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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Forty-First Session
Geneva, April 6, 2000

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its forty-first session in Geneva on April 6, 2000, under the chairmanship of Mr. John Carvill (Ireland).
2. The list of participants is given in the Annex to this report.

Adoption of the Agenda

3. The Committee adopted the agenda as given in document CAJ/41/1 after having noted an additional document, CAJ/41/5 Add., for item 6.

The Notion of Breeder

4. Discussions were based on document CAJ/41/2, which had been prepared in the light of discussions in the last session.
5. The participants of the enlarged Editorial Committee of the Technical Committee also took part in the discussion of this item as the notion of breeder is closely related to the notion

of “common knowledge,” which was currently under discussion in the preparation of a new General Introduction to the Assessment of Distinctness, Uniformity and Stability in New Varieties of Plants.

6. The Delegation of France reaffirmed its position that the criterion of “development” is only satisfied if the discovered plant itself is subsequently changed in some way. The multiplication, without any improvement, of a plant discovered in nature would not meet the “discover and develop” criterion. In principle, a variety obtained by “simple” discovery in nature would therefore not be eligible for protection. It also stressed that the notions of “breeder” and “common knowledge” are politically sensitive subjects and should be discussed taking into account discussions in related international fora concerning the conservation of plant genetic resources.

7. The representative of ASSINSEL supported the views expressed by the Delegation of France. He believed that, without some “improvement” on plants, the applicants did not deserve protection. However, “plant improvement” cannot be easily defined. Only negative cases of “plant improvement” can be drawn up: varieties discovered in nature and to which no further work or modifications have been made, that is, “propagated by multiplication in the same form” should not be protectable. However, the simple discovery of a variety within wild variation cannot be regarded as a “development.” He also considered that the word “developed” was inserted after “discovered” in the 1991 Act to reflect political concerns for the misappropriation of genetic resources.

8. The Chairman asked whether a mutation in nature could be protected. The Delegation of France stated that the answer depends on the mode of propagation, in other words, the need for further breeding activities after discovery. Another point of judgement was whether a mutation in nature is already a part of “common knowledge.” It, however, insisted that vegetatively propagated varieties that were known mutations in the wild would not be eligible for protection. On the other hand, a vegetatively propagated variety originating from a mutation within a cultivated variety could be protected if it met the conditions for protection. It stressed that the decisive criterion might be whether the variety already existed in nature in its present form.

9. The Delegation of France also stated that, in this connection, an important question in practice is how to distinguish variation occurring in the wild and variation created by artificial efforts. A judgement can only be made on a case-by-case basis, relying on information on the origins of the variety given by the applicant. It should be also judged on whether the variety is a variety of common knowledge. A significant question in this connection is how genetic resource accessions should be dealt with in the context of varieties of “common knowledge.” In its opinion, once a description of a genetic resource is available, that description should be taken into account as a part of “common knowledge” for the purpose of the assessment of distinctness.

10. Several delegations questioned the views of the Delegation of France and ASSINSEL, which did not seem to them to be founded upon the Convention.

11. The Delegation of Australia stated that different interpretations of the Convention should not exist in member States. The Committee should work to establish a uniform interpretation of the language of the Convention. It suggested that, considering the difficulty of establishing criteria applicable to all possible cases, the Committee prepare a paper listing

practical examples that conform to and do not conform to the notion of “discover and develop.”

12. It also asked whether varieties selected from within existing protected varieties were protectable and stressed the need for a uniform understanding on this question between the Committee and the Technical Committee and for a clear statement of the position of UPOV in a new General Introduction. It further pointed out that, if varieties selected from cultivated varieties were protectable and if those selected in the wild were not protectable, the source of variation would be regarded as a pre-condition for protection. This pre-condition could not be found in the text of the Convention. In addition, it wondered, assuming that some improvement efforts were needed for protection, if a mutation discovered in the tree of a cultivated apple variety would be protectable.

13. The Vice Secretary-General stated that a re-selection from within existing varieties would in some cases be protectable and pointed out that the introduction of the essential derivation concept is premised on the use of existing varieties as a source of breeding other new varieties. He also stressed that, regardless of the source of variation, new varieties that meet the conditions could be protected.

14. The Delegation of Germany considered that the draft position paper (Annex I) prepared by the Office reflected discussions in the past sessions and described very well the possible position to be taken by UPOV as well as the background of the problem. It believed that UPOV could not go beyond the limits of the paper. The matter of the conservation of genetic resources did not fall within the mission of UPOV, but of other international organizations. Having accepted the political sensitivity and the difficulty in defining “discover and develop,” it stressed that member States were bound by the language of the Convention, and that the position taken by the Delegation of France and the representative of ASSINSEL seemed to go beyond the Convention. In particular, a requirement of “plant improvement” for the protection of a discovery was not spelled out in the Convention. It also stated that the Convention does not exclude varieties found in the wild from protectability. A revision of the Convention would be required if protection should not be available for any varieties that exist in the wild and have not been improved by the breeders. However, it also warned that a possible consequence of such a change might be to cause difficulties for the granting of protection for varieties obtained by the selection from within naturally occurring variation, which is one of conventional breeding practices.

15. The Delegation of the European Community was also supportive of the draft position paper, recognizing the importance of carefully discussing the notion of “common knowledge” for the assessment of distinctness in combination with the notion of “breeder”, to counter emerging criticism, such as “the misappropriation of genetic resources.” Furthermore, it stressed that the word “develop” should not be defined too strictly, but should take into account normal breeding practices. It also endorsed paragraphs 13 and 22 of Annex I and stressed that the UPOV system is different from the patent system in its treatment of discoveries.

16. It also pointed out, with reference to paragraph 19, that the integrity of the UPOV system should be strengthened by realizing in practice a “worldwide test” for the assessment of the distinctness of candidate varieties from other varieties that are a matter of common knowledge anywhere in the world.

17. The Delegation of the United States of America supported the views expressed by the Delegations of Australia, Germany and the Community Plant Variety Office. Having expressed its sympathy for the desire of the Delegations of France and of ASSINSEL to reflect political discussions in other fora, it insisted that any objectives outside of the missions of the Convention could not be sought in this forum without the revision of the Convention. It also insisted that it was inappropriate to define "development" as "genetic improvement." In practice, breeders cannot immediately apply for protection simply after picking up plant material in the wild. After the discovery of plant materials in the wild, a breeder should domesticate or cultivate these selected materials as a variety. This process should be regarded as "development."

18. The Delegation of New Zealand supported the view of the United States of America and insisted that different principles could not be applied, depending on two origins of variety, variation in the wild or in cultivated varieties. Technical conditions in addition to DUS should not be stipulated. It introduced a relevant example from New Zealand; an application for a *Libertia* variety claimed to be vegetatively propagated from wild material was rejected. The reason for the rejection was not simply because the origin of the variety was a naturally occurred mutation, but because the description of the candidate variety totally corresponded to a form already described in a scientific journal and known to be growing naturally in the wild in certain specified regions.

19. The Delegation of the Russian Federation also stressed that the patent system and the UPOV system have different principles. From the viewpoint of potential benefits to humanity, the UPOV system should allow the protection of new varieties which originate from various origins and modes of creation.

20. The Chairman of the Technical Committee pointed out that, in reality, many varieties had been created by selecting plant material in the wild. However, the necessary process is not to simply take a plant from the wild, but to select a variety from variation in the wild by applying the professional skills of breeders and evaluating the agronomic and commercial worth of selections. She also suggested that the degree of variation in the wild should be taken into account in this discussion because selection work might not be required in the case of highly uniform species (with no variation) in the wild.

21. The representative of CIOPORA reserved its position on this problem because its General Assembly, which was taking place at the same time, was also discussing the matter. She stated that CIOPORA would send its opinion to the Office of UPOV later.

22. The Vice Secretary -General observed that there can surely be no varieties that result from the discovery of a single plant in the wild which is then protected without any further activities on the part of the discoverer. After collecting variation in the wild, breeders typically selected within that variation using their professional skills. This is the normal breeding practice. He agreed with the Chairman of the Technical Committee that if the wild material showed no variation from the species type, it might not be possible to protect a variety based on these selected materials.

23. Finally, the Chairman noted that there were differing interpretations in member States of "discover and develop" and proposed that the notion of "breeder" should be further discussed in conjunction with "varieties of common knowledge." He therefore suggested that this item should be on the agenda of the next session with a view to obtaining one harmonized

interpretation in member States. The Office of UPOV would prepare a revised position paper for the next session, reflecting opinion expressed in this session.

24. The Vice Secretary -General stated that the fresh document for the next session should take into account discussion of common knowledge in technical circles during the preparation of the General Introduction document.

25. The Committee went along with these suggestions.

Revision of the General Introduction to the Test Guidelines

26. The Committee took note of document CAJ/41/3 and the explanation given by the Office of the Union concerning the structure of the new General Introduction, the main document and associated supplementary documents.

27. The Chairman suggested that some outstanding matters of a legal nature be discussed in the next session. The Committee went along with that suggestion.

28. The Delegation of Australia requested that the opportunity be created for all member States to participate in discussions on the new General Introduction document, as to date most discussions seemed to have taken place in the enlarged Editorial Committee. The Vice Secretary-General explained that several opportunities for commenting on the draft (e.g., in Technical Working Parties) had already been provided to member States to ensure that the opinions of all member States were well reflected in the document. He took note of the request by the Delegation of Australia.

Notion of Trees and Vines for the Purposes of the Provisions on Novelty and the Duration of Protection

29. Discussions were based on document CAJ/41/4.

30. The Delegations of Australia and Japan requested the clarification of the criteria used for selecting genera and species in the Annexes to the document. The Delegation of Japan also explained that “woody” or “non-woody” plants did not work well as criteria for identifying tree species.

31. With respect to the proposal for the future revision of the Convention and possible solutions for the transition period, the Delegations of New Zealand, the Netherlands and the European Community observed that the reduction of the time limit for acts of exploitation of a variety bred abroad to 4 years for all species would not be accepted by breeders whilst the unification of the durations of protection to a longer period, 25 years, might not face any objections. The Delegation of New Zealand also reported that the fruit industry in New Zealand had difficulty even with the time limit of 6 years because of the strict quarantine procedure in its country.

32. Several delegations, moreover, questioned the proposal for the transitional period written in paragraph 10. In particular, it was doubtful whether a resolution conflicting with the Convention could be legally adopted by the Council.

33. The Vice Secretary -General reminded the Delegations that it was not appropriate to have different treatment for the same species in different member States and that UPOV should endeavor to solve this problem without waiting for the next revision of the Convention.

34. The Committee considered that further discussions on the revision of the Convention and on the adoption of a resolution in the Council were not likely to provide any meaningful consensus. It therefore decided to continue, in its next session, only the discussion on the lists in Annex I (genera and species of trees and vines) and Annex I (genera and species assimilable to vines) and to ask member States to provide more information to the Office of the Union.

Signs Which May Constitute a Variety Denomination

35. Discussion was based on document CAJ/41/7.

36. The Delegation of the European Community first explained that guidelines on the suitability of variety denominations would be used not only for the purposes of plant variety protection, but also for market authorization and would be adopted in the Administrative Council of the Community Plant Variety Office (CPVO). It also pointed out the following:

(a) The words "ortwoletters" should be deleted in indent (a), (i) of paragraph 2

(b) The explanation in paragraph 3 concerning the use of trademark as a variety denomination is correct. However, Article 18 of the Council Regulation (No. 2100/94) prohibits the exercise of the right in the trademark.

(c) The establishing of new guidelines, which differ in some respects from the UPOV Recommendations, was motivated by the CPVO's experience in the examination of over 10,000 denominations and the demands of breeders. The CPVO had found it more and more difficult to reject some variety denominations and to convince the applicants of its decisions based on the UPOV Recommendations, especially in the case of codes.

37. With respect to the use of a trademark as a denomination, the Delegation of the United States of America pointed out the possible risk that, after the expiration of plant variety protection, the former holder of the breeder's right and owner of the trademark used as the denomination of the variety, might exercise the rights in the trademark and effectively block the free use/marketing of the variety because other persons could not use its denomination without the consent of the owner of the trademark. It further explained that, in its country, attempts had been made to suppress a similar but different potential problem: the hampering of the free use of the variety (variety denomination) by applying for a trademark corresponding to the denomination after the expiration of a plant variety protection certificate or plant patent.

38. It also questioned the necessity of permitting the use of a trademark in a variety denomination, because there seemed to be no need for breeders to use one. It also pointed out one clear difference between trademark and variety denomination: while a trademark aims to indicate the origin of products, a variety denomination could be used with products from any origin. The Vice Secretary -General noted that the use of a trademark as a denomination would be an unwise choice for the holder of the trademark because the variety denomination

is by definition a generic designation. Accordingly, any trademark used as a variety denomination is potentially invalid.

39. The Delegation of the European Community explained that Article 18(1) of the Council Regulation prohibits the exercise of the right of the trademark used for variety denomination even after the expiration of a Community plant variety right. Accordingly the departure from the UPOV guidelines in the proposed EC Guidelines would be neutralized by the prohibition on exercising the trademark.

40. The Delegations of France and Germany suggested that the full text of the guidelines be discussed in the next session of the Committee. Moreover, they stated that the draft guidelines might be inconsistent, not only with the UPOV Recommendations on variety denominations, but also with the Convention. They further suggested that possible revisions of the UPOV Recommendations be discussed along with the full text of the guidelines in the next session.

41. The Chairman proposed to add this item to the agenda of the next session and to discuss the full text, which would be provided by the European Community. The Committee accepted his suggestion.

Links Between a Hybrid Variety and its Components From the Point of View of Novelty

42. Discussions were based on documents CAJ/41/5 and CAJ/41/5 Add.

43. The Vice Secretary - General first explained the concerns raised in UPOV circles prior to the revision in 1991. An inbred line was the subject of an application for protection many years after it had first been used in commercial production of, perhaps, the most widely grown hybrid in Europe, potentially extending exclusivity in its use far into the future. He believed that the revision in 1991 was intended to take into account these concerns. The question whether the exploitation of a hybrid variety does destroy the novelty of the inbred lines depended on the interpretation of the language of the 1991 Act. To what extent did the language of the 1991 Act have this effect? A separate policy question for the Committee was whether any loss of the novelty of an inbred line under these circumstances would produce an unreasonable result. He noted that hybrid breeding was given special treatment in the Convention since the scope of protection of varieties used as parent lines (i.e., as inbreds) extended to varieties (i.e., to F₁ hybrids) whose production required the repeated use of the variety used as a parent line. He also noted a possible inconsistency in the policy of ASSINSEL which had over recent years pressed for hybrids to be defined by reference to their parent inbred lines and the formula which associated them. There was a tendency for some UPOV technical experts to share that view. However, such a policy did not sit well with the idea that the commercialization of the hybrid was irrelevant to the novelty of the inbred line.

44. The Delegation of the European Community pointed out that the wording "the same machinery" in paragraph 7 of document CAJ/41/5 was not correct. The position of the European Community is that the exploitation of a hybrid variety shall not automatically damage novelty of the parent lines. The novelty of the inbred lines should be judged only by the exploitation of the inbred lines themselves. If the inbred lines stayed on the breeder's premises and were not disposed of to others at all, the exploitation of the hybrids produced would not affect their novelty. However, once the inbred lines had left the breeder's premises

(even in the case where the inbred lines were provided to the third party under a contractual agreement), those inbred lines shall be deemed to be no longer novel.

45. The representative of ASSINSEL reaffirmed the position of ASSINSEL described in document CAJ/41/5 Add. He also stated that the 1991 Act did not foresee the commercialization of hybrid varieties causing a loss of novelty of the inbred lines. The Convention did not make any specific references to “inbred line.” He drew attention to the word “exploitation” in Article 6(i) and contrasted it with the word “use” in Article 14(5)(iii), which suggested that “use” was not equivalent to “exploitation”. He noted that although ASSINSEL had pressed for hybrids to be defined by reference to their inbred lines and the formula which associated them, this interpretation had not been adopted by UPOV.

46. The representative of COMASSO stated that the position of the European plant breeding industry was that, if the inbred lines of a hybrid variety were handed over to a contracting party for the exclusive purpose of production and multiplication of seed of the hybrid, and the breeder keeps the exclusive right on these without any further acts of handing over being carried out, then the novelty of inbred lines would not be affected.

47. Several European countries reported their legal interpretations which were different from those of the European Community. The Delegation of Germany reported that the German regulation in this respect clearly provided that the exploitation of a hybrid variety does influence the novelty of its inbred lines. The Delegations of Denmark and Spain also reported that their law has the same effect.

48. The Delegation of France first stated that its bill to establish conformity with the 1991 Act was still before its legislature and that its position in this respect might therefore not be definitive. The draft bill provided that the components of a hybrid variety would lose their novelty on the basis of the first commercialization of any hybrid variety produced by the components. It wondered, however, whether certain flexibility might be allowed in the case of an inbred line which is completely controlled by the breeder on his premises.

49. The Delegations of the Russian Federation and the United States of America pointed out that the novelty of the inbred lines would be destroyed by the exploitation of hybrid varieties so that the breeder could not enjoy further *de facto* protection of the hybrid variety after the expiration of its protection, by obtaining protection for the inbred lines. The Delegation of the United States of America further stated that, from the viewpoint of good public policy, the plant variety protection system should not allow some breeders to enjoy longer periods of protection than others.

50. The Chairman concluded that, as expressed by several member States, the basic view on this issue seemed to be that the novelty of the inbred lines was lost by the exploitation of the hybrid variety. He also stated, however, that note should be taken of the different positions expressed in the session. He considered that the Committee had exhausted its discussions and could not go further at this stage.

Breeder's Exemption

51. Discussions were based on documents CAJ/41/6 and CAJ /41/5 Add. (section (b)).

52. The Delegation of France stressed that the breeder's exemption was one of the key provisions of the *suigeneris* system for plant variety protection. The provision was aimed at allowing other breeders to use protected varieties as a source of further breeding and to facilitate further genetic progress. However, the question raised in the document was whether the free access to protected varieties for other breeders for the purpose of further breeding should be legally obliged in the light of the spirit of the breeder's exemption. In practice, problems arose, in the case of varieties that were not marketed, for example, inbred lines of hybrid varieties. Another important problem raised was that, if protected varieties are not available in the market, other breeders cannot compare their candidate varieties with the unmarketed varieties for the purpose of distinctness. Are such varieties nonetheless a matter of common knowledge? The national office cannot provide any plant material of protected varieties to third parties at their request; in the French law, the access of other breeders to protected varieties was not obligatory. At this stage, the proportion of unmarketed varieties out of all protected varieties was not generally significant. However, the problem was becoming more important. Access to protected varieties might become an issue in genetic resource circles.

53. The representative of ASSINSEL pointed out that the disclosure of protected varieties could not be required as it might be an additional condition for the grant of protection and be in conflict with the UPOV Convention. It insisted that the exceptions listed in Article 15 had to be exercised in accordance with strict rules and conditions. He also stated that no problems would occur with most varieties because varieties available in the market can be freely used by other breeders for the purpose of further breeding.

54. The Delegation of the Netherlands insisted that the access to protected varieties by third parties should not be required because such an additional obligation on breeders might discourage them from applying for protection.

55. The Vice Secretary-General stated that the Convention did not set out any provisions concerning access to protected varieties by third parties. This issue was left entirely to national laws. He also stated that no great problems had so far arisen in this connection, since many national laws seemed to accept the breeder's position on this question.

56. He also pointed out that a more significant, practical problem might exist in the recognition by third parties of inaccessible varieties as "varieties whose existence is a matter of common knowledge." The representative of ASSINSEL stated that variety descriptions but not plant material of protected varieties could be made available to third parties in this connection. The construction of a variety description database might solve to some extent the problems relating to "common knowledge."

57. The Delegation of the United States of America supported the views of the Vice Secretary-General and France and stated that the Convention does not specifically allow the breeders to keep varieties or variety information secret, but does not oblige the breeder to make available the propagating material of protected varieties.

58. The Chairman concluded that the UPOV Convention does not provide any obligation to make plant material available to third parties and that it is a matter to be decided at the national level. The Committee accepted this conclusion.

Marking of Protected Varieties

59. Discussions were based on document CAJ/41/8.

60. The Delegations of Australia, Denmark and New Zealand and reported examples of the use of symbols as indication of the protected status of varieties. The Delegation of New Zealand further pointed out possible problems in the use of an internationally standardized mark: An internationally standardized mark could be misleading if the propagating material to which it is attached should happen to be sold in a territory where the variety was not protected.

61. The Committee found the introduction of an internationally standardized mark difficult. The representatives of ASSINSEL and CIOFORA stated that the possibility of using an internationally standardized mark would be discussed internally, and the result of the discussion would be reported in the next session of the Committee.

Program for the Forty-Second Session

62. The program for the forty-second session would include the following items:

- (a) The notion of breeder and common knowledge;
- (b) New general introduction to the assessment of distinctness, uniformity and stability;
- (c) The list of genera and species of trees and vines for the purposes of the provisions on novelty and the duration of protection;
- (d) Guidelines on the suitability of variety denominations in the European Union and the UPOV Recommendation on Variety Denominations;
- (e) Marking of protected varieties (reports of breeders).

Others

63. The Committee noted the retirement of Mr. David A. Boreham, Controller of Plant Variety Rights, United Kingdom, and extended to him its best wishes for the future.

64. The Committee also noted that the forty-first session was likely to be the last session at which Mr. Barry Greengrass would be present as Vice Secretary-General. It expressed many thanks for his significant contributions to the development of UPOV over the last twelve years and wished him a happy retirement.

65. This report has been adopted by correspondence.

[Annex follows]

ANNEXE/ANNEX/ANLAGE/ANEXO

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS/ TEILNEHMERLISTE/
LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des États/in the alphabetical order of the names
in French of the States/ in alphabetischer Reihenfolge der französischen Namen der Staaten/
por orden alfabético de los nombres en francés de los Estados)

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