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CAJ/31/5

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirty-first Session

Geneva, October 26 and 27, 1992

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its thirty-first session on October 26, 1992, under the chairmanship of Mr. J.-F. Prevel (France). The list of participants is given at annex hereto.
2. The session was opened by the Chairman, who welcomed the participants.

Adoption of the Agenda

3. The agenda was adopted as given in document CAJ/31/1.
4. The Delegation of Germany noted that matters concerning the interpretation of the 1991 Act of the Convention had been submitted to the Technical Committee and that the question of holding a possible joint meeting had been raised. The Chairman agreed that the matter was relevant; however, it was not discussed by the Committee, but by the Council.

Conditions for the Examination of a Variety by the Breeder

5. Discussions were based on document CAJ/31/2.
6. The Committee adopted the draft declaration annexed to the above-mentioned document, for presentation to the Council, with the following provisos:

(i) the title was to become: "Declaration on the Conditions for the Examination of a Variety Based Upon Tests Carried out by the Breeder";

(ii) the words "or accepted" were to be added to item 1 of the enacting terms following "established";

(iii) the words "if requested to do so" were to be replaced by "when requested to do so" in item 4 of the enacting terms.

The amended wording was published in document C/26/9 Add.

7. During discussion on that declaration, the Delegation of the Netherlands called into question the claim made in paragraph 1(i) of document CAJ/31/2 according to which "it is not always possible ... to require the deposit of a sample" and requested that "... at the time of application" be added. The Delegations of Australia and of New Zealand referred in that context to phytosanitary quarantine measures and the Office of the Union to the case of "recalcitrant" species (of which seed could only be kept for a short lapse of time).

UPOV Model Administrative Agreement for International Cooperation in the Testing of Varieties

8. Discussions were based on document CAJ/31/3.

9. The Committee decided not to limit revision of the Model Agreement to adjustment to the prior decisions taken on fees connected with cooperation in examination. The discussions led to the following decisions and suggestions:

(i) Scope of the bilateral agreements and the Model Agreement.- The Model Agreement was currently limited to those cases where variety testing was carried out by an official service. It would be desirable to include provisions on other forms of testing, for example on cooperation in inspection of growing trials carried out by breeders.

(ii) Articles 2 and 6.- The Committee was informed of the fact that Article 2 of the Model Agreement - laying down, in particular, that examination carried out under cooperation should be conducted according to the guidelines, if any, adopted by the UPOV Council - would tempt the Technical Working Parties to limit the number of characteristics bearing an asterisk in the guidelines - meaning that the characteristic would have to be examined for all varieties and would be shown in all variety descriptions - in order to limit the obligations deriving from a cooperation agreement. It was suggested that "except where otherwise agreed by the authorities under Article 6" be added to the end of the first sentence of Article 2. That proposal met with objections of various types: the role and significance of the guidelines should not be weakened, but, on the contrary, strengthened; Article 6 already provided a possibility of detailing or redefining the scope of trials; the proposed addition, just as an extension of Article 6 through a reference to the characteristics to be examined, did not resolve the problem. It was finally decided to resume examination of the matter at a later date in a joint meeting with the Technical Committee.

(iii) Article 3.- On a proposal by the Delegation of the Netherlands, the Committee agreed to add the following provision:

"The authority requesting examination shall decide on the application, in principle, on the basis of the final report with respect

to the conditions of distinctness, homogeneity and stability. Where exceptional circumstances require, it may carry out supplementary trials. If it chooses to do so, it shall inform the authority carrying out the examination thereof."

(iv) Article 4.- It was agreed to amend paragraph (2) as follows: "Except with the specific authorization of the requesting authority and [or] the applicant..." and the first indent of paragraph (3) as follows: "... and any person duly authorized by both [either] of them."

(v) Article 5.- The Committee decided to amend paragraph (2) as follows: "If the prior application is rejected or withdrawn [If the prior application ceases to exist]..." It further decided to reword paragraph (4) as follows: "This Article applies to varieties of the genera and species listed in Annex III" (the present wording makes it possible to draw up a list of the genera and species excluded from the agreement). It was further suggested that the principle underlying the article be set out in Article 1.

(vi)(a) Article 7.- The delegation of Hungary observed that the National Office of Inventions was not the examining authority, that the national examination fee was equivalent to some 30 Swiss francs and that currency could not be freely transferred. Cooperation in examination, therefore, could not be adopted by that country unless payments were made by the applicant. The Delegation of Romania went along with those observations. The Delegation of the Netherlands stressed that the payment procedure could be defined under Article 6. The Delegations of Germany and Belgium pointed out that the schedule of fees could be adjusted to cooperation in examination by stipulating, for example, a fee equivalent to the payment due for taking over examination results.

(b) The Delegation of Germany proposed that the 350 Swiss franc fee referred to in paragraph (3) should be increased to 500 Swiss francs. Several delegations were opposed, particularly in view of the matter raised by the Delegations of Hungary and Romania and the fact that most authorities had now to cover their expenditure by means of the fees and that the fee concerned served solely to cover the administrative cost involved in transmitting an examination report.

(c) Several delegations emphasized the need to promote the financial rules on which the Model Agreement was based to ensure that all the member States compensated the authority that had carried out the examination in those cases where they took over examination results.

(d) With regard to paragraph (2), the Committee decided to adopt a wording such as: "... the amount payable shall be equal to the additional cost resulting from pursuit of the examination."

10. The Committee decided to continue examination of the Model Agreement at its next session, in a joint meeting with the Technical Committee.

Harmonization of Legislation and Implementation of the 1991 Act

11. Discussions were based on document CAJ/31/4.

12. Several delegations regretted that they had only received the above-mentioned document at a very late date and could do no more than make preliminary observations.

13. Novelty.- Paragraph 4 of document CAJ/31/4 gave rise to a brief discussion on relations between hybrids and lines from the point of view of novelty. It was emphasized that handing seed of a line to another person for production of hybrid seed was an act carried out with a view to exploiting the line. However, a more important question was whether exploitation of the hybrid by means of sale or disposal to others amounted to exploitation of the lines included in its formula where those lines were not handed to another person. The Delegations of the United States of America and of France had no trouble in accepting that F₁ hybrid seed be the harvested material of the female line in view of the biological link between the two; they felt, on the other hand, that the case of the male line--for which an economic link could be envisaged (its purpose was to produce pollen and, thereby, hybrid seed)--should be subjected to more ample thinking. The Delegation of the United States of America pointed out that if the F₁ hybrid seed was not held to be the harvested material of the male line, then the legal outcome would be that exploitation of the hybrid would cause the female line to lose its novelty, but not the male line. The Delegation of Australia suggested that the matter be examined together with the professional organizations.

14. With respect to paragraph 5 of document CAJ/31/4, the Delegation of Japan expressed a doubt as to the sale of the by-products of experimental use. The Delegation of the United Kingdom felt that sale or disposal to others should be subject, as appropriate, to the condition that there was no subsequent transaction and that the variety was not identified. Moreover, the list of cases could be supplemented by sale or disposal to others of material shown within an exhibition. Finally, the Delegation of the United States of America felt that sale should not be excluded in those cases where it was mentioned in brackets in the above-mentioned paragraph: firstly, prohibition would lead solely to adjustment of the price of material returned to the breeder or the price of the service requested and, secondly, sale provided the breeder with a degree of protection where the contract was not executed.

15. With regard to paragraph 6 of document CAJ/31/4, the Delegations of France and the Netherlands felt that an attempt should not be made to draw up a full list or a concerted interpretation; on the contrary, some room should be left to the courts since the discussions in the Committee could only provide elements of doctrine or a common basis for interpreting Article 6 of the 1991 Act of the Convention.

16. Exploitation of a variety prior to filing an application and provisional protection.- The Delegation of the United States of America shared the view sketched out in paragraph 11 of document CAJ/31/4 according to which Article 16 of the 1991 Act of the Convention (exhaustion of the breeder's right) applied to materials sold or otherwise marketed prior to filing of the application. The Delegation of New Zealand tended towards the same interpretation.

Closing of the Session

17. At the end of the afternoon meeting on October 26, the Committee decided, on a proposal by the Delegation of the Netherlands, seconded by the Delegations of Germany and France, to suspend its discussions until the next session.

18. The Committee thanked Mr. Prevel, at the end of his term of office as Chairman of the Committee, for his work.

19. This report has been adopted by correspondence.

[Annex follows]

ANNEXE/ANNEX/ANLAGE

LISTE DES PARTICIPANTS/
LIST OF PARTICIPANTS/
TEILNEHMERLISTE

(dans l'ordre alphabétique des noms français des Etats/
in the alphabetical order of the names in French of the States/
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