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UPOV

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

SUBGROUP OF THE ADMINISTRATIVE AND LEGAL COMMITTEE

First Session

Geneva, June 23 to 25, 1980

LIST OF TOPICS TO BE DISCUSSED IN THE FUTURE,
NOTABLY BY THE ADMINISTRATIVE AND LEGAL COMMITTEE,
RELATING TO THE DEVELOPMENT OF THE UNION

Document prepared by the Office of the Union

1. At its fifth session, the Administrative and Legal Committee (hereinafter referred to as "the Committee") decided, inter alia, on the task to be fulfilled by its subgroup at the session which the latter was to hold from June 23 to 25, 1980. That task consists in drawing up, in cooperation with the Office of the Union, a list of issues relating to the development of the Union which should be discussed in the future, notably by the Committee. An extract from the draft report of the Committee's fifth session is included for information in Annex I to this document.
2. The Committee also asked the States represented on it to send lists of issues to the Office of the Union in preparation for the meeting of the subgroup or, if time did not permit them to do so, in preparation for the next session of the Committee itself. The Office of the Union has received contributions from the following States: Germany (Federal Republic of) (Annex II), Belgium (Annex III), France (Annex IV), Netherlands (Annex V), Switzerland (Annex VI).

[Annexes follow]

REPORT ON THE FIFTH SESSION OF THE
ADMINISTRATIVE AND LEGAL COMMITTEE
(Extract)

...

Development of the Union

5. Comparative Study of Certain Aspects of the Legislation of Member States and of Spain with a View to the Evaluation of the Possibilities for Harmonization of that Legislation. Discussions were based on document CAJ/V/2.

6. The Vice Secretary-General introduced document CAJ/V/2 and drew attention to the fact that the short time available and the limited technical means had not permitted the Office of the Union to produce the translations of that document and of document CAJ/V/3 with the customary accuracy and in the usual presentation. Besides, a study on legislative texts made in a language other than that in which they were drafted unavoidably encountered the difficulty, and was sometimes confronted with the impossibility, of finding strict equivalents, especially for legal words and expressions. Therefore, the document had to be regarded as a guide to the legal situation in the States concerned, rather than an absolutely faithful description of that situation.

7. All speakers pointed out that the document was very useful in many respects, notably in view of the fact that several member States had to update their legislation and intended, at the same time, to harmonize it, as far as possible, with that of other States. It was therefore proposed that the document be transformed into a reference document usable over a longer period and not specifically for the purpose of evaluating the possibilities for harmonization of plant variety protection legislation. More precisely, it was suggested that the study be extended to further States--where necessary in cooperation with the States concerned--particularly the signatory States of the 1978 text of the UPOV Convention, and that it be drafted in a manner permitting periodical updating.

8. Closer Cooperation Among Member States. Discussions were based on document CAJ/IV/2, entitled "Closer Cooperation Among Member States Concerning Applications Effective in Several States" and containing a draft Special Agreement on International Procedure Concerning New Varieties of Plants (PICOV).

9. The general discussion led to the following conclusions:

(i) All participants were satisfied with the thoroughness and the broad scope of document CAJ/IV/2, which showed all possibilities for closer cooperation and a great number of points that deserved consideration.

(ii) All delegations wished to continue work on the topic. Whereas certain delegations, among them the Delegation of Switzerland, would regret any delay in the consideration of a system such as that outlined in the above-mentioned draft special agreement, the majority considered that the activities of the Union should for the time being concentrate on more urgent objectives.

(iii) Three main fields of activity were identified:

(a) intensification of the existing cooperation based on bilateral administrative agreements, for instance by means of multilateral concerted action with a view to further centralizing the examination of varieties and facilitating the taking over of examination results, thereby reducing the cost of plant variety protection;

(b) harmonization of national legislation, procedures, forms, etc.

(c) examination of a system--or systems--of cooperation as outlined in document CAJ/IV/2.

It was noted in this respect that any activity in one of those fields would have bearings on the others and, in particular, that the solution of any issue falling within one of the first two fields was likely to facilitate work on the third.

10. The Committee then decided that its subgroup which was to meet from June 23 to 25, 1980, according to the decisions taken by the Council at its thirteenth ordinary session should draw up, in cooperation with the Office of the Union, a list of issues to be discussed and an order of priority, to constitute a basis for the Committee's discussions at its next session. The subgroup should not restrict its investigations to the normal field of competence of the Committee. The subgroup should be composed of one expert from each member State. Finally, the States represented on the Committee were asked to send to the Office of the Union a list of such issues in preparation for the meeting of the subgroup or, if time did not permit them to do so, in preparation for the Committee's next session.

...

[Annex II follows]

ANNEX II

LETTER DATED APRIL 29, 1980, FROM MR. H. KUNHARDT,
OF THE FEDERAL PLANT VARIETIES OFFICE OF THE FEDERAL REPUBLIC OF GERMANY,
TO THE OFFICE OF THE UNION

Subject: Development of the Union, more specifically matters for preliminary discussion by the Subgroup of the Administrative and Legal Committee from June 23 to 25, 1980 (Reference: Item 2 on the agenda of the fifth session of the Administrative and Legal Committee)

As agreed at the above session, we have selected the following points for the list of issues to be drawn up by the Subgroup, as we consider them worthy of discussion between member States interested in further harmonizing their legislation (the articles cited between brackets are those of the Convention as revised on October 23, 1978):

1. National treatment; reciprocity (Article 3).
2. Botanical genera and species which must or may be protected (Article 4).
3. Definition of propagating material (Article 5(1)).
4. Extension of the scope of protection specified by Article 5(1), third sentence, for ornamental varieties to include other vegetatively propagated species (Article 5(4)).
5. Extension of protection to the end product (Article 5(4)).
6. Grant of a one-year period of grace (Article 6(1)(b)(i)).
7. Measures to protect the breeder against abusive acts of third parties committed during the period between the filing of the application and the grant of protection (Article 7(3)).
8. Period of protection (Article 8).
9. Priority, with specific reference to the furnishing of material, in the case of withdrawal or rejection of the first application, before expiry of the four-year period mentioned in Article 12(3), first sentence (Article 12(3), last sentence).
10. Variety denomination, in particular its relation to the trademark (Article 13).
11. Transitional limitation of the requirement of novelty (Article 38).

[Annex III follows]

LETTER DATED JUNE 9, 1980, FROM MR. J. RIGOT,
DIRECTOR AT THE MINISTRY OF AGRICULTURE OF BELGIUM,
TO THE VICE SECRETARY-GENERAL OF UPOV

With reference to your Circular No. U 563/084 of May 28, 1980, I have the honor to convey to you my thoughts on the program of closer cooperation between member States (document CAJ/IV/2 of October 5, 1979), and a list of questions to be studied, in order of priority.

I. General remarks

The items in the program of cooperation that concern the receipt and administrative examination of applications and variety denominations and the issue of titles of protection do not seem to present any difficult problems.

UPOV member States that are also members of the European Communities will, however, have to do their utmost to abide by the Community rules on the acceptance of varieties for seed marketing (catalogue system).

It is a fact that in those States the examination of varieties for distinctness, homogeneity and stability is generally performed for the purposes of both the inclusion of varieties in a catalogue and the grant of protection.

It is moreover desirable that cooperation should lead as far as possible to a sharing of the examination of varieties among member States with relatively similar conditions of exploitation (for example Western Europe), with international examining authorities performing the examination of the varieties of certain species for the benefit of all other member States.

It is necessary therefore for catalogue authorities and breeders' rights authorities to accept the same international examining authorities and the same species to be examined.

In order to achieve perfect cooperation, it is necessary for all member States to agree on the same examination system, under which they would apply the same methods for the examination of distinctness, homogeneity and stability in the varieties of all the species concerned, both for the catalogues and for protection.

I do not underestimate the reluctance that any proposal to realize such a program will encounter, yet that is the price of true cooperation.

II. Questions to be studied, in order of priority

A. Questions concerning the design of a cooperation system

1. Receipt of the international application

The "receiving authority" would normally be the national authority of each contracting State. The applicant would have to specify in his application whether he wished to obtain a breeder's certificate either only in the State in which he had filed his application or in that and other States, which he would then have to specify.

Certain contracting States lacking the necessary facilities would have to be allowed to assign receiving functions to another State within the group (that would be the case with Luxembourg).

Examination of application forms, power of attorney forms, etc.

2. Administrative examination of applications

Each national administrative authority recognized by the Assembly would become an international administrative authority empowered to carry out the administrative processing of international applications.

The international administrative authorities of the regional group of UPOV member States should preferably be existing plant variety protection authorities.

Only one international administrative authority would be competent for the processing of each international application.

3. Examination of varieties

The examination of the varieties of a given species would take place in one or another international examination center, each member State being entitled, however, to reserve certain species or groups of varieties for national examination. In the latter case, namely the case of varieties examined at the national level, the possibility of granting an international certificate should be provided, in view of the uniform application of the Test Guidelines by all member States. Indeed this is already so: when examination reports are taken over by a State, that State recognizes ipso facto the examination carried out by another State.

4. Examination of the proposed variety denominations

This examination should be international but entrusted to the national authority of the State that has received the application.

It does not appear necessary to designate a special international variety denomination authority. There would, moreover, be a risk of delays in the forwarding of information.

5. Issue of the plant variety certificate

On the basis of the international reports on the examination of the variety and of the variety denomination, national certificates or an international (regional) certificate would be granted, depending on the provisions of the special agreement concluded between the States forming the regional group.

6. Fees to be paid

The system proposed in document CAJ/IV/2 seems reasonable as a basis for discussion. The idea of a scale of fees that decreases in relation to the number of States concerned by the application should be retained.

7. Tasks of the Office of UPOV and examination of the financial implications of the program for the UPOV budget

This matter would have to be examined at each stage of the program.

B. Questions relating to the harmonization of legislation

The study appearing in document CAJ/V/2 appears to be a valuable basis for the evaluation of the possibilities of harmonizing the legislation of member States that desire such harmonization.

C. Questions relating to international cooperation in examination

Given the special situation of Belgium regarding the examination of varieties (plans to set up an examination institution), it is too early to make proposals for the moment.

LETTER DATED JUNE 10, 1980, FROM MR. M. SIMON,
SECRETARY-GENERAL OF THE COMMITTEE FOR THE PROTECTION OF NEW PLANT
VARIETIES OF FRANCE, TO THE VICE SECRETARY-GENERAL OF UPOV

According to your request, I have the honor to send you herewith a list of main points regarding which France would like to have a study made of the possibilities of harmonizing either the various national laws and regulations or, where there are no legal provisions, the various national doctrines:

- I. National treatment or reciprocity.
- II. Nationality of the applicant or variety as a condition of entitlement to protection in the States limiting such entitlement.
- III. Definition of the protected plant material (seeds, plantlets, parts of plants, end product) and strict reciprocity.
- IV. Limitation of protection to a certain type of varieties within a species (examples: exclusion of ornamental varieties in the case of fruiting species; maize, excluding intermediate hybrids; gerbera, excluding sexually reproduced varieties; sugar beet, hybrid varieties only; etc.).
- V. Definition of offering for sale and commercialization in relation to the material to which such acts relate:

for example, (a) sale or delivery of prebasic seeds to a multiplier with a view to the production of basic seeds, without distribution to farmers;

(b) sale of seeds by a breeder established in country A to a buyer established in country B with a view to distribution of the variety to farmers. Nationality of the sale?
- VI. Application of the four-year deferment of the official examination where priority is claimed and earlier submission of a sample of the variety:
 1. For the purposes of distinguishing the variety from other varieties under test (reference sample only).
 2. For the purposes of performing the mandatory examination immediately in the case of withdrawal or rejection of the application the priority of which is claimed.
- VII. Provisional protection during the examination of the application.
- VIII. Definition of the official preliminary examination.
- IX. Duration of protection and adjustment of that duration according to the types of varieties within one species (example: 30 years for maize lines and 20 years for commercial hybrids of maize).
- X. Transitional provisions allowing the protection of varieties newly created at the time of entry into force of the law in relation to further species.
- XI. "Exhaustion of rights" concept and its application.
- XII. Application of a "grace period" for the requirement of novelty.
- XIII. Relations between patents and plant variety certificates for the application of the priority period.
- XIV. Variety denominations and registration systems (American system).

What might appear to be a lack of consistency in the above list is due to our classification of the questions in the decreasing order of the importance attached to their examination.

ANNEX V

TELEX DATED JUNE 13, 1980, OF MR. K.A. FIKKERT,
LEGAL COUNSELLOR IN THE MINISTRY OF AGRICULTURE AND FISHERIES
OF THE NETHERLANDS, TO THE VICE SECRETARY-GENERAL OF UPOV

In relation to the meeting of the group of consultants (23-25 June 1980) please find a list of issues, concerning the closer cooperation within and the development of the Union, possibly to be discussed in the future:

I. The transmission of material:

- the affirmation of the sending by the applicant to the requesting authority;
- the affirmation of the receipt by the testing authority to the requesting authority (p.e. on a form, as far as possible filled in by the requesting authority, which is to be sent together with the request for examination).

N.B. The fact that no or no good material is delivered before a certain date is in some member States of importance for the validity of the application. Of course, the desirability and, possibly, the harmonization of such a regulation might be subject of discussion.

- How to fix the very last date for delivery of the material in relation to the subsequent testing period?

II. The testing of a variety:

Harmonization of the testing as far as the characteristics, which should be taken into account, are concerned (only or at least the characteristics of the UPOV guidelines?)

III. Reports:

- mentioning of data concerning the application such as: application number, date of application, (provisional) denomination, the applicant, etc. Those data should be provided in the request for examination.
- Prompt transmission of the report as soon as the tests are concluded.
- In the report facts concerning the novelty may be useful, but preferably no conclusions on the novelty, since the judgement on the novelty is the responsibility of the requesting authority.

IV. Denomination:

- the guarding of the principle "one denomination for one variety" (the applicant often fails to mention a rejection of a proposed denomination in another country).
- In the judgement of proposed denominations one should take into account:
 1. proposed denominations of an earlier date;
 2. denominations of varieties, which are rejected for P.B.R. only for the reason of lack of novelty.

V. Fees:

Which fee is due when the application is withdrawn in country A before the drawing up of the report by country B:

1. in case country B performs the test only on request of country A?
2. In case country B performs the test on request of several countries?

I hope this list can be helpful for you in preparing the consultants' meeting.

[Annex VI follows]

LETTER DATED JUNE 3, 1980, FROM DR. W. GFELLER,
HEAD OF THE PLANT VARIETY PROTECTION OFFICE OF SWITZERLAND,
TO THE VICE SECRETARY-GENERAL OF UPOV

Subject: UPOV - closer cooperation

The Swiss Delegation said several times that closer cooperation between UPOV member States was a desirable aim. The last session of the Administrative and Legal Committee gave the impression that, although all delegations were in favor of closer cooperation, it was clearly going to be difficult to embark on concrete negotiations, despite the excellence of documents CAJ/III/2 and CAJ/IV/2. We have now tried, within a small working group which was also attended by a representative of the interested circles, to make an inventory of the minimum requirements for a system of closer cooperation, and we should like to inform you here, perhaps as a basis for discussions at the forthcoming session of the Subgroup, of our conceptions on those minimum requirements.

The arrangement should at least provide for the following:

1. The breeder should be able to file an application with effect for all designated States in the country in which he has his residence or headquarters;
2. All designated States should decide on the basis of one technical examination of the variety whether protection can be granted;
3. The breeder should have sufficient time to file an application for protection in a designated State (mainly in the case of varieties of species for which there is a national list of varieties, in which case protection is only meaningful if the variety has been passed nationally for trade and cultivation);
4. A preliminary decision should be taken centrally (in other words by the UPOV Secretariat) on the acceptance of variety denominations, designated States being however allowed to give their opinions on the subject;
5. The UPOV Secretariat should publish international applications, such publication being binding on all designated States;
6. Each designated State should decide according to its national law whether it can grant protection and accept the variety denomination;
7. The breeder should be assured of the option to file an application for protection under the national law of the country in which he has his residence or headquarters or, if he so desires, under the national law of another State.

We wish to assure you of our availability for assistance in the working out of an arrangement of this kind.

[End of document]