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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

COUNCIL

Fourteenth Extraordinary Session
Geneva, April 29, 1997

EXAMINATION OF THE CONFORMITY OF THE EUROPEAN COMMUNITY
REGULATIONS WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter, dated April 1, 1997, Mr. Guy Legras, Director General, General Directorate for Agriculture, European Commission, requested the advice of the Council of UPOV, pursuant to Article 34(3) of the 1991 Act of the UPOV Convention (hereinafter referred to as "the 1991 Act"), on the conformity of the system of Community plant variety rights with the 1991 Act, with a view to enable the Commission to prepare the possible future accession of the Community to that Act. A translation of that letter appears in Annex I to this document.
2. The European Community is an intergovernmental organization which has competence in respect of plant variety protection and has its own regulations (legislation) on plant variety protection binding on all its member States; those regulations provide for the granting, on the basis of a single procedure, of Community plant variety rights having effect on the whole territory of the Community.
3. The European Community thus fulfills the substantive conditions set by Article 34(1)(b) of the 1991 Act for becoming a party to that Act (it being understood that the authorization to deposit an instrument of accession—contemplated in item (iii) of the said Article—will have to be obtained at a later stage according to the rules applicable within the European Community).

4. Under Article 34(2) of the 1991 Act, the European Community must deposit an instrument of accession in order to become a member of UPOV on the basis of that Act. Under Article 34(3), an instrument of that kind can only be deposited by the European Community if it has requested the advice of the Council on the conformity of its laws with the provisions of the 1991 Act and if the decision of the Council embodying the advice is positive.

Legal Basis of the Protection of New Plant Varieties in the European Community

5. The Community plant variety rights are governed by the following instruments:

(a) Council Regulation (EC) No. 2100/94 (of July 27, 1994) on Community plant variety rights, as amended by Council Regulation (EC) No. 2506/95 (of October 25, 1995) (hereinafter referred to as “the main Regulation”—Annex II to this document);

(b) Commission Regulation (EC) No. 1238/95 (of May 31, 1995) establishing implementing rules for the application of Council Regulation (EC) No. 2100/94 as regards the fees payable to the Community Plant Variety Office (Annex III to this document);

(c) Commission Regulation (EC) No. 1239/95 (of May 31, 1995) establishing implementing rules for the application of Council Regulation (EC) No. 2100/94 as regards proceedings before the Community Plant Variety Office (Annex IV to this document);

(d) Commission Regulation (EC) No. 1768/95 (of July 24, 1995) establishing implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No. 2100/94 on Community plant variety rights (Annex V to this document);

(e) Council Regulation (EC) No. 2470/96 (of December 17, 1996) providing for an extension of the terms of a Community plant variety right in respect of potatoes (not reproduced in this document).

6. There follows an analysis of the provisions of the above-mentioned instruments, more specifically of the main Regulation, given that the implementing rules merely supplement the basic provisions.

Article 1 of the 1991 Act: Definitions

7. Definition of “Breeder”.—Article 11 of the main Regulation reproduces the substance of Article 1(iv) of the 1991 Act and refers to national law with regard to employee breeding.

8. Definition of “Variety”.—Article 5.2 of the main Regulation takes over, almost without change, the variety definition appearing in Article 1(vi) of the 1991 Act. Paragraph 3 specifies the kind of material which may constitute a plant grouping corresponding to a variety, whereas paragraph 4 makes it clear that the expression of the characteristics defining a variety may be variable from one plant to another.

Article 2 of the 1991 Act: Basic Obligation of the Contracting Parties

9. According to Article 1 of the main Regulation, a system of Community plant variety rights is established as the sole and exclusive form of Community industrial property rights for plant varieties. According to Article 2, such rights have uniform effect within the territory of the Community.

10. The European Community thus fulfills the basic obligation set out in Article 2 of the 1991 Act.

Article 3 of the 1991 Act: Genera and Species to be Protected

11. According to Article 5.1 of the main Regulation, the system of Community plant variety rights applies to all botanical genera and species. The European Community is thus conforming with Article 3 of the 1991 Act.

Article 4 of the 1991 Act: National Treatment

12. The European Community has set out the principle of national treatment in Article 12 of the main Regulation in terms which satisfy the requirements of Article 4 of the 1991 Act.

Articles 5 to 9 of the 1991 Act: Conditions for the Grant of the Breeder's Right

13. The conditions for the grant of a Community plant variety right form the subject of Articles 6 to 10 of the main Regulation, which are drafted in terms conforming with Articles 5 to 9 of the 1991 Act.

14. Article 116 of the main Regulation contains provisions for the protection of varieties of recent creation, in accordance with Article 6(2) of the 1991 Act.

15. The formal requirements to be satisfied by the application are set out in Article 50 of the main Regulation and conform with Article 5(2) of the 1991 Act.

Article 10 of the 1991 Act: Filing of Applications

16. The regulations of the European Community do not contain any provision that would contravene Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

17. The right of priority is set out in Article 32 of the main Regulation in terms conforming with Article 11 of the 1991 Act.

Article 12 of the 1991 Act: Examination of the Application

18. The examination of the application is foreseen in Articles 53 to 58 of the main Regulation in terms which enable the European Community to give effect to Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

19. The European Community has introduced a system of provisional protection corresponding to the minimum prescribed by Article 13 of the 1991 Act (Article 94 of the main Regulation).

Articles 14 to 16 of the 1991 Act: The Rights of the Breeder

20. The European Community has faithfully taken over Articles 14 to 16 of the 1991 Act into its regulations, in Articles 13 to 16 of the main Regulation. However, the following is to be noted:

(a) Article 13.1 provides that the Community right has the effect that its holder “shall be entitled to effect the acts set out in paragraph 2” (and listed in Article 14(1)(a) of the 1991 Act). This provision seems to vary slightly from one language to the other; thus, in French and Spanish, the effect is to reserve to the holder the right to effect the acts, whereas, in German, only the holder is entitled to effect them. The 1991 Act does not provide for a positive right to do, which may be competing with another such positive right, for instance in the case of an essentially derived variety. This aspect would deserve further reflection.

(b) The “breeder’s exemption” is qualified—in respect of the exploitation of a daughter variety—not only for essentially derived varieties, varieties that would not be distinct from the mother variety and varieties whose production requires the repeated use of the protected variety, but also for varieties coming under the protection of a property right which does not contain a comparable exemption (see Article 15(d) of the main Regulation and Article 15(1)(iii) of the 1991 Act); this provision improves the protection offered to breeders using the protection system based upon the UPOV Convention.

21. The European Community has contemplated in Article 13.4 of the main Regulation the possibility of extending, through implementing rules, the right of the breeder in respect of products obtained directly from harvested material. Such an extension has not yet been decided.

22. It has introduced in Article 14 of the main Regulation—and in Commission Regulation (EC) No. 1768/95 (Annex V to this document)—a “farmer’s privilege” that is restricted to some 20 species and is subject to very detailed conditions which conform with the letter and spirit of Article 15(2) of the 1991 Act.

Article 17 of the 1991 Act: Restrictions on the Exercise of the Breeder's Right

23. Article 13.8 of the main Regulation provides in general terms that the exercise of the Community breeder's right may not violate a series of provisions relating to public interest.

24. Article 29 of the main Regulation provides for the possibility of granting compulsory licenses under conditions which meet the requirements of Article 17 of the 1991 Act.

Article 18 of the 1991 Act: Measures Regulating Commerce

25. The regulations analyzed here do not contain any provision that would be contrary to Article 18 of the 1991 Act, and the Office of the Union does not know of any other text that would be contrary to it.

Article 19 of the 1991 Act: Duration of the Breeder's Right

26. According to Article 19 of the main Regulation, the term of the Community plant variety right is 30 years for trees and grapevine and 25 for other species. The Council of the European Community may extend these terms up to a further five years for specified genera and species. Such an extension was provided for in respect of potato through Council Regulation (EC) No. 2470/96 (of December 17, 1996), which is not reproduced in this document.

Article 20 of the 1991 Act: Variety Denomination

27. The provisions on variety denominations appear in Articles 17 (mandatory use of variety denominations), 18 (other rights that may hamper the use of a denomination), 63 (characteristics of the denomination) and 65 (changes in the denomination) of the main Regulation.

28. Those provisions conform with Article 20 of the 1991 Act.

Article 21 of the 1991 Act: Nullity of the Breeder's Right

29. Article 20 of the main Regulation faithfully reproduces the provisions of Article 21 of the 1991 Act.

Article 22 of the 1991 Act: Cancellation of the Breeder's Right

30. Article 21 of the main Regulation sets out the reasons for cancellation provided in Article 22 of the 1991 Act, but adds the case where the holder of the right no longer fulfills the conditions relating to nationality and place of residence or registered office (linked to national treatment and reciprocity) and has no procedural representative (or no longer has one). This case is a possible consequence of Article 4 of the 1991 Act, under which the

obligation relating to national treatment refers not only to the grant of breeder's rights, but also to their protection.

31. Article 21 of the main Regulation also specifies that cancellation as a result of the loss of homogeneity or stability produces its effects *in futurum*, but may be retroactive to the date on which the variety lost those properties.

32. Article 21 of the main Regulation essentially conforms with Article 22 of the 1991 Act.

Article 30 of the 1991 Act: Implementation of the Convention

33. Appropriate Legal Remedies.—The main Regulation provides for recourses against decisions of the Office (see Articles 45 to 48, and 67 to 74), guarantees with respect to proceedings before the Office being given in Articles 75 to 91.

34. The civil law remedies offered to the holder of a Community plant variety right are defined in the main Regulation, in Articles 94 *et seq.* As regards penal law remedies, Article 107 of the main Regulation refers to the provisions of national law that apply to national breeder's rights.

35. Authority.—Article 4 of the main Regulation provides for the establishment of a Community Plant Variety Office. The Office has been set up and provisionally operates in Brussels (Belgium). Its seat has been set at Angers (France), where it will settle July next.

36. Information of the Public.—The Office maintains registers that are open to public inspection and publishes a periodical gazette (Articles 87 to 89 of the main Regulation).

37. Conclusion.—The main Regulation enables the European Community to meet the requirements set out in Article 30 of the 1991 Act.

General Conclusion

38. In the opinion of the Office of the Union, the regulations of the European Community essentially conform with the provisions of the 1991 Act and enable the Community to “give effect” to the provisions of that Act, as required by Article 30(2) of that Act.

39. *The Council is invited to:*

(a) take a positive decision on the conformity of the regulations of the European Community on Community plant variety rights with the provisions of the 1991 Act, in accordance with Article 34(3) of that Act;

(b) authorize the Secretary-General to inform the authorities of the European Community of that decision.

[Two annexes follow;
annexes III to V are reproduced
in document C(Extr.)/14/3 Add.]

ANNEX I

LETTER, DATED APRIL 1, 1997, FROM Mr. GUY LEGRAS, DIRECTOR GENERAL,
GENERAL DIRECTORATE FOR AGRICULTURE, EUROPEAN COMMISSION,
TO THE SECRETARY-GENERAL

Subject: Request for an advice on the conformity of Community Legislation on
Community plant variety rights with the provisions of the 1991 Act of the UPOV
Convention

Article 34(1)(b) of the 1991 Act of the UPOV Convention will enable certain intergovernmental organizations to become party to that Convention.

Pursuant to Article 34(3) of that Convention, any intergovernmental organization must, before depositing its instrument of accession, ask the Council of UPOV to advise it in respect of the conformity of its laws with the provisions of the Convention.

I consider that, in accordance with the provisions quoted above, the European Community is entitled to become party to the 1991 Act of the UPOV Convention.

I have the honor to ask, pursuant to Article 34(3) of the 1991 Act of the UPOV Convention, the advice of the Council of UPOV on the conformity of the legislation on Community plant variety rights with the provisions of the Convention, with a view to enable the Commission to prepare the possible future accession of the Community to that Convention.

Please find enclosed Council Regulation (EC) No. 2100/94 of July 27, 1994, on Community plant variety rights and the Regulations adopted for its amendment and implementation. My services are at your disposal should you need any further information on the Community system.

[Annex II follows]