.e. basically the fact that the description of a variety could possibly differ as a result of the climatic conditions at the place of cultivation--could also occur in one and the same country in the case of species cultivated both in the open and under glass where the examination was carried out in one of those environments only, even for the varieties to be cultivated in the other.

(ii) Those problems were first to be examined by the Technical Committee and then by the Administrative and Legal Committee at its fourteenth session on the basis of a document prepared by the Office of the Union.

3. The Office of the Union would like to contribute to the discussion with the following observations on the legal and administrative aspects of the matter.

4. From the legal point of view, the following question arises for a State that wishes to make use, in respect of a variety that is very sensitive to climate, of an examination report drawn up in another State that has different climatic conditions: should it make use of the report as it stands, should it carry out a supplementary examination in order to obtain a description that is also applicable for its climate (and, if necessary, confirm the distinctness, homogeneity and stability) or can it not use the report at all. Neither the UPOV Convention nor the relevant national laws contain specific provisions in this respect. After analyzing the various possibilities, the following may be said:

(i) Distinctness

(a) As far as the distinctness of a variety is concerned, there should be no problems where the examining authority has made entries in its examination report that justify the assumption that the examined variety is distinguishable from any other variety whose existence is a matter of common knowledge. Should the distinctness from another commonly known variety not occur in the State whose authority has taken over the examination report as a result of differing climatic conditions, such authority will generally nevertheless grant protection (assuming all other conditions are met) for the very good reason that it is not as a rule aware of the difference. Whether the authority can in such case invoke the principle of the variety having to be distinguishable from any other commonly known variety in one testing place (see paragraph 20 of the revised General Introduction to The UPOV Guidelines of November 14, 1979, document TG/1/2; see also, however, the decision of the United Kingdom Plant Varieties and Seeds Tribunal in the Italian rye grass variety--Prego case, UPOV-Newsletter No. 5, pages 8 to 15, particularly subparagraph (c) on page 12) would be a matter for the applicable domestic law. Such decision would prejudice solely the proprietor of the other variety, who could be referred, however, to the possibility of having the distinctness reexamined by instituting nullity proceedings (see Article 10(1) of the UPOV Convention).

(b) If the examining authority comes to the opposite conclusion, that the variety cannot be distinguished from another commonly known variety, the authority taking over the report will as a rule assume a lack of distinctness and will not grant protection. It is possible, however, that in such case the applicant claims, and can possibly prove, that the variety is indeed distinguishable in the State taking over the report. Indeed, such a situation can arise within one and the same member State, namely when at the--national---testing place no sufficient distinctness of the tested variety in respect of any other commonly known variety can be determined, but the breeder advances or even proves that in some other place in the State in question differences do in fact exist between the two varieties. It would therefore seem reasonable that the member States resolve the problem, when it arises under an agreement on cooperation in examination, according to the same principles that they would apply in the same case within the country. It is possible that the authority would carry out or have carried out a supplementary trial in those cases where the applicant's claim appears justified at first view.

(ii) Description

(a) As far as the description is concerned, two cases have to be taken into account, firstly the case in which the trial variety is influenced by the climatic differences in the same way as the reference varieties used for the distinctness testing, and secondly the case where the trial variety and the reference variety are influenced in different ways. In the first case, an authority having reasonable experience with the varieties of that species can take over the examination report and correct it by simple extrapolation. Such corrections are indeed carried out within one and the same country from year to year. In the second case, the examination report can only be corrected by means of a supplementary trial which, however, can be limited to those characteristics that experience has shown to fluctuate and which therefore involves less effort and cost than a full trial and furthermore that can be carried out by an authority that does not normally conduct trials for varieties of that botanical species (e.g. does not maintain a full comparative collection). Such a case is therefore in no way an exception since the description of a variety is always linked to the testing place, even at national level, and only at such place does it have unrestricted validity. Differences in other places also necessarily occur within one and the same member State.

(b) However, the basic question arises as to whether it is indeed necessary to correct the variety description. The Technical Committee has held that this is not the case for UPOV purposes (see document TC/XVIII/13, paragraph 61). Advocates of the opposite view will point out that the granting of variety protection gives the proprietor the right to exclude others from the production and marketing of propagating material of the variety (and in exceptional cases even from subsequent acts) and for that purpose they may enlist the help of courts and authorities. It can therefore be argued that it is in the interests not only of the breeder but also of the consumers that are required to respect the protection right, and also the courts and authorities that may be involved, that a State that takes over the examination report should possess a usable description.

(iii) Homogeneity and Stability

It is finally also conceivable that differing climatic conditions will have an effect on homogeneity or on stability. Where the examining authority has determined homogeneity and stability, no further trials will be undertaken by the Office taking over the examination report as part of its granting procedure. Competitors who question the homogeneity and consider themselves prejudiced by the variety protection that has been granted may be advised that they can at any time apply to the authority for annulment of protection on the grounds of lack of homogeneity (see Article 10(2) of the Convention). Where the examining office has found a lack of homogeneity, the State taking over the report will also refuse to grant protection, even where the lack of homogeneity does not occur in its State. The comments made under subparagraph (i) (b) also apply in this case.

(iv) General

(a) The general question arises whether cases of this kind occur frequently enough and create sufficient problems for them to need regulating within the UPOV framework. Account should be perhaps taken of the fact that examination in accordance with the UPOV principles is essentially based on characteristics that are extensively independent of environmental influences. Paragraph 17 of the General Introduction to the Guidelines (document TG/1/2) reads as follows:

"Both qualitative and quantitative characteristics may be to a greater or less extent subject to environmental influence which may modify the expression of genetically controlled differences. The characteristics least influenced by environment are preferred. If in certain cases the expression of a characteristic has been influenced more than usual by environmental factors, it should not be used."

However, it is not reasonable to forego examination of a characteristic that is strongly influenced by the climate in those cases where the characteristic is of particular importance for the species concerned, as for instance the color of an ornamental plant.

(b) Comments made by the Technical Committee and by a Technical Working Group are to be found in documents TC/XVIII/13, paragraphs 35 and 61, TC/XIX/5, paragraph 43, and TWO/XV/12, paragraph 14 (see Annex II).

5. From an administrative point of view, the main question is that of the financial processing in respect, firstly, of applications for protection (has the applicant to pay an examination fee for the supplementary examination?) and, secondly, in respect of cooperation in examination (should a State that makes use of an examination report from another State, but regularly carries out supplementary trials, pay a fee to the examining State in accordance with the UPOV Recommendation on fees to be charged in connection with cooperation in examination?). A number of States, that hold a supplementary examination to be necessary in all cases, do not apply this Recommendation on the grounds that the report they use does not alleviate their own examination work. However, it is questionable whether the authority in such a State does not in fact essentially base itself on the conclusions reached in the report that has been taken over, meaning that payment of a fee of 350 francs is indeed reasonable, which, moreover, can be charged to the applicant for protection if the Recommendation is applied. The possible fee to be charged to the applicant for a supplementary trial must be decided by the State concerned.

[Two annexes follow]

EXTRACT FROM THE REPORT OF  
THE SEVENTEENTH ORDINARY SESSION OF THE COUNCIL

(paragraphs 51 to 54 of document C/XIV/15)

51. As far as cooperation in examination was concerned, Israel faced the problem of its climatic conditions, mainly that of high luminosity and high temperatures. Indeed, the descriptions of varieties, carnation or rose for example, established in the countries of northern Europe and those established in Israel contained differences affecting characteristics such as the color of the flower, the length of the stem or the number of petals, and those differences were such that one would be inclined to conclude that they concerned different varieties. In that respect, certain colors seemed to be more subject than others to variations resulting from the intensity of the light. In view of that problem, the Israeli authorities had decided to make use of tests carried out in other member States for determining distinctness, homogeneity and stability and then to carry out additional growing trials and an examination to draw up a description that corresponded to local climatic conditions. That practice had at least the advantage of dispensing with the--costly--upkeep of a reference collection.

52. The comments reported in the above paragraph gave rise to an exchange of views. The representative of New Zealand pointed out, in concluding his statement, that his country also had similar, or even greater, reservations to make as regards the usefulness of the descriptions drawn up in other countries. Indeed, his country enjoyed a climate characterized by an unusual combination of high luminosity and low temperatures. When comparing the description of a variety drawn up, for example, in Europe and drawn up in New Zealand, it was sometimes very difficult to convince oneself that they were descriptions of the same variety. Additionally, it sometimes happened that two varieties that had proved to be distinct in another country could not be distinguished in New Zealand or again that a variety had proved homogeneous in another country but was not so in New Zealand. Finally, for some species such as wheat, the assortment of varieties grown in New Zealand, was characteristic of the country and unknown in the other member States, thus making it necessary to examine varieties for which protection had been requested, at national level, in comparison with that assortment. It was to a great extent because of those problems that New Zealand did not participate in the cooperation arrangements instituted within UPOV.

53. The representative of France felt that it had been clearly shown that the principles governing variety examination had to be adapted to each climatic zone and, notably, the lists of characteristics and the levels of expression used in the examination could not be harmonized in detail if the effect of the environment was ignored. Indeed, even at the level of a single country such as France, it could also be observed that the behavior of a variety, particularly as regards its distinctness in relation to another variety and also its homogeneity, varied depending on the environment in which it was studied. Knowledge of the various environments in which examinations were carried out and their effect on the behavior of the varieties would, however, enable variety descriptions to be drawn up that had practical significance for users. On the other hand, a description drawn up by a breeder in a specific environment was not necessarily comparable to those drawn up in the official testing locations.

54. The representative of the Federal Republic of Germany considered that the solution adopted by Israel, which was not unreasonable, raised a problem insofar as it was not included in the various recommendations made by UPOV in respect of cooperation. He therefore proposed that the matter be referred to the Administrative and Legal Committee which should examine whether the solution could be incorporated in the cooperation arrangements currently in force. Such an examination was all the more necessary since, as had been shown by the comments of the representative of New Zealand, the difficulties referred to by the representative of Israel also arose in a good number of other countries and UPOV indeed had a universal vocation. He further remarked that the problem was in fact even more complex. He noted, for instance, that a breeder to whom a title of protection had been issued in the Federal Republic of Germany for a

variety of saintpaulia was required to furnish in the United States of America, in connection with an application for a plant patent, a description whose content did not correspond to that drawn up in the Federal Republic of Germany despite the fact that saintpaulia was a species cultivated under glass and that glasshouse growing conditions were very similar in both States. In his view, account should also be taken of that fact in order to further improve the cooperation arrangements.

[Annex II follows]

## EXTRACTS FROM THE REPORTS OF THE TECHNICAL MEETINGS

EXTRACT FROM THE REPORT OF THE EIGHTEENTH SESSION  
OF THE TECHNICAL COMMITTEE

(Document TC/XVIII/13, paragraphs 35 and 61)

Applicability of Characteristics Throughout the World

35. The Committee took note of the information given in document TC/XVIII/6, paragraph 2. It finally concluded that there was general agreement that decisions on distinctness should always be based on the results obtained at a given testing station and the growing conditions prevailing there and that variety descriptions reflected those results and conditions. There was therefore no need to delete a certain characteristic from given Test Guidelines if it proved that the expression of that characteristic would differ in different parts of the world. Differences of that kind had existed already inside in the original--European--member States and were likely to become more pronounced as UPOV became a truly worldwide organization. The attention of the Technical Working Parties would have to be drawn to the need for a careful check of whether the example varieties given has a value only for a certain region, which might result in different example varieties having to be given for different regions. Inside Europe, it was already now the case that the expression of certain example varieties, e.g. for potatoes, differed by about one to two states of expression between the testing stations in the Netherlands and those in France. This had so far not posed a problem as long as the whole order of example varieties was kept the same. Cases could, however, arise where the order of the example varieties changed. In those cases, it might be better to choose other example varieties.

Distinctness, Homogeneity and Stability in Species Containing Both Vegetatively Propagated Varieties and Varieties Produced by Seed

61. The Committee agreed with the information given in document TC/XVIII/6 Add., paragraph 9, with respect to the testing of varieties of species containing both vegetatively propagated varieties and varieties produced by seed. With respect to the question whether, to the description of a variety which had been obtained under special growing conditions, the expression of characteristics obtained under normal growing conditions would have to be added, the Committee referred to earlier remarks made during the present session (see paragraph 35) that any test report or description prepared was always connected to the place where and the conditions under which it had been prepared. The question of further descriptions for the final use of the variety did not fall under the competence of UPOV and therefore the Committee could not take a position with respect to that question.

EXTRACT FROM THE REPORT OF THE NINETEENTH SESSION  
OF THE TECHNICAL COMMITTEE

(Document TC/XIX/5, paragraph 43)

Qualitative Characteristics in Which a Variety Expression Differs Under a Different Latitude.

43. The Committee noted paragraph 19 of document TC/XIX/3. It noted that the example given was that of a pseudo qualitative characteristic and also that the question presented had partly been solved by deleting the semi-determinate state of the characteristic mentioned. In other cases it might be necessary to fix artificial growing conditions for comparison purposes or, if no other solution was possible, to delete the whole characteristic from the Table of Characteristics.

EXTRACT FROM THE REPORT OF THE FIFTEENTH SESSION  
OF THE TECHNICAL WORKING PARTY FOR  
ORNAMENTAL PLANTS AND FOREST TREES

(Document TWO/XV/XII, paragraph 14)

14. In connection with the reports of the experts on the progress made in their States, the expert from Israel reported that they had encountered some difficulty when taking over test reports made in another member State in so far as the expressions of certain characteristics (especially with respect to colors) were different in his country compared to those of the country from which the test reports were obtained. Therefore, Israel had to complete this test report by own test results, especially with respect to colors which were different under the climatic conditions prevailing in Israel.

[End of Annex and of document]