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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

## Second Session

Geneva, November 15 to 17, 1978

## DRAFT REPORT

prepared by the Office of the UnionOpening of the Session

1. The second session of the Administrative and Legal Committee (hereinafter referred to as "the Committee") was held in Geneva from November 15 to 17, 1978. All member States were represented. Of the non-member States invited, Canada, Ireland and Spain were represented by observers. The list of participants is attached as Annex I to this document.
2. The session was opened by Dr. D. Böringer (Federal Republic of Germany), Chairman of the Committee, who welcomed the participants.

Adoption of the Agenda

3. The Committee unanimously adopted the agenda as appearing in document CAJ/II/1, after having agreed that it would also deal with the following questions:
  - (i) Cooperation with the European Communities (document CAJ/II/6), as requested by the Council at its fourth extraordinary session;
  - (ii) UPOV model form for the transmittal of examination results (document CAJ/II/5);
  - (iii) Report on the discussions of the Technical Committee at its twelfth session concerning cooperation in examination;
  - (iv) Fees paid in connection with the examination of varieties under an arrangement on cooperation;
  - (v) Report on the First Subregional Andean Seed Symposium held under the auspices of the Andean Group in Lima (Peru) from October 30 to November 3, 1978.

Relationship Between the Law on Competition and Plant Variety Protection

4. The Delegation of the Federal Republic of Germany introduced document CAJ/II/2 which contained comments from member States on the special features of licenses for the multiplication of propagating material as compared with production licenses in the field of industrial property. After a detailed discussion,

the Committee reached agreement on the considerations appearing in Annex II to this document. It further agreed that those considerations might be useful, at the national level, for the assessment of licenses for the multiplication of propagating material in the light of the law on competition.

#### Harmonization of Plant Breeders' Rights Gazettes

5. Discussions were based on documents CAJ/I/5 and CAJ/II/3. It was established that the national plant breeders' rights gazettes were founded on different bases: in some member States they were documents of a legal nature containing announcements prescribed under the national law, whereas in other member States they contained similar announcements but for information only. Whilst it was accepted that the main purpose of a national gazette was to inform the public within the country concerned, it was equally recognized that the need for the information contained in the gazette went beyond the borders of that country. In particular, the authorities of the member States were interested in the information contained in all national gazettes. It was therefore agreed that there was a need for the arrangement of the gazettes to be harmonized, due account being taken of the requirements of the various national laws.

6. The Committee agreed on the six main chapters appearing in Annex III to this document. They should appear in all gazettes (where there was relevant information to be published) and should be numbered I to VI with an indication that the numbering had been agreed upon and harmonized within UPOV. The information to be published in each main chapter would continue to be arranged in tables, the number and headings of which would be decided by each State in accordance with national law and practice. Annex III gives an indication of what should be published in each chapter. As to the items of information not covered by those chapters, they would appear in further chapters whose numbering would be optional. Finally, the Committee decided that the Council should be invited to issue a recommendation that member States implement Annex III to this document.

7. The Committee, recognizing the value and usefulness of the draft UPOV Model Gazette appearing in Annex I to document CAJ/I/5, decided that the Office of the Union should revise it in the light of the decisions reported upon above and should submit the revised version to the Committee at its next session. The UPOV Model Gazette should then be published and, as a first step, should serve as a guide for those States--especially new member States--beginning publication of a plant breeders' rights gazette or of a new type of gazette.

8. The question was raised of the order in which the various genera and species were to be listed in the national gazettes. The Delegation of France suggested that a UPOV Guide be established. After some indication was given of the order adopted in various member States, the Committee decided to postpone discussions on the matter.

#### Long-Term Development of the Union

9. It was pointed out that in the new text of the Convention adopted by the Diplomatic Conference on October 23, 1978, a number of provisions had been made more flexible in order to take account of the special difficulties of certain States wishing to join the Union. The view was expressed that at some time in the future an even greater flexibility might be required to open the Convention to further States. In addition, it was mentioned that the legislation of member States already showed differences in some basic principles, in particular in the cases where the Convention defined only a minimum. It was recalled that it had been the intention of the drafters of the Convention to resolve the problems connected with the protection of new varieties of plants in a uniform manner and for that reason it was proposed to consider whether a greater harmony, which could not be aimed at for all member States, might be achieved by some of them, if necessary by concluding special agreements in accordance with Article 29 of the Convention.

10. In the ensuing discussion, it was stated that the following could be envisaged:

(i) Agreement among at least some of the member States on one or more of the following points: list of species eligible for protection; national treatment without reciprocity; extension of the scope of protection in certain cases,

for example the sale of plantlets; definition of novelty; duration of protection; variety denominations; fees (their kinds and levels); plant breeders' rights gazettes;

(ii) Establishment of a system under which one application for protection filed with one State would have the effect of an application in the other States party to the system. (Each State would continue to grant separate titles of protection);

(iii) Conclusion of a special agreement among certain member States under which the title of protection granted in one member State would be effective also in the other member States.

11. The Committee noted the various possibilities with great interest and agreed that they should be examined in detail. It was therefore agreed to ask the Council to give the Committee a mandate to continue its discussions on this question. The Office of the Union was to prepare a document for the purpose of the discussions.

12. It was pointed out that, in view of the interconnection between administrative, legal and technical matters in that question, the Technical Committee should participate in the discussions whenever necessary. Joint meetings for that purpose should be held under the direction of the Administrative and Legal Committee. In that connection, it was recalled that the Technical Committee had decided at its twelfth session that the questions of regionalized testing and of the acceptance of examination reports established by other States were to be discussed on November 14, 1979, in a joint meeting with the Committee.

#### Cooperation with the European Communities (EC)

13. Discussions were based on document CAJ/II/6, as well as on the previous discussions on the future development of the Union. The UPOV member States which were not members of the EC stressed their great interest in participating in the work on the future development of the Union towards closer cooperation and expressed the hope that UPOV would take the necessary initiatives in order that this and other matters would continue to be considered in UPOV, where there was no risk of their being excluded from the discussions or from the agreed solutions. In particular, they stressed that, if an agreement of the kind referred to in Article 29 of the Convention were to be concluded, such agreement should be open to every UPOV member State able to implement its provisions.

14. The Committee discussed, on the basis of document CAJ/II/6, the desirability of establishing a working agreement with the EC. It proposed that the Consultative Committee should examine the question further.

#### Bilateral Agreements on Cooperation in Examination

15. Discussions were based on Draft No. 1 of document C/XII/7. The Chairman recalled that the member States had been invited to keep the Office of the Union premanently informed on any new bilateral agreement concluded as well as on any extension of an agreement already concluded. The Committee agreed to the draft and authorized its distribution as document C/XII/7.

#### Fees Paid in Connection with the Examination of Varieties Under an Arrangement on Cooperation

16. After it had been reported that in some member States the rules concerning the fees to be paid in connection with the examination of varieties under an arrangement on cooperation (see the Resolution on Fee Questions (document C/VII/23) and the UPOV Model Agreement for International Cooperation in the Testing of Varieties (document C/IX/12, Annex II)) led to certain difficulties, the Committee agreed that the question should be rediscussed in its entirety. For that purpose, the member States were asked to provide the Office of the Union with the following information by the end of January 1979:

(i) complete schedule of the fees payable in connection with plant variety protection (and, where appropriate, for national listing);

(ii) detailed description of the fees payable in relation to cooperation in

examination (in particular in the cases where the examination report already established by another State or in preparation in such State was taken over, and where another State was requested to perform the examination).

17. After having received the information mentioned in the preceding paragraph, the Office of the Union was to prepare a synopsis of the situation.

18. Finally, the Committee decided that, in order to prepare the discussion, a meeting of experts (one expert from each member State) should take place on April 23, 1979, commencing at 2 p.m.

#### UPOV Model Form for the Transmittal of Examination Results

19. Discussions were based on document CAJ/II/5. The majority of the Delegations recognized the usefulness of a model form for the transmittal of examination results and favored a concise form such as that appearing in Annex I to document CAJ/II/5. The Committee asked the Office of the Union to prepare a new proposal on the basis of that Annex.

20. In that connection, the Delegation of the Netherlands introduced a further proposed model form, which is attached as Annex IV to this document. The Committee decided that the item should be put on the agenda for the next session. The Delegation of the Netherlands was asked to provide a detailed explanation of the problem to be solved.

#### Report on the Subregional Andean Seed Symposium

21. The Vice Secretary-General reported on the First Subregional Andean Seed Symposium held under the auspices of the Andean Group in Lima (Peru) from October 30 to November 3, 1978, and in which he and Dr. Böringer (Federal Republic of Germany) had participated. He mentioned that Dr. Böringer had delivered a paper in which he treated, *inter alia*, the technical and legal aspects of the protection of new plant varieties under the UPOV Convention and the impact of plant breeders' rights on the marketing of seed. The Vice Secretary-General further reported that, in a meeting with the present Coordinator of the Junta of the Andean Group, the highest executive of that organization, it had been agreed to put the fruitful relationship between UPOV and the Andean Group on a more formal basis by exchanging, between the administrative heads, letters which were to form an agreement of cooperation.

#### Organization of the Future Work of the Committee - Program for the Next Session

22. The Committee took note of the agreement reached by the Consultative Committee at its seventeenth session, that "the future work of all Committees, and also of the Council itself, should be meticulously planned so as to allow the most effective use of meeting time" (see document CC/XVII/6, paragraph 16). The Committee fully agreed with the Consultative Committee, especially since it had to examine a number of important and complex questions, such as the future development of the Union and the establishment of a model law on plant variety protection, in rather short meetings.

23. As to the next session, to be held on April 24 and 25, 1979, the Committee agreed that, subject to the decisions to be taken by the appropriate body in December 1978, the agenda should contain the following items: future development of the Union (including, if necessary, the question of cooperation with the European Communities); UPOV model plant breeders' rights gazette; fees paid in connection with the examination of varieties under an arrangement on cooperation (discussions to be prepared by a meeting of experts on April 23, 1979); UPOV model form for the transmittal of examination results; model form for the designation of the sample of the variety; other business. The Committee did not include the item "report by representatives of member States on the conclusion of bilateral agreements for cooperation in examination" as it was to be expected that each member State would keep the Office of the Union informed on any conclusion or extension of a bilateral agreement.

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## ANNEX II

[Original: German]

CONSIDERATIONS ON THE ASSESSMENT OF MULTIPLICATION LICENSES  
IN THE LIGHT OF COMPETITION LAW

In determining to what degree licenses for the multiplication of seed and planting material can be treated in the same way as production licenses for manufactured goods, the following should be taken into consideration:

I. The production of seed and planting material, because of its biological background, tends to have certain special features in comparison with the production of manufactured goods. In the production of goods which fall within the scope of industrial property, the following conditions are generally met:

(a) An instruction for solving a technical problem (as disclosed in the invention) is given. This instruction is so described as to allow an average person skilled in the art to repeat the process as described in that invention and to reproduce the subject matter of the invention at will. Normally only the right to use this technical instruction is the subject of the contractual relations between the inventor and producer.

(b) The basic requisites (for instance, metals, chemical raw materials) for the production of the subject matter of the invention are as a rule freely obtainable, in the same quality, from a number of independent suppliers. The supply of these raw materials does not presuppose any special relationship between inventor and producer.

(c) Should different producers use the technical instruction referred to in (a) and the raw materials referred to in (b), then the products of those producers will be essentially identical, regardless of the location of the production plant and of other production factors. The goods are therefore the same, in spite of the independence of the production processes. It is thus fair to conclude that exclusive production licenses may affect trade in the goods concerned.

II. None of the above conditions is met in the multiplication of seed or planting material, these being living material.

(a) The raw material for the production of seed or planting material of a variety (and hence for multiplication) is an assemblage of plants, or several such assemblages, having certain genetically determined morphological and physiological characteristics. The production of further plants having the same characteristics is only possible by hereditary transmission of those characteristics, through multiplication of the plants of the said assemblage of plants. The production of assemblages of plants, all having certain characteristics, cannot therefore be described in an instruction, whereby another person skilled in the art could, on the basis of plant material other than that of the said assemblages of plants, produce plants which correspond to the characteristics of the variety. The process of producing plants having certain characteristics thus cannot be repeated by third parties who are not in possession of the initial material typical of the variety.

(b) Even if a producer of seed or planting material (multiplier) obtains plant material of the variety, there is no certainty that he will be able to produce seed or planting material of the said variety at will by multiplying that initial material. It should be kept in mind in this connection that every multiplication of plant material is not merely a mechanical production process, but a hereditary transmission process in the biological sense. The combination of characteristics of a bred variety is the result of protracted breeding work through which specific hereditary characteristics have been bred into a variety by means of various breeding methods (such as crossing, back-crossing, induced mutation, all combined with stringent selection processes and progeny testing). However, depending on biological conditions, a variety does not remain stable, with all its plants retaining the same combination of characteristics, over an indefinite number of hereditary transmission processes (multiplications), tending rather to undergo certain changes. The most significant changes are the following:

(i) In the course of genetically controlled segregations and mutations, plants appear with characteristics that do not correspond to those established for the variety. In this way the variety loses its homogeneity. Homogeneity



(i.e., the fact that all the plants of a variety are uniform in their characteristics, subject to the particularities of the different species) is however an essential prerequisite for the variety to have a definable identity and for legal consequences to be attached to that identity (plant variety protection, inclusion in catalogues of varieties, seed certification). A collection of plants that are not identical, subject to the particularities of the species concerned, is not a "variety," and seed or planting material thereof is not a product suitable for cultivation. Therefore, Article 6(1)(c) of the UPOV Convention, as well as Article 4 of the Directive of the Council of the European Communities on the Common Catalogue of Agricultural Species and Article 4 of the Directive of the Council of the European Communities on the Trade in Vegetable Seed, have prescribed homogeneity as one of the prerequisites for plant variety protection and for inclusion in catalogues of varieties.

(ii) In most species varieties tend to undergo overall changes in the course of successive multiplications, in other words the collection of plants "shifts." Eventually, therefore, after successive multiplications, a variety no longer corresponds in its morphological and physiological characteristics to the states of expression originally specified by the breeder and established at the time of granting protection or including the variety in the catalogue of varieties. Thus the variety is no longer stable. Through this change, a different assemblage of plants has come into existence, and the seed or planting material is therefore no more seed or planting material of that variety, but another product. For this reason stability is also among the prerequisites of protection and inclusion in a catalogue, pursuant to Article 6(1)(d) of the UPOV Convention and to the said provisions of the Directives of the Council of the European Communities.

In order to avoid the changes mentioned, the variety (also including the genealogical components, in the case of hybrids or synthetic varieties for instance) must be subjected to continuous maintenance breeding. The maintenance of a variety thus always includes the essential steps of the original breeding work (elimination of extraneous material, of mutations, of mechanical mixtures and of diseased plants). Proof of this maintenance selection and its results must be constantly submitted to the competent authority pursuant to Article 10(2) of the UPOV Convention and to Articles 11 and 12 of the aforementioned Directives of the Council of the European Communities. Should the variety not remain true to the states of expression originally specified, the protection or the entry in the catalogue, as the case may be, lapses.

(c) Even if a multiplier always had seed or planting material at his disposal, which would allow the variety to be grown pure and true to type, this would not guarantee that the multiplication would produce typical and pure seed or planting material of the variety. The result of multiplication can be influenced by the following additional factors:

(i) Seed and planting material are living matter which cannot be stored at will like other goods, but must be kept alive by adequate measures. Inadequate measures (certain chemical or physical influences) may also lead to genetic changes in the seed and planting material so that, while they were originally a typical and pure example of the variety, they will result in a growth which is neither a typical nor pure example of the variety.

(ii) Being botanical matter, plants are very vulnerable to attack by noxious organisms, which may be influenced by factors beyond the control of the multiplier (climate, location, surrounding crops and wild plants, general infection potential in the growing area). Diseases can be transmitted--often unnoticed at the beginning--by the seed and planting material. They do considerable economic harm to the user of seed and planting material (grower).

(iii) Varieties of many species can only be kept typical and pure if there is no pollination by surrounding plants, as otherwise undesired and uncontrollable crossings occur, which modify the variety. It must therefore be ensured that multiplication takes place only where such influences, which cannot always be monitored by the multiplier, are absent.

III. In view of the above, the following factors should be regarded as characteristic of multiplication as compared with the production of manufactured goods.

(i) The innovation consisting in the creation of a variety does not end with the production of a certain amount of plant material, but because of the variety's botanical nature, requires constant breeding work to be done on the variety.

(ii) Each multiplication is part of this maintenance. Errors in the multiplication process may modify the variety, or an important part of it, and thus seriously affect the availability of typical and pure seed or planting material of the variety, or even make it unobtainable.

(iii) Such errors cannot be observed on the seed or planting material itself, as they generally take the form of genetic deficiencies. The user of seed and planting material (grower) has therefore no means of judging the characteristics and quality of the seed or planting material on the basis of a sample. The deficiencies appear only at the growing stage, when, for the grower, the damage is already and irreversibly done.

(iv) As the person responsible for the variety, the breeder has to guarantee its maintenance. In conformity with the above-mentioned basic legal instruments, this fact is expressly provided for by the national legislation of each State on plant variety protection and on seed matters. Defects in the maintenance of the variety have repercussions on the breeder, for in such cases protection may lapse or the entry in the catalogue be invalidated. As a general rule this is also prejudicial to the users of seed and planting material. The breeder can only fulfill his obligation to maintain the variety, which is imposed on him in the interest of the user, and guarantee that maintenance, if he retains decisive control over the multiplication of the variety. He must be able to determine and supervise absolutely the conditions under which his variety is multiplied.

(v) The biologically determined characteristics of breeding, including the requirement of constant maintenance breeding, are the main reason for which the rules of patent legislation, applicable to industrial products, proved unsuitable for ensuring the protection of breeders' rights, so that it became necessary to introduce a special right.

(vi) For the reasons set fourth above, the breeder should retain full control over multiplication and the power to limit it to certain establishments through the grant of exclusive multiplication licenses. This principle should also apply where a number of establishments with the same qualifications are available but the breeder cannot be expected, in economic terms, to set up a control system extending to several multiplication establishments.

It follows from the above that there are essential differences between the material prerequisites for production licenses for manufactured goods on the one hand and multiplication licenses for seed and planting material on the other hand. These differences should be given careful consideration when assessing questions of competition.

[Annex III follows]

## PLANT BREEDERS' RIGHTS GAZETTES

## MAIN CHAPTERS

agreed upon by the Administrative and Legal Committee  
at its second session (November 15 to 17, 1978)

The following main chapters should appear in the plant breeders' rights gazettes of all member States and their headings should, at least from time to time, be translated into the three working languages of UPOV.

I.\* Applications

To contain information on the applications for protection and, where relevant, on the applications for a protective direction or for the entry in the Netherlands Register of Varieties pursuant to Article 18(2) of the [Dutch] Law.

II.\* Variety Denominations

To contain information on the proposed denominations, the approved denominations (where relevant) and the changes to denominations before (where relevant) and after the grant of protection.

III.\* Withdrawal of Applications

To contain information on the withdrawal of the applications of any kind referred to in Chapter I above.

IV.\* Decisions

To contain information on the proposed decisions (where relevant) and on the decisions taken on the applications of any kind referred to in Chapter I above, namely:

- (i) the decisions to grant the application (i.e., grant of protection, issue of protective direction, entry in the Netherlands Register of Varieties);
- (ii) the decisions to reject the application.

V.\* Changes in the Person of the Applicant or the Holder of Protection

To contain information on changes in the person of the applicant or the holder of protection and, where relevant, in the person of the agent.

VI.\* Termination of Protection

To contain information on the surrender, the expiration, the forfeiture and the annulment of protection.

Further chapters would be numbered VII, VIII, etc. without reference to the note, would be referenced by some system other than Roman numerals or would be without any reference.

[Annex IV follows]

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\*Numbering to be used in all gazettes and to be accompanied by a note drawing the attention of the readers to the fact that it has been harmonized within UPOV.

CAJ/II/8

## ANNEX IV

## MODEL FORM FOR THE DESIGNATION OF THE SAMPLE OF THE VARIETY

proposed by the Delegation of the NetherlandsSTATEMENT DESIGNATING AN IDENTITY SAMPLE.

The undersigned .....  
 declares herewith, that he does mark out the identity sample, which

☐ pertains to the application being dealt with in .....(country)  
 under reference number .....

☐ did pertain to the application already dealt with in .....(country)  
 under reference number .....

as the identity sample of the variety .....  
 of the species .....for which the application under reference  
 number ..... has been filed in .....(country).

.....19  
 (place and date)

.....  
 (signature)

☒ cross the relevant box.

[End of Annex IV and of document]