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UPOV

CAJ/XIX/11

ORIGINAL: French

DATE: June 18, 1987

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Nineteenth Session

Geneva, March 31 and April 1, 1987

REPORT

adopted by the CommitteeOpening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its nineteenth session on March 31 and April 1, 1987. The list of participants is given in Annex I to this report.

2. The session was opened by Mr. F. Espenhain (Denmark), Chairman of the Committee, who welcomed the participants. On the second day of the session, the Chairman, on behalf of the Committee, welcomed Mr. Christopher Rogers, who took up his duties in the Office of the Union as Legal Officer.

Adoption of the Agenda

3. The Committee adopted the agenda as given in document CAJ/XIX/1. A list of the documents prepared for the session is given in Annex II to this report.

Adoption of the Report on the Eighteenth Session of the Committee

4. The Committee adopted the report on the eighteenth session as given in document CAJ/XVIII/7 Prov., subject to the deletion of paragraph 13.

New Developments in the Field of Plant Variety Protection

5. The representative of the Federal Republic of Germany announced that protection had been extended to *Brassica oleracea* L. var. *cymosa* Duch. (sprouting broccoli), *Exacum* L. and *Melilotus albus* Medik. (white sweet clover) and *officinalis* (L.) Pall. (yellow sweet clover). Furthermore, the concept of species had been amended for the purposes of the list of species covered by the Plant Variety Protection Law. It now covered taxa appearing on the list, as well as hybrids between taxa on the list, and hybrids between one of those taxa and a taxon not on the list. It should be noted in that connection that a patent had recently been granted--in conformity with the special provision that only excluded from patentability varieties of species covered by the Plant Variety Protection Law--for a somatic potato X tomato hybrid ("pomato") mentioning that it was a new species not appearing on the list of species covered by the Plant Variety Protection Law.

6. Authorities in the Federal Republic of Germany were studying the possibility of extending plant variety protection to all botanical species, as well as the possibility of granting protection in the case of "minor" species also on the basis of an examination carried out under official supervision on the breeder's premises.

7. The representative of Belgium announced that, following a new bilateral agreement on cooperation in examination concluded between the Federal Republic of Germany and the Netherlands, the agreements concluded by Belgium would have to be adapted. Belgium was also considering entrusting the Federal Republic of Germany with the examination of swede rape.

8. The Belgian authorities had been contacted by a genetic engineering enterprise regarding field tests of genetically engineered plants, containing, in particular, a gene coding for an insecticide molecule or resistant to a total herbicide. The representative of Belgium asked whether other member States had come up against similar questions.

9. In reply to the question, the representative of Denmark said that in his country a breeding enterprise had applied to the Ministry of the Environment for authorization to grow a variety of swede rape in the field within the framework of a plant improvement program. The representative of the Federal Republic of Germany said that there were similar cases in his country; the competent committee had not yet issued the authorizations for the experiment.

10. The representative of Denmark said that the revised draft Plant Variety Protection Law had been submitted to the Government. It had not been possible to include the draft in the agenda of Parliament's spring session but it was hoped that it could be taken up in the autumn.

11. A new bilateral agreement had been concluded with the Federal Republic of Germany.

12. Moreover, it had been decided to set up within the Ministry of Agriculture a committee on general questions of plant variety protection law and also to appoint a specialist on plant biotechnology.

13. The representative of Spain announced that a request had been made to extend protection to almond varieties and that fees had been increased by 10% on January 1, 1987.

14. The representative of France announced the imminent publication of the extension of protection previously announced. Furthermore, fees had been increased by 2.5% from January 21, 1987. Finally, there was at present intensive concerted activity related to biotechnology among the interested sectors.

15. The representative of the Netherlands announced that protection had been extended to 26 further taxa from March 9, 1987, and that a further extension to some 60 to 90 taxa was being studied. In that respect, it was hoped to make use of the examinations carried out by other member States and the examinations carried out by the breeder under the supervision of the authorities.

16. During the week preceding the Committee's session, a Subcommittee of the Parliament's Committee on Agriculture had discussed biotechnology, plant variety protection and patents. The general view had been that the scope of application of plant variety protection should be extended. Following that initial discussion, the Minister of Agriculture had announced his intention of asking another study group to draw up proposals. In that connection, the representative of the Netherlands emphasized that his country wished to undertake the relevant study in cooperation with international organizations.

17. The representative of the United Kingdom announced that the Government had called for an increase to 50% of the proportion of costs covered by fees, which had previously stood at approximately 20%. New levels of fees had come into force on April 1.

18. Furthermore, in reply to a written question in the House of Commons, the Minister of Agriculture had decided to undertake an evaluation of the plant variety examination systems in relation to plant variety protection and the national lists of varieties, and in relation to the seed certification systems. The study group was due to report towards the end of 1987.

19. The representative of Sweden said that discussions were taking place in the Ministry of Agriculture on biotechnology and extension of the scope of protection. The discussions had not yet concluded, but the trend was in favor of extension. However, the final decision would be the responsibility of the political authorities. In that connection, it should be noted that consumer organizations constituted an important pressure group.

20. The representative of the European Communities announced that the preliminary draft text of European/Community law on plant variety protection was currently the subject of internal consultation, in particular, regarding the question of granting adequate protection to biotechnology. It was hoped that the external consultation could commence in May 1987.

21. In addition, General Directorate III was studying the question of biotechnology and patent protection and was drawing up a draft text.

List of Priorities in Relation to Extension of Protection

22. Discussions were based on documents CAJ/XVIII/2 and CAJ/XIX/2.

23. Several delegations referred to the link between the list of protected species and examination of varieties. The latter included an important economic aspect (the cost of the examination itself and the cost of maintaining the necessary infrastructure, especially reference collections), as well as a political aspect as shown in the Annex to document CAJ/XIX/2.

24. The representative of the Netherlands proposed that a subgroup composed of two or three persons should be set up to formulate a document on the different possibilities available in the field of examination.

25. The representative of France emphasized that France's policy consisted of extending protection where it was of economic interest and there was a reliable means of examination, thus permitting the granting of reliable titles of protection. He considered that users should be asked whether or not they agreed to less reliable titles being granted.

26. The representative of the Federal Republic of Germany said that in his country varieties of all species were protectable under the Plant Variety Protection Law or, if the latter was not yet extended to a particular species, under the Patent Law. Until recently, the existence of two forms of protection had not led to any problems because the second form was more theoretical than practical. Patentability of plant varieties, while allowed in theory, was denied in practice because plant varieties could not fulfill the conditions for patentability. Moreover, the practice of the Federal Office of Plant Varieties had always been to extend plant variety protection to a particular species whenever it became necessary or desirable. In those rare cases where a patent application was filed before plant variety protection was extended, the applicant subsequently transformed it into an application for breeders' rights, once the extension had been achieved. Finally, patents were only very rarely granted for breeding processes.

27. The situation had, however, changed. In the first place, views in patent circles were changing with regard to patentability, in practice, of plant varieties. Secondly, at present a number of patent applications were being examined and patents had even been issued either for groups of plants assimilated to products (for example, varieties or intergeneric hybrids such as the pomato), or for breeding processes. In that connection, the representative of the Federal Republic of Germany cited the case of a process for creating the pomato through fusion of protoplasts, a process for producing camomile plants (having a certain content of useful substances) which used in particular alternately micropropagation and sexual reproduction, and a process for producing beer by using brewer's barley with a low proanthocyanidine content.

28. That new trend would give rise to long and difficult discussions on the dividing line between patents and plant variety protection. But above all, it created a political problem. It would be contrary to the rationality of the legal order to allow varieties protected under the plant variety protection law—for which examination had allowed verification of their material existence and characteristics—to coexist with varieties or non-variety material protected under the patent law—where a straightforward documentary examination did not offer the above-mentioned guarantees. That was why authorities in the Federal Republic of Germany were studying the possibility of extending protection to all botanical species, as was mentioned in paragraph 6 above. Such an extension would solve part of the problem.

29. However, the problem also had an international dimension. In that connection, the representative of the Federal Republic of Germany appealed to other member States to protect at least the economically important species. He considered that work on the subject should commence as soon as possible and proposed that a start should be made by regulating the technical aspects in the Committee itself, in a subgroup or in the Technical Committee.

30. The Chairman proposed that the Technical Committee should be asked to define the groups of species that should be protected and to report to the Committee. The Committee endorsed the proposal.

Biotechnology and Plant Variety Protection

31. In introducing the agenda item, the Chairman recalled that, at the twentieth regular session of the Council held in Paris on December 2, 1986, Mr. S.D. Schlosser (United States of America) had asked to be relieved of the chairmanship of the Biotechnology Subgroup following his election to the presidency of the Council. The Subgroup had therefore elected Mr. M. Heuver (Netherlands) as its new chairman at its meeting on March 30, 1987.

32. At the meeting held on the morning of March 31, Mr. Heuver reported on the Subgroup's work at its meeting on March 30. At its meeting held on the afternoon of April 1, the Committee had before it a partial draft of the report that the Subgroup had been asked to draw up; it made a number of comments on the text and asked the Subgroup to take them into account when finalizing the report.

33. The Subgroup then met after the Committee's session to discuss briefly the above-mentioned comments and to define the procedure to be followed for finalizing the report. It was agreed that the work would be mainly carried out by Mr. H. Kunhardt (Federal Republic of Germany), in cooperation with Mr. M. Heuver and Mr. K.A. Fikkert (Netherlands), with whom he would meet on April 24. The report would then be submitted to the Committee's next session.

Variety Denominations

34. Discussions were based on document CAJ/XIX/3, in particular Annex I thereto which contained the proposed new text for the first part of the UPOV Recommendations on Variety Denominations.

35. Following a detailed discussion, the Committee adopted the new text of Recommendations 3 to 7 appearing in Annex I to document CAJ/XIX/3. With regard to Recommendations 1 and 2, a consensus emerged on the text contained in document CAJ/XIX/10; the delegation of France, however, expressed a temporary reservation regarding Recommendation 2, which would have to be the subject of consultations at the national level.

36. It was agreed that the new text of the Recommendations would be submitted to the third (next) meeting with international organizations.

37. With regard to Recommendations 10 to 12 on the procedure for the information and mutual consultation of the competent authorities, the representative of the European Communities said that the Commission's attention had recently been drawn to the increased number of synonyms filed and registered. The Commission was now facing the possibility of having to take measures going as far as refusal to register the varieties concerned in the Community Catalogue. The representative of the Communities therefore appealed to authorities in member States to apply the Recommendations more strictly.

Revision of the Convention

38. General.-- Discussions were based on documents CAJ/XIX/4, CAJ/XIX/6 to 9, CAJ/XVIII/6 and CAJ/XVIII/7, paragraphs 44 to 46 and Annex II.

39. Substantive discussion.-- The Committee took note of the proposals and comments submitted by France, the Netherlands and a large number of international organizations, contained in documents CAJ/XIX/4 and CAJ/XIX/6 to 9. It noted that they were preliminary comments and proposals that in no way committed the parties in question.

40. In view of the short time allowed for studying the proposals and comments, the Committee held a general exchange of views in order to identify those points for which a possible revision of the Convention should be studied. Those points--which in general corresponded to the points raised by the organizations--were the following, in the order of the corresponding Articles of the Convention:

(i) Article 3: abandonment of the possibility of restricting access to protection on the basis of reciprocity;

(ii) Article 4: increase of the minimum conditions for application of the Convention to botanical genera and species; obligation to apply the Convention to all genera and species;

(iii) Article 5: in general, an increase in the level of protection granted, in particular, along the lines of the protection afforded by a patent for an invention. More specifically:

(a) wider definition of the objects of protection (elements of the plant such as cells, with or without walls; elements of the cell such as genes; plant material other than propagating material, in particular, the final product);

(b) wider definition of the activities covered by protection (production and marketing, including importation, of agricultural produce, as well as medicines, flavorings, etc.; production of seeds or seedlings for the producer's own requirements ("farmer's privilege")) and restriction of the principle of freedom of use of a protected variety for the purposes of plant breeding; consequently, maintenance or deletion, as superfluous, of Article 5(4);

(iv) Article 6: concept of important characteristic;

(v) Article 7: scope and procedure of examination;

(vi) Article 8: increase of the minimum duration of protection and harmonization of such duration;

(vii) Article 11: introduction of a system whereby a single application led to the issuing of several titles;

(viii) Article 12: extension of the priority period;

(ix) Article 13: redrafting of the provisions on variety denominations;

(x) General principles: dividing line between the plant variety protection and patents.

41. During the exchange of views, several delegations emphasized the urgency of commencing revision of the Convention. The representative of the Federal Republic of Germany stressed that revision must take into account the new requirements engendered by the current and future situation of technology, as well as the effects it would have on member States and non-member States and on the Convention's appeal.

42. The Representative of the European Communities said that the draft text on European/Community law on plant variety protection took into account the requirements of the European Economic Community, as well as the present-day needs of plant breeding and economy. Moreover, the draft fully utilized the possibilities afforded by the UPOV Convention, although it was not yet possible to guarantee that provisions to be introduced might not make it necessary to revise the Convention.

43. Future work.— The Committee agreed that the question of the Convention's revision should be included in the agenda for the third (next) meeting with international organizations. It proposed holding its next meeting on June 17 and 18 so as to prepare the third meeting. [At its thirty-fifth session held on April 2, 1987, the Consultative Committee approved that proposal.]

44. With regard to revision of the Convention, the documentation to be submitted to the above-mentioned meeting would include a synopsis of the proposals and comments submitted by organizations. [Regarding the provisional views of delegations of member States and the report of the Biotechnology Subgroup, the Consultative Committee, at its thirty-fifth session, decided that the Administrative and Legal Committee should decide at its next session whether one or two documents should be drawn up for the meeting with international organizations.]

ASSINSEL Motion on the Definition of Maize Hybrids

45. Discussions were based on document CAJ/XIX/5.

46. The Committee shared the point of view expressed by the Office of the Union that the request contained in the motion was not in conformity with Article 6(1)(a) of the Convention.

47. The representatives of France and the Federal Republic of Germany noted that the motion was in fact related to the examination of hybrid varieties. The problem was particularly critical in the case of maize because of the very large number of applications for protection and registration in the national lists of varieties. In theory, two methods could be envisaged: either to examine each hybrid variety, which would be long and costly, or to decide upon the distinctness solely on the basis of a study of the formula and lines, the hybrid only being examined in the last resort in case of doubt.

48. Up to the present, authorities in member States had used the first method and the representatives of the Federal Republic of Germany and France hoped that it could be maintained. In any case, growing of the hybrid and its examination were necessary in order to verify the conformity of the hybrid material with the formula and to establish its description. Nevertheless, a revision of examination procedures could perhaps be envisaged in the case of species such as maize and sunflower (but not, for example, in the case of

synthetic varieties, particularly in respect of grasses). It was therefore necessary to undertake a more detailed examination, in particular, on the basis of the Technical Committee's eventual contribution.

49. The Committee shared that point of view and decided to postpone examination of the question until the Technical Committee had made its report. [At its thirty-fifth session, the Consultative Committee decided to include the question in the agenda of the third (next) meeting with international organizations, as well as in the agenda of the next session of the Administrative and Legal Committee, which would study it on the basis of a document to be drawn up by the delegation of France.]

Date and Program for the Twentieth Session of the Committee

50. In view of the decisions taken by the Committee at its present session and by the Consultative Committee at its thirty-fifth session, the twentieth session of the Committee would be held on June 17 and 18, 1987, so as to prepare the third meeting with international organizations. The agenda would include the following main points:

- (i) revision of the Convention;
- (ii) UPOV Recommendations on Variety Denominations;
- (iii) definition and examination of hybrids.

Transfers

51. The Committee was informed that Mr. K.A. Fikkert (Netherlands) had been transferred to other functions. He should be replaced in the Biotechnology Subgroup by his successor at the national level and in the UPOV bodies, Miss Y. Gerner. The Committee thanked Mr. Fikkert for the work he had carried out, particularly within the Subgroup, and wished him every success in his new post.

52. This report was unanimously adopted by the Committee at its twentieth session, on June 18, 1987.

[Annexes follow]

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

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Mr. C. ROGERS, Legal Officer
Mr. M. TABATA, Associate Officer

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

ANNEX II/ANNEXE II/ANLAGE II

LIST OF THE DOCUMENTS PREPARED FOR THE SESSION
 LISTE DES DOCUMENTS ETABLIS POUR LA SESSION
 LISTE DER FUER DIE TAGUNG ERSTELLTEN DOKUMENTE

Number Cote Nummer	Title Titre Titel (falls Dokument in deutsch erstellt)
CAJ/XIX/1	Draft agenda Projet d'ordre du jour Entwurf einer Tagesordnung
CAJ/XIX/2	List of priorities in relation to extension of protection Liste des priorités en matière d'extension de la protection
CAJ/XIX/3	UPOV Recommendations on Variety Denominations Recommandations de l'UPOV relatives aux dénominations variétales
CAJ/XIX/4	Revision of the Convention Révision de la Convention
CAJ/XIX/5	ASSINSEL motion on the definition of maize hybrids Motion de l'ASSINSEL sur la définition des hybrides de maïs Motion der ASSINSEL über die Definition von Maishybriden
CAJ/XIX/6	Revision of the Convention - Comments from the International Chamber of Commerce Révision de la Convention - Observations de la Chambre de commerce internationale
CAJ/XIX/7	Revision of the Convention - Comments from the International Association for the Protection of Industrial Property Révision de la Convention - Observations de l'Association internationale pour la protection de la propriété industrielle Revision des Uebereinkommens - Bemerkungen der Internationalen Vereinigung für Gewerblichen Rechtsschutz
CAJ/XIX/8	Revision of the Convention - Proposals from the International Association of Horticultural Producers Révision de la Convention - Propositions de l'Association internationale des producteurs de l'horticulture
CAJ/XIX/9	Revision of the Convention - Comments from the British Society of Plant Breeders Ltd Révision de la Convention - Observations de la British Society of Plant Breeders Ltd
CAJ/XIX/10	UPOV Recommendations on Variety Denominations - Outcome of the Committee's deliberations Recommandations de l'UPOV relatives aux dénominations variétales - résultat des délibérations du Comité