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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-eighth Session

Geneva, October 12 to 16, 1990

REPORT

adopted by the CommitteeOpening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its twenty-eighth session from October 12 to 16, 1990. The list of participants is given in the annex to this report.
2. The session was opened by Mr. J.-F. Prevel (France), Chairman of the Committee, who welcomed the participants.

Adoption of the Agenda

3. The Committee adopted the agenda as given in document CAJ/28/1.
4. The Committee noted that the main purpose of the session was to prepare a new proposed text for the Convention which, subject to the approval of the Council at its twenty-fourth ordinary session, on October 18 and 19, 1990, would serve as a basis for discussion for the Diplomatic Conference. This new text is hereinafter referred to as "the Final Draft." In view of the said purpose, this report is restricted to the main decisions and arguments for or against such decisions.

Working Arrangements

5. The Committee set up a working group (hereinafter referred to as "the Working Group") comprising the delegations of France, Germany, the Netherlands, the United Kingdom and the United States of America to consider the

order of the provisions. The Working Group also suggested some amendments on substance and drafting which were subsequently submitted to the Council.

Substantive Law Provisions

6. Discussions were based on document IOM/5/2 Rev. (hereinafter referred to as "the Draft").

Article 1 - Definition

Item (iv) - Definition of "Breeder"

7. The text proposed in the Draft was accepted by the Committee.

8. In reply to the proposal made by the delegation of Sweden to delete the second indent, the Secretary-General explained that that indent was necessary for those countries where the employer was regarded as the original owner of the rights.

Item (vi) - Definition of "Variety"

9. The delegation of Italy expressed its preference for the definition of "variety" as worded at the twenty-seventh session of the Committee by the delegation of Germany and the Office of the Union.

10. The Committee agreed to replace the phrase "are the result of a given genotype" by "are the expression of a given genotype."

11. The majority of the Committee was against the insertion of "within a species or a taxon of a rank lower than species" after the words "a group of plants" proposed by the representative of the European Patent Office (EPO) and the delegation of Italy with a view to maintaining the possible patentability of inventions relating to a group of plants of a rank superior to a variety. Several delegations expressed the view that these words might be construed as excluding the first interspecific hybrid from the scope of application of the Convention because in this case the notions of "variety" and "species" would be coextensive, and that they might cause difficulties where the botanical classification was complex or uncertain.

12. Concerning the second sentence of the item, the representative of the EPO stated that the proposed Article 12(1)(a)(viii) showed that UPOV intended to extend its scope to industrial production, which was basically an area for the patent system. He wished that the phrase "unit for purposes of cultivation" be reintroduced. Alternatively, he wished that an exception be introduced into the definition to the effect that cells and cell lines would not be considered varieties. He added that if that second sentence was regarded as a part of the definition, a direct contradiction would arise to the second sentence of Article 53(b) of the European Patent Convention, as that Article provided that products of microbiological processes, e.g. cells, were patentable. No delegation of a member State made a proposal for amendment in response to the representative of the EPO. Following an explanation by the delegation of Germany, the Secretary-General stated, and the Committee agreed, that the records of the Diplomatic Conference should indicate that the sentence was not part of the definition. To highlight this, the Committee agreed to replace the words "a variety" by "a particular variety" in the English text.

Items (vii) to (ix), (xi) and (xii) - Definition of "Contracting Party," "Territory," "Authority," "Member of the Union" and "Secretary-General"

13. The proposals by the delegation of Germany to delete those definitions (the part relating to member States in the case of "territory") as superfluous were not seconded.

Article 2(1) of the Present [1978] Text of the Convention - Forms of Protection

14. The delegations of Belgium, Denmark, Spain and Sweden reiterated their preference for the inclusion of a provision corresponding to Article 2(1) of the present text in the Final Draft. The delegation of France would have preferred that a provision be inserted in the Final Draft to ensure the continuation of the discussions on the relations with the patent system. The delegations of Australia, the Netherlands, the United Kingdom and the United States of America variously welcomed the proposed deletion of Article 2(1) of the present text of the Convention, on the basis either that there ought not to be any exclusionary provision, or that an exclusionary provision, if any, ought to appear in patent laws and conventions rather than in the UPOV Convention, or that an exclusionary provision might make the accession to the Convention impossible to those States in which industrial patents had been granted for one or more varieties. The delegation of Japan reserved its position.

Article 2 - Obligations of Contracting Parties

15. The Working Group proposed to delete the introductory part of the provision and to insert a cross-reference to Article 2 in Article 36(2).

Article 4 - Genera and Species to be Protected

16. The Committee did not accept, after a show of hands, any amendments to the Draft with a view to reducing the number of plant genera and species specified in paragraph (1)(i) and to increasing the period specified in paragraph (2)(ii) from three to five years. The delegations of Italy and Spain requested that their reservation to the proposed text be recorded in the report.

Article 6 - First Application

17. The delegation of Denmark stated that the deletion of Article 11(3) of the present text ought to be reconsidered in view of the fact that certain non-member States made protection on their territory dependent on the protection obtained in the country of origin of the variety.

Article 7 - Conditions for the Grant of a Breeder's Right

Paragraph (2) - Novelty

18. The Committee agreed to delete in this and other provisions the words "reproductive and vegetative" and similar language as superfluous. The French text would remain unaffected.

19. Several delegations pointed out that the sale of the by-products of a breeding and testing program should not be regarded as detrimental to novelty. The Committee agreed, therefore, to replace the words "for the purposes of exploitation" by "for purposes of exploitation of the variety" in items (i) and (ii) of subparagraph (a).

20. The delegations of Denmark, Italy, Sweden and the United States of America were in favor of deleting the words between the square brackets in subparagraph (a). After discussion, the Committee agreed that the reference to "any product directly obtained from the harvested material of the variety" should be maintained without the square brackets in the Final Draft.

21. Several delegations proposed to replace the word "may" in subparagraph (b) with "shall" to make a transitional limitation of the requirement of novelty mandatory rather than optional. The Committee, however, decided to maintain the optional character of the provision to facilitate accessions to the Convention.

Paragraph (3) - Distinctness

22. The following proposals were made in respect of the second sentence, but not accepted by the Committee, primarily for the reasons set out below in brackets:

(i) to delete the phrase "provided that ..." or amend it to cover also cases where the application had failed e.g. for non-payment of fees (on account of the fact that only successful applications should make a variety to be deemed a matter of common knowledge as from the date of application);

(ii) to make the provision optional, it being impossible to take into consideration all varieties being the subject of an application (on account of the need for legal security and of the possibility of annulling a breeder's right granted erroneously);

(iii) to insert a reference to commercial exploitation (on account of the fact that the insertion of references to obvious examples would reopen the whole issue).

Article 8 - Right of Priority

Paragraph (1)

23. The delegation of the United States of America proposed to extend the basis for a right of priority under the UPOV Convention to an application for the grant of a title of protection for a plant variety that was not a breeder's right. In view of the wide-ranging implications of the proposal and of the impossibility of deciding on it at short notice, the Committee agreed to include, for further discussion at the Diplomatic Conference, in the first sentence of paragraph (1) the words ", or an application for another title of protection for a variety in," after the words "the authority of" in the second line and the words "the grant of a breeder's right for" before the words "the same variety," both in square brackets.

24. The following points, in particular, were raised during the discussion of the proposal:

(i) whether there should be reciprocal treatment (i.e. the possibility of using a plant breeder's right application as the basis for a priority claim in relation to a patent application);

(ii) whether the proposed addition should be limited to the industrial property titles contemplated in Article 36 (reservations);

(iii) whether the benefit of paragraph (3) should be limited to cases of priority based on an earlier plant breeder's right application;

(iv) whether the proposal would not imply to some extent the acceptance of the patentability of plant varieties;

(v) whether the proposal would not create uncertainties since priority would be based on applications which did not afford as much guarantee as a plant breeder's right application in respect of the existence of a variety meeting the requirements for protection.

25. The delegations of Australia and the United Kingdom supported the proposal.

26. The delegation of Germany observed that the last two sentences of paragraph (1) could be combined to read: "This period shall be computed from the day following the date of filing of the first application."

Paragraphs (2) to (4)

27. The Committee decided to replace the words "supporting documents and material" by "documents and materials supporting the priority claim, as" in paragraph (3).

28. The delegation of Japan observed that it should be made clear that the periods mentioned in paragraphs (2) and (3) should be counted from the day following the event.

29. The Committee accepted the wording of paragraph (4) proposed in the Draft, after having replaced the word "facts" by "events."

30. The delegation of Germany observed that paragraph (4) was not to the point. It considered that the effect of priority was that the date of the first application served as the reference in the examination of novelty and distinctness, and suggested that it should be examined whether further effects were contemplated. The proposal was not followed-up.

Article 9 - Examination of the Application; Provisional Protection

31. The Committee agreed that the first sentence of paragraph (1) should read: "Any decision to grant a breeder's right shall require an examination ..." and that the two subparagraphs of paragraph (1) should be merged.

32. The Committee agreed to replace the words "decision thereon" by "grant of that right" in paragraph (2). The delegation of France opposed that amendment since it considered that there should be provisional protection whatever the subsequent fate of the application. It observed that other branches of law would regulate reimbursements and possible damages where remuneration had been paid in respect of a variety for which the breeder's right was eventually refused.

Article 10 - Duration of the Breeder's Right

33. The delegations of Australia and Italy proposed that the duration of the breeder's right should be counted from the date of filing, taking into account

that the breeder would enjoy the provisional protection from that date. The Secretary-General explained that the latter was much less than the full protection under Article 12 and that the Article should therefore remain unchanged.

34. The delegations of Italy, Sweden and the United States of America were in favor of a shorter duration of protection than proposed in the Draft. Several delegations spoke in favor of the text proposed in the Draft on account of the need to ensure and reward the maintenance of the protected variety, to ensure that a successful variety would provide a source of revenue compensating investments in varieties that would have been less successful or of the need to compensate for the exceptions to the breeder's right introduced for political reasons.

35. The Committee agreed to maintain the wording proposed in the Draft.

Article 11 - Nullity and Forfeiture of the Breeder's Right

36. For paragraph (1) the Committee agreed to the proposed text in the Draft, after having replaced the words "it can be" in subparagraph (iii) by "it is."

37. For paragraph (2) the delegation of Japan proposed that a refusal to accept the inspection made by the authority on the maintenance of the variety should be a reason for cancellation. No proposal for an amended text was made, however. The delegation of the Netherlands proposed to make the provisions of paragraph (2) compulsory rather than optional. The proposal was supported, but it was also recalled that there were instances in which the reason for cancellation could be remedied. The Committee, aware that it had intensively discussed the problems raised by the above proposals at its preceding session, decided not to go into the details and agreed to maintain the text as proposed in the Draft.

Article 12 - Effects of the Breeder's Right

Paragraph (1) - Acts Requiring the Breeder's Authorization

38. The Committee agreed that item (ii) should read: "conditioning for the purpose of propagation." The delegation of Sweden reserved its position on that item.

39. The representative of the EPO and the delegation of Italy observed that item (viii) in paragraph (a) would cause problems because plant cells or cell lines could be used in industrial processes, for purposes other than propagation, and proposed the deletion of that item. The delegation of the Netherlands proposed to add the words "as such" after the word "use" in item (viii) to solve the problem. The delegation of Germany recalled that the definition of the scope of protection should be as broad as possible and that there was no conflict with patent protection. The proposal was not seconded.

40. A number of delegations wondered whether item (viii) was necessary in view of the fact that items (i) to (vii) already covered all areas to be covered by the breeder's right. The delegation of Canada said that items (vii) and (viii) would cause some political difficulty, as the inclusion of these two items would reduce the difference between the patent and the plant breeder's right. After a long debate and following the statement of the Secretary-General that a reference to stocking was usual in intellectual property law and

offered in effect a convenient point at which a right could be exercised in the case of infringement, and that item (viii) was a catch-all clause protecting the breeder against unforeseen forms of exploitation, the Committee agreed after a show of hands to maintain items (vii) and (viii) as proposed in the Draft.

41. Concerning the harvested material and products directly obtained from harvested material, the delegations of Australia, Ireland, Japan, New Zealand, Spain, Sweden and the United Kingdom were in favor of the introduction of a notion of "cascading application" of a breeder's right. The delegation of France expressly opposed the proposal on account of the fact that the purpose of the revision was to strengthen the breeder's right, that other intellectual property laws did not specify the point at which the obligation to pay royalty was incurred and that since the breeder's right was already subject to a limitation for political reasons, the breeder should be given the choice of the point of collection. The Secretary-General reminded the Committee that the formulation of the notion of a "cascading application" was technically difficult and that this was the reason why the present text had been adopted. The Committee finally agreed to the inclusion of the notion of cascading as an option in the Final Draft by adding in square brackets at the end of subparagraph (b) the words "and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material" and at the end of subparagraph (c) the words "and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material."

42. On the proposal of the delegation of Sweden, the Committee agreed to include in the Final Draft the further alternative that there should appear no reference to the possible exercise of the plant breeder's right on products directly obtained from harvested material.

Paragraph (2) - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties

43. The Committee accepted the text proposed in the Draft after having deleted the words "whether directly or indirectly", replaced the words "result of [elements of]" by "expression of" in subparagraph (b)(i), and deleted the words "specific or incidental" in subparagraph (b)(iii).

44. The representative of the European Communities (EC) said that the proposed provision relating to essentially derived varieties would cause difficulties for his organization because it went too far.

Paragraph (4) - Possible "Farmer's Privilege"

45. For the title of the paragraph, the Committee agreed that the words "farmer's privilege" should be replaced by "farm-saved seed," which was thought to be neutral and more appropriate.

46. Concerning the systematic position of the provision, several delegations proposed that it should be combined with paragraph (3) (this was eventually done on the suggestion of the Working Group) or with Article 13.

47. Concerning the text of the provision, the Committee decided to replace the phrase "provided that due consideration is given to the need for the breeder to obtain adequate remuneration" by "subject to the safeguarding of the

legitimate interests of the breeder" and to delete the last proviso relating to the quantitative limitation of farm-saved seed.

Paragraph (5) - Exhaustion of Right

48. The delegation of Germany observed that subparagraph (a)(ii) was too vague and could give the breeder excessive power over materials of the variety put on the market. The delegation of the Netherlands raised the question of proof in relation to both the consent and the field of use for which the consent was given. Several delegations were in favor of deletion. The delegation of France opposed deletion, in particular on the ground that none of the organizations had objected to the provision in the fifth Meeting with International Organizations. The Committee finally agreed to maintain the item between square brackets for discussion at the Diplomatic Conference.

49. On the proposal of the delegations of Sweden and Germany, the Committee agreed to add the words "except where the export is for consumption purposes" at the end of subparagraph (a)(iii).

50. The representative of the EC observed that the notion of "territory of the Contracting Party concerned" would cause problems in the context of the EC. He suggested that there should be a specific provision for the EC.

Administrative Provisions and Final Clauses

51. Discussions were based on document IOM/5/3.

Article 16 - Organs of the Union

52. It was agreed that this Article would read: "The permanent organs of the Union are the Council and the Office of the Union."

Article 17 - Composition of the Council; Vote

53. On the suggestion of the Secretary-General, the Committee adopted the Article as proposed and noted that the discussion on substance should take place in the Diplomatic Conference.

54. The delegation of Italy, in the name of the 12 member States of the European Community, requested that the European Community be able to participate in the Diplomatic Conference in 1991 in a capacity equal to that granted to non-member States of the Union.

Article 28 - Languages Used by the Office and in Meetings of the Council

55. The delegation of Spain reserved its position on this Article and announced that it would propose to the Diplomatic Conference that Spanish should become an official language of UPOV as the importance of Spanish had increased since the last Diplomatic Conference in the light of recent developments. The delegation of Denmark proposed that the Office of UPOV should report on the cost implications of the proposal.

Article 31 - Ratification, Acceptance or Approval; Accession

56. The Committee did not take any decision on this Article in view of the remaining uncertainties as to whether an intergovernmental organization might wish, and be allowed, to become a Contracting Party.

57. The Secretary-General observed that at present, no intergovernmental organization fulfilled the conditions laid down in subparagraph (1)(b) to become party to the Convention. He added that the fundamental question was whether an international treaty in the field of intellectual property rights should have a member other than a State. Once an intergovernmental organization became a member, it should pay contributions and have the right to vote. Such right to vote would in no way mean that a given State would have two votes.

58. The delegation of Germany observed that the EC would fulfill the conditions upon the adoption of the proposed Regulation on Community Plant Variety Rights.

59. The Vice Secretary-General explained that the membership of an intergovernmental organization would have definite advantages for the nationals of member States that were not members of that organization: they could for instance enjoy national treatment and the right of priority vis-à-vis that organization. Furthermore, they would enjoy protection in territories which were covered by the legislation of the organization but not by any national plant variety protection system.

60. The delegation of New Zealand expressed its reservation to subparagraph (1)(b).

61. The delegation of Germany proposed to replace the words "Sorge trägt" by "sicherstellt" in the German text.

Article 36 of the Present [1978] Text of the Convention - Territories

62. The delegation of Denmark asked whether it would be possible to include in the Final Text a provision corresponding to Article 36 of the 1978 Convention. The Secretary-General explained that this would present some difficulties in view of the recent trends in this matter and the purpose for which territorial clauses had been used in the past. He suggested that this issue should be reserved for the Diplomatic Conference.

Order of the Provisions

63. Discussions were based on document CAJ/28/2.

64. The order finally retained for submission to the Council is shown in document C/24/11.

Provisional Agenda of the 1991 Diplomatic Conference for the Revision of the UPOV Convention

65. The Committee approved the Provisional Agenda of the Diplomatic Conference as proposed in document CAJ/28/3 for submission to the Council.

Provisional Rules of Procedure of the 1991 Diplomatic Conference for the Revision of the UPOV Convention

66. Discussions were based on document CAJ/28/4.

67. The Committee agreed to recommend to the Council that the Provisional Rules of Procedure of the Diplomatic Conference be as contained in the Annex of document CAJ/28/4, subject to the following changes:

(i) Rule 2(3) should read: "The Conference may invite to any meeting any person whose advice it may consider useful for the work of that meeting."

(ii) Rule 13(2) should read: "The Conference, meeting in Plenary, shall decide on the number of members of any working group and shall elect them from among the Member delegations and, exceptionally, also from among Observer delegations."

(iii) Rule 29(1): The square brackets around the second sentence should be removed.

(iv) Rule 41(1): The words "it being understood ... a working group" should be deleted.

(v) Rule 45: The title of this Rule and its text should also refer to the Steering Committee.

68. The Committee agreed that the question of the status of the European Community in the Diplomatic Conference should be discussed by the Council at its twenty-fourth ordinary session.

Notes and Letters of Invitation to the 1991 Diplomatic Conference for the Revision of the UPOV Convention

69. Discussions were based on document CAJ/28/5.

70. The Committee agreed to recommend to the Council that the Notes and letters of invitation to the Diplomatic Conference be as proposed in document CAJ/28/5, subject to the following changes:

(i) Annex I: In (ii), the sentence "those delegations will also be eligible for membership in the working groups which may be established" should read "those delegations may, exceptionally, be eligible for membership in any given working group."

(ii) Annex II: This Note should not necessarily be addressed to the Minister for Agriculture but to that Minister or all those Ministers whose names will be indicated to the Office of the Union by the representatives of the countries participating in the twenty-fourth ordinary session of the Council, during that session.

71. This report has been adopted by correspondence.

[Annex follows]

ANNEX/ANNEXE/ANLAGE

LIST OF PARTICIPANTS*/LISTE DES PARTICIPANTS*/TEILNEHMERLISTE*

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* In French alphabetical order of the names of the States and the acronyms of the organizations/Dans l'ordre alphabétique français des noms des Etats et des sigles des organisations/In französischer alphabetischer Reihenfolge der Namen der Staaten und der Akronyme der Organisationen

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