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UPOV

CAJ/32/10- TC/29/9
ORIGINAL : French
DATE : August 26, 1993

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirty-second Session
Geneva, April 21 and 22, 1993

TECHNICAL COMMITTEE

Twenty-ninth Session
Geneva, April 21, 1993

REPORT

adopted by the Committees

Opening of the Session

1. The Administrative and Legal Committee and the Technical Committee held a joint session on April 21 and 22, 1993, under the chairmanship of Mr. H. Kunhardt (Germany), Chairman of the Administrative and Legal Committee. The list of participants is given in Annex I to this report.

2. The session was opened by the Chairman, who welcomed the participants. The Chairman expressed particular pleasure at the presence of the Delegation of Finland, a State which had become a member of UPOV on April 16, 1993, and that of the Delegations of the Czech Republic and Slovakia, the latter States ensuring the continued adherence of the former Czechoslovakia.

Adoption of the Agenda

3. The Committees adopted the agenda presented in document CAJ/32/1-TC/29/1.

Proposed Central Computerized Data Base on Plant Variety Protection and Related Matters

4. The Chairman introduced the above item, emphasizing that the discussion should concentrate on the proposal to be made to the Consultative Committee and on questions that had yet to be clarified with that in mind, notably:

(i) Should the data be supplied to the company providing the service direct or through the Office of the Union (which in that case would do some screening)?

(ii) In order to ensure the viability of the project, should member States undertake to supply data?

(iii) Who will be the users of the data base, and for what purpose would they use it? What consequently would be the intervals between updates?

(iv) Will the data base make it possible to reduce workloads?

5. Twelve delegations (Czech Republic, Denmark, France, Germany, Ireland, Japan, Netherlands, New Zealand, South Africa, Spain, Sweden, United Kingdom) took the floor on this point and declared themselves generally in favor of the data base project. The Delegations of Ireland, New Zealand and Sweden nevertheless drew attention to the limited value that the computerized data base would have for their countries, and to the amount of work that it was liable to cause.

6. The need for wide participation on the part of member States was emphasized by the majority of delegations. Several of them wished to have the project financed under the ordinary Union budget. The Delegations of Denmark and Germany wished to have more information on the cost-benefit ratio.

7. Divergent opinions were expressed on the question of the frequency of updates. Generally speaking, the delegations of States with large amounts of activity in the field of protection and catalogues of varieties cleared for marketing were in favor of monthly updating, whereas States with smaller amounts would be content with two-monthly updates. The Delegation of Japan drew attention to the link, in its country, between the frequency and the language difficulties arising for its authorities.

8. A member of the Delegation of the Netherlands mentioned that the distribution of computerized data by diskette exchange had been considered within the Technical Working Party on Automation and Computer Programs, and that it would constitute a particularly attractive alternative solution, its cost being practically nil. The Delegation of the Czech Republic suggested combining an annual CD-ROM with a monthly update by diskette exchange.

9. At the invitation of the Chairman, a representative of WIPO pointed out that, on the basis of the procedure laid down for ROMARIN, every national authority would be responsible for the accuracy of the data that it provided; the data would nevertheless be checked by the company providing the service. They would be collected by the Office of the Union for the making of the prototype. The cost of updates to the member State would be small, indeed it could even be covered by the proceeds from the sale of discs to the public. Finally, the discs could be produced within a month following the supply of the data; the data would therefore become accessible within a period shorter than that currently necessary for the exchange of official gazettes.

10. Referring to the suggestions recorded in paragraph 8 above, the representative of WIPO pointed out that the exchange of diskettes involved some intricate and time-consuming work, especially the handling of a large number of diskettes, and would cause the advantage of the data base interrogation program to be lost.

11. Concluding the discussion, the Chairman proposed informing the Consultative Committee that the establishment of a computerized data base distributed on CD-ROM and permitting the examination of variety denominations was unanimously favored, and recommending:

(i) that the Technical Working Party on Automation and Computer Programs consider the outstanding questions;

(ii) that member States then indicate whether, and if so on what terms, they would be willing to supply data and take discs;

(iii) that the cost be then calculated;

(iv) that a decision be finally taken on the basis of that information.

12. At the end of the session, the delegations were asked to declare by show of hands whether, at the present stage of the project, they were willing in principle to support the introduction and operation of a central computerized data base which would be made available to users on CD-ROM. The great majority responded favorably. A number of delegations of non-member States likewise declared their interest.

Report on the First Session of the Working Group on Biochemical and Molecular Techniques, and DNA Profiling in Particular

13. The Office of the Union gave a brief account of the discussions and conclusions of the Working Group. For more detail, document BMT/1/4 should be consulted.

14. The Chairman pointed out that biochemical and molecular techniques represented the opening up of a new dimension of technical examination, inasmuch as such techniques made it possible to analyze the non-coding part of DNA. That raised conceptual questions, notably on the subject of the genotype, which, according to him, could not be clarified by the Committees at their present session. The same applied to the question, already raised within the Technical Committee, of the nature of the characteristics to be taken into account to ensure protection that was both economically and legally effective. In a way it was a question of the very philosophy of examination: in the knowledge that it was for the breeder to create a variety that was distinct, should the competent authority merely check whether that aim had been achieved, or should it concern itself with looking for ways of proving the fact?

Relations between Articles 1(vi), 7 and 14(5)(b) of the 1991 Act

15. The Chairman introduced this question by giving an account of the history of the provisions concerned:

(i) The 1978 Act did not contain a definition of the variety, which was because it was not necessary for the assessment of a variety for which a protection application was filed. The variety concept came up only in connection with other varieties, notably in the examination of distinctness or that of variety denominations. It was the discussions within WIPO that gave rise to the definition, in view of the fact that a certain number of States excluded plant varieties from patentability. A joint committee of experts of UPOV and WIPO met from January 29 to February 2, 1990, to discuss questions of mutual concern, and it considered it necessary to devise a general definition that would make for a uniform approach to the variety concept in the field of plant variety protection and in that of patents. That intention was moreover apparent in the fact that the 1991 Diplomatic Conference appointed a representative of the European Patent Organisation to its Working Group on Article 1.

(ii) As far as the discussions of the Plenary of the Conference were concerned, the following should be remembered: Article 1 defined the variety concept, but remained silent on whether or not a variety was eligible for protection; the reference to the genotype was intended to make it clear that

the existence of a variety merely presupposed the possibility of defining it according to genetically determined criteria, and not necessarily by characteristics appearing in lists drawn up for the purposes of the grant of breeders' rights. The genotype was neither defined nor even specified in the course of the discussions. There was nevertheless the underlying hypothesis that a variety could not be defined otherwise than by its genes; in that sense, no substantive difference was made between the genotype and the phenotype. Finally, for the variety concept to be satisfied, there needed only be a difference in one characteristic, even if the difference was not a clear one. It was the Conference's intention to set the lower limit above which one could speak of a variety, without pronouncing on any other conditions that might have to be met.

(iii) Article 7 dealt only--and that was already clear from its inclusion in Chapter III--with the circumstances in which a variety may be protected, in view of the fact that it was not eligible for protection by virtue of the mere fact of its being a variety. Article 7 therefore contained stricter conditions than Article 1. To qualify for protection, a variety had to be "clearly" distinguishable. The word "clearly" had not been defined, and it was important to point out that the Diplomatic Conference did not want to introduce specific restrictions. Article 7 did not refer to the characteristics to be taken into account, not even from the point of view of their importance or their essential nature. It was therefore for the examining authority to determine the characteristics or combinations of characteristics that it would use in examination. The Article also did not specify when a difference was clear, so it was for the authority to decide, for instance, whether a single difference was sufficient, assuming that it was great enough, or alternatively whether one needed only note the existence of a number of differences that were not clear, provided that they could be combined to give a clear difference. The Convention left all these options open.

(iv) Article 14(5)(b) owed its origins to the wishes of the professional organizations, its purpose being to protect the breeder against the marketing of the results of his work by third parties who had not invested as much as he had. It did not define either the variety or distinctness. Inasmuch as it repeated the terms of Article 7, it presupposed that the essentially derived variety was distinct within the meaning of Article 7.

(v) One should refer here to the basic proposal on Article 14(5)(b). The essentially derived variety concept referred to derivation, in other words to a process and not to a property. The basic proposal relied, for its definition, on derivation using methods that it had specified. It emerged from the debate that it was not possible to draw up an exhaustive list of methods, and that it was preferable to rely on examples--given in the last subparagraph--and moreover on the results achieved by means of those methods. It left untouched the principle according to which the criterion for determining whether or not a variety was essentially derived was not the minimum distance required for one characteristic or another, but rather the manner in which the variety had been bred. This was clear both from the discussions at the Diplomatic Conference and from the text and import of the provision.

16. The Delegation of the United States of America shared the view expressed by the Chairman.

17. The Delegation of the Netherlands referred to document CAJ/32/3-TC/29/3, drawn up by the Office of the Union as the basis for the discussions on this agenda item. One of its members expressed disagreement with the last sentence of paragraph 7(ii). Another pointed out that the distinctness criterion did not differ in conception between Article 1 and Article 7, even though the

requirements were different; there was no need to go further into that question, however, as Article 1(vi) had no functional importance. He then said that the questions raised in paragraph 6 in connection with Article 1(vi) were applicable also to Article 7. In the case of the latter Article, the present practice in the Netherlands was to base distinctness on observable characteristics, in other words the phenotype; a genotypical difference not expressed at phenotype level could not result in the grant of a breeder's right. He wondered whether the 1991 Act required the approach to be reconsidered; yet that was in fact a question that should be dealt with case by case, and possibly left to case law. Finally, he endorsed the conclusion recorded in paragraph 22, and pointed out that the authorities had no role to play in the handling of the essentially derived variety concept (unless a court were to ask them for expert advice).

18. It was pointed out that questions concerning the genotype and phenotype concepts, notably DNA profiles, were central to the terms of reference of the Working Group on Biochemical and Molecular Techniques, and that the Technical Committee should also concern itself with them. In that connection, the Delegation of the Netherlands mentioned that the two bodies should not take decisions, but rather assemble facts and arguments on the basis of which national authorities could take decisions that would then be substantiated and uniform within UPOV.

Declaration on the Conditions for the Examination of a Variety Based Upon Tests Carried out by the Breeder

19. Discussions were based on document CAJ/32/4-TC/29/4.

20. The Committees adopted the text reproduced in Annex II to this report.

21. In the course of the discussion, the question of the role and nature of the Declaration was raised. The Chairman replied that by adopting it, member States undertook to accept a certain examination procedure as being consistent with the Convention, and to do so without pronouncing on the consistency of other procedures; compared with a recommendation, a declaration had the advantage of not being addressed to a specifically named party.

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

22. Discussions were based on document CAJ/32/5-TC/29/5.

23. Preamble.- The Delegation of the United Kingdom wished to have another recital added to the preamble recalling that bilateral agreements could be extended to areas such as the catalogues of varieties cleared for marketing or seed certification. The Delegation of Morocco referred in that connection to the fourth recital. The Chairman proposed the amendment of that recital to place emphasis on the form that the Agreement had to have in order to permit cooperation in areas neighboring on plant variety protection.

24. The Delegation of the Netherlands expressed its disagreement with the comment appearing in paragraph 2(ii) of the Annex to document CAJ/32/5-TC/29/5. The Chairman proposed reintroducing a recital on the exchange of examination results but with a new wording.

25. Article 1.- It was noted that, in the German version, the order of subparagraphs (iii) and (iv) needed to be reversed. The Delegation of the

Netherlands asked whether there should be provisions in Article 1 to cover cases in which one bilateral agreement should be bracketed in favor of another. The Delegations of France and the United Kingdom insisted that the texts should remain simple and that such cases should be settled, as they were at present, in a pragmatic way. The Delegation of Japan pointed out that the drawing up of a list of genera and species had the effect of making revision necessary every time cooperation was appropriate in a case not provided for. The Chairman replied that, in the experience of States that had engaged in cooperation, agreements could be applied flexibly.

26. Article 2.- The Committees decided to retain Article 2 as proposed. It was mentioned that the Article referred to the Test Guidelines in their currently applicable form; that Article 6 allowed full latitude for special arrangements between parties (in so far as those arrangements were not at variance with other applicable provisions); and that the Test Guidelines were recommendations which, from the point of view of the List of Characteristics, imposed obligations only for characteristics with an asterisk.

27. Article 4.- The Committees decided to replace the phrase "person duly authorized by both of them" with "duly authorized person" in paragraph (3)(i).

Guidelines Relating to Essentially Derived Varieties

28. The Chairman asked whether a list of sample cases in which a variety would be essentially derived should be drawn up at the present stage, or whether one should rather await the entry into force of the provisions concerned and the accumulation of some initial practical experience. In the first hypothesis the question that arose was how to incorporate the advice of breeders in the Guidelines, as the Guidelines were addressed to them; in that case the form of the document would also have to be specified.

29. The Delegations of Germany, France and the Netherlands were of the opinion that one could not draw up a list in the abstract, which moreover would be liable to be taken as an exhaustive list, and that one should wait. It was also mentioned that the work of the Working Group on Biochemical and Molecular Techniques would greatly contribute to the definition of the essentially derived variety concept in practical cases.

30. The Chairman concluded that this agenda item could be adjourned sine die.

Adoption of the Report on the Twenty-Eighth Session of the Technical Committee

31. Discussions were based on documents TC/28/6 Prov. and TC/29/8.

32. The Technical Committee adopted the amendment proposals recorded in paragraphs 2(i), 3(i) and (iii), 4(ii)--"might" being substituted for "would"--5 and 6. It was asked that the questions covered by paragraphs 2(ii) and 3(ii) be reconsidered at the next session of the Technical Committee.

Participation of Experts from International Professional Organizations in the Sessions of the Technical Committee

33. Discussions were based on document TC/29/7. It was pointed out that the mention of the Administrative and Legal Committee should be deleted in paragraph 2.

34. The Technical Committee decided to adjourn consideration of this agenda item to its next session, when the Chairmen of the Technical Working Parties, among others, would be present.

Harmonization of Legislation and Implementation of the 1991 Act

35. Novelty.- Opinions were divided on the desirability of a list of cases in which novelty would not be affected. The Delegation of Sweden considered that it would be risky, as far as some such cases were concerned, to rely solely on interpretation of legislative provisions. The Delegation of the Netherlands considered that the text of the Convention should be incorporated in national law and case law be allowed to interpret it, all the more so as circumstances might be determinative in a specific case. For the Delegation of Japan, the question should be left to the individual lawmaker. That of the United Kingdom, for its part, pointed out that it would be helpful to work out a common approach.

36. The discussion also turned on the question whether the 1991 Diplomatic Conference had intended the introduction of amendments. The Administrative and Legal Committee agreed to place the question on the agenda of its next session.

37. Exploitation of the Variety Before the Filing of the Application and Provisional Protection.- It was noted that there was no need to discuss this question further.

38. Effects of the Priority Right.- As no delegation wished to take the floor on this question, the Chairman noted that the interpretation proposed in paragraph 14 of document CAJ/31/4 was generally accepted.

39. Transitional Application of the Provisions on Essentially Derived Varieties.- The Chairman pointed out that this question was a very difficult one, and probably could not be settled uniformly, as illustrated by the example of personal possession in patent law. In fact the question was one of arbitrating between the interest of the breeder of an essentially derived variety and that of the breeder of the initial variety. The Delegation of the Netherlands said that it preferred the "intermediate solution" (paragraph 20(ii) of document CAJ/31/4), with a "first act" according to paragraph 19(ii).

40. Other Matters.- The Delegation of the United Kingdom said that there were plans to extend the benefit of the new rights provided for in Article 14 to the breeders of varieties protected under present law. It asked whether other States were planning to adopt the same solution. The Delegations of the Netherlands and New Zealand replied in the affirmative and the Chairman pointed out that this solution was consistent with the practice in Germany. The Delegation of Spain pointed out that such a solution could cause difficulties in its country.

Model Law on Plant Variety Protection

41. The procedures proposed in paragraph 2(i) and (ii) of document CAJ/32/8 were supported by one delegation each. The proposal by the Chairman that the draft model law be referred to the Administrative and Legal Committee met with no objection.

Request for Advice Formulated by the Consultative Group on International Agricultural Research

42. The Vice Secretary-General gave an indication of the reply that he intended to convey to the CGIAR, which was duly noted.

43. This report has been adopted by correspondence.

[Two Annexes follow]

CAJ/32/10-TC/29/9

ANNEXE I/ANNEX I/ANLAGE I

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[L'annexe II suit]
[Annex II follows]
[Anlage II folgt]

ANNEX II

DRAFT

DECLARATION ON THE CONDITIONS FOR THE EXAMINATION OF A VARIETY BASED UPON TRIALS CARRIED OUT BY OR ON BEHALF OF THE BREEDER

Text Adopted by the Administrative and Legal Committee and the Technical Committee at Their Joint Session of April 21 and 22, 1993

The Council of the International Union for the Protection of New Varieties of Plants,

Pursuant to Article 21(h) of the 1978 Act of the International Convention for the Protection of New Varieties of Plants;

Considering Article 7(1) of the 1978 Act of the Convention, under which: "Protection shall be granted after examination of the variety in the light of the criteria defined in Article 6. Such examination shall be appropriate to each botanical genus or species";

Considering Article 12 of the 1991 Act of the Convention, under which: "Any decision to grant a breeder's right shall require an examination for compliance with the conditions under Articles 5 to 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material";

Recognizing that Article 7(1) of the 1978 Act and Article 12 of the 1991 Act permit but do not require the authority to base its examination upon growing and other necessary tests carried out by or on behalf of the breeder;

Declares that a system for the examination of applications based upon such tests carried out by or on behalf of the breeder and on the information submitted by him on the basis of those tests will be considered in keeping with the provisions of the Convention if:

1. The growing tests and other necessary tests are conducted according to guidelines established or accepted by the authority;

2. The testing arrangement is maintained--in order to permit the checking of data or the collecting of further data--until a decision has been made on the application or until the authority has informed the breeder that the arrangement is no longer necessary;

3. Access to the tests by persons properly authorized by the authority is provided;

4. The breeder, when requested to do so, deposits in a designated place, and within a time limit set by the authority, a sample of propagating material representing the variety.

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