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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Fifteenth Session
Geneva, March 27 and 28, 1985

REPORT

adopted by the CommitteeOpening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its fifteenth session on March 27 and 28, 1985. The list of participants appears in Annex I to this document.
2. The session was opened by Mr. M. Heuver (Netherlands), Chairman of the Committee, who welcomed the participants.
3. The Chairman announced that a former member of the Committee, Mr. J. Le Roux, had met his death in a road accident on his return to South Africa. The Committee paid homage to his memory.

Adoption of the Agenda

4. The Committee adopted the agenda as appearing in document CAJ/XV/1.

Intentions of Member States Regarding Amendment of National Plant Variety Protection Law

5. The representative of Denmark mentioned by way of information that discussions had taken place within the European Communities on the subject of variety denominations. It had been decided that the UPOV Recommendations for Variety Denominations would be submitted to the Standing Committee on Seeds and Propagating Material in Agriculture, Horticulture and Forestry, so that they might be made officially applicable to catalogues of varieties passed for marketing.
6. The representative of Spain announced that there were plans to extend protection to maize, apple, lettuce, almond x peach hybrids, lucerne and soya bean. Moreover, fees had been increased by about 25% as from the beginning of the current year.
7. The representative of New Zealand said that fee increases were planned. By way of information he also mentioned that an owner of breeders' rights had lodged an appeal against a decision of the competent authority to grant compulsory licenses on two varieties for failure to deliver propagating material to a section of the potential clientele (amateur gardeners). His appeal had just been dismissed.

8. The representative of the United Kingdom mentioned that the long-planned extension of protection to certain ornamentals should occur in the course of the summer. Moreover, fees would be increased by about 5% as from April 8. The increase was due to the need to review fees periodically in the light of inflation.

9. The representative of Sweden announced that there was a proposal before the Parliament of that country for the extension of protection to triticale.

10. The representative of the European Economic Community said that work was continuing on the introduction of a European/Community breeder's right. A preliminary draft was expected to be available in 1986.

Trends in Variety Creation Work and Intended Extension of Protection to New Species

11. The representative of Belgium announced that, in order to implement the work of the Committee, the Belgian authorities were planning to extend protection to some 50 species that were of minor importance to Belgium. To that end the authorities had approached the authorities of the other member States that participated in the system of cooperation in examination. Moreover, the Service for the Protection of New Plant Varieties had received requests for information from breeders concerning the following genera and species: *Petunia*, *Salvia*, *Thuya*, *Scabiosa caucasica*, *Cordyline terminalis*.

12. The representative of the United Kingdom mentioned that the authorities of that country were considering, in consultation with breeders and at their request, the possibility of extending protection to seed-propagated ornamentals.

Recommendation on the Harmonization of Lists of Protected Species

13. Discussions were based on document CAJ/XV/2.

14. In general, the Committee supported the principle of a recommendation whereby member States would be invited to extend their lists of protected species. It was mentioned that, according to a general principle of intellectual property law, a protection system applied without restriction to the whole area that it was capable of covering. In the field of plant variety protection, however, there were good reasons for specifying by name the genera and species eligible for protection. And yet those reasons should not result in gaps being left in the area of application of the protection system. On the basis of those principles, there were now plans in the Federal Republic of Germany to incorporate in the law the obligation to extend protection to any genus or species for which there was a market for reproductive or vegetative propagating material in that country, and for which an examination infrastructure was available. It was to be noted that there was no necessity, according to the proposed provision, for variety creation work to exist in the Federal Republic of Germany.

15. It was further pointed out that present circumstances favored the extension of protection: cooperation in examination was well established, even though further progress was still possible. Moreover, on evidence of the proposals made for the agenda of the second meeting with international organizations, breeders were calling for extension.

16. Some delegations, however, referred to the difficulties that arose. For instance, for a number of species that had been protected at the request of professionals, the first applications were still awaited. It was of course agreed that the filing of an application could justify the interest of extending protection, for instance where the variety concerned took a substantial share of the market for its species. Furthermore, the replies of breeders consulted regarding the planned extension had not always been encouraging, for instance in France with respect to sugar beet, onion or cauliflower, in those particular cases mainly for technical reasons. Objections to the extension of protection could also originate in other circles, for instance those concerned with health.

17. As the extension of protection relied in a number of cases on cooperation in examination, the point was made that it could present problems, notably from the point of view of plant health legislation. As for the costs incurred by extension, it was pointed out that they would be to a large extent borne by the State that carried out the examination under the cooperation scheme, notably in its maintenance of reference collections. It was suggested that the Technical Committee might be invited to consider the question and the possibilities for cost reduction. The representative of the United States of America mentioned that the present discussions were of no concern to his country because it applied its protection systems practically to the entire plant kingdom, and relied on growing tests carried out by applicants. He announced that a proposal whereby the authorities of the other member States would be invited to accept the results of tests carried out by applicants was in preparation and would shortly be submitted to the Committee.

18. Finally the question arose whether member States would in fact be able to implement the recommendation. In particular future member States could feel constrained, even though it amounted only to a moral obligation. On the suggestion that the professional organizations might be asked to draw up a list of priorities, it was pointed out that they were not in a position to present the views of all those concerned, notably amateur breeders.

19. The Committee eventually adopted an amended draft of the recommendations, the text of which appears in Annex II to this document, and decided that the draft should be submitted, with explanations, to the next meeting with international organizations.

Progress Report on the Work of the Biotechnology Subgroup

20. It was stated that the subgroup had had a first meeting at the time of the previous session of the Committee (see the footnote to paragraph 18 of document CAJ/XIV/6). The second meeting, which had been scheduled for March 26, had to be postponed to March 28, so that little progress could be reported. In any event the subgroup should take its time, and should await on the one hand the outcome of the debate that would take place at the next meeting with international organizations, and on the other hand the results of the work of certain other bodies, WIPO in particular. It was mentioned in that connection that UPOV had been one of the first to publish a study on the subject, namely in document CAJ/XIII/3, which was being used as a reference for the concurrent work.*

Interpretation of Article 2(1) and Related Provisions of the Convention

21. Discussions were based on document CAJ/XV/3.

22. In general, the Committee shared the conclusions drawn in document CAJ/XV/3.

* The subgroup met on March 28 and had an initial exchange of views on the basis of a preparatory document drawn up by Mr. K.A. Fikkert (Netherlands) and correspondence between Mr. Fikkert and Mr. H. Kunhardt (Federal Republic of Germany). This documentation related to the legal position in Western Europe. Following this exchange, Mr. Fikkert was invited to revise the preparatory document.

Mr. Tsuchiyama (Japan) presented a brief summary of the position in Japan, drawn up on the basis of the above preparatory document.

The Office of the Union presented a draft for the section dealing with the historical development of the protection systems concerned, drawn up in the form of an introduction to the final report of the subgroup. The draft was not examined. The Office of the Union also presented an outline for the section describing techniques of "classical" plant breeding and of genetic engineering. The subgroup agreed that that part should not be drafted until one had a more accurate idea of the content of the legal part.

The subgroup considered the possibility of a meeting during the summer. The decision would depend among other things on the progress made with the documentation.

23. The representative of the Netherlands pointed out, however, that in view of paragraphs (a), (b) and (c) of the Preamble, as well as of Articles 1(1) and 2(1), UPOV member States should protect plant varieties only by means of legislation that fulfilled the conditions set forth in the UPOV Convention, i.e. plant variety protection or plant patent law. In other words, general patent law should not be applied to the protection of plant varieties in UPOV member States.

24. It was mentioned that the present position of member States was conditioned by their position before they became members of UPOV:

(i) For States that did not protect plant varieties before becoming members of UPOV, the Convention--through the medium of national legislation--created a whole new law. Those States took on the obligation, under Article 1(1), to recognize a right and to confer it on breeders under the conditions laid down by the Convention, and also the obligation under Article 4(2) to apply the Convention progressively to the largest possible number of botanical genera and species. In other words, those States undertook to abstain from providing varieties with a form of protection that would compete with the one based on the Convention.

(ii) For States which allowed--at least in theory--the protection of plant varieties by means of "industrial" patents, the Convention provided a better system of protection, because it was tailor-made. When they implemented the Convention at national level, the majority of those States neither wanted nor were able to deprive breeders of the patent route in the case of genera and species not (yet) covered by the special protection system based on the Convention. They therefore had to introduce provisions governing transitorily the relations between the two systems of protection.

25. In that context, the law and the practice of the Federal Republic of Germany were explained in detail. The Plant Variety Protection Law provided for the possibility, when protection was extended to a genus or species, of converting patent applications into applications for special titles and patents into special titles. In practice, a breeder who wished to protect a variety of a genus or species that was not--yet--within the scope of the Plant Variety Protection Law, applied for a patent. Through that application, his right to the variety was given a date, which enabled the breeder to market the variety without prejudice to his right. During the period the application was pending, the competent authorities arranged for special protection to be extended to the genus or species concerned. The patent application was then converted by the breeder into an application for a special title of protection. The effect of that system was that, in practice, no patent had ever been granted for a variety in the last 30 years. It also established that the special system of protection applied to the "useful" plant kingdom in its virtual entirety.

26. It was pointed out that the position of the United States of America bore some resemblance to that of the Federal Republic of Germany, inasmuch as the Patent Office accepted applications for "industrial" patents in respect of varieties that could not be protected either under the Plant Patent Law or under the Plant Variety Protection Law, especially hybrid varieties.

Preparation of the Second Meeting with International Organizations

27. Discussions were based on documents CAJ/XV/4, 6 and 7.

28. The Committee made some changes to Annex II to document CAJ/XV/4. In Annex III, it decided among other things to remove the second part. At the end of Annex IV, it would be mentioned that the preliminary draft of the Commission of the European Communities, according to the Commission's own projections, would be available in 1986.

29. With regard to the proposals for agenda items made by the international organizations, the Committee agreed to include minimum distances between varieties, the application of the Convention to botanical genera and species and the scope of protection. The matter of the distribution of UPOV documents should be considered under "Any other business." On the other hand, the question of variety denominations should not be dealt with, in view of the fact that some experience had first to be gained from the implementation of the

recently-adopted UPOV Recommendations for Variety Denominations. It was mentioned that the international organizations would have to submit preparatory documents on all the items proposed by them, which would then be used as the basis for discussion. For the question of the application of the Convention to botanical genera and species, the draft recommendations drawn up by the Committee would also be available.

Plant Variety Protection and Virus Diseases

30. Discussions were based on document CAJ/XV/5.

31. The representative of Spain, in his capacity as Chairman of the Technical Committee, said that the technical bodies of UPOV were already working on the above question, and that they planned to draw up a list of diseases affecting the expression of variety characteristics and a list of diseases subject to plant health regulations.

32. The representative of France considered that protection could not be granted if the new appearance of plants was due to a natural infection. It could on the other hand be granted if the new appearance was the result of genetic manipulation.

33. The representative of Ireland announced that Mr. A.C. Cassells had said how pleased he was that the Office of the Union had submitted the question so promptly to the competent bodies of UPOV, and also how interested he was in the question, which brought into play fundamental principles of the highest order, not to mention the important economic stakes involved.

34. The Office of the Union also stressed the above point, drawing attention to the fact that, in terms of its results, natural infection was very close to genetic manipulation. For instance, Agrobacterium tumefaciens injected its carcinogenic genes into the genetic information in the nucleus of the plant cell. That was precisely the property genetic engineering used, replacing those genes with "useful" genes. Moreover, there were plants considered in the trade to be representative of varieties, as in the case of tulips, even though their specific characteristics were known to be due to the presence of a virus. One could even imagine such a peculiarity to exist in other "varieties" without anyone's knowledge. Ultimately, the Office of the Union, without wishing to anticipate the outcome of the debate, considered that it should go beyond considerations associated with the state of health of plant material supplied for testing.

35. The Committee eventually decided to seek first the opinions of the Technical Committee on the subject.

Program for the Sixteenth Session of the Committee

36. Subject to the appearance of anything new, the Committee would concern itself mainly with the evaluation of the results of the second meeting with international organizations. In that connection it would also give its attention, as requested by the Delegation of France, to the possibilities for harmonization of the scope of protection.

37. This report has been adopted by correspondence.

[Annexes follow]

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

CAJ/XV/8

ANNEX II

DRAFT
UPOV RECOMMENDATIONS
ON THE HARMONIZATION OF THE LISTS OF PROTECTED SPECIES

adopted by the Committee on March 28, 1985

The Council of the International Union for the Protection of New Varieties of Plants,

Considering that Article 4(1) of the International Convention for the Protection of New Varieties of Plants provides that the Convention may be applied to all botanical genera and species;

Considering that the member States have undertaken under Article 4(2) of the Convention to adopt all measures necessary for the progressive application of the provisions of the Convention to the largest possible number of botanical genera and species;

Considering further that Article 7(1) of the Convention requires that protection be granted after examination of the variety in the light of the criteria defined in Article 6 and that such examination is to be appropriate to each botanical genus or species;

Referring to the statement noted with approval by the Council at its tenth ordinary session in 1976 that "it is clear that it is the responsibility of the member State to ensure that the examination required by Article 7(1) of the UPOV Convention includes a growing test and the authorities in the present UPOV States [in 1976] normally conduct these tests themselves";

Taking into account the fact that the main obstacle to the application of the Convention in the member States to the largest possible number of botanical genera and species is the limitation on the economic and technical and on the scientific possibilities of carrying out variety examination;

Referring to the fact that Article 30(2) of the Convention specifically sets out the possibility of the competent authorities of the member States concluding special contracts with a view to the joint utilization of the services of the authorities entrusted with the examination of varieties in accordance with the provisions of Article 7 and with assembling the necessary reference collections and documents;

Noting with satisfaction that the member States have already made extensive use of that possibility, both in order to keep the cost of protection for new plant varieties at the lowest possible level and also to extend their lists of protected species;

Convinced that further progress can be achieved in this field and that such progress is also called for to maintain or even improve the effectiveness of new plant variety protection as a tool in the development of agriculture and the safeguarding of breeders' interests;

Recommends the member States of the Union:

(a) to extend protection to every genus or species for which the following conditions are met:

(i) The genus or species is the subject of plant breeding work, or it is expected that the extension of protection will be an incentive for such work to be undertaken;

(ii) There is a real or potential market in the member State of the Union concerned for reproductive or vegetative propagating material of varieties from that genus or species;

(iii) Examination facilities are existing or will be set up for the genus or species, either in the member State of the Union concerned or in another member State which offers its services for examination pursuant to the provisions of Article 30(2) of the Convention;

(iv) There are no legal, climatic or other obstacles to such extension;

(b) to offer their services to the other member States for the examination of varieties, particularly in those cases in which the other States participating in the cooperation system do not yet protect the genus or species concerned, by means of concerted action to concentrate examination of the varieties at an optimum number of the authorities concerned;

(c) to inform the other member States as early as possible of their intentions to extend protection to a given genus or species, giving sufficient details, and to offer the services of their authorities for the examination of varieties of such genus or species to enable the other States, as appropriate, to put in hand the procedures required by their legislation for an extension of the same kind.

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