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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL

Third Extraordinary Session
Geneva, November 16, 1976

COMPATIBILITY OF THE NEW ZEALAND PLANT VARIETIES RIGHTS SYSTEM WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

1. In a letter dated October 13, 1976, the Registrar of Plant Varieties requested the comments of the competent organs of UPOV on the compatibility of the New Zealand plant varieties rights testing and rights granting procedures with the UPOV Convention (hereinafter referred to as "the Convention"). That letter is reproduced in Annex I of this document.

2. Pursuant to the above request, the Office of the Union has prepared draft comments on the legislation of New Zealand in the field of plant breeders' rights and its practical application, as described by the New Zealand authorities. These draft comments, which will be forwarded to the Registrar of Plant Varieties of New Zealand, are attached as Annex II of this document, for consideration by the Council.

3. Annex III contains the observations of the Plant Variety Rights Office of the United Kingdom on the legislation of New Zealand.

[Annexes follow]

Plant Varieties Office
MINISTRY OF AGRICULTURE & FISHERIES

DFI Building
Featherston St.
Wellington
Telephone 720367

PV 5/2/2

October 13 1976

Mr A. Bogsch
Secretary-General
Union Internationale pour la
Protection des Obtentions Vegetales
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SWITZERLAND

Dear Mr Bogsch

COMPATABILITY OF NEW ZEALAND PLANT VARIETIES RIGHTS SYSTEM WITH UPOV RULES

It has been suggested that I seek your comments on the compatability of the New Zealand plant varieties rights testing and rights granting procedures with UPOV rules in view of this country's expressed interest in joining UPOV and our experience after one year's operations.

Before detailing our procedures I should point out that, being a small country, New Zealand's available resources (manpower, facilities and finance) for plant varieties work are extremely limited and every effort has had to be made to restrict resource requirements to the minimum. It is for this reason that, where available, existing test facilities and staff are being used.

Protection is currently available under the New Zealand Plant Varieties Act 1973 for -

Roses	-	Rosa L.
Barley	-	Hordeum vulgare

Fodder-type perennial ryegrass - Lolium spp.

All communications to be addressed to the:

Registrar
Plant Varieties Office
P. O. Box 2298

Consideration is being given to extending protection to annual ryegrass, potatoes, field and garden peas, lucerne and Lotus pedunculatus within the next 12 months.

Testing procedures now operating or proposed are -

Roses - tests are conducted on New Zealand's behalf by the United Kingdom Plant Varieties Rights Office in conjunction with that Office's own rose variety testing programme. Varieties which pass the U.K. testing procedures are accepted as qualifying for plant selector's rights in this country.

Barley and Perennial Ryegrass - prior to the introduction of the Plant Varieties Act New Zealand already had in operation growing trial procedures to test the agronomic worth of new cultivars of several species for inclusion in our Lists of Acceptable Cultivars (similar to European countries' National Lists). These trials take at least two years to complete and are made under the supervision of Ministry of Agriculture and Fisheries Officers.

For barley and perennial ryegrass, plant selector's rights testing has been added to these trials with the necessary additional recording and identification work for establishment of distinctness, uniformity and stability being handled by officers under Ministry supervision. Where available, overseas test reports of new cultivars are also considered in reaching a decision on the granting of plant selector's rights.

Similar procedures will apply for annual ryegrass, potatoes, Lotus, peas and lucerne and for any other species subsequently provided protection under the Act where Acceptable List growing trial procedures are already in operation.

No Acceptable List Tests - where there are no Acceptable Lists growing trials in existence for any species to which Act protection is extended in the future it currently appears unlikely that this Office will be able to operate a growing trials procedure for rights testing. If this is the case, assuming New Zealand cannot make arrangements for testing by another country, it is probable we will be forced to adopt a system of granting rights based on breeder's descriptions of cultivars and a search of a computerised data base on existing cultivars as is now operated in the United States.

EDP System

Because of our shortage of resources in New Zealand, particularly the need to keep operating costs to a minimum, we intend to create an EDP system on which to store data on cultivars of all species covered by the Plant Varieties Act. Our technical description forms are designed with this purpose in mind.

Initially at least this system will serve as record storage for those cultivars for which rights have been sought but it is our intention to eventually insert data on all cultivars of the species involved which are known in this country to provide an additional check on growing trials results before a grant of rights is made. As already explained, if no growing trials are carried out, the DUP system would be used as the main source of information in deciding on a grant of rights.

New Zealand's procedures in the plant varieties rights field are still developing as we gain more experience and any comments you could provide on either the systems outlined above or on their compatability with UPOV requirements would be very much appreciated. At this early stage of our involvement in rights we would not want to debar ourselves from joining the international organisation concerned.

Yours sincerely

(T.D. Norris)
Registrar of Plant Varieties

[Annex II follows]

ANNEX II

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COMMENTS TO BE SENT BY THE OFFICE OF THE UNION TO THE REGISTRAR OF PLANT VARIETIES OF NEW ZEALAND CONCERNING THE LEGISLATION OF NEW ZEALAND IN THE FIELD OF PLANT BREEDERS' RIGHTS AND ITS PRACTICAL APPLICATION

I. GENERAL

1. In order to study whether the legislation of New Zealand in the field of plant breeders' rights and its practical application fulfill the requirements of the UPOV Convention, the Office of the Union had at its disposal:

(i) the Plant Varieties Act 1973 (hereinafter referred to as "the Act"),

(ii) the Plant Varieties Regulations 1975 (hereinafter referred to as "the Regulations"),

(iii) the letter from the Registrar of Plant Varieties of New Zealand dated October 13, 1976 (hereinafter referred to as "the letter").

2. This study, though not constituting the final position of UPOV on the accession of New Zealand to the Convention, since the decision can only be taken by the Council after New Zealand has submitted a formal application for accession, was noted by the Council during its third ordinary session, on November 16, 1976.

II. REQUIREMENTS OF THE CONVENTION AND CORRESPONDING PROVISIONS OF THE ACT

Article 3 (National Treatment) and Article 30(1)(a) (Legal Remedies) of the Convention

3. Article 3 provides that in any member State

(i) nationals and residents of the other member States are entitled to the benefit of protection, subject possibly to the limitation of Article 4(4);

(ii) such persons must enjoy the same treatment as the nationals of that State.

Under Section 13 of the Act, an application for a grant of plant selectors' rights in respect of any new plant variety pertaining to a species eligible for protection may be made by any person claiming to be the breeder of a new plant variety. Neither in the Act nor in the Regulations is there any provision which limits the benefit of protection according to nationality, domicile or residence in the case of natural persons, or according to the place of the headquarters or the effective and serious establishment in the case of legal persons. Furthermore, no discrimination between the citizens of New Zealand and the nationals or residents of other States can be detected in the legislation, particularly with respect to the legal remedies for the effective defense of the selectors' rights, which seem to be appropriate. The legislation of New Zealand thus complies with Article 3 and Article 30(1)(a) of the Convention.

Article 4 of the Convention (Genera and Species Eligible for Protection)

4. According to Section 4 of the Act, the latter is applied to all plant varieties, groups of plant varieties and species of plants specified by the Governor-General of New Zealand. So far it is applied only to roses (Rosa L.), barley (Hordeum vulgare L.) and fodder-type perennial ryegrass (Lolium perenne L.). In order to comply with Article 4(3) of the Convention, New Zealand should, on the entry into force of the Convention in its territory, apply the Convention to five of the genera named in the list annexed to the Convention. According to the information contained in the letter, this could be achieved within the next year.

Article 5 of the Convention (Scope of Protection)

5. The rights deriving from the grant of plant selectors' rights are determined in Section 22 of the Act (the term "reproductive material" being defined in Section 2). They conform with the minimum scope of protection required under Article 5(1) of the Convention.

6. The Act which states that any person may hybridize plants of a protected variety does not, however, expressly protect the holder of the grant of plant selectors' rights against the repeated use, by others, of his variety as a genetic component in the commercial production of another (hybrid) variety, as is required by Article 5(3) of the Convention. Clarification of this matter would be desirable.

7. Attention is also drawn to a difficulty which the Office of the Union encountered in interpreting Section 22: according to paragraph (1)(a), the right of the breeder refers to "whole plants or reproductive material." Under Section 2, reproductive material is defined as including among others "whole plants." The Office of the Union wonders why the expression "whole plants" appears both in Section 22(1) and in Section 2 and whether or not it covers two different concepts.

Article 6 of the Convention (Conditions Required for Protection)

8. According to Section 13 of the Act, the person claiming to be the breeder of a new plant variety may apply for a grant of plant "selectors'" rights in respect of any new plant variety. In Section 2, the word "breeder" is deemed to apply also to the discoverer of a new plant variety and to the successor in title of the breeder or discoverer. Thus the Act is in conformity with the introductory sentence of Article 6.

9. The Office of the Union wishes, however, to draw attention to a minor drafting problem concerning Section 13(1) of the Act which might be worth considering on the occasion of a future amendment of the Act. The Office of the Union assumes that this Section is intended to mean that an application in respect of any variety may be filed only by a person claiming to be the breeder of that [not: "a"] variety.

10. The requirements of distinctness, homogeneity and stability, which the variety must fulfil under Section 15(1) of the Act, are contained in the Schedule to the Act. The wording of the relevant provisions is very close to the wording of Article 6 of the Convention. The requirement of novelty, which is laid down in Section 13(1), is also appropriately provided for.

11. Section 14 of the Act and Regulations 9 and 12, which provide for formalities, do not call for any remarks.

12. Section 15(3)(b) of the Act, however, raised some problems for the Office of the Union. In cases where a variety does not satisfy one of the basic conditions for protectability, namely, distinctness, homogeneity and stability, the Act does not provide for a straightforward rejection of the application, but offers the possibility of obtaining the grant of rights subject to compliance with certain conditions. This is of advantage to the applicant, but might prejudice other breeders of the same variety with a later filing date, who have scrupulously accomplished the breeding work before filing the application. It would be desirable to have some clarification as to the question whether Section 15(3)(b) of the Act is applied in such a manner that the rights of other breeders are not jeopardized.

Article 7 of the Convention (Examination of the Variety)

13. At its tenth ordinary session, the Council took note with approval of a statement on Article 7 of the Convention which had been formulated by the Committee of Experts on the Interpretation and Revision of the Convention. That statement appears in the Annex to this study.[1] Some remarks are made below on the question whether the legislation of New Zealand and its envisaged practical implementation are compatible with the wording of Article 7 of the Convention as interpreted by the above statement.

14. According to Section 15(1) of the Act, the Registrar must be satisfied that the variety is distinct, homogeneous and stable before he grants plant "selectors" rights. Section 15(2) of the Act leaves it to him to decide on the modalities of the examination of the new plant variety. Regulation 15 describes the powers of the Registrar in detail. The examination as envisaged in New Zealand for the various genera and species is described in the letter. For roses it is planned to base the examination on tests performed in the United Kingdom. Such an examination will fully conform to the Convention, which provides for cooperation in examination of Article 30(2). It is envisaged that the examination of barley and

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[1] Not reproduced here.

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perennial ryegrass--and in future of annual ryegrass, potatoes, lotus pedunculatus, peas and lucerne--will be carried out under the supervision of the officers of the Ministry of Agriculture and Fisheries. It can be assumed that this examination will also comply with the requirements of the above-mentioned statement on Article 7. As regards the species for which no trials are carried out for the purpose of including varieties in the List of Acceptable Cultivars, New Zealand should conclude, as far as possible, bilateral agreements for the examination of varieties with the present member States of UPOV.

15. If, nevertheless, it were impossible to do otherwise than base the grant of rights for varieties of certain species merely on the description furnished by the breeder, such a procedure would be considered compatible with Article 7 of the Convention only if the conditions of the statement on Article 7 were fulfilled, namely, if the description was made in accordance with special guidelines and if samples of the varieties were deposited together with the application [such conditions can be imposed on the applicant by the Registrar according to Regulation 15(1)(a)].

16. As a general conclusion, the Office of the Union considers that, according to the information available, the present legislation and practice of New Zealand can be applied in such a manner as to fulfill the requirements of Article 7 of the Convention.

Article 7(3) of the Convention (Provisional Protection)

17. The protective direction provided for in Section 18 of the Act is very similar to the corresponding provisions of the Plant Varieties and Seeds Act 1964 of the United Kingdom and is fully compatible with Article 7(3) of the Convention.

Article 8 of the Convention (Period of Protection)

18. Sections 20 and 21 of the Act comply with the provisions of Article 8 of the Convention.

Article 9 of the Convention (Restrictions in the Exercise of Rights Protected)

19. Section 23 of the Act and Part IV of the Regulations provide for compulsory licensing in a manner which is compatible with Article 9 of the Convention.

20. Section 22(2) of the Act allows the Minister of Agriculture to impose such restrictions on the exercise of the rights as he thinks fit, where the restrictions are necessary in the public interest. This rule is also compatible with Article 9(1) of the Convention.

Article 10 of the Convention (Nullity and Forfeiture of the Rights Protected)

21. Section 24 of the Act is compatible with Article 10 of the Convention.

Article 11 of the Convention (Application in Different States)

22. The Act and the Regulations contain no provisions which contravene those of Article 11 of the Convention.

Article 12 of the Convention (Right of Priority)

23. Neither the Act nor the Regulations contain provisions on the right of priority within the meaning of Article 12 of the Convention. Clarification would be appreciated as to the question whether the claiming of such a right may be based on the Convention itself.

Article 13 of the Convention (Denomonation of the Variety)

24. Under Section 14 of the Act, the application must be accompanied by a proposed name or other form of identification of the variety which, if approved, will form part of the grant of plant selectors' rights. The meaning of "other form of identification" is not quite clear to the Office of the Union.

25. The details of the requirements with which a "denomination" (and not as in the Act "a proposed name or other form of identification") has to comply are contained in Regulation 10: the denomination must

(a) be denoted by one designation only,

(b) conform to international usage for the nomenclature of cultivated plants,

(c) not be the same as, or likely to be confused with, any trademark.

26. The meaning of the requirement referred to in paragraph 25(a) above is not clear to the Office of the Union. It can be interpreted as prohibiting the use of synonyms in New Zealand or--less likely--as requiring the denomination of a variety to consist of one word only. Though both interpretations would be in keeping with Article 13 of the Convention, clarification on this point would be appreciated. The second requirement, referred to in paragraph 25(b), can be interpreted in the sense that international usage is governed by the International Code of Nomenclature of Cultivated Plants or it can be understood as referring--at least after the accession of New Zealand to the UPOV Convention--to the provisions of Article 13 of the Convention. It would be desirable to clarify this provision in the latter sense. A mere reference to the International Code of Nomenclature of Cultivated Plants cannot be considered sufficient as that Code does not contain all the requirements of the UPOV Convention, in particular it does not exclude denominations consisting solely of figures. As to the third requirement, referred to in paragraph 25(c), it is not clear whether the applicant is allowed, in conformity with Article 13(3), first subparagraph, of the Convention, to submit a trademark as a variety denomination which he is ready to renounce his right to after its registration as a variety denomination or to which he may not assert his right after that registration. Clarification would be desirable as to the question whether a breeder could base his right to submit such a trademark on the Convention itself.

Article 14 of the Convention (Protection Independent of Measures Regulating Production, Certification and Marketing)

27. Neither the Act nor the Regulations contain any rule making the plant selector's right dependent on the seed trade regulations. They are thus in conformity with Article 14 of the Convention.

Article 30(1)(b) of the Convention (Special Authority)

28. The special authority for the protection of new varieties of plants is already set up in New Zealand.

Article 30(1) of the Convention (Information of Public)

29. Selections 11 and 12 of the Act are a sufficient basis for concluding that the legislation of New Zealand complies with Article 30(1)(c) of the Convention.

III. CONCLUSION

30. The main features of the legislation of New Zealand are compatible with the Convention. Some clarification would seem, however, to be desirable to ensure that

(i) the owner of plant breeders' rights is protected against the repeated use of his variety for the commercial production of another variety (see paragraph 6 above);

(ii) for a variety which is found to lack distinctness, homogeneity or stability a right cannot be granted--to the detriment of others--, under the condition that the applicant fulfills certain conditions (see paragraph 12 above);

(iii) as far as the variety denomination is concerned, applicants fully enjoy their rights under Article 13 of the Convention (see paragraph 25(b) and (c) in connection with paragraph 26 above).

31 Finally, some further clarifications on minor questions concerning the legislation and the intentions of New Zealand would be appreciated to facilitate the final decision of the Council (see paragraphs 7, 14, 23 and 25(a) in connection with 26 above).

[Annex III follows]

THE PLANT VARIETY RIGHTS OFFICE
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FROM THE CONTROLLER

Our ref: PVA 338

Dr H J Mast
UPOV
32 chemin des Colombettes
1211 GENEVE 20

27 October 1976

Dear Dr Mast

Thank you for your letter of 22 October and the enclosed copies of the New Zealand Act and Regulations. I would agree that we might study the compatibility of their law with the Convention when we meet on 16 November and in advance would make the following observations:

a) Neither the Act nor the Regulations appear to make any provision for the priority rules provided for in Article 12.

b) Regulation 15(1) is interesting in that it takes account of the new interpretation of Article 7.

c) The legislation does not appear to provide for the use of the registered denomination, both during and after the expiry of rights in accordance with Article 13(7).

d) The legislation is specific in references to material which must be published in the Gazette but is strangely silent on the subject of variety denominations.

Yours sincerely

H A Doughty
Controller

[End of Annex III and of document]