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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Eighteenth Session
Geneva, November 18 and 19, 1986

REPORT

Adopted by the CommitteeOpening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its eighteenth session on November 18 and 19, 1986. The list of participants is given in Annex I to this document.

2. The session was opened by Mr. F. Espenhain (Denmark), Chairman of the Committee, who welcomed the participants.

Staff Movements

3. The Committee observed a minute's silence in memory of Dr. Heribert Mast, Vice-Secretary General of UPOV from March 1, 1974, to August 11, 1986, who had died on August 15, 1986, after a short illness.

4. The Committee congratulated Dr. Walter Gfeller on his election to the post of Vice-Secretary General of UPOV and noted that he would take up his new functions on December 1, 1986.

Adoption of the Agenda

5. The Committee adopted the agenda as given in document CAJ/XVIII/1, noting that the Office of the Union had used the symbol CAJ/XVIII/4, originally allocated to a document on biotechnology and plant variety protection, to submit a motion of the Vegetable Seed Section of FIS on the scope of protection.

New Developments in the Field of Plant Variety Protection

6. The representative of South Africa announced that fees had been increased with effect from August 1, 1986, that it was intended to extend protection to 12 taxa, that a cooperation agreement had been concluded with the United Kingdom (although negotiations were still continuing on the list of taxa covered by the agreement) and that two further agreements were being drawn up.

7. The representative of the Federal Republic of Germany announced that it was proposed to extend protection to *Agaricus* L. (mushroom), *Brassica oleracea* L. var. *cymosa* Duch. (sprouting broccoli), *Exacum* L. and *Melilotus albus* Medik. (white sweetclover) and *officinalis* (L.) Pall. (yellow sweetclover).

8. The representative of Belgium announced that the draft law amending the Plant Variety Protection Law and authorizing approval of the 1978 Act of the Convention had still to come before Parliament. Likewise, it had not yet been possible to finalize the proposal to extend protection to propagation with a view to planting for the purposes of commercial production of fruit, ornamental plants and forest trees.

9. The representative of Denmark said that the Committee responsible for revising the Plant Variety Protection Law had drawn up a draft law. The explanations were being prepared and the draft as a whole should be submitted before the end of the year. The salient points of the draft Law were the following:

(i) it envisaged a uniform term of protection of 25 years;

(ii) it provided for a system of provisional protection under which the license fees would be paid into a blocked account;

(iii) it provided that license fees concerning any trademark could only be collected after expiration of the normal term of protection.

The explanations would provide indications on admissible practice in the field of propagation of varieties. In particular, propagators would not be obliged to obtain the initial plant material from the breeder, but could choose their source of supply, except in the case of the very first propagation. The possibility of choice was based on reasons of plant health.

10. The representative of Denmark also stated that work on cooperation agreements was continuing and would be concluded shortly.

11. The representative of Spain announced that protection had recently been extended to triticale.

12. The representative of France announced that it was proposed to increase fees by up to 2.5%. Furthermore, it was proposed to extend protection to chicory (*Cichorium intybus* L.), to vegetable Brassicas (Brussels sprouts, curly kale and cabbages), Christ's thorn, tall fescue, walnut, show and fancy pelargoniums, oyster mushroom and rye.

13. The representative of Japan said that the Center for Genetic Resources, Seeds and Seedlings would be inaugurated on December 1, 1986.

14. The representative of the Netherlands announced that the list of protected taxa would be extended within a period of approximately two months. A further extension was being prepared in order to take into account plant improvement activities in the Netherlands and to harmonize the Netherlands' list with that of other member States. It would probably be implemented at the end of 1987.

15. The representative of the United Kingdom announced that regulations permitting an increase in the percentage of costs covered by fees were being drawn up and should enter into force on April 1, 1987. Moreover, United Kingdom authorities continued negotiations with authorities in other member States with a view to concluding bilateral agreements.

16. The representative of the European Communities announced that the preliminary draft text on European/Community law for the protection of plant varieties should be available before the end of the year and that consultations could commence in 1987.

WIPO Questionnaire Concerning the Legal Protection of Biotechnological Inventions (Document BioT/Q1)

17. A preliminary exchange of views showed that a majority of the competent authorities in the field of plant variety protection had participated in one form or another in providing replies to the WIPO questionnaire.

18. The representative of France said that, when consulted by the Patent Office, the Plant Variety Protection Committee had not wished to reply because of the complexity of the questions.

19. The representative of Sweden emphasized that many of the questions were theoretical, and in his view the replies given by the authorities in his country were not satisfactory. He expressed the hope that in future the problem would be dealt with in a practical manner.

List of Priorities in Relation to Extension of Protection

20. Introduction.— Discussions were based on document CAJ/XVIII/2 and paragraphs 4 and 5 of the report of the Biotechnology Subgroup contained in Annex II hereto.

21. Document CAJ/XVIII/2.— Introducing document CAJ/XVIII/2, the Office of the Union drew attention to the fact that, at its next session, the Council would be called upon to adopt recommendations that would have a very wide-ranging practical effect. It then stated that AIPH had not been able to provide its list of priorities in time and that it would do so before the next session of the Committee.

22. It was noted that, in principle, CIOPORA's position did not mean that member States should grant protection to all genera and species, but only to those contained in a member State's restrictive list and for which examination structures existed. In that connection, it was emphasized that CIOPORA had made such a proposal at the 1978 Diplomatic Conference. A number of delegations would nevertheless have liked CIOPORA to submit a list of priorities.

23. The Committee decided to postpone detailed consideration of lists of priorities until its subsequent session. Representatives of member States would then be asked to report on the possibilities of satisfying the organizations and making offers for cooperation.

24. The representative of the Federal Republic of Germany drew attention to the fact that authorities in his country had consulted national organizations but had not received any replies. He considered that it was also necessary to encourage such organizations to make proposals concerning extension of protection to genera and species.

25. Recommendation of the Biotechnology Subgroup.— The Committee noted that the main aim of the recommendation—like those concerning Article 5 of the Convention—was to promote reflection and discussion.

26. In that connection, the representative of France wondered whether the recommendation was not simply a declaration of principle since the inventory of the plant world was far from complete. He said that its effect on Article 2(2) of the Convention should also be studied.

27. The representative of the Netherlands wondered whether the recommendation would not make it more difficult for States that were not yet members to join the Union.

28. The representative of Spain made a specific reservation concerning the recommendation because it would be difficult for his country to accept automatic extension of protection to all genera and species.

Minimum Distances Between Varieties

29. Discussions were based on document CAJ/XVIII/3.

30. The representatives of the United States of America and the Federal Republic of Germany having stated that the proposals submitted by the Office of the Union as a basis for discussion raised more problems than they solved, the Committee agreed not to deal with the subject and only to take up the question again if the discussions in the Technical Committee so justified. It also reaffirmed its previous decisions contained in the first part of document CAJ/XVIII/3. Outside the meeting, the Chairmen of the two Committees in question agreed that document CAJ/XVIII/3 should be submitted to the Technical Committee.

31. The representative of France noted, however, that users were facing problems. He considered that, if the competent authorities were aware of the existence and the scope of those problems, they should pursue their reflection.

Biotechnology and Plant Variety Protection

32. The Chairman of the Biotechnology Subgroup gave a report on the Subgroup meeting held the previous day, on the basis of a report prepared by the Office of the Union, which is contained in Annex II hereto.

33. The Committee noted that the Biotechnology Subgroup had made recommendations with a view to revising the Convention. It agreed that it was necessary to examine all questions related to possible revision of the Convention so as to afford appropriate protection. It decided to report on the question to the Consultative Committee and the Council and to invite the latter to give the Committee the necessary terms of reference.

34. The Committee also noted that the Biotechnology Subgroup had not fulfilled its terms of reference; many delegations considered that the terms of reference should be fulfilled and some of them believed that questions such as the protection of genes should also be studied. After detailed discussion, it was decided to keep the Biotechnology Subgroup and that it should submit a report, in accordance with its terms of reference, limited to questions of biotechnology and reflecting the variety of views.

35. In connection with that item of the agenda, the Chairman of the Council gave a report on the seminar on the theme "Biotechnology and Plant Creation," organized at Dijon (France) on June 6, 1986, by the Center for Research on Market and International Investments Law (CREDIMI).

Variety Denominations

36. Discussions were based on documents INF/10, IOM/VD/I/1 and CAJ/XVIII/5.

37. The majority of the Committee agreed that it was useful and desirable to have recommendations and considered that the text of the Recommendations contained in document INF/10 should be simplified.

38. A narrow majority of the Committee was in favor of keeping Recommendation 2, subject to simplification. Since it did not prove possible to reach agreement on its new wording, the Committee decided to invite member States to send their proposals for amendment of the Recommendations as a whole to the Office of the Union before January 15, 1987. The Office of the Union would compile the amendments for study at the Committee's subsequent meeting.

39. With regard to the denomination code system drawn up by CIOPORA, it was stated that the system had been used in a number of member States before being prohibited within the framework of plant variety protection, while it had not been used in other member States. It was also noted that it was not appropriate to study whether or not it constituted established practice within the meaning of Article 13(2) of the Convention, because the question of established practice in that Article only related to denominations composed solely of figures, but that it was appropriate to do so with regard to Recommendation 2. Since the latter was being revised, the Committee considered that it was not yet able to reply to the question.

40. The Committee finally decided to recommend the establishment of a small group of experts from various sectors for the revision of Article 13 of the Convention.

Scope of Protection

41. Introduction.— Discussions were based on documents CAJ/XVIII/4 and 6 and paragraphs 6 to 13 of the report of the Biotechnology Subgroup contained in Annex II hereto.

42. Motion of the Vegetable Seed Section of FIS.— Introducing document CAJ/XVIII/4, the Office of the Union emphasized that the motion was drafted along the lines of the Recommendation on Article 5 of the Convention adopted by the 1978 Diplomatic Conference.

43. The Committee took note of the motion and decided to ask the Council to draw the attention of member States thereto, as well as to the Recommendation adopted by the 1978 Diplomatic Conference.

44. Document CAJ/XVIII/6 and recommendations of the Biotechnology Subgroup.— Introducing document CAJ/XVIII/6, the Office of the Union emphasized that it was undoubtedly possible to extend protection to those fields where it was necessary or desirable by means of specific provisions covering each particular case. However, that quickly led to a catalogue of specific provisions that was difficult to administer. That was why the Office of the Union had proposed, as a basis for discussion, that there should be a very general definition together with, on the one hand, exceptions outlining the fields that would not be covered by breeders' rights and, on the other hand, the principle of exhaustion of rights adapted to the subject of protection. The form of a recommendation had been chosen by the Office of the Union in view of the discussions that had taken place at the previous session of the Committee and of the fact that any measure with wider scope (special agreement or revision of the Convention) would be a longer-term measure that could be based on a recommendation. Finally, the Office of the Union drew attention to the fact that the recommendation proposed as a basis for discussion provided for protection whose scope was less than that envisaged by the Biotechnology Subgroup.

45. The Committee took note of document CAJ/XVIII/6 and the recommendations of the Biotechnology Subgroup.

46. Several delegations expressed interest in the solution proposed by the Office of the Union and the Biotechnology Subgroup, while reserving their position on details of the model provisions submitted by the Office of the Union, in particular with regard to the right to keep back part of the crop for use as seed (paragraph (5) of the draft recommendation). With regard to paragraph (1), which was also the subject of reservations, the Office of the Union explained that its scope was limited by the principle of exhaustion contained in paragraph (3). In particular, any act related to a crop produced from propagating material on which the breeder had exercised his right was not covered by protection. Therefore, except in the case of imports of plant material, the scope of protection that would be granted under the recommendation was appreciably equivalent to that granted by a general provision based on Article 5(1) of the Convention supplemented by provisions covering the various specific cases.

Program for the Nineteenth Session of the Committee

47. Subject to any new matters that might arise, the agenda of the nineteenth session of the Committee would include the following items:

- (i) list of priorities in the field of extension of protection;
- (ii) biotechnology and plant variety protection;
- (iii) variety denominations;
- (iv) revision of the Convention.

Retirement

48. The Chairman said that Mr. J. Rigot (Belgium) was taking part in the Committee's work for the last time. On behalf of the Committee, he thanked him for the work he had carried out and wished him a long and happy retirement.

49. This report was unanimously adopted by the Committee at its nineteenth session, on March 31, 1987.

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

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- Dr. M.-H. THIELE-WITTIG, Senior Counsellor
Mr. A. HEITZ, Senior Officer
Mr. M. TABATA, Associate Officer

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

ANNEX II

REPORT OF THE MEETING OF THE BIOTECHNOLOGY SUBGROUP
ON NOVEMBER 17, 1986General

1. The Biotechnology Subgroup met on November 17, 1986.
2. The Office of the Union had not been able to draw up a document to serve as a basis for discussion in the Subgroup. Therefore, the Subgroup decided to concentrate on the last point of the revised terms of reference given to it by the Administrative and Legal Committee at its seventeenth session (see paragraph 3(vi) of document CAJ/XVII/9), namely, possible solutions to problems raised in particular by the organizations in respect of protection in the field of biology.
3. In that connection, the Subgroup decided to make the following recommendations to the Administrative and Legal Committee. They concerned Articles 4 and 5 of the Convention respectively.

Article 4 of the Convention (Botanical Genera and Species Which Must or May Be Protected)

4. The Biotechnology Subgroup recommended that it should be made compulsory for member States to extend protection to all genera and species by amending Article 4 of the Convention. The competent authorities should ensure, in accordance with Article 7 of the Convention, that varieties that were the subject of an application fulfilled the conditions laid down in Article 6, either by undertaking the examination themselves, by taking over the results of an examination by another competent authority or recognized institution, or by basing themselves on tests carried out by the breeder himself, in conformity with the declaration on Article 7 made by the UPOV Council at its tenth ordinary session.¹

¹ The statement is worded as follows:

"(1) It is clear that it is the responsibility of the member States 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 member States normally conduct these tests themselves; however, it is considered that, if the competent authority were to require these tests to be conducted by the applicant, this is in keeping with the provisions of Article 7(1) provided that:

"(a) the growing tests are conducted according to guidelines established by the authority, and that they continue until a decision on the application has been given;

"(b) the applicant is required to deposit in a designated place, simultaneously with his application, a sample of the propagating material representing the variety;

5. The preceding recommendation is based on the fact that, according to the recommendation submitted to the Council for adoption, member States had already been invited to extend protection to all genera and species for which there was a need for protection and for which examination facilities existed.² The genera and species for which protection was available in at least one member State (on the basis of examinations carried out by the competent authorities) were listed in the Council document bearing the symbol 6 in each series. The Subgroup's recommendation had a wider scope since it required the protection of all genera and species.

Article 5 of the Convention (Rights Protected; Scope of Protection)

6. The Biotechnology Subgroup recommended that protection granted under Article 5(1) of the Convention should be extended to any use of plants or parts of plants of the protected variety, subject to exceptions to be defined and to the principle of exhaustion of rights.

7. The Subgroup also recommended that the possibility of extending protection to products directly obtained from plants or parts of plants of the protected variety should be studied.

8. Those recommendations were based on the fact that protection granted under Article 5(1) of the Convention was not adequate in certain respects and that it should be extended as regards both the material that was the subject of the rights and the acts carried out with such material. That need existed already in the case of "traditional" techniques of plant breeding, production and use.

[Note 1, cont'd]

"(c) the applicant is required to provide access to the growing tests mentioned under (a) by persons properly authorized by the competent authority.

"(2) A system of examination as described above is considered compatible with the UPOV Convention."

² The recommendation in question is the following:

"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; or 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;

"(ii) 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."

9. Biotechnology had given a new dimension to the problem because of the use of plant cells in an industrial process so as to produce a specific compound. For varieties materialized by such plant cells, the plant variety protection system only made sense if protection was also extended to such use. It would not be of any use if it only applied to reproductive or propagating material because such varieties were only very rarely the subject of "marketing of the reproductive or vegetative propagating material, as such."

10. The Subgroup considered it desirable to extend plant variety protection legislation to such varieties since protection under a patent for example in respect of the production process for the compound, might not guarantee adequate protection to the variety. It also noted that in such cases a patent and a plant variety protection certificate could coexist.

11. The Subgroup was not able to reach a final conclusion regarding products. However, it noted that the problem raised, for example, by imports of cut flowers from a country without protection, could also be raised in a similar manner for products such as wine or oil.

12. The Subgroup also noted that member States should take care when drafting national legislation so as to avoid giving the impression that it only applied to varieties in the form of whole plants, thus excluding plant cells.

13. Finally, the Subgroup took note of a proposal that, in the long term, a study should be made to see whether the system contained in the UPOV Convention should not also be extended to microorganisms (if they were not considered to be plants) and to animals.

[End of document]